CYRIL RAMAPHOSA
BUNDLE 06

EXHIBIT BBB 4

MC RAMAPHOSA
(PRESIDENT OF RSA)

REFERENCE BUNDLE

(CONTINUED)

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
Tel: (010) 214 to 0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

INDEX: CYRIL RAMAPHOSA BUNDLE 06

#	Description	Bundle	Bundle Pages	Exhibit Pages
1.	**Section D** - General reference bundle	06	001 to 1145	648 to 1792

CYRIL RAMAPHOSA

EXHIBIT BBB 4

PRESIDENT OF
THE REPUBLIC OF SOUTH AFRICA

MATAMELA CYRIL
RAMAPHOSA

AS PRESIDENT OF THE
REPUBLIC OF SOUTH AFRICA

ADDITIONAL INFORMATION RE: MC RAMAPHOSA

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
Tel: (010) 214 to 0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

INDEX: EXHIBIT BBB 4

Sec	Description	Bundle	Bundle Page	Exhibit Page
A	**ESKOM related evidence**	**05**	**001 to 223**	**001 to 223**
1	**Eskom Board and ANC Deployment Committee and Policy – Dec 2014**	**05**	**001 to 023**	**001 to 023**
	1.1. Extracts from the 1st Supplementary Affidavit of Lynne Brown, dated 19 Aug 2020	05	001 to 013	001 to 013
	1.2 Extracts from 2nd Supplementary Affidavit of Lynne Brown, dated 17 Sep 2020	05	014 to 023	014 to 023
2	**Secondment of Brian Molefe**	**05**	**024 to 058**	**024 to 058**
	2.1 Extracts from the affidavit of Matsietsi Mokholo, dated 25 Sep 2020	05	024 to 027	024 to 027
	2.2 Extracts from the transcript of evidence presented by Henk Bester at the Commission on 20 Oct 2020	05	028 to 033	028 to 033
	2.3 Extracts from the second supplementary statement by Lynne Brown - 17Sep 2020	05	034 to 040	034 to 040
	2.4 Media statement by Lynne Brown – 17 Apr 2015	05	041 to 042	041 to 042
	2.5 Statement by Lynne Brown to the Transnet Board, dated 21 Apr 2015	05	044 to 046	044 to 046
	2.6 Minutes of the Eskom Board meeting held on 23 Apr 2015	05	047 to 055	047 to 055
	2.7 Minutes of the Transnet Board meeting held on 20 Apr 2015	05	056 to 058	056 to 058

Sec	Description	Bundle	Bundle Page	Exhibit Page
3	**Appointment of Brian Molefe as Eskom GCEO**	05	**059 to 107**	**059 to 107**
	3.1 Communication between Eskom and DPE regarding the appointment of Brian Molefe	05	059 to 107	059 to 107
4.	**War Room: Teurnaround Strategy**	05	**108 to 163**	**108 to 163**
	4.1 Statement on the Cabinet meeting of 11 Dec 2014	05	108 to 119	108 to 119
	4.2 Questions for oral reply - 18 Mar 2015	05	120 to 126	120 to 126
	4.3 Statement by Presidency - 19 Mar 2015	05	127 to 128	127 to 128
	4.4 Presidency budget speech & responses by ANC, DA and IFP - 26 May 2015	05	129 to 131	129 to 131
	4.5 Minutes of the Eskom Board Meeting – 11 Mar 2015 (Montan's Report)	05	132 to 139	132 to 139
	4.6 Notice of suspension letter of Tshediso Matona – 11 Mar 2015	05	140 to 141	140 to 141
	4.7 2nd Supplementary Affidavit of Tsholo Molefe – 06 Nov 2020	05	142 to 151	142 to 151
	4.8 National Assembly Questions for oral reply – 10 Jun 2015	05	152 to 156	152 to 156
	4.9 Letter from Ben Ngubane to Lynne Brown, dated 10 Sep 2015	05	157	157
	4.10 National Assembly Questions & Answers – 07 Mar 2019	05	158 to 163	158 to 163
5	**Averments raised by Brian Molefe & Matshela Koko**	05	**164 to 188**	**164 to 188**
	5.1 Opening statement by Brian Molefe - 15 Jan 2021	05	164 to 172	164 to 172
	5.2 Extracts from the affidavit of Brian Molefe to the Commission - 13 May 2020	05	173 to 177	173 to 177
	5.3 Documents handed up by Brian Molefe during his appearance at the Commission on 15 Jan 2021	05	178 to 182	178 to 182
	5.4 Second statement of Clinton Ephron to the Commission - 11 Feb 2021	05	183 to 187	183 to 187
	5.5 Third statement of Clinton Ephron to the Commission - 14 Apr 2021	05	188	188
6	**Dismissal of Matshela Koko**	05	**189 to 223**	**189 to 223**
	6.1 Extracts from the transcript of evidence presented by Matshela Koko at the Commission on 03 Dec 2020	05	189 to 193	189 to 193
	6.2 Supplementary affidavit of Matshela Koko to the Commission - 13 Apr 2021	05	194 to 210	194 to 210

Sec	Description	Bundle	Bundle Page	Exhibit Page
	6.3 Eskom memorandum addressed to the Mr Ramaphosa, dated 19 Jan 2018	05	211 to 218	211 to 218
	6.4 Statement released by the Presidency – 20 Jan 2018	05	219 to 223	219 to 223

B	**TRANSNET related evidence**	**05**	**224 to 480**	**224 to 480**
7	Mr Gama: reinstatement as CEO of Transnet Freight Rail in 2011	05	224 to 247	224 to 247
8	Mr Molefe: appointment as CGE of Transnet in 2011	05	248 to 277	248 to 277
9	Mr Molefe: his move to Eskom in 2015	05	278 to 285	278 to 285
10	Mr Sharma: Minister Gigaba's attempt to have him appointed as the chairperson of the board of Transnet in 2011	05	286 to 355	286 to 355
11	Minister Gigaba: appointment to various ministerial posts – and the evidence of Ms Mngoma relating thereto	05	356 to 377	356 to 377
12	Supplier development partners (SDP): corruption through their use	05	378 to 454	378 to 454
13	Business development services agreements (BDSAs): corruption through their use	05	455 to 473	455 to 473
14	External consultants: extensive use of – Regiments as an example	05	474 to 480	474 to 480

C	**PRASA related evidence**	**05**	**481 to 647**	**481 to 647**
15	**Extract from affidavit or exhibits**	**05**	**481 to 537**	**481 to 537**
	15.1 Exhibit SS6: Molefe, PS	05	481 to 510	481 to 510
	15.2 Exhibit ZZ12: de Freitas, MSF	05	511 to 527	511 to 527
	15.3 Exhibit ZZ13: Makwetu, T	05	528 to 537	528 to 537
16	**Extracts from transcripts of Commission hearings**	05	**538 to 647**	**538 to 647**
	16.1 SCC Day 223 – 13 Mar 2020 (Molefe)	05	538 to 575	538 to 575
	16.2 SCC Day 226 – 29 Jun 2020 (Molefe)	05	576 to 599	576 to 599
	16.3 SCC Day 347 – 22 Feb 2021 (Peters)	05	600 to 632	600 to 632
	16.4 SCC Day 348 – 23 Feb 2021 (Peters)	05	633 to 647	633 to 647

Sec	Description	Bundle	Bundle Page	Exhibit Page
D	**General**	**06**	**001 to 681**	**648 to 1328**
17	Supplementary affidavit of "Ms K" – 11 May 2021	06	001 to 026	648 to 673
18	Affidavit and Annexures of Frans Moloi – 18 Feb 2021	06	027 to 346	674 to 993
19	Affidavit of Gugile Ernest Nkwinti – 15 Aug 2021	06	347 to 366	994 to 1013
20	PAN Summary	06	367 to 380	1014 to 1027
21	National Treasury and Project Spider Web	06	381 to 407	1028 to 1054
22	Checkmate	06	408 to 411	1055 to 1058
23	Extracts from the Affidavit of Ismail Momoniat – 01 Feb 2021	06	412 to 562	1059 to 1209
24	Affidavit and Annexures of Lloyd Mhlangu – 30 Nov 2020	06	563 to 658	1210 to 1305
25	Article: "*Fired for misconduct, rehired by Presidential Minute: The curious case of Land Affairs DG Mdu Shabane*" – 2019	06	659 to 669	1306 to 1316
26	Article: *"Gordhan has Ramaphosa's backing*" – 26 Aug 2016	06	670 to 673	1317 to 1320
27	Article: "*Ramaphosa supports Gordhan, warns against state at 'war with itself'*" – 25 Aug 2016	06	674 to 675	1321 to 1322
28	Article: "*State Security Minister Dlodlo wants to smoke out information peddlers among spooks*" – 22 Jun 2021	06	676 to 679	1323 to 1326
29	ILJ Shabane	06	680 to 681	1327 to 1328
30	Media Articles	06	682 to 702	1329 to 1349
31	Exhibit PP2. L Njenje - Statement	06	703 to 712	1350 to 1359
32	Exhibit PP3. Maqetuka, M - Affidavit & Annexures	06	713 to 891	1360 to 1538
33	Transcripts of SCC Day 419 - 29 June 2021	06	892 to 1066	1539 to 1713
34	Exhibit YY4. Mr Y Affidavit 11 May 2021	06	1067 to 1145	1714 to 1792

SECTION “D”

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

SUPPLEMENTARY AFFIDAVIT OF [redacted]

I, the undersigned,

Ms K

do hereby state under oath that:

1. BACKGROUND

1. I am an adult female employed by the South African State Security Agency ("**SSA**").

2. At the time that I testified at the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State ("**the Commission**"), I was the incumbent Divisional Head (Operational Analysis): Chief Directorate Counter-Intelligence, but was not actively engaged in this position as I had been appointed full-time as the Project Manager Project Veza which had been established to investigate irregularities in SSA, particularly in the Chief Directorate: Special Operations ("**CDSO**") over the period 2012 to 2018.

3. Since testifying at the Commission, I have been redeployed in my former position as the Divisional Head (Operational Analysis): Chief Directorate Counter-Intelligence.

4. I am duly authorised to depose to this affidavit as per permission granted to me in January 2021 which, according to my knowledge, has not been rescinded.

5. The contents of this affidavit are, unless stated otherwise or where the contrary appears from the context, within my own personal knowledge or knowledge gained by me in the course of the above-mentioned investigations, and are true and correct.

2. THE PURPOSE OF THIS AFFIDAVIT

6. Mr Y deposed to an affidavit dated 30 November 2020 for submission to the Commission. Due to unforeseen circumstances, Mr Y was not able to testify at the Commission and I was summonsed to testify in his place by virtue of my position as Project Manager of Project Veza and my personal knowledge of the internal investigations conducted by SSA under Project Veza. Pursuant to this summons, I gave evidence at the hearings between 27 January 2021 and 29 January 2021.

7. Although I had deposed to a separate affidavit, qualifying and expanding on certain of the issues canvassed by Mr Y in his affidavit, as this was found to implicate further individuals, thus requiring further Rule 3.3 Notices to be issued, owing to time constraints I was requested to limit my evidence to that dealt with by Mr Y in his affidavit. It was contemplated that I would provide the Commission with a supplementary affidavit in order to expand upon certain of the averments made by Mr Y.

8. As the Project Manager of Project Veza, I was intimately involved in the investigation and in certain instances, had more direct knowledge thereof than Mr Y. My investigation team and I conducted the investigative work and interviewed the witnesses pursuant to which we compiled reports which were submitted to Mr Y and the DDG. These reports informed much of the content of Mr Y's affidavit.

9. In this affidavit, I propose to deal with the further aspects alluded to by me during the course of my testimony and to elaborate on certain issues dealt with by Mr Y in his affidavit. I will also deal with the events which have transpired since I testified at the Commission and the circumstances under which the Project Veza investigation was effectively shut down by Advocate Muofhe, the Director of the Domestic branch of the SSA. To this effect I and the other members of the investigation team were redeployed to our positions.

3. THE CHALLENGES FACED BY THE INVESTIGATORS DURING THE COURSE OF THE PROJECT MOMENTUM AND PROJECT VEZA INVESTIGATIONS

Project Veza's Predecessor: Project Momentum

10. Stemming from the Budget Vote address delivered by the former Minister of State Security, Ms Dipou Letsatsi-Duba on 18 May 2018, an internal investigation under code name "*Project Momentum*" was established in June 2018 to address allegations of corruption within the SSA.

11. Limited progress was made under Project Momentum, I believe for the following reasons:

    11.1. First, information and documentation was deliberately withheld from the investigators;

    11.2. Second, there was little co-operation from the persons who were implicated in the investigation.

    11.3. Third, it was discovered that certain members of the Project Momentum investigation team were sabotaging the investigation and had forewarned persons who were being investigated that their communications were being intercepted pursuant to Directives issued in terms of the Regulation of the Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 ("**Act 70**"); and

    11.4. Fourth, there was limited support internally for the investigation.

12. I must point out that much of the documentation relating to the CDSO which informed much of the content of Mr Y's affidavit and our investigative reports about the irregularities within the CDSO, were discovered by chance during an inspection of a walk-in safe at the SSA Headquarters for other purposes. These documents referred to ought to have been disclosed to the investigators of Project Momentum, but they were not, and it is my view that they were deliberately hidden.

13. The safe in which the documents were discovered was controlled by the General Manager: Cover Support, a position previously located under the office of Mr Arthur Fraser, the erstwhile DG of the SSA, albeit unofficially. Certain of the members of the CDSO informed the investigation team that after Mr Fraser was appointed, he closed down the CDSO and requested that all the documents concerning the operations of the CDSO be handed to his Office. These documents were then put in the safe by the aforementioned General Manager.

14. After Mr Lloyd Mhlanga was appointed as the Acting Director of the Domestic Branch of the SSA, he and Mr Y obtained access to the keys of the safe and stumbled upon the original documentation pertaining to the operations which had been conducted by the CDSO.

15. In addition, a SSA member with the pseudonym 'Helen', who was seriously implicated in our investigations was found attempting to remove original documentation implicating her, from the premises of SSA during April 2018: 'Helen' was the Office Manager in the Office of both former DGs of SSA, Ambassador Kudjoe and Mr Fraser. It can be concluded that these documents were removed from her office and mainly related to covert operations run from Mr Fraser's office. The documents which were confiscated from 'Helen' proved to be crucial to our investigation which revealed that:

    15.1. During the period that Ambassador Kudjoe was appointed as the DG of SSA and Mr David Mahlobo was appointed as the Minister of State Security, the Office of the DG became involved in covert operations, purported to be the *'President's projects'*, allegedly pursuant to a directive from Mr Mahlobo and the Deputy Director General: Counter-Intelligence, Ambassador Thulani Dlomo. The Minister received large amounts of cash from operatives during this period, on average in the region of R4.5 million per month, R2.5 million of which was reportedly for onward transmission to former President Zuma.

    15.2. After Mr Fraser was appointed as the DG in September 2016, 'Helen' retained her role as Office Manager in his office. Although Mr Fraser closed down the CDSO established by Ambassador Dlomo, 'Helen' continued to withdraw large sums of cash and delivered it to Mr

Mahlobo; the evidence revealed that the DG's Office under Mr Fraser continued to run the operations which had been run through the CDSO. During this period the expenditure for the Office of the DG increased from approximately R42 million to R303 million between the 2016/2017 and 2017/18 financial years

15.3. Although 'Helen' was not an operative, according to the financial records of the SSA, she withdrew R244 million in cash during the period she worked in the office of the DG between 2014 and 2018.

15.4. There is also evidence that 'Helen' assisted former Ministers of SSA, Minister Mr Bongo and Mr Mahlobo in pursuing political objectives by utilizing the resources and funds of SSA under the guise of covert projects. 'Helen' also withdrew R19 million prior to the ANC National Conference held at Nasrec during 2017. It was suspected by members of the internal SSA investigation team that these funds may have been used to influence the voting of ANC members at the conference. I wish to point out that 'Helen' made numerous withdrawals during this month and the withdrawal of R19 million was but one of these withdrawals. As I no longer have access to the books and records of the CDSO for this period, I am unable to verify how much was withdrawn by 'Helen' during this period.

15.5. While the documents seized from 'Helen' were crucial to Project Momentum's investigations, her case was initially dealt with separately by a member of Internal Security, although he was also a member of both Projects, Momentum and Veza investigation teams. At the insistence of Mr Mhlanga and myself, the documents seized, as well as an inventory thereof, were obtained by the Project Veza team for analysis and further investigation.

16. I wish to stress that when 'Helen' was apprehended trying to remove documentation, we, as the investigators, were not aware that any operations were being conducted from the DG's office and thus, this was not our focus. I and two other analysts had only joined the team on 5 December 2018.

The Project Veza investigation

17. Due to the challenges faced by the investigation team discussed above, the investigation conducted under Project Momentum was reinforced and re-launched by the then Director: Domestic Branch, Mr Lloyd Mhlanga and the then Acting DDG: Counter Intelligence, Ms **Ian**, on 5 December 2018 under the name, 'Project Veza'. Accordingly, when I was asked to lead the investigation team in December 2018, this was under the newly established Project Veza. Subsequent to the departure of Mr Mhlanga and Mr **Ian**, the then Acting Director General, Mr Loyiso Jafta, reaffirmed and approved the continuation of Project Veza and reconstituted the team thereby, removing team members who were found to have been compromised and suspected of sabotaging the work of the team.

18. Notwithstanding the institutional support provided to the Project Veza team by Mr Jafta, we continued to face lack of co-operation, obstruction and deliberate sabotage of the investigation both from those implicated and the Director of the Domestic Branch, Advocate Muofhe, and the Executive. Regrettably, Project Veza did not have the support of some elements within SSA, who seek to preserve the *status quo*, as opposed to supporting our efforts to identify wrongdoing and remedy it.

19. What we also found was that the SSA's current organizational and administrative tools which are available in order to conduct internal investigations are not geared to effectively deal with the level of organised crime discovered during the course of our investigations. This was exacerbated by the fact that we did not have powers of compulsion and the fact that our investigative processes were seemingly scuppered by the Executive.

20. It appears to be the attitude of some of the current senior management within SSA and the Executive that malfeasance should be dealt with internally and not by law enforcement agencies, purportedly in order to preserve national security; notwithstanding that criminality cannot be hidden under the rubric of secrecy and classification. It has been disheartening to have found that even our internal disciplinary powers and recommendations have been undermined in that those implicated who had been placed on suspension, have been

allowed to return to work without sanction.

21. There have been many instances of persons deliberately trying to sabotage our investigations and Executive overreach in the investigation and the disciplinary process:

The threats against the investigators

22. As indicated by Mr Y, there have been threats made by certain implicated persons against members of the investigation team, as well as against officials who have assisted the investigation team.

23. These threats and intimidation have continued since the testimonies by SSA officials have been given to the Commission; our names were submitted to Internal Security (IS) to block our access to the SSA Head Quarters and security officials started carrying R5 automatic assault rifles while manning the gates. I view this as an intimidation tactic to silence us as, well as the other SSA officials who may want to expose the criminality that is apparent. Most importantly, I view this as an attempt to intimidate the Investigating Directorate (ID) of the National Prosecuting Authority (NPA) and the Office of the Inspector General of Intelligence (OIGI), who are known to be pursuing the criminal investigations referred to law enforcement agencies and carrying out their respective mandates. This has included the issuing of summonses for documents, dealt with below.

The interference with the investigation by Advocate Muofhe

24. The Acting Director: Domestic Branch, Advocate Muofhe, has interfered with and actively obstructed the work of Project Veza. Advocate Muofhe, while he was Minister Letsatsi-Duba's advisor, sought to persuade Mr Mhlanga, the then Acting Director: Domestic Branch, to withdraw his referral of the criminal conduct uncovered during the course of our investigations to the Directorate of Priority Crime Investigation (DPCI). At a meeting called by Advocate Muofhe during 2019, attended by Mr Mhlanga and Mr Ian, including Mr Y and myself, he demanded that we hand over all of the evidentiary documentation relating to Project Veza to the Ministry, which I refused to do unless he provided me with an instruction in writing, which was not forthcoming.

[redacted]

25. A few weeks after this incident, Mr Ian was instructed to return to his foreign posting. Around this time, and after Adv Moufhe had attempted to persuade Mr Mhlanga to withdraw the referral of the matters investigated to the DPCI, Advocate Moufhe opened a criminal case against Mr Mhlanga for alleged '*double dipping*' relating to the payment of his salary by DIRCO, from where he had been seconded, and the SSA, for which, I believe he provided a proper explanation and was cleared by the IGI. Suffice to say, the NPA declined to prosecute the matter. This was however, used as a basis to suspend and subsequently remove Mr Mhlanga. These actions in essence eroded the governance structure of Project Veza.

26. After Advocate Muofhe replaced Mr Mhlanga as Director: Domestic Branch, he made it clear, through an operative with the pseudonym 'Steven', who had replaced Mr Ian as the project sponsor, that he did not support our investigation. Recent events are testimony to this.

27. I am aware that Advocate Muofhe attempted to outsource the investigation to a private forensic company, Bowman Gilfillan. The submission compiled by Advocate Muofhe requesting the appointment of the attorneys, Bowman Gilfillan was prepared on 19 December 2019. In support of the requested approval for the appointment of these attorneys to conduct this investigation, it was falsely stated that no investigation had been conducted since the release of the High-Level Review Panel Report in early 2018, which was not true: Project Momentum and Project Veza had actively pursued the investigation of the irregularities at the CDSO. Further, Advocate Muofhe's statement, could not have been made in ignorance, as he had been briefed on Veza investigations, both in his capacity as Special Advisor to former Minister, Ms Letsatsi Duba, and as Director of the Domestic Branch of the SSA. He was also present during the JSCI briefing in November 2019. He therefore misled the State Attorney's office when he requested assistance in appointing a forensic firm.

28. After we served a notification of investigation and subsequently interviewed the Head of the Cover Support Unit, who had the keys to the safe in which much of the CDSO documentation was hidden, Advocate Muofhe instructed a member of the team to desist from contacting or interviewing any person within

the Domestic Branch and directed that his Office be the only contact point with such members. Had this instruction been implemented, it would have effectively closed down the investigation, by encouraging non-cooperation from implicated officials. Fortunately, this instruction was not ratified by Mr Jafta, which in turn, resulted in the team reporting to Mr Jafta.

29. The project Veza team has, since its inception, always indicated in its Project Plan, as well as in various briefings to the Minister, the Office of the Inspector General of Intelligence (OIGI), the Staff Council, the Joint Standing Committee on Intelligence (JSCI), its multi-disciplinary and multi-stakeholder approach taken to address the entrenched organised crime networks found to be operating at the SSA. This included collaboration with the Organised Crime Section of then NPA, the DPCI, the Financial Intelligence Centre (FIC) and later, the ID.

30. Due to the lack of progress on the DPCI investigations and the North Gauteng Director of Public Prosecutor's view that this matter fell within the mandate of the ID, the criminal matters uncovered during the course of our investigation were subsequently referred to the ID in October 2020 by Mr Jafta.

31. The probe into the SSA by the State Capture Commission, and the related requests for information and subpoenas issued to the SSA, were reported by the Veza team to the JSCI in August 2020. Furthermore, the interference in the investigation by Advocate Muofhe dealt with above was reported in depth to the Joint Standing Committee on Intelligence (JSCI). In addition, the lack of progress in relation to the criminal case opened with the DPCI in April 2019, was reported to the JSCI as one of the constraints experienced by our investigation team.

32. Two weeks prior to the SSA related evidence being led at the Commission, I received a call from Mr Jafta to report to the office. It is in this meeting that he informed me that Minister Dlodlo had requested a briefing on what was going to be presented at the SCC. He thus instructed me to be on standby to brief the Minister as we awaited confirmation of the date of the briefing from the Minister. This did not materialise for reasons unknown to me.

33. However, on the day that Dr Mufamadi appeared before the Commission, I

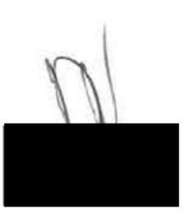
received a call from Mr Jafta's Acting Office Manager informing me that the Minister had postponed the meeting to the following week. I was confused as to what the point of the briefing would be, as it would be after the SSA evidence. I therefore posed this question to the Acting Office Manager, who said he was also confused.

34. Later that day I received a call from Mr Jafta saying the he had been trying to secure a briefing with the Minister, but she kept changing the times. I believe that he later had an opportunity to meet the Minister that same evening to discuss his affidavit; I do not know any further details about that meeting. I was, therefore, shocked on the day that Mr Jafta was scheduled to appear at the Commission, when the Minister attempted to block his testimony, citing as a reason that there was no consultation and that Mr Jafta was undermining her authority. A further cause for confusion for me was that several people including SSA Legal Services were aware that the President had given permission to both Dr Mufamadi and Mr Jafta to testify before the Commission.

The interference in the investigation since the testimony of Dr Mufamadi, Mr Jafta and myself during the last week of January 2021

35. It is noteworthy that despite my testimony having been given in camera with the intention of concealing my identify, during my testimony on 28 January 2021, I received a photograph of myself which was circulating on social media revealing my identity, coupled with defamatory and disparaging remarks about my person and my career, which sought to discredit me and consequently, my testimony. Mr Y's identity was also revealed and pictures of his family were also circulated on social media, as a veiled threat against Mr Y, at a time that he was hospitalized and in a coma. Blatant falsehoods were also spread on social media about him, obviously also in an attempt to discredit him and the contents of his affidavit which had been confirmed by me during my testimony.

36. On 31 January 2021, I became aware that Mr Arthur Fraser had opened a case of perjury against myself and others that had testified at the Commission. I was surprised by this, as he had the right to apply to cross examine me and other witnesses implicating him in terms of Rule 3.3 of the Rules of the Commission. This will be dealt with at the appropriate forum.



37. Following this, the Project Veza investigation team was required to attend a meeting with the Audit and Risk Committee of the SSA (ARC), which had convened a special meeting on 11 February 2021 to deal with the evidence that had been presented at the Commission, particularly the R125 million audit query raised by the Auditor General's report and referred to by Mr Jafta during his testimony, which was unaccounted for during the period that Mr Fraser was the Director General of the SSA. The meeting also questioned, not only the progress of the investigation, but the legitimacy of Project Veza itself and the methodology employed by it. Although the agenda of the meeting indicated that Mr Jafta would be making a presentation at the meeting, he was not present at the meeting. The ARC requested a copy of the affidavit of Mr Y which had been presented to the Commission which we indicated was in the custody of the Commission. Needless to say, we found the request made to be suspect and inappropriate. Should it be required, the recording as well as the transcript of this meeting are available.

38. Subsequent to the meeting, the ARC Chairperson, XXXX, prepared a report for the Minister of State Security. This report was shared with Mr Jafta for his comment who in turn requested that the Project Veza investigation team provide comments on the report to enable him to respond to it, as he was not present at the meeting.

39. The various members of the team who were present at the meeting with the ARC were astounded at the conclusions drawn by them, as it did not accurately reflect the substance of our engagement or our representations to it during the meeting.

40. The reason for my raising this issue was my concern that there seemed to be a concerted effort by the ARC to discredit the evidence presented at the Commission, without going through the proper procedures prescribed in the Commission's Rules to refute evidence presented to the Commission. Furthermore, they focused on issues that related to 'Helen' and the two CFO's. The team even gave the ARC copies of the Final investigation report on the two CFOs. Meanwhile, no attention was given to the financial irregularities and weaknesses detected by the Veza team. The chair also kept referring to the transcripts from the Commission.

41. Soon after this, a Parliamentary Question was sent to the SSA via the Ministry, relating to Project Justice, which had been raised in the evidence at the Commission. The question asked for details on what had transpired and which Judges had received cash from the SSA. The Parliamentary question itself was peculiar, given that it was asked by a member of the JSCI, who I assume knew about the scheduled JCSI meeting which was due to take place two weeks later.

42. In response to this question, the Project Veza team prepared a response for Mr Jafta to submit to Ministry, indicating that as the investigation was ongoing, it was not prudent to discuss details at this stage, but stressing that the issue could be canvassed further at the JSCI, who had been briefed previously about this. On the morning of the parliamentary Q&A session, the Ministry requested further details about this project, which were subsequently furnished by way of submission by an SSA official, confirming the existence of the project and its stated objectives. I later received a call from the Acting Office Manager in Mr Jafta's Office, informing me that the Minister wanted the entire project file. I felt this was not appropriate, as the investigation was ongoing and she is the person charged with authority to decide appeals from implicated parties subject to the disciplinary process.

43. Despite this, the Minister, in her response to Parliament, stated that the allegations made about this Project were based on 'peddler information'. This is not true: our investigation revealed that an operation under the name, 'Operation Justice', was conceived to influence the judiciary and that monies were allocated on a monthly basis towards this operation. Of particular concern, was the publishing of the Minister's response on the SSA intranet, quoting my evidence at the Commission. This was particularly so as the publishing of the Ministry's responses to Parliamentary questions is a rare occurrence. I know this because the Veza team provided numerous inputs to responses by the Ministry via the DG's office, none of which were ever published on the SSA intranet. It is for this reason that I believe the intention was to discredit me, not only in Parliament, but also within SSA, full knowing that I have no platform to challenge the averments.

44. Following the above developments, Mr Jafta asked the team to compile a full

presentation about Project Justice for consideration by the JSCI at their meeting scheduled to discuss this. Mr Jafta also asked us to wait outside the venue and be ready to present our presentation, should this be required. We were however not called in. I was later informed by an individual close to the JSCI that the Committee was told that I was not around when there was a suggestion that I should be called into the meeting; this notwithstanding that we were waiting outside the venue for almost the entire day. If this is indeed accurate, I believe that I was prevented from addressing the meeting to ensure that the 'peddler information" narrative was upheld; the team was also denied the opportunity to make their representations to ensure that the Minister's statement that there was no documentary evidence of the existence of Operation Justice, was not contradicted.

45. During the same week, an instruction addressed to Mr Jafta from the Ministry, which was shared with the team, directed him to transfer the Project Veza investigation to Advocate Muofhe, who we were told had appointed the law firm, Bowman Gilfillan, to conduct a forensic investigation at a rate of R15 million for one financial year to do exactly what Project Veza had been doing. This, I concluded from the projected output from their scope of work, which was merely involved preparing charge sheets.

46. The Ministry's instruction that the matter be referred to Bowman Gilfillan was also problematic as it paid little regard to the fact that Advocate Muofhe's submission had been declined in April 2020 by the finance section and Mr Jafta, who is the Accounting Officer of the SSA. No further action was taken on this submission until the instruction from the Minister to Mr Jafta during March 2021 to take away the investigation from the internal Project Veza investigators and give it to Bowman Gilfillan subsequent to the appearance of the SSA witnesses at the Commission.

47. Shortly after this instruction had been given to Mr Jafta and our input had been sought by him to prepare a response, I received a call from a colleague, who was the analyst on Project Veza, who informed me that she had received a call from the Office Manager of Adv Muofhe, instructing her to hand over the keys for the team's work space (Bravo Campus) to himself, as they were preparing a venue for a forensic team to start working. She indicated that the

Office Manager had told her that a meeting had been held the day before with Adv. Muofhe to prepare for this team's arrival, following the Minister's instruction. He indicated that the forensic team was currently being screened and would be urgently vetted notwithstanding that the vetting process usually takes more than 6 months to complete. He further indicated that the Minister was planning to make the announcement regarding the appointment of this forensic team at the Parliamentary reply session scheduled for later that afternoon.

48. The aforementioned analyst indicated that I had the keys and had requested that the Office Manager contact me directly. I immediately called Mr Jafta to appraise him of the development. Mr Jafta indicated that he was surprised by this development and the involvement of an operative, who had retired from the SSA at the end of February 2021.

49. On the morning of 4 March 2021, I received a call from the Office Manager, who indicated that Advocate Muofhe and this retired operative had requested a meeting with me relating to the Bravo campus. I then enquired whether it related to the Bowman Gilfillan issue, to which I received no response. I also enquired whether the meeting was about the keys which they had sought to our office space and it was confirmed that the proposed meeting was about the office space to be made available to the external investigators. I suggested that the Office Manager request work space for the team from the head of our logistics department. He was not satisfied with this response and again insisted that I attend the meeting. I then informed the Office Manager that it would not be the correct protocol for me to meet Advocate Muofhe, who was very much senior to me, in the absence of the person I was now reporting to, Mr Jafta. I indicated that once they had secured the attendance of Mr Jafta, I would attend the proposed meeting. I subsequently advised Mr Jafta of the conversation. I also sent an sms to the Office Manager to enquire whether the meeting was going ahead. I did not receive any response to my sms.

50. On 10 March 2021, on checking my internal email, I found a letter from Advocate Muofhe alleging that I had refused to hand over the keys, for an 'unexplainable' reason. I immediately responded, apologising for only seeing his email, which was dated 8 March 2021, on 10 March 2021, and putting

forward my version of what had actually transpired.

51. I then informed Mr Jafta of this and it was agreed that the key would be handed over to his Office.

52. At this stage it is important to note that in October 2020, the SSA had referred matters of suspected criminality to the NPA. Thereafter, several meetings were held between the SSA and the NPA. On 9 March 2021, following the finalisation of the scoping document, a meeting was held between the OIGI, whose investigation into the operations conducted by the CDSO and the Cover Support Unit (CSU), overlapped with the Project Veza and the ID investigations. It was resolved that in order to safeguard the processes that needed to follow, the documents pertaining to the investigations be transferred to the OIGI, which had the requisite security clearance, to be safeguarded.

53. This meeting coincided with a request from the Office of the Director Foreign Branch, Mr Robert McBride, to return the keys for the office where all the documents had originally been stored, which had been assigned to him. In view of Mr McBride's request on 10 March 2021 (the same day that I had received the letter from Adv. Muofhe), I and two other Project Veza team members, transferred some of the documents from Mr McBride's office to another of our offices, which we deemed safer. Within 15 minutes of our having moved the documents, we found that Internal Security (IS) had placed a security lock on the office that we had moved the documents from (which had been allocated to Mr McBride).

54. The locking of the office from where documents were removed was reported to Mr Robert McBride, as we had a prior engagement for that morning to hand over the keys and brief him on progress with regard to the investigation. During this meeting, a member of staff from Mr McBride's office indicated that she had seen the Office Manager and the retired operative outside the office with the lock. Mr McBride tasked her to advise the Office Manager to account for the locks as the office had been allocated to the Foreign Branch. I am not aware what transpired thereafter, but can state that the office remained locked.

55. On the morning of 11 March 2021, the investigator whose office we stored the documents in, reported to me that, on attempting to access his workspace, he

could not, as the locks were changed. I called several members of IS to find out what was happening, and was informed that they had been instructed to lock certain offices (including those occupied by Mr Y) and change the padlocks to Bravo campus. The change in locks at Bravo campus completely prevented us from accessing our workspace, the documents necessary for our investigation, as well as the equipment (computers and printers) that had been assigned to the aforementioned analyst and me. We have still not been able to retrieve our computers and printer.

56. I would like to point out that during the course of our lawful investigation, save one member whose office was locked in order to safeguard information and ensure the chain of evidence, no other member, either suspended or under investigation, were ever subjected to such treatment.

57. On the morning of 12 March 2021, the ID and OIGI, had informed us that a summons in terms of S28 of the NPA Act had been prepared and would be served on the DG of the SSA. Later that afternoon, a team comprising members of the ID and OIGI, served the summons on Mr Jafta, who authorised that access be given to the officials in order to implement the summons. I and the said analyst were requested by Mr Jafta to point out the areas where the documents were secured. We duly complied. However, although Mr Jafta had instructed the IS members who were present at the main gate to comply with the summons, they were not able to open the offices pointed out by us as they had been locked the previous day and the keys had been removed from the safe keeping of the regular key custodian on the instructions of senior management.

58. As the ID attempted to gain access to the secured documents, they were intercepted by Advocate Muofhe, who indicated that he would not allow them access to the information. At this point it is important to point out that in terms of the SSA reporting lines, IS reports to the DDG Counter Intelligence, who reports to Director: Domestic Branch. It was explained to Advocate Muofhe that this was tantamount to obstruction of justice. Advocate Muofhe indicated that the ID was being used by the DG (Mr Jafta) (for reasons not given) and referred to Project Veza as a rogue unit forming part of Mr Thulani Dlomo's outfit and was not legitimate. He furthermore, indicated to the ID officials

present that he wanted everyone involved with Project Veza charged. Advocate Muofhe appeared to be of the view that he was senior to Mr Jafta, as he had been appointed to a position higher than that of Mr Jafta prior to his appointment as the Acting DG, without regard to the level of authority conferred on the Office of the DG.

59. Whilst Advocate Muofhe was obstructing the implementation of the summons, I was informed that the main-gates to the Musanda Complex were locked and all members entering and exiting the premises were prevented from doing so.

60. When the ID were preparing to leave the building, Advocate Muofhe drove down to the main gate. Subsequently, Adv Moufhe, together with the then newly appointed General Managers of IS, CDSO and DDG Counter Intelligence, attempted to prevent the ID from exiting the premises of the SSA. A criminal case docket in an unrelated case was found in the vehicle of a member of the ID and his non-declaration of this document was used as pretext for the prevention of the ID leaving the premises. Mr Barry, one the implicated members under Project Veza and newly-appointed GM CDSO, was also present during this process.

61. I point out that both Mr Garth and Mr Barry, who were seriously implicated in the PAN 1 and PAN 2 investigations, were permanently appointed by the Minister as General Managers of Operational Coordination and Special Operations respectively. This is despite the fact that their involvement in impropriety had been disclosed to the JSCI in August 2020, of which the Minister would have been aware. What is of particular concern is that Mr Y will now have to report to Mr Garth, who he had investigated, both during the PAN 1 and Veza investigations. Mr Barry was also appointed into the post occupied by the operative with the pseudonym, 'Daryl', while, although on suspension, he still occupied this position. These posts were not advertised and are a subject of numerous complaints within the SSA. Furthermore, the appointments were not approved by the Accounting Officer, but implemented nonetheless. Apart from these appointments, the CFOs who were found to have facilitated the misappropriation of the funds of the SSA and against whom criminal cases are being investigated, have been returned to their respective positions. I view this as Executive overreach, which will permit

the continuation of the criminal networks within the SSA and have the effect of further entrenching corruption. This is because it has been made plain by the reinstatement of these implicated members, that there will be no consequent management.

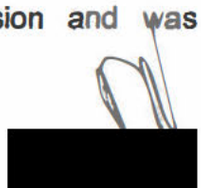
62. On 16 March 2021, one of the analysts on the team, received a letter from Advocate Muofhe, instructing her to return to her post with immediate effect. I have seen the letter and there are no reasons offered for this instruction.

63. Subsequently, on 23 March 2021, I received a similar instruction to return to my post of Divisional Head (Operational Analysis): Chief Directorate Counter-Intelligence. This was telephonically communicated to me by the staff officer in our Chief Directorate, indicating that there was correspondence addressed to me from Advocate Moufhe relaying the aforementioned instruction.

64. I was informed that a Memorandum of Understanding (MoU) between the OIGI, ID and SSA would be crafted in order to facilitate the ID's access to the documentation and evidence listed in the NPA's Section 28 Summons. I was further informed that the MoU dealt with issues of access to the locked offices, stipulating that none of the three parties would access the locked offices or the documents without the presence of the other parties.

65. Despite the above agreement, I witnessed incidents of suspected evidence tampering, which I have deduced from the accessing by SSA officials of the areas that contain documentary evidence relating to both the PAN and Veza investigations in the absence of representatives of the ID or the OIGI. This includes the opening and accessing of an office previously occupied by Mr Y, which was one of the offices previously padlocked by the IS. The office was being prepared for the occupation by Mr **Barry**, a close associate of Mr Arthur Fraser and implicated person in PAN 2. I have reported this matter to the ID.

66. I have little doubt that the steps taken against Mr Jafta, me, some members of the Veza team and Mr Y have been taken solely to shut down and discredit the Project Veza investigation. We have been accused of leaking classified documentation to the Commission, notwithstanding that all the information was provided pursuant to subpoenas issued by the Commission and was



declassified by Mr Jafta.

Executive overreach in the investigation and the disciplinary process

67. There have been several examples of Ministerial overreach, which contributed to the difficulties which we faced in attaining a sustained and institutionalised clean governance culture within the SSA. The current Minister of State Security, Ms Ayanda Dlodlo, re-instated several SSA officials who were implicated in wrongdoing in our investigations and were suspended. This following her refusal to accede to an application made by SSA to deviate from the time period within which to finalise all the disciplinary processes against such members within 18 months. The reasons advanced were the delays attributed to the lack of cooperation that has been faced by the investigators, as well as the fact that last year, five months were lost due to COVID-19. It had been thought that such an application brought by the HR Labour Relations Office on behalf of the DG to the Minister for a deviation from the aforementioned prescripts would be a formality in the circumstances. Indeed, in the past, deviations from this procedural rule under less trying circumstances have been granted.

Further instances of Executive overreach in the disciplinary process have occurred:

68. 'Helen', who, as aforementioned, was seriously implicated by Project Veza and discharged from SSA, has been reinstated, after appealing her discharge to the Appeals Board to whom the Minister delegated her powers. Notwithstanding that the majority of the Board reportedly voted to uphold the decision to discharge 'Helen', the Minister and the Chairperson of the Appeals Board, Ms XXXX, who is also an advisor to the Minister, have overturned this decision. This was done two days before Mr Jafta's contract as DG was due to expire and it was thought that his contract may not be extended at the time.

69. Another incident that occurred, which in my view amounted to Executive overreach, involves a member who worked under Mr Fraser and failed to properly settle her Temporary Advance (TA) and was directed to repay the money by the then Acting Chief Financial Officer, these repayments were

deducted from the member's salary. The member appealed this decision to the Minister, who subsequently directed that the money deducted from the member's salary be re-paid with 15% interest. It is not clear how the 15% interest was calculated. The Minister further instructed that disciplinary action be taken against the Acting CFO. The then Acting DG Jafta requested Minister Dlodlo to keep the instruction in abeyance so as to allow further investigation of the TA. During the said investigation, it was established that the member was busy trying to get assistance from some finance officers to reconstruct the claim, which was irregular. Attempts to contact the affected member in pursuance of an investigation were unsuccessful, as her response was that the Minister had issued an instruction that the monies be repaid to her; hence she would not cooperate with any investigation about this.

70. The impression the Project Veza team had was that our limited powers to conduct the investigation, thereby ensuring accountability, were undermined, as the implicated members knew that they have the ear and the protection of the Minister. The effect was that there was no consequence management and persons have been permitted to act unlawfully and commit theft and fraud with impunity. Of serious concern is the blatant disregard for the recommendations of the High-Level Review Panel in relation to investigation. This was disheartening for the investigators, who had worked tirelessly for two years in pursuing Project Veza objectives, as well as to the numerous members within SSA who have dedicated their lives to preserving national security.

71. With the absence of will within SSA, Executive overreach and the lack of support from the Ministry, it is difficult to see how realistically, the long-term vision for Project Veza could have been attained; this notwithstanding the support of the Mr Jafta whose powers were curtailed in terms of the Intelligence Services Act 65 of 2002 by the Minister. The Minister's actions made it clear that she did not support the Project Veza investigation, which I deem to be in defiance of the President's instruction to implement the HLRP recommendations.

72. It is in these circumstances, it is submitted that it is necessary that law enforcement agencies, with powers of compulsion, continue the investigation and prosecute those who are found to have acted unlawfully under the guise

of covert operations.

THE ABUSE OF THE SSA AND ITS MANDATE

Primary enablers

73. At an executive level, the abuse of the SSA and its mandate occurred primarily under the political leadership of Ministers Siyabonga Cwele, David Mahlobo and Bongani Bongo, and was executed or implemented primarily – although not exclusively – by Mr Mruti Noosi, Ambassador Thulani Dlomo, Ambassador Sonto Kudjoe and Mr Arthur Fraser. I have excluded Mr Dennis Dlomo from this list, although I appreciate that he was instrumental in the restructuring of SSA which enabled the abuse.

74. Ambassador Langa should also be mentioned as he signed off on Project Hollywood and Project Lungisa in respect of which R500 000 to R800 000 per month was paid to fictitious companies. He also signed Mr Arthur Fraser's Security Clearance certificate albeit that the process was irregular.

ILLEGAL COUNTER-INTELLIGENCE OPERATIONS

75. I have the following further to add concerning certain of the projects and operations run through the Office of the Minister and the CDSO:

75.1. **Project Academia**

75.1.1. It is my view that there was more to Project Academia than indicated by Mr Y in his affidavit; it was not only about the #FeesMustFall campaign.

75.1.2. The #FeesMustFall movement was a legitimate project already being pursued by SSA after the protests turned violent. The Project Veza team thus questioned the need for engaging Mr Murray under a separate Special Operation. It was also uncertain to whom Mr Murray was reporting and providing information to and to what end. In view of this, Mr Murray's activities were probed by Mr Mhlanga, Mr Ian and Mr Steven, Mr Y and the Veza team.

75.1.3. Mr Murray is suing the SSA for R14 million for the 2018/2019 financial year. He has been pursuing this matter since 2019, claiming that he was providing funding for the fees of 110 students. He indicated that he selected the students and no specifications were provided by the SSA. Mr Murray also indicated in a meeting with several Managers at which I was present, that he was seamlessly receiving cash payments of R800 000.00 per month from various members of the SSA during the 2016/17 and 2017/2018 financial years, which he purported to have deposited into his XXXX Foundation account.

75.1.4. There is no indication what benefit these alleged students were providing to SSA. Mr Murray was not able to provide a contract or project establishment document to recruit students, entitling him to the vast amounts claimed by him. Information provided by Mr Murray on the payments for the said students was investigated for purposes of verification on the instructions of Mr Jafta. The findings of this verification process revealed that some of the students on Mr Murrays list of beneficiaries were actually NSFAS recipients; furthermore, some students owed the Institutions at which they were studying fees from previous years, some amounting to about R200 000,00. As Mr Murray had clearly not been paying these student's fees, the question arose as to what he had utilised the monies received from SSA during from 2016 to 2018 years for. It was thus suspected that he may have misappropriated the funds. It is noteworthy that Mr Murray has approached several Ministers, including Minister Dlodlo, who requested the then Acting DG for a response to this complaint, which we provided for Mr Jafta's consideration. It should also be noted that SSA officials that were mentioned by Mr Murray as people who paid him and/or received his products, were approached by Mr Mhlanga, Mr Ian and Mr Steven to confirm and clarify

the SSA's relationship with Mr Murray and the payments made by them. Although these individuals confirmed working with Mr Murray, they did not compile any report in this regard; neither could they produce the project establishment documents and contract to justify these payments.

75.2. **Project Mayibuye**

75.2.1. Testimony has been already given that Minister Mahlobo was intimately involved in Project Mayibuye and received R4.5 million per month in cash from members of SSA for this project, which included Operation Justice and Operation Commitment. An amount of R2.5 million per month appears to have been paid to the Minister for onward transmission to the former President, President Zuma. All in all, a total amount of R4.51 million per month was taken to the Office of the Minister by various operatives, which included an amount of R2.5 million under Operation Commitment, R1.3 – R1,8 million under Operation Justice and R200 000 in respect of Operation Lock.

75.2.2. During the interviews which we had with the some implicated individuals, we were told that they personally delivered money for Operations Justice, Commitment and Lock to Minister Mahlobo and in certain instances to Mr Jay, the then head of Ministerial Services. We were told that it was common knowledge that the amount for Project Commitment was for former President Zuma.

THE CREATION OF A PARALLEL INTELLIGENCE STRUCTURE

76. **The recruitment and training of co-workers**

76.1. The rationale for recruiting and training of the so-called co-workers and the restructuring of SSA was to build a presidential protection unit. I am unsure that the term 'co-worker' means as it was used interchangeably with terms like 'agents' and 'sources'. These co-workers were engaged without going through SSA's normal

[redacted]

recruitment and vetting procedures, were not governed by SSA's operational direction

76.2. There was no record of what these co-workers in fact did, as the information or intelligence collected by them was not channelled through the official structures at SSA. They did not divulge to the investigation team what their duties were.

76.3. Some co-workers were registered as sources in a source list parallel to the SSA source index. Their source codes were created within CDSO, thus creating opportunities for withdrawing cash by CDSO members for "source remuneration". A case in point is a SSA CDSO member who admitted during an interview that she paid 72 sources, but only knew of seven sources. She indicated that the rest of the sources were known by Mr Thulani Dlomo. It was in pursuit of this ruse that co-workers/ sources were given blank acknowledgement of cash receipt forms to sign and copies thereof made by the aforementioned CDSO member.

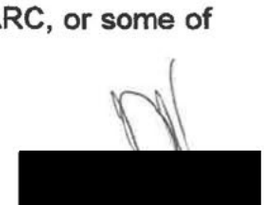
THE BREACH OF GOVERNANCE AND FINANCIAL CONTROLS

77. **Weak financial controls and a culture of complicity**

77.1. One cannot underestimate the role played by the CFOs in the malfeasance that took place within the SSA. At the end of the day, the wholesale looting of funds by the CDSO would not have occurred without the involvement of the CFOs.

77.2. Before they approved the projects, they ought to have performed their fiduciary duties in accordance with the Public Finance Management Act. Instead, one of the CFO's de-activated controls allowing funds to be withdrawn even though the funds for the project were depleted and bypassed the Budget Controller. CFO's permitted agents to withdraw funds when previous Temporary Advances taken by them had not been settled.

77.3. The financial and governance weaknesses should have been addressed by the ARC; however. it appears that the ARC, or some of



its members, were either incompetent or complicit in the criminality by turning a blind eye to all the risks and financial weaknesses. The Project Veza team identified and shared all weaknesses in the SSA financial systems as well as proposed solutions with the ARC members. These were however, not even mentioned in the report the ARC submitted to the Minister.

CONCLUSION

78. While I acknowledge the support provided to the investigation team by the JSCI, Mr Jafta, the Inspector General of Intelligence and previous sponsors of Project Veza, I knew that our investigation would not be successful without the full support of all senior management and the Executive. My fears have proved correct as the Project Veza has been effectively shut down by Adv. Muofhe and the Minister.

79. It is my view that the investigation is now best pursued by Law Enforcement Agencies. I have been informally informed that there are current processes underway to secure another forensic firm to investigate corruption within SSA at an amount of R50 million through SSA's Supply Chain Management. If this is accurate, I believe it will be another opportunity to loot SSA funds, whilst creating an impression that the malfeasance and corrupt networks entrenched within the SSA are being dealt with, thus keeping Law enforcement Agencies in abeyance. Furthermore, the criminal matters dealt with by the Veza investigation, coupled with the evidence obtained through investigations by the State Capture Commission, are sufficient to expedite the ID investigation and subsequent prosecutions. The Resolution that enables the NPA to utilize evidence from the SCC is a case in point.

80. 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" [redacted]

Ms K

[redacted]

Ms K

I certify that the deponent has acknowledged that she knows and understands this contents of this statement. This statement was sworn to before me and the deponent's signature was placed thereon in my presence at Garsfontein on this the 11 day of May 2021 at 14:25

SOUTH AFRICAN POLICE SERVICE
GARSFONTEIN
2021 -05- 11
COMMUNITY SERVICE CENTRE
SUID-AFRIKAANSE POLISIEDIENS

COMMISSIONER OF OATHS
EX OFFICIO

Natasha Vorster

277 Johnny Claassens

Garsfontein

IN THE COMMISSION OF INQUIRY INTO STATE CAPTURE
HELD IN JOHANNESBURG

February 2021

AFFIDAVIT

SEHLOHO FRANCIS MOLOI

Table of Contents

IN THE COMMISSION OF INQUIRY INTO STATE CAPTURE
HELD IN JOHANNESBURG

AFFIDAVIT

I. Introduction

I, the undersigned

SEHLOHO FRANCIS MOLOI

do hereby make oath and say:

1. I am an adult, male South Africa citizen residing at 8 Coral Close, Mooikloof Heights, Pretoria.

2. I hold the degrees of Bachelor of Social Science (BSocSc)(in economics and political studies); Bachelor of Laws (LLB); Master of Laws (LLM)(Commercial Law)(University of Cape Town); Diploma (Trade Policies)(World Trade Organisation)(WTO)(Geneva); Master of Laws (LLM) (Harvard University, Cambridge, Massachusetts)); and Doctor of Philosophy (PhD)(in Law)(University of the Witwatersrand, Johannesburg). I am an Attorney of the High Court of South Africa (admitted in December 1996) and former High Commissioner for South Africa to India (June 2005 – December 2009), and former Ambassador of South Africa to Sudan (April 2015 – December 2019). I am currently Chief Director responsible for Human Rights & Humanitarian Affairs, in the Department of International Relations and Cooperation (Dirco or the Department) in Pretoria.

3. I joined the public service in January 1998 as Assistant Director in the Department of Trade and Industry (DTI as it then was) in the division that was responsible for South Africa's negotiations in the World Trade Organisation. In 2001, I was appointed Director: Multilateral Trade Negotiations (in the DTI) responsible for trade negotiations in the WTO. My responsibilities in that position entailed, among others, (a) coordinating the positions of South Africa in negotiating market access for products and services of export interest to South Africa; (b) advising our government on the compatibility or otherwise of proposed legislation, proposed economic and industrial policies and programmes with South Africa's obligations under various agreements of the WTO; and (c) preparing reports on South Africa's trade policies, which reports were presented to the WTO Trade Policy Review Mechanism (TPRM) in Geneva. I also worked closely with my counterparts and colleagues in the other four countries of the Southern African Customs Union (SACU) that is, Botswana, Lesotho, Namibia, and Swaziland (now Eswatini) to prepare a joint trade policy report of the SACU, which would also be presented to the WTO TPRM in Geneva. In a nutshell, the main purpose of the WTO TPRM is to peer-review the trade and industrial policies of WTO member states with the objective of contributing to improved adherence by all members (of the WTO) to rules and commitments made under WTO agreements and hence to the smoother functioning of the multilateral trade system, by achieving greater transparency in, and understanding of, the trade policies and practices of members.

4. In February 2004, I left the DTI and joined the erstwhile Department of Foreign Affairs (DFA)(now Dirco) as Chief Director in the Branch: Asia & Middle East and I was responsible for managing South Africa's relations with countries in Asia. When I joined DFA in February 2004, I was going to be responsible for managing South Africa's

relations with countries in South Asia (including, India, Pakistan, Maldives, Nepal, Sri Lanka, Bangladesh); South-east Asia (including, Indonesia, Thailand, Myanmar, Vietnam, Laos, Cambodia, Singapore, Malaysia, Philippines, and Brunei); and Oceania (including, Australia, New Zealand, Fiji, and the Pacific Islands). But when I joined DFA in February 2004, I recall that the other position of Chief Director in the same Branch: Asia & Middle East, covering the rest of Asian countries (including, China, Japan, South Korea, North Korea, Mongolia) was vacant and I ended up "acting" in the other Chief Directorate as well. In other words, for the remainder of 2004, I was therefore responsible for the whole of Asia.

5. My responsibilities in the position as Chief Director responsible for managing South Africa's relations with Asian countries included the following: (a) coordinating with other government departments South Africa's diplomatic relations with Asian countries in all areas of mutual interest (e.g. delegation visits; trade, business, tourism, education, culture, sport); (b) working closely with Asian embassies and missions and their ambassadors and Heads of Mission resident in Pretoria on all matters of mutual interest between South Africa and individual Asian countries and/or groups of countries, such as the group of countries belonging to the Association of South-east Asian Nations (ASEAN); and (c) managing the work of South African embassies and missions in Asian countries falling under my responsibility. As far as the latter responsibility is concerned, my responsibilities also included (a) managing and supervising the performance of all my South African embassies (in e.g. New Delhi, Islamabad, Bangkok, Singapore, Kuala Lumpur, Canberra, Wellington) reporting to me; (b) approving their business plans; and (c) signing performance agreements with South African ambassadors and Heads of Mission posted to those countries.

6. In January 2005, former Director General of then DFA, Dr Ayanda Ntsaluba informed me that I had been nominated as the next High Commissioner for South Africa to India to succeed Ms Maite Nkoana-Mashabane who was High Commissioner for South Africa in New Delhi then and whose term (as High Commissioner) was coming to an end in that year (2005). To prepare myself for that assignment, I participated (with other nominated ambassadors, High Commissioners and Heads of Mission) in a 5-month training/orientation programme, which training/orientation programme was supposed to "familiarise" us with everything we needed to know and that was expected of us as ambassadors and Heads of Mission. Some of the issues we were trained and briefed and "oriented" on included, important elements of South Africa's foreign policy; key objectives of our government in addressing domestic challenges; information about key trade and industrial policies, programmes, and incentives; diplomatic etiquette; how to run a mission; reporting requirements; consular matters; trade, tourism and investment promotion; the do's and dont's; and all other matters diplomatic.

7. Before the ambassador takes up her/his position in the country where she/he is to be posted – and this would have happened in my case as well – the South African government (through the DFA) would send a note verbale to the Foreign Ministry of the country where the South African ambassador is to be posted notifying the latter Ministry about the newly nominated ambassador whom South Africa intents to send to that country. Attached to that note verbale would be the ambassador-designate's CV and other relevant biodata. The other important purpose of the note verbale is to request the other country's concurrence and agreement that the nominated ambassador is "acceptable". In essence, by notifying the other country of the nominated ambassador, and providing her/his CV, the South African government in turn, would "expect" the other government to issue a "Letter of Agreement" or Agrément that our ambassador is welcome to come to that country.

8. When South Africa notifies the other country of our intention to send (so-and-so) as our ambassador and before that other country issues the "Letter of Agreement", the host country government ordinarily conducts a "security clearance" on the nominated ambassador from South Africa. And if and when the host government is "satisfied", then it would ordinarily issue the "Letter of Agreement". It does happen, though rarely, that the host government might decline to issue the "Letter of Agreement" (for whatever reason. Host countries are also not obliged to give reasons why they decline to issue the agrément). But in a great majority of cases, host countries do issue "Letter of Agreement" for nominated ambassadors. It is a public secret in the world of diplomacy that, even when host countries are "not happy" with the nominated ambassador (for whatever reason), the host government would not lightly come to a decision not to accept the nominated ambassador.

9. The host country is not the only one that conducts a security clearance on the nominated ambassador. The South African authorities also conduct a security clearance on nominated ambassadors. If I am not mistaken, a separate security clearance for the purposes of my assignment to New Delhi as High Commissioner was not conducted, maybe because my security clearance that was issued a year before (in 2003?) was still valid. A security clearance is normally valid for five years.

10. I arrived in New Delhi with my family in June 2005 and presented my credentials to President APJ Abdul Kalam (may his Gracious Soul rest in peace!) in August 2005. I was High Commissioner until December 2009 when my tour of duty ended. The main difference as far as accreditation to a foreign country is concerned, between ambassadors and other diplomatic/embassy officials is that, it is only the ambassador/High Commissioner who presents her/his credentials to the Head of State (usually the President

or the King or the Queen) of the host country. The "credentials" or the "Letters of Credence" of the South African ambassador/High Commissioner are signed by the President (and the Minister of International Relations and Cooperation) and these are handed to the Head of State who will receive the South African ambassador/High Commissioner/Head of Mission. The "credentials" or "Letters of Credence" state in essence – if it is to the King of the host country - that:

> "Your Majesty, Being desirous of maintaining and strengthening still further the cordial relations and good understanding which so happily subsist between our two countries I have judged it expedient to accredit to Your Majesty [**the full names of the Ambassador**] as Ambassador Extraordinaire and Plenipotentiary of the Republic of South Africa. I do not doubt that (s)he will discharge her/his duties in such a manner as to merit Your Majesty's approbation and esteem and prove herself/himself worthy of this mark of my confidence. I therefore request Your Majesty to give entire credence to all that (s)he may say in my name or in the name of the Republic of South Africa, more especially when (s)he shall have occasion to convey to Your Majesty the assurance of my sincere wishes for Your Majesty's happiness and for the welfare and prosperity of the Kingdom of [name of the country].
>
> Your Majesty's Good Friend
>
> [Signed by the President of the Republic of South Africa]
>
> [Signed also by the Minister of International Relations and Cooperation]"

11. The "Letters of Credence" appear to be crafted in "convoluted diplomatic language", but the essence of it is that, the President of South Africa introduces and presents his appointed ambassador to the Head of State of the host country, and requests the

"receiving" Head of State to accept the ambassador and his (President of South Africa's) representative (and the representative of the people of South Africa). But what is also important is that, the President requests the "receiving" Head of State to "give credence" to everything that the ambassador will say, as if what the Ambassador will say is said by him (President of South Africa) and the government of South Africa. That is why the document is called "Letters of credence". A massive responsibility indeed.

12. There are other Heads of Mission that countries appoint, called Consuls General who are normally appointed to head one of the offices or missions of, in this case, South Africa in other countries. These offices are not embassies but consulates, and these offices are largely responsible for trade and investment promotion, and related activities. For example, during my time in India, our embassy was based in New Delhi and the Consulate General Office was based in Mumbai (the financial capital of India, situated in the state of Maharashtra). Consuls General also "present" (not the "Letters of Credence") but what in diplomatic parlance is called, the Exequatur, which states in essence that:

> "To All and Singular to whom these Presents shall come, Greetings!
>
> Under the power vested in me by Section 84(2)(i) of the Constitution of the Republic of South Africa, 1996 and by virtue of my great confidence in her/him I hereby appoint [full names of the Consul General] as Consul General of the Republic of South Africa in [name of the country and territories or provinces in the host country] as her/his consular district and empower her/him to hold the said office, to take care of the interests of South African citizens and to aid and assist them in their mercantile and lawful affairs during the pleasure of the President of the Republic of South Africa, and to exercise and enjoy all the rights, privileges and immunities appertaining to the said office. I hereby enjoin and require all South African citizens to take due notice of this commission and to yield obedience thereto.
> [Signed by the President of the Republic of South Africa]
> [Signed also by the Minister of International Relations and Cooperation]

13. As can be seen, the Exequatur is also worded in "convoluted diplomatic language", but its message is also clear, simple and straightforward: the Consul General is appointed by the President and is commissioned to do everything in her/his power to pursue the interests of South Africa over a defined area (jurisdiction) in the country of accreditation and assist South African citizens promote and pursue their business interests in relation to the host country. Again, a massive responsibility indeed.

14. My responsibilities as High Commissioner and Head of Mission in India included the following: (a) managing the business of the mission as a whole, including "supervising" the work of other diplomatic officials sent by other government departments, such as DTI, Defence, and Home Affairs); (b) ensuring compliance on the part of all of us, South African diplomats, with performance management requirements (e.g. preparing business plans, signing performance agreements, appraising and evaluating performance); (c) ensuring that the missions' resources (both personnel and financial) are used to achieve the objectives of our business plans and to ensure no wasteful, unauthorised and fruitless expenditure; (d) to maintain cordial relations between South Africa and India; (e) to represent the President, the Government, and the people of South Africa in India in pursuit of our mutual interests (to promote trade, investment, tourism, defence cooperation, and to deepen people-to-people contacts through sports, cultural cooperation, student exchanges, participation in each other's capacity building programmes); (f) "scouting" for business opportunities for South African business in sectors such as mining, retail, tourism, leisure, banking, energy, and education and training; and (g) promoting South Africa as a viable destination of choice for business, investment, leisure, education and training.

15. In December 2009, my tour of duty in India ended and I returned to Pretoria to work in the Department of International Relations and Cooperation (Dirco) in my old Branch: Asia &

Middle East, responsible for managing South Africa's relations with countries in South Asia, South-east Asia and Oceania. My responsibilities in this position were largely the same as the ones I had before I left for India. It is important to also state that, in addition to these responsibilities, I was also appointed to act in many roles as, for example, chairperson of the performance monitoring bodies, member of the bid adjudication committee, representing the DG at meetings of DGs (DG Cluster meetings), as well as presenting "training" to nominated ambassadors who would be participating in an orientation program before they leave to take their ambassadorial posts in the countries of their accreditation.

16. In 2014, I was nominated ambassador to the Republic of Sudan, in Khartoum and took up my post there in April 2015. Before I could leave, I once again participated in the "orientation" programme with all those designated as ambassadors to other countries, such as the Netherlands, Denmark, Australia, and South Korea. My responsibilities as ambassador in Sudan were more or less the same as those of other Heads of Mission (as elaborated on in the case of India), but with pronounced differences. Given the socio-economic and political situation that Sudan found itself in at the time of my tour of duty in that beautiful country (e.g. civil strife, socio-economic and political instability, crippling unilateral economic and financial sanctions), my responsibilities centred largely on: (a) maintaining cordial relations with Sudan; (b) supporting South African peacekeepers who were participating in a large peacekeeping mission under the joint African Union-United Nations Mission in Darfur (UNAMID); (c) sharing South Africa's experiences in peaceful resolution of conflicts with various parties (including warring parties) in Sudan; (d) supporting the work of the South African permanent mission in New York (including the AU and UN) in facilitating contacts and meetings with leaders of warring parties in South Sudan who were based in Khartoum, Sudan; and (e) kept regular contacts with the leaders

of the military and those of the opposition forces in the lead up, during and in the aftermath of the "revolution" that saw the ousting of President Omar Al Bashir from power in 2019. In Sudan, I also assisted and supported South African businesses in their on-going operations in that country (e.g. telecommunications (MTN), water management and purification (the Al Manara Water project (IDC)) as well as those companies that were looking for opportunities in areas such as mining, mineral exploration, and mining technology and equipment. In that tough economic, political and financial environment of Sudan, we also tried to promote South Africa as a destination of choice for leisure, education and training.

17. In December 2019, my tour of duty in Sudan ended and I returned to Head Office in Pretoria (Dirco) and was assigned to work in the Branch responsible for Global Governance issues, including human rights and humanitarian affairs. My responsibilities in this position, Chief Director: Human Rights & Humanitarian Affairs include: (a) managing the work of the unit; (a) supervising officials reporting to me; (c) managing the South African mission in Geneva (also part of the work of our missions in New York, Vienna and Rome); (d) participating in and supporting the work of our missions in Geneva in UN bodies such as the Human Rights Council and in New York in the work of the Third Committee of the UN; (e) coordinate humanitarian assistance jointly with UN agencies (such as UN High Commissioner for Refugees (UNHCR) and the World Food Programme (WFP)) and other international agencies such as the International Committee of the Red Cross (ICRC)). In addition to these responsibilities, I also participate in "institution-building programmes" such as participating in bid adjudication committees and performance monitoring and evaluation committees.

18. For all intents and purposes, I regard myself as a professional civil servant and a "professional" diplomat who has been in the South African diplomatic service (starting with "trade diplomacy" in the DTI in 1998) for the last 23 years. I believe that my academic training and background (in economics, politics, law (international trade), diplomacy, management, and leadership) as well as my professional qualifications as a lawyer and professional diplomat, coupled with my practical experience, knowledge and skill in diplomacy (in all these years) stand me in good stead to do my work and perform my responsibilities on behalf of the Government and People of South Africa with a great measure of confidence and satisfaction. And I say this with humility.

19. I have decided to approach the *Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* (the Commission or the Zondo Commission or the State Capture Commission) to present evidence on a number of matters which, I believe, are in the interests of the public and South Africa as a whole and fall within the terms of reference of this Commission.

20. In a nutshell, my affidavit/statement seeks: **First**, to explain the nature of a foreign service that the South African government (courtesy of the Presidency and the Department of International Relations and Cooperation in the main) in collaboration with the African National Congress (ANC) has cultivated in the years following our transition from apartheid to constitutional democracy. But most importantly, how that foreign service is managed, how ambassadors are appointed, and how the role of the ANC in the "appointment" and "deployment of its cadres" into the foreign service have engendered a situation where the seeds of corruption, fraud, maladministration, patronage, abuse of power, abuse of state institutions, and "redirecting" of public funds away from their intended purposes into the hands of "private interests for private gain". In order to prove

these allegations, evidence will be presented, for example, of how the ANC is (ab)using its influence and role as the majority party or the so-called "ruling party" to "deploy its cadres" and other "political appointees" into the foreign service for purposes of raising funds for its coffers through soliciting "kickbacks" ostensibly in exchange for ambassadorial positions, which "kickbacks" ANC "deployees", "cadres" and "appointees" duly paid.

21. The **Second** objective of my affidavit/statement is to show how an ANC-dominated Parliament has commandeered a piece of legislation, that is, the newly promulgated Foreign Service Act 26 of 2019 - signed into law by President Ramaphosa on 26 May 2020 and published in *Government Gazette* No. 43403 of 4 June 2020 - with the objective of maintain and preserving the current status in the foreign service (a) where the ANC will continue to hold sway in the appointment of ambassadors and continue to benefit financially from ambassadorial appointments; (b) where the criteria for appointment into the foreign service stipulated in the Constitution have been jettisoned in favour of criteria which will continue to protect the current status quo, which status quo is riddled with seeds of fraud, corruption, and maladministration; and (c) where the President's power of appointment under section 84(2)(i) of the Constitution is misconstrued and (ab)used for the purposes of abetting corruption and "facilitating" the payment of "kickbacks" to the ANC for the private gain of that party.

22. Therefore, the matters I wish to present evidence on relate to the following:

(a) The current system of ambassadorial appointments in the South African foreign service which is implemented, facilitated and commandeered by the President, Dirco

and the ANC in a manner that is in violation of the Constitution and is tainted with corruption and maladministration;

(b) The role of the African National Congress (ANC) - which role, arguably, is not authorised by the Constitution - in the "appointment" of ambassadors and the "deployment of its cadres" and other "political appointees" (through the ANC's so-called "cadre deployment policy") into the foreign service;

(c) The corrupt nature of ambassadorial appointments as evidenced by the "kickbacks" that "ANC-appointed" ambassadors and other career diplomats are expected to pay back to the ANC (ostensibly in return for diplomatic positions) via debit orders that appointed ambassadors and diplomats sign in favour of the ANC;

(d) The participation of the President in the scheme of "kickbacks" in favour of his party through the (mis)use of his power of appointment (of ambassadors) under section 84(2)(i) of the Constitution, and concomitant violation of his oath of office;

(e) The role of parliament (through the Foreign Service Act (No. 26 of 2019)) in the perpetuation of a foreign service dispensation which is inconsistent with the Constitution, but most importantly, the maintenance of a foreign service regime that seeks to give the ANC the pronounced role it has continued to play in the appointment of ambassadors and the continued (ab)use of the foreign service for the private financial gain of the ANC;

(f) The abuse of a state institution (the foreign service) for the private financial gain of a political party;

(g) The diversion of state resources away from their intended purposes and directed to benefit private interests (the ANC, its "cadres", its politicians, its associates, friends, spouses, children and relatives of its "bigwigs"); and

(h) The detrimental impact of the kind of practices mentioned above on good governance and on the values that govern public administration in South Africa, including on the morale of career diplomats as well as the ability of the South African government (through its foreign service) to serve the interests of South Africa and its People in relation to other nations.

23. It is important to point out at this stage that I am aware that some of the issues I mentioned in paragraph 22 above, specifically, the idea that some provisions of the recently promulgated Foreign Service Act are unconstitutional, do not fall under the terms of reference of the Commission. The constitutionality of the Foreign Service Act cannot be challenged in this Commission. The High Court (and ultimately the Constitutional Court) is the appropriate forum for such an action. I believe it is appropriate at this stage to inform the Chairman and this Commission that there is intention to apply to the High Court for the review and setting aside of certain provisions of the Foreign Service Act. That is a course of action for another day.

24. Having said that however, I wish to underscore the following points:

(a) It is important for this Commission to understand the legal background, context and environment in which the ills of fraud, corruption and maladministration (related to ambassadorial appointments) have been allowed to flourish in the South African foreign service;

(b) It is important for this Commission to understand how it could be argued – and demonstrated – that the consequences of the current practices in ambassadorial appointments (corruption, maladministration, political patronage) are not authorised by the Constitution and the law and how parties involved in the appointments of ambassadors (i.e. The President, Dirco and the ANC) misconstrue their powers and in the process flout the rules;

(c) It is important for this Commission to understand how it could be argued – and demonstrated – that Parliament (by enacting a piece of legislation, in this case, the Foreign Service Act, which Act is, arguably, inconsistent with the Constitution) could also be found to be abetting "state capture", in the sense that, Parliament (through the Foreign Service Act) sought to maintain a foreign service where e.g. the door will be kept open for the ANC to continue to have a pronounced role in the appointment of ambassadors and where the foreign service would continue to be (ab)used by the ANC as a "cash cow" for private gain; and

(d) It is important for this Commission to understand how state functionaries (President), state departments (Dirco), public officials (Director General), state institutions (the ANC-dominated Parliament) can all "collude" (under the thin disguise of fulfilling their constitutional and legislative functions) to defraud the state; to abuse public resources and funds; to deepen corruption; to divert public funds away from their intended purposes into private hands; to promote and abet maladministration, and to "capture the state". I believe that a thorough appreciation of the 'legal issues' and the 'legal context' in which the appointment of ambassadors is done will shed light on the rest of the submissions in this affidavit/statement.

25. Before I go into the details of my evidence, I wish to mention the following point. The issue of appointment of ambassadors in the foreign service and the role of the ANC in that process (and the antecedent problems with this phenomenon) have been a rather thorny issue in the Department for many years. And the main source of great "discomfort" and disillusionment among the career diplomats in the Department in this regard has been the continuing practice where – over all these years – the ambassadorial/head of mission positions in South African missions abroad have consistently and incrementally been dominated – grotesquely and disproportionately so – by the so-called "political appointees" and "party deployees" who come mainly from outside the ranks of professional diplomats and who are "appointed" almost exclusively by the ANC (who are members of the ANC or are associated in one way or another with the ANC or are relatives, spouses, friends, comrades, and/or children of "bigwigs" in the ANC).

26. There has never been an opportunity to discuss these matters in the Department. In fact, any attempt by officials to invite a discussion with the top leadership of the Department – whether Ministers or Directors General - on matters relating to ambassadorial appointments and the role of the ANC and the Presidency in that process, that invitation or request would normally be met with stern warnings from the top, and officials would be told that the appointment of ambassadors is the "prerogative" of the President and no official(s) had any rights to question that "prerogative" or enter into any discussion on how the appointment of ambassadors should be made. The first real opportunity came in 2015 when Parliament published the Foreign Service Bill for public comment. That Bill was published in *Government Gazette* No. 39211 of 17 September 2015. I for one took advantage of that parliamentary process (invitation to the public to comment on the Bill) and also the invitation from Mr Khabo Mahoai, Acting Director General (as he then was) to all interested Dirco officials to submit their views and comments on the Bill and

channel those via their respective Deputy Directors General. The Director General had informed us (Dirco officials) that all our comments, if any, would be consolidated in one presentation that would be submitted to Parliament for consideration.

27. On 5 February 2017 – while I was still based in Khartoum, Sudan as ambassador of South Africa there – I sent, per email (Isigwela@parliament.gov.za), my detailed Comment on the proposed Foreign Service Bill, 2015. I attach the said Letter and Comment as Annexure "A". I sent that Comment under cover of a letter addressed to:

Hon. Moses Siphosezwe Amos Masango, MP
Chairperson of the Portfolio Committee on International Relations & Cooperation
Parliament of the Republic of South Africa
Plein Street
CAPE TOWN

28. In my covering letter to Honourable Masango, I wrote, in part:

"Dear Honourable Masango

COMMENT ON THE PROPOSED FOREIGN SERVICE BILL, 2015

I refer to the above matter and enclose under cover hereof my Comment on the proposed Foreign Service Bill, 2015 (the Bill) for your kind attention and consideration. My submission of this Comment is pursuant to the process currently underway, where Parliament, courtesy of the Portfolio Committee on International Relations & Cooperation (the Committee) is engaging the public on the proposed Bill."

29. In my aforementioned letter of 5 February 2017 to Honourable Masango, I had also confirmed that "should [Mr Masango] and/or the [Portfolio Committee on International Relations and Cooperation] wish to receive my oral submissions in this regard, I shall be delighted to do so." I shall discuss some of my detailed comments later in my affidavit/statement. My Letter and Comment to Hon. Masango (Annexure "A"), for some reason was "not delivered". I discovered later, after I had telephoned Hon. Masango's office in Parliament that I had misspelled the email address of the email recipient. Instead

of lsigwela@parliament.gov.za, I had typed Isigwela@parliament.gov.za. After I had telephoned a certain Lubabalo (in Hon. Masango's parliamentary office), I resent my Letter and Comment using the correct email address). Copy of my second email to Hon. Masango (courtesy of Lubabalo) is attached hereto marked Annexure "B".

30. The signing into law of the Foreign Service Bill by President Ramaphosa on 26 May 2020 (and published in *Government Gazette* No. 43403 of 4 June 2020) has provided us with another opportunity to "discuss" the kind of matters (relating, inter alia, to the nature of foreign service South Africa needs; the nature of President's power of appointment under section 84(2)(i) of the Constitution; and the kind of process and criteria which must be used to appoint ambassadors, and related matters). I shall address some of these matters in this affidavit/statement.

31. Because there was this "push-back" and "resistance" on the part of the leadership of the Department to discuss matters relating to ambassadorial appointments and how the practice, as it was carried out then (and still persists), impacted on career diplomats, there was also never an opportunity to raise the allegations of corruption, patronage, nepotism, discrimination, abuse of power, "selling of ambassadorial posts" in return for "kickbacks" for the benefit of the ANC which were deeply rooted in the system of ambassadorial appointments (and still are). The opportunity to raise these matters – with the hope that these problems could be eradicated – came with the establishment of this Commission of Inquiry with very clear terms of reference. And I have already stated earlier that, the kind of evidence that I will present to this Commission, I believe, covers matters which fall neatly within its terms of reference, including fraud, corruption and abuse of power, abuse of public institutions and resources for private gain by private interests.

32. The submission I had made to Parliament on the Foreign Service Bill was also sent to Minister Lindiwe Sisulu (who was Minister of International Relations and Cooperation at that time (2017) by email (29 March 2017) courtesy of Mr Mahoai, Director General. My Comment on the Foreign Service Bill was also sent (under the same email to the Director General) to Advocate Sandea de Wet (State Attorney: International Law in Dirco), to Mr X Makaya (then Deputy Director General: Africa), as well as to Ambassador M Joyini (then Head and Deputy Director General: Diplomatic Training).

33. When Mr Cyril Ramaphosa became President of South Africa on 15 February 2018, I also took the liberty to write to him (when I was still in Sudan) and to raise some of the key issues I had highlighted in my submission to Parliament which I invited him to consider. My letter to President Ramaphosa (enclosing my detailed memo) is dated 14 March 2018 and is attached hereto marked Annexure "C". My letter to President Ramaphosa was also copied to then Minister Lindiwe Sisulu (Minister of International Relations and Cooperation), Honourable Moses Siphosezwe Amos Masango, MP, Chairperson of the Portfolio Committee on International Relations & Cooperation, Parliament of the Republic of South Africa, as well as Mr Aziz Pahad, Chairperson, South African Council on International Relations (SACOIR).

34. When I did not receive an acknowledgement of receipt from the Office of the President, I hand-delivered a copy of this letter (and memo) to his Office in the Union Building on (Tuesday 19 June 2018) – when I was on leave in South Africa - as evidenced by the stamped cover page bearing the President's Private Office stamp (2018-06-19), which is attached hereto marked Annexure "D". Other than Annexure "D", I did not receive a "formal" letter of acknowledgment from the President.

35. In my letter to President Ramaphosa, I wrote:

"Your Excellency

AMBASSADORIAL AND OTHER HEADS OF MISSION APPOINTMENTS IN THE FOREIGN SERVICE OF SOUTH AFRICA: THE URGENT NEED FOR CHANGE!

I refer to the above matter and enclose under cover hereof a Memorandum (a Memo) for your kind attention and consideration. The contents of the Memo are self-explanatory and are based on my initial Comment on the proposed Foreign Service Bill, 2015 (the Bill), which Comment I submitted in February 2017 to Parliament courtesy of Hon. Moses Siphosezwe Amos Masango, MP and Chairperson of the Portfolio Committee on International Relations and Cooperation (the Committee).

I have chosen to address this Memo to you Honourable President, because the issues it addresses and the recommendations it makes, including how ambassadors and other Heads of Mission should be appointed in the Foreign Service of the Republic of South Africa, rest squarely within your constitutional powers, specifically, section 84(2)(i) of the Constitution and do not need to wait for the passing of the Bill into law before the President can act upon the recommendations herein.

The gist of my submission is that there is an urgent need to change the manner in which ambassadors and other Heads of Mission are appointed in the Foreign Service of South Africa. My submission is that South Africa needs to move away from the current practice - where ambassadorial positions in South African missions abroad are disproportionately and grotesquely dominated by "political appointees" and other "party deployees" - to a system where the Foreign Service (at ambassadorial level) is properly staffed with **career-oriented, professional and non-partisan diplomats**.

In this Memo, I demonstrate that the current practice of ambassadorial appointments is inconsistent with: (a) the letter and spirit of our Constitution; (b) the decision of the Constitutional Court in *the Second Certification Judgement*; (c) the previous foreign policy position of the ANC (contained in the ANC's Foreign Policy Discussion Paper, 1993); and (d) is out of step with international good practice.

In the circumstances, I implore you Honourable President, to take into account the submissions in this Memo and consider seriously the constitutional and legal obligations resting on you as you exercise your powers of appointment (of ambassadors) in terms of section 84(2)(i) of the Constitution. Specifically, that Honourable President ensure that the exercise of your powers of appointment under section 84(2)(i) is consistent with the Constitution and the law and other tenets of our constitutional democracy such as respect for the rule of law, transparency, rationality, accountability, non-discrimination and non-arbitrariness.

I wish to clarify that my submission of this Memo to you Honourable President, is part of my contribution to:

(a) promoting public participation in policy making as required by section 195(1)(e) of our Constitution;
(b) your call (in the SONA, Friday 16 February 2018) to all of us, South Africans, to put our shoulder to the wheel and "turn our country around" for the better; and
(c) the on-going process, where Parliament, courtesy of the Committee is engaging the public on the proposed Foreign Service Bill.

I am aware that Your Excellency has undertaken to visit government departments and engage with them on various matters. I trust that when you visit dirco, Your Excellency will have an opportunity to address some of the issues raised in this Memo with the leadership and officials of that department.

I confirm that should Your Excellency wish to receive any further clarifications and inputs on any issue raised in this Memo, I shall be delighted to do so."

36. In addition to the recommendations I made to President Ramaphosa, one of my objectives for sending him that letter was to ensure that in the unlikely event that Parliament would finalise its process on the Foreign Service Bill and actually present that Bill to him for signature into law, President Ramaphosa would "recall" some of the views I had expressed in my letter and maybe, just maybe, he might consider sending the Bill back to Parliament for the lawmakers to address some of the constitutional inconsistencies that would still have remained, if at all, in the Bill after the public participation process would have been concluded.

37. On 2 March 2020, I wrote a letter to Minister Dr Naledi Pandor (copying Deputy Ministers Mr Alvin Botes and Ms KC Mashego-Dlamini as well as Director General, Mr Khabo Mahoai) bringing to their kind attention the contents of my letter and memo (of 14 March 2018) to President Ramaphosa. The copy of my letter to Minister Pandor is attached hereto marked Annexures "E". Other than the stamp from the Office of the Minister (dated 2010-03-02), I did not receive a formal acknowledgement of receipt from either the Minister, the Deputy Ministers or the Director General.

38. As I stated in my Memo to President Ramaphosa, my whole interest in a series of these letters, memos, and comments on an important area of our government's responsibility (in this case, the management of South Africa's foreign service and compliance with the Constitution and the law) was to make a small contribution to promoting the values that govern public administration in South Africa while exercising the right of South African citizens to participate openly in lawful and democratic processes of our government (in this case, policy-making and -implementation).

39. In order to present my evidence in an organised and systematic manner, I would prefer to present such evidence under the following key topics, issues, themes or headings:

(a) the nature of the foreign service envisaged by the Foreign Service Act compared to the nature of the foreign service envisaged by the Constitution;

(b) the criteria for appointment as Head of Mission (HOM) prescribed by the Foreign Service Act and the criteria for appointment as diplomat/ambassador/HOM prescribed by the Constitution;

(c) the explanation of the nature of President's power of appointment (of ambassadors) under section 84(2)(i) of the Constitution;

(d) the moral hazards of an unprofessional, non-career oriented and partisan foreign service;

(e) the role of the African National Congress (ANC) in the "appointment" of ambassadors/HOMs and its detrimental effects;

(f) the foreign service, appointment of ambassadors and state capture;

(g) career diplomats and their right to legitimate expectation; and

(h) the critical evaluation of President Ramaphosa's views on the kind of public/foreign service South Africa needs.

40. Under the **First Topic**, I shall cover **the nature of the foreign service South Africa requires**. The idea behind that discussion is to explain the kind of public/foreign service the Constitution envisaged right from the beginning of the political settlement negotiations (circa 1990-1993) through to the final signing into law of the 1996 Constitution (by President Mandela on 10 December 1996 in Sharpeville). The kind of foreign service envisaged in the Constitution will be compared with the kind of foreign service the Presidency, Dirco and the ANC have progressively cultivated over many years, which foreign service the newly promulgated Foreign Service Act wishes to maintain, protect and preserve. The essence of the discussion under the First Topic will be to show how the foreign service which the ANC-led government has cultivated over all these many years of our democracy (which foreign service is also envisaged in the Act) is different from the foreign service envisaged in the Constitution. The point will be made that the kind of foreign service South Africa requires is *not* the one which has been created by the South African government (under the leadership of the ANC), but the one envisaged in the Constitution. In order to ascertain what kind of a foreign service the Constitution envisaged, reference should be made to the following:

(a) the relevant provisions of the 1996 Constitution governing public service and administration (read with the relevant provisions of the 1993 interim Constitution, particularly CP XXX.1 in schedule 4 to the 1993 Constitution));

(b) the decision of the Constitutional Court when it certified the 1996 Constitution;[1] specifically when the Constitutional Court held that the 1996 Constitution complied fully with the requirements of a public/foreign service contained in Constitutional Principle XXX in Schedule 4 to the 1993 interim Constitution;

(c) previous policy positions of the ANC (contained in the ANC's Foreign Policy Discussion Paper, 1993) on the kind of foreign service democratic South Africa needed; and

(d) international good practice.

41. The key point I make under the First Topic of this affidavit/statement is that the kind of foreign service which the ANC-led government has cultivated and allowed to flourish in the past 26 years or so is not consistent with the Constitution and it is exactly that phenomenon i.e. the creation of an institution which operates on criteria which are far removed from the criteria stipulated in the Constitution, which is the source of so much corruption, maladministration, patronage, and abuse of power that has been allowed to take root in the South African public/foreign service.

42. Under the **Second Topic** of my affidavit, I shall discuss the **criteria for the appointment of Heads of Mission** (HOMs) in the South African foreign service. The aim of the discussion under the Second Topic is to demonstrate how the manner and criteria for appointment of ambassadors under the current system of ambassadorial appointments as implemented by the Presidency, Dirco and the ANC (and which the current Foreign Service Act wishes to maintain) are different from the manner and criteria for appointment

[1] *Ex Parte Chairperson of the Constitutional Assembly: Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (the *First Certification Judgment*); *Ex Parte Chairperson of the Constitutional Assembly: Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) (the *Second Certification Judgment*)

stipulated in the Constitution. In order to show the inconsistencies between the system of ambassadorial appointments as carried out by the government and the ANC on the one hand and the Constitution on the other, I will endeavour to provide the historical, legal and constitutional background and context within which the framework for appointment of ambassadors was conceived by the framers of our Constitution. It should be remembered that, in addition to addressing the domestic malady of apartheid, one of the main objectives of the framers of our Constitution was to remodel the image of South Africa in the eyes of the international community from a pariah (rogue apartheid state) to a cooperative member of the family of nations willing to abide by the rule of international law. On the latter objective, one of the key considerations on the part of the framers was how a democratic South Africa should conduct its foreign policy (after the fall of apartheid) and what kind of foreign service should carry out that responsibility. Under the Second Topic, I shall elaborate on the differences between the legal regimes that governed the conduct of foreign policy in general and the appointment of ambassadors in particular in pre-democratic South Africa (under apartheid) and the principles that govern foreign policy in general and appointment of ambassadors in particular under the current constitutional-legal order (in a democratic state). The key point would be that the manner of appointment of ambassadors in the apartheid era has now been replaced by a new system under the present constitutional dispensation that requires that certain constitutional-legal norms, values, standards and principles be taken into consideration when the President appoints ambassadors and HOMs. The conclusion would be that, a close and careful look at how the Presidency, Dirco and the ANC have been "appointing" ambassadors, particularly the criteria they use for such appointments fall short of those criteria stipulated in the Constitution.

43. Further, under the **Second Topic**, I shall refer to specific provisions of the current Foreign Service Act and demonstrate how those provisions have been engineered by an ANC-dominated Parliament with the objective of maintaining the current system of ambassadorial appointments (which favours the ANC) and which the framers of the post-1993 constitutions sought to eradicate. Specifically, the Foreign Service Act seeks to maintain the current system where some persons who are "appointed" or "deployed" into the foreign service come from outside the ranks of professional corps and where this practice (of "cadre deployment") is managed and implemented by a political party, the ANC to be precise (largely for its own private interest and financial gain). On this issue of "cadre deployment" into the foreign service, I shall endeavour to demonstrate how the consequences of political party-meddling in the appointment of ambassadors (a) produces consequences that are not authorised by the Constitution; (b) exposes the President to criminal liability and breach of his oath of office; and (c) leads to a false interpretation and misconstruing of the President's powers of appointment under section 84(2)(i) of the Constitution.

44. Under the **Third Topic**, I shall focus on **the nature of President's responsibility to appoint ambassadors under section 84(2)(i) of the Constitution**. The idea behind this discussion is to address the argument made by ANC politicians, including Ministers of International Relations and Cooperation as well as some officials in the Department who say that the power to appoint ambassadors is the President's "prerogative" and that therefore the exercise of that power cannot be questioned or challenged in any way and by anyone. The argument that it is the President's "prerogative" to appoint ambassadors is raised by Dirco Ministers, and those ANC "cadres" and some Dirco officials as a stern warning against any attempt by anyone to question the current practice where the foreign service of South Africa is grotesquely and disproportionately dominated by "political

appointees". What these Ministers, "cadres" and some Dirco officials say is that, no-one may question the current practice of ambassadorial appointments because the decision (to appoint ambassadors) lies with the President and with *him* alone. This argument is made by the supporters of the current status quo in an attempt to chill and squelch any attempt to suggest that the current system of ambassadorial appointments (which is essentially a system of "cadre deployment of political appointees") is inconsistent with the Constitution and should be abolished. In my affidavit/statement, I shall attempt, among other considerations, to explain the differences between "prerogative power" (as it was understood and applied in pre-democratic South Africa under apartheid) and the notion/concept of "public power" (as it is understood and applied in democratic South Africa under the current constitutional-legal order). On the latter point, I shall venture to demonstrate how the old common law notion of "prerogative power" was eradicated when the new Constitution was adopted in 1993 and how it ("prerogative power") no longer has any place in the current constitutional-legal nomenclature since the demise of apartheid. And most importantly, how that argument (that the President exercises "prerogative power" when he appoints ambassadors) can no longer be used as justification to support and maintain the current status quo of ambassadorial appointments.

45. Under the **Fourth Topic**, I shall discuss **the moral and legal "hazards" of an unprofessional, non-career-oriented, and partisan foreign service**. The main idea behind that discussion would be to demonstrate how the current system of appointment of HOMs (which the Foreign Service Act inadvertently seeks to protect, maintain and perpetuate) leads to, among other hazards, **demoralisation of career diplomats, perpetuation of political patronage, unjustifiable discrimination, corruption, maladministration**, and, arguably, **exposes the President to criminal liability, violation**

of the Constitution and breach of his oath of office. The point will be that the consequences of preserving, protecting and perpetuating the current status quo of ambassadorial appointments - as the Foreign Service Act seeks to do - are not authorised by the Constitution.

46. Under the **Fifth Topic**, I shall discuss **the role of the ANC in ambassadorial appointments**. The point will be that there is no basis in the Constitution or the law for the ANC (or any political party for that matter) to be "nominating" its "cadres" (or anyone) into the foreign service, or "recommending" to the Minister of International Relations and Cooperation (hereinafter the Minister) or "imposing" on the President the names of anyone to be appointed as ambassadors. I shall attempt to demonstrate that, according to the Constitution, foreign policy decisions should be taken by "the national government"; not the provincial government, not the local government, and not a political party. The Constitution vests foreign policy powers (in this case, appointment of ambassadors) in the hands of the "national government" (the Executive President to be precise under section 84(2)(i) of the Constitution). My submission would be that the current practice by the ANC to "nominate" its "cadres" for appointment as ambassadors *and* the routine "endorsement", "approval", and "appointment" of these "party cadres" by the President under section 84(2)(i) of the Constitution is unwarranted, unlawful, and unconstitutional.

47. Under the **Sixth Topic**, I shall draw the correlation between the appointment of ambassadors into the South African foreign service on the one hand and state capture on the other. The aim of that discussion is to demonstrate how the current system of ambassadorial appointments where the ANC calls the shots is reminiscent of state capture. For instance, the discussion under Topic Six will demonstrate, inter alia, (a) how the ANC

(ab)uses its popular mandate (as a "ruling party") to "deploy" its "cadres" into the foreign service (particularly at ambassadorial levels) with the objective of raising money though the "kickbacks" that ANC "deployees" pay back to the ANC; and (b) how the President "legitimises" the system of ambassadorial appointments which is riddled with corruption ("kickbacks") and maladministration through the exercise of his power of appointment under section 84(2)(i) of the Constitution for the benefit of his political party. The point there would be that, to the extent that the Foreign Service Act seeks to maintain the current system of ambassadorial appointments where the ANC will continue to (ab)use an institution of government (the foreign service) to divert state resources into its coffers (through "kickbacks" and patronage); this practice bears all the hallmarks of a captured institution of state for the benefit of private interests.

48. Under the **Seventh Topic**, I shall talk about career diplomats and their right to legitimate expectation. The brief point there would be that those Dirco officials who have chosen diplomacy as a career; who are professional diplomats; and are not partisan have a legitimate expectation to be considered for appointment (provided they meet the requirements, of course) and that they should not be consistently and systematically overlooked and marginalised by a system that is deliberately engineered and commandeered to favour a whole group of "political appointees" who are ordinarily partisan, non-career oriented and non-professional (and are beholden to the interests of a political party). I would suggest that, to the extent that the Foreign Service Act seeks to maintain a system of ambassadorial appointments which effectively perpetuates a practice that potentially violates the right to legitimate expectation of career diplomats, the Act is inconsistent with the Constitution and the law.

49. Under the **Eighth and last Topic**, I shall discuss and evaluate President Ramaphosa's views on the kind of civil service South Africa needs. The discussion under the Last Topic will concentrate on the contents of President Ramaphosa's weekly "Dear Fellow South African" letter of 31 August 2020 ('from the President's Desk") and evaluate how the ideas of a professional, corruption- and patronage-free civil service square-up with the system of ambassadorial appointments currently in place. The call will be that, the President's commitment to rid the civil service of corruption, patronage, maladministration, and "undue political interference" should also apply to the foreign service. Specifically, the call will be that the President needs to ensure that his exercise of the power to appoint ambassadors under section 84(2)(i) of the Constitution does not "legitimise" the current system of ambassadorial appointments which is riddled with corruption, patronage, maladministration, and "undue political interference", given the role played by his political party in the "appointment" of ambassadors (where ANC "deployees" pay "kickbacks" to the ANC in return for ambassadorial posts).

II. The First Topic: The nature of foreign service South Africa requires (as envisaged in the Constitution)

50. The first issue I wish to address is **the nature of the foreign service South Africa requires and as envisaged in the Constitution**. In order to understand the nature of foreign service South Africa requires and as envisaged by the Constitution, it is important to look briefly down the corridors of our constitution-making history. This is important because that history will not only remind us of the kind of foreign service that was to serve the people of the 'new' South Africa after the end of apartheid; but will also explain the reasons why the framers of our Constitution wanted to ensure that the foreign service of

the 'new' South Africa was different from the foreign service under apartheid. Knowing this historical background and context will also help us understand the rationale behind some of the provisions in the Constitution, relating, in this case, to the kind of public/foreign service South Africa needs in a post-apartheid era under the current constitutional legal order. This history is important because even the courts sometimes refer to historical background and context to interpret the Constitution and legislation.

51. There are two important historical "events" that should be recounted for the purposes of the discussion that will follow. The first event relates to the two main objectives of negotiators at Kempton Park when they drafted the Constitution and the terms of the transition from apartheid to democracy. The second event relates to the background, rationale and purposes for what the negotiators called a "solemn pact" based on the 34 "Constitutional Principles" which were finally inscribed in Schedule 4 to the 1993 interim Constitution. In parenthesis, the 34 "Constitutional Principles" (CPs) were supposed to guide, inform, and bind the Constitutional Assembly that drafted the 1996 Constitution. The Constitutional Assembly was under a solemn obligation to ensure that the 1996 Constitution complied fully with each and every one of the 34 CPs agreed to in the 1993 interim Constitution. And the body that was constitutionally empowered to certify that the 1996 Constitution complied with all 34 CPs was the Constitutional Court. The Constitutional Court issued two judgements in this regard which essentially decided authoritatively that, after thorough consideration, the entire text of the 1996 Constitution complied fully with all 34 CPs.

52. <u>The first historical event: the twin objectives of negotiators at Kempton Park.</u> In 1994, apartheid, as statute law, ended and South Africa became a constitutional democracy.

under the rule of law. The shift from apartheid to democratic rule was radical and revolutionary. It brought about, among other fundamental and far-reaching changes, a brand new way of how public power was to be exercised under a supreme constitution. One of the most important areas of governmental responsibility which underwent radical transformation was the conduct of foreign policy, including the appointment of ambassadors and the kind of foreign service the 'new' South Africa needed.

53. During the negotiations for an alternative political dispensation (1990-1993), the negotiators aimed to achieve two cardinal objectives. The first one was to address the *domestic* malady of apartheid (e.g. racial discrimination, inequality and violation of rights) by, for example, protecting human rights and defining the constitutional limits of the exercise of public power. A related question was: what type of civil service should a 'new' South Africa have which will be the backbone of an administration that will be based on new values of e.g. democracy, respect for human rights, political accountability, and would serve the people of South Africa with dedication, commitment, impartially, and with dignity. The second objective of the framers of our Constitution was to remodel the face of South Africa in the eyes of the international community from a pariah (rogue apartheid) state to a cooperative and responsible member in the family of nations[2] and to define what role, if any, this country should play in global politics and what norms, if any, should guide the conduct of its foreign policy. In the context of the latter objective, one of the most important issues which the framers of our Constitution defined is what kind of public/foreign service should the "new" South Africa cultivate that will serve the people of South Africa and pursue South Africa's interests and promote its values in relation to other countries. Because it was clear to the framers: the manner in which the new democratic

[2] *Minister of Justice and Constitutional Development & Others v Southern Africa Litigation Centre & Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA) (*Al Bashir (SCA)*) at para 63.

government was to design, manage and conduct its foreign policy (from 1994 onwards) was expected to be radically different from the way the erstwhile apartheid government designed, managed and conducted its foreign policy during the 'horrendous years'[3] of 1948 to 1990.

54. When I later discuss the kind of foreign service envisaged by the Constitution and the criteria that were supposed to apply in appointing ambassadors, that discussion should be understood in the context of the twin objectives mentioned in the paragraph immediately above. What will also be important to pay attention to are the reasons why the framers of our Constitution sought to move away from the kind of foreign service and the manner of ambassadorial appointments that characterised the apartheid system. The kind of foreign service and the manner of appointment of ambassadors envisaged by the Constitution (and its framers) will be juxtaposed to the kind of foreign service and manner of appointment of ambassadors envisaged by the Foreign Service Act. This "comparative analysis" will show how the Foreign Service Act departs from and side-steps the requirements stipulated in the Constitution on the two issues (i.e. the kind of foreign service South Africa requires and the manner of appointment of ambassadors).

55. The second historical event: agreement on "Constitutional Principles" and their import. In his lecture (to celebrate the 100th birthday of Oliver Tambo), President Mbeki gave an interesting historical account of how and why the ANC came to propose the adoption of "Constitutional Principles" (CPs) as a basis for agreement among parties at Kempton Park and as a basis for the drafting of the 'final' Constitution after the initial transitional period (between 1993–1996). President Mbeki said that while the ANC was still in exile and the

[3] The words, 'horrendous years' are used by C Tomuschat 'International law and foreign policy' (2009) 34 *DAJV* 166, 166 when he describes the period when Germany was under Nazi rule (1933-1945).

signs started showing that there were strong indications that the problem of apartheid would be settled through negotiations, the ANC drafted, among other documents, the draft Bill of Rights for South Africa and put together a constitutional blueprint setting out a clear process that the transition would take: starting from negotiations, to elections, to the establishment of a constitutional assembly, and finally to the drafting of a constitution (by the elected Constitutional Assembly).

56. President Mbeki said that after the ANC finalised its proposals on how it (the ANC) saw the way forward, how the negotiations will unfold, how and who will draft the Constitution, and how the ultimate transfer of power (to the majority) would happen, the ANC presented its constitutional blueprint to Mwalimu President Julius Nyerere (of Tanzania) for the respected statesman's consideration and advice. In essence, the ANC had proposed that the constitution of South Africa should be drafted by a constitutional assembly (representatives of the people) immediately after elections would have been held after the conclusion of negotiations. When President Nyerere read the ANC's proposals, his first reaction, apparently, was that those proposals, in the form in which they were, were not going to be acceptable to the National Party government! The wise Mwalimu pointed out that since the ANC had not defeated the apartheid government (through armed struggle) and neither had the apartheid government defeated the ANC, there was no way the Nats would have agreed to a "negotiated settlement" that provided, in essence, that the constitution of South Africa would be drafted by the elected representatives of the people (after negotiations to transfer power are concluded and elections are held). According to President Nyerere, the Nats were aware that when the elections are held, the ANC would win by an overwhelming majority. And because of that, the Nats (and the white minority population) would not agree that the new constitution be drafted by a constitutional assembly which would be overwhelmingly dominated by the ANC. The Nats did not trust

the ANC and they feared that a constitutional assembly dominated by the ANC will draft a constitution that will take into account the interests of one dominant party (the ANC) and the socio-economic and political programme of the new South Africa would be heavily influenced by the "ideology" of the ANC and its alliance partners (particularly the South African Communist Party). President Nyerere stated that these and other fears would lead the Nats to reject the ANC's constitutional proposals and blueprint.

57. President Mbeki said it was President Nyerere who suggested to the ANC to consider the adoption of certain "constitutional principles" which would form the basis of the 'final' constitution. President Nyerere suggested that all parties to the negotiations should agree upfront on a set of constitutional principles that would form the basis of a new constitution and which constitutional principles would guide, inform and bind those who would have been elected into the constitutional assembly to draft the 'final' constitution. As far as President Nyerere was concerned, when all parties agreed upfront on a set of "binding" constitutional principles that would guide the drafters of the 'final' constitution, there would be a strong possibility of an agreement by the Nats; precisely because they (the Nats) would be guaranteed somehow that the ANC (or the elected constitutional assembly that would be dominated by the ANC) would not draft the 'final' constitution solely on its own terms, but would be guided, bound and "restrained" by the agreed constitutional principles. President Nyerere was of the considered view that when the National Party (and the white minority population) knew in advance what to expect in the 'final' constitution (precisely because the 'final' constitution would reflect the basic agreement of the parties expressed in the constitutional principles), they would be confident that the outcome would not violate the commitments made by all parties in the form of "Constitutional Principles". At Kempton Park, the ANC proposed the adoption of

constitutional principles along the advice given by Mwalimu. And this approach was adopted by all negotiating parties and was written into the 1993 interim Constitution.

58. So, during the negotiations for a new democratic dispensation (1990-1993), the negotiating parties at Kempton Park agreed, among other things, on 34 "Constitutional Principles" (CPs), which CPs constituted what the parties called a "solemn pact". The parties had agreed that, when the elected representatives of all the people of South Africa draft the 'final' Constitution (within two years after the 1994 elections), they should adopt that 'final' Constitution "in accordance with a solemn pact recorded as Constitutional Principles."[4] These CPs were contained in Schedule 4 to the 1993 interim Constitution.

59. In terms of the "solemn pact" concluded at Kempton Park, the Constitutional Assembly that was charged with the responsibility of drafting and adopting the 'final' Constitution was legally and constitutionally bound to ensure that the final text of the Constitution complied with *all* the CPs agreed to and contained in schedule 4 to the 1993 interim Constitution.[5] In other words, the 34 CPs contained in schedule 4 to the 1993 interim Constitution were "non-negotiables" and the Constitutional Assembly drafting the 'final' Constitution had no discretion and no mandate and no powers and no authority to depart from the letter and spirit of the CPs. In fact, the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: Re Certification of the Constitution of the Republic of South Africa, 1996*[6] (the *First Certification Judgment*), stated that the CPs

[4] The preamble to the 1993 interim Constitution provided, in part: '[A]ND WHEREAS in order to secure the achievement of this goal [creation of a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms], elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with the solemn pact recorded as Constitutional Principles.'

[5] Ibid.

[6] 1996 (4) SA 744 (CC); [1996] ZACC 26; 1996 (10) BCLR (CC)

were acknowledged by the preamble to the 1993 interim Constitution "to be foundational to the new constitution."[7]

60. The constitutional-legal obligation rested on the Constitutional Assembly to ensure that the 'final' Constitution complied with *all* CPs.[8] The obligation to ensure that the 'final' Constitution complied with all CPs was stated clearly and unambiguously in section 71 of the 1993 interim Constitution. Section 71(1) of the 1993 interim Constitution provided in peremptory terms that

> A new constitutional text *shall* (a) *comply with the Constitutional Principles* contained in Schedule 4; and (b) be passed by the Constitutional Assembly *in accordance with this Chapter*. [Emphasis added]

61. Section 71(2) of the 1993 interim Constitution underscored the importance of the constitutional-legal obligation placed on the Constitutional Assembly by providing that

> The new constitutional text passed by the Constitutional Assembly, or any provision thereof, *shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles* referred to in subsection (1)(a). [Emphasis added]

62. The firm commitment and obligation to ensure that the 'final' Constitution complied with all 34 CPs was buttressed by section 71(3) of the 1993 interim Constitution which provided that

[7] The *First Certification Judgment* at para [15].
[8] See also *First Certification Judgment* at para [2].

> A decision of the Constitutional Court in terms of subsection (2) *certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.* [Emphasis added]

63. During the process of the drafting of the 'final' Constitution, the Constitutional Assembly was under an obligation, if petitioned to do so by at least one fifth of all its members, to refer any proposed draft of the constitutional text before the Constitutional Assembly to the Constitutional Court "in order to obtain an opinion from the Court as to whether such proposed text, or part or provision thereof, would, if passed by the Constitutional Assembly, *comply with Constitutional Principles*."[9] [Emphasis added].

64. The obligation to ensure that the draft 'final' Constitution complied with all 34 CPs was pressing. For instance, section 73(3) of the 1993 interim Constitution provided in essence that if the Constitutional Assembly failed to pass a proposed new constitutional text, the text should be referred to a panel of experts (constitutional lawyers) for advice on amendments to the proposed text, *"within the framework of the Constitutional Principles."*

65. The provisions of section 71 of the 1993 interim Constitution aimed to achieve one key objective: to ensure that the fundamental tenets of South Africa's new constitutional democracy and the values of that new society enshrined all the norms, values, ethos,

[9] Section 71(4) of the 1993 interim Constitution: "During the course of the proceedings of the Constitutional Assembly any proposed draft of the constitutional text before the Constitutional Assembly, or any part or provision of such text, shall be referred to the Constitutional Court by the Chairperson if petitioned to do so by at least one fifth of all the members of the Constitutional Assembly, in order to obtain an opinion from the Court as to whether such proposed text, or part of provision thereof, would, if passed by the Constitutional Assembly, comply with Constitutional Principles."

principles, and commitments agreed to by the framers of our Constitution as encapsulated in the 'solemn pact' in the form of CPs in schedule 4 to the 1993 interim Constitution.

66. As I stated earlier, it is important to recount the above historical events of our constitution-making because they will inform the next discussion, which will explain the kind of foreign service which the Constitution envisaged and the reasons why the framers wanted to distinguish the foreign service of the 'new' South Africa from the foreign service of the old (apartheid) South Africa.

67. The foreign service envisaged by the Constitution. Before I discuss the kind of foreign service envisaged by the Constitution, it is important to consider the kind of foreign service that the government has created in the last two decades, which foreign service is also envisaged and perpetuated by the newly promulgated Foreign Service Act. Section 3(2) of the Act provides in material terms that the foreign service of South Africa will consist, among others, of those persons "who are accredited to a foreign state for the period of time that they hold that position, *regardless of whether they are ordinarily employed by the Department [of International Relations and Cooperation] or by another national department or appointed on a contractual basis for a fixed period."* [Emphasis added]

68. Section 4(1) of the Foreign Service Act also provides that persons who are eligible to become members of the foreign service include persons employed *"by another national department, or appointed on a contractual basis for a fixed period."* [Emphais added]

69. A close and careful reading of sections 3(2) and 4(1) of the Foreign Service Act will show that this piece of legislation seeks to maintain, preserve, protect and perpetuate the current status quo where the foreign service of South Africa, particularly at ambassadorial (and

Head of Mission) level is grotesquely dominated by "political appointees" who are ordinarily *not* employed by the Department but are employed by other national departments, or are said to be "appointed on a contractual basis for a fixed period." As I will attempt to show later, the current status quo where the foreign service is completely dominated by "political appointees" is inconsistent with the norms, values, principles and standards stipulated in the Constitution governing the kind of foreign service South Africa needs and the criteria to be used for appointment as ambassador, HOM and diplomat into the foreign service.

70. Flowing from the latter part of the paragraph immediately above, the point would be that the clear attempt by the Act (in sections 3(2) and 4(1)) to preserve, protect and perpetuate the system of ambassadorial appointments which is prohibited by the Constitution raises serious concerns about the Act's professed commitment to "professionalise" the South African foreign service. The Act should avoid putting in place and giving effect to a system of ambassadorial appointments whose consequences are not authorised by the Constitution.

71. In the next couple of paragraphs, I explain the kind of foreign service envisaged by the Constitution. CP XXX.1 in schedule 4 to the 1993 interim Constitution provided as follows:

> There *shall* be *an efficient, non-partisan, career-oriented public service* broadly representative of the South African community, functioning on a basis of fairness and which *shall serve all members of the public in an unbiased and impartial manner*, and *shall*, in the exercise of its powers and in compliance with its duties, *loyally execute the lawful policies of the government of the day* in the performance of its administrative functions. The structures and functions of the public service, as well as the terms and conditions of service of its members, *shall be regulated by law*. [Emphasis added]

72. Before the Foreign Service Act comes into operation, the foreign service of South Africa is part of the "public service" and the terms and conditions of service of its members are regulated by the Public Service Act 1994 (as amended). When the Foreign Service Act comes into operation (sometime in April 2021?), the terms and conditions of foreign service officials will be governed by the Act (Foreign Service Act)? Having said that, I would suggest that the same norms, values, principles and standards which were supposed to apply to the "public service" as stipulated in CP XXX.1 would continue to bind the foreign service after the latter "migrates" from the purview of the Public Service Act to the purview of the Foreign Service Act. This should make perfect sense because it would be repugnant to right-thinking that anyone could argue that since the new "foreign service" envisaged by the Act is no longer under the purview of the "public service" then it (the new foreign service) is not bound by the constitutional norms, values and standards (professionalism, career-orientation and non-partisanship) which govern the "public service" as demanded by CP XXX.1. To argue otherwise would, I submit, be 'anti-constitutionalist' and would fly in the face of the letter and spirit of the Constitution (specifically CP XXX.1).

73. CP XXX.1 enumerated some of the key values, norms, principles, requirements and attributes of the public/foreign service of a post-apartheid South Africa - which had become a constitutional state under the rule of law. These include, efficiency, professionalism, career-orientation, representativity, loyalty, fairness, non-discrimination, and lawfulness. My submission in this regard is limited to the discussion of the kind of foreign service South Africa needs, which is, a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN foreign service (as required by CP XXX.1)

74. When considering the nature of foreign service envisaged by the Act, it is important to ask the following questions in the light of what CP XXX.1 provided: (1) Is there a constitutional obligation on the South African government, including the President to ensure that South Africa's foreign service is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? (2) Is government (or more precisely, the President, the Executive, and/or Parliament) bound by the constitutional obligation to ensure that the foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? The immediate answer to both questions is an emphatic 'yes' (there is a constitutional obligation on government to ensure that South Africa's foreign service is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN and that government is obliged to comply with that obligation). In this regard, it should follow automatically that the Foreign Service Act may not, by hook or crook, try to create the kind of foreign service that seeks to flout the requirements of PROFESSIONALISM, CAREER-ORIENTATION and NON-PARTISANSHIP stipulated in the Constitution.

75. That there is an obligation on government to comply with the criteria set by the Constitution to ensure that the foreign service in PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN is borne by the following considerations:

75.1 First, the 1993 interim Constitution was unambiguous that it was the intention of the framers that the 'final' Constitution complies fully with all 34 CPs in Schedule 4 to the 1993 interim Constitution, including CP XXX.1.[10] For instance, while the preamble to the 1993 interim Constitution provided, in part, that "[e]lected representatives of all the people of South Africa should be mandated to adopt a new Constitution in *accordance with a solemn pact recorded as Constitutional Principles*", section 71(1) of the 1993 interim

[10] See *First Certification Judgment* at para [13].

Constitution provided in peremptory terms that "[A] new constitutional text shall (a) comply with the Constitutional Principles contained in Schedule 4; and (b) be passed by the Constitutional Assembly in accordance with this Chapter."

75.2 Second, section 71(2) made the intention of the framers even clearer by insisting that "[T]he new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a)."

75.3 Third, according to section 71(3), "[A] decision of the Constitutional Court in terms of subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof." In the *First Certification Judgment*, the Constitutional Court pointed out that the 'final' draft constitutional text "[f]ailed to comply with all the 34 Constitutional Principles in respect of 12 areas."[11] In light of the Court's finding, the draft text was referred back to the Constitutional Assembly "[t]o amend the constitution in order to bring it in line with the decision of the Court."[12] In *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*[13] (the *Second Certification Judgment*), the Constitutional Court unanimously certified that the whole 'final' constitutional text complied with all the 34 Constitutional Principles, including CP XXX.[14]

[11] See Justice Richard J Goldstone 'The first years of the South African Constitutional Court' (2008) 42 *Supreme Court L R (2d)* 25, 27.
[12] Goldstone Ibid.
[13] 1997 (2) SA 97 (CC); [1996] ZACC 24; 1997 (1) BCLR 1
[14] Goldstone note 11, 27.

75.4 Fourth (and flowing from the point immediately above), when the Constitutional Court certified that the final text of the 1996 Constitution complied with all 34 CPs, that 'certification decision' became *final and binding* (in terms of section 71(3) of the 1993 interim Constitution). What this means is that, when the Constitutional Court certified that the 1996 Constitution complied with all 34 CPs, no court of law could come later to enquire into or pronounce upon the validity of the Constitution or any of its provisions. What this also means is that, once certified to be compliant with all 34 CPs, the 1996 Constitution had finality and binding effect on all state functionaries, and the latter would have no power, discretion or authority whatsoever to question (or doubt) the validity or legitimacy of the 1996 Constitution or any of its provisions.

76. Applying the above logic to CP XXX would mean that, when the Constitutional Court finally certified the 1996 Constitution to be compliant with all 34 CPs, then no court of law or state functionary or any branch of government (in this case, the Executive and/or Parliament) had any authority whatsoever to undo or question the validity and legitimacy of the requirement to ensure that the foreign service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. Similarly, no Act of Parliament (in this case, the Foreign Service Act) could provide and create its own norms and criteria to govern the foreign service, which norms and criteria are inconsistent with those clearly stipulated in the Constitution.

77. In the circumstances therefore, the obligation to ensure that the foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN is retained in the 1996 Constitution and that it is incumbent upon state functionaries and Parliament (through any legislation enacted by this branch of government) to comply with that

obligation. Any attempt on the part of state functionaries to act contrary to that obligation or Parliament to come up with a piece of legislation that seeks to undo the provisions of the Constitution would be unlawful. When state functionaries and/or Parliament act in this manner, they would also be acting unconstitutionally. Further, they would be acting beyond the scope of their powers. And their decisions would therefore be invalid.

78. Sections 3(2) and 4(1) of the Foreign Service Act essentially provide that the foreign service of South Africa will consist of, among others, those persons who may not ordinarily be employed by the Department (of International Relations and Cooperation) or who are appointed on a contractual basis for a fixed period. By providing that the foreign service of South Africa would consist of all-and-sundry, the Act seeks, in a nutshell, to open the door to anyone coming from outside the ranks of PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN diplomatic corps.

79. The observation in the paragraph immediately above warrants the following questions: **First**, how can the Foreign Service Act seek to preserve, protect and perpetuate a practice of populating ambassadorial positions in the South African foreign service with non-career, non-professional and partisan "political appointees" and "party deployees"? **Second**, how can the "recruitment" of "political appointees" and "party deployees" into the foreign service (as contemplated in the Act) be consistent with the constitutional obligation to ensure that the foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? **Third**, what could be the rational justification, if any, on the part of the Act and/or government for non-compliance with a clear constitutional obligation requiring a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN foreign service (in this case, at ambassadorial level)? **Fourth**, when

ambassadorial appointments are made contrary to the letter and spirit of the Constitution, (i.e. where the President simply rubberstamps the decisions of the ANC and appoints "party deployees" who may not be career-oriented, professional and non-partisan), would the Executive (the President to be precise) not be acting contrary to her/his responsibility to "uphold, defend and respect the Constitution as the supreme law of the Republic"? (see section 83(b) of the 1996 Constitution). **Fifth**, will Dirco officials – those charged with the responsibility of drafting policies that will implement the Act – not be acting in violation of the Constitution when they implement the provisions of the Act (the Foreign Service Act) which is, itself, inconsistent with the Constitution?

80. Someone may ask: where in the 1996 Constitution is it stated that the foreign service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? This question can be answered by following the following logic: First, the requirement that the foreign service of a democratic South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN was clearly and unambiguously stated in CP XXX.1 contained in schedule 4 to the 1993 interim Constitution. Second, the 1993 interim Constitution provided, in terms of the "solemn pact" concluded by all negotiating parties at Kempton Park, that the "final" (1996) Constitution must comply with all 34 CPs, including CP XXX.1. Third, the Constitutional Court certified that the 1996 Constitution complied with all 34 CPs, including CP XXX.1. What that means is that the 1996 Constitution also requires that the foreign service of South Africa must be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN.

81. But someone may still persist: if the 1996 Constitution does not state categorically and in clear terms that the foreign service of South Africa must be CAREER-ORIENTED,

PROFESSIONAL and NON-PARTISAN, how can it be said that the 1996 Constitution requires that the foreign service of South Africa must be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? The answer to this question is simple: Precisely because the Constitutional Court has authoritatively decided and certified that the 1996 Constitution complies with all 34 CPs, including CP XXX.1. In parenthesis, CP VI of schedule 4 to the interim Constitution provided that the Constitutional Assembly drafting the 1996 Constitution shall ensure that "there shall be a *separation of powers* between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.[15] But when the 1996 Constitution is read, no-where are the words "separation of powers" mentioned. Does this mean that the 1996 Constitution does not provide for separation of powers? Of course, not! In certifying that the final text of the 1996 Constitution complied with CP VI,[16] the Constitutional Court held:

> We find in the [new text] checks and balances that evidence a concern for both the over-concentration of power and the requirement of an energetic and effective, yet answerable executive.[17]

In any event, a close and careful reading of the 1996 Constitution would show that the norms, values and principles (e.g. PROFESSIONALISM, CAREER-ORIENTATION and NON-PARTISANSHIP) governing the new public/foreign service of South Africa are enshrined in the 1996 Constitution. This is evidenced by the clear and straightforward provisions of section 195 of the Constitution. Section 195 provides for the "basic values and principles governing public administration". These include, "a high standard of

[15] Emphasis added.
[16] See *First Certification Judgment* paras 106-113.
[17] Ibid at para 112. See also *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC) at para 22.

professional ethics";[18] efficiency;[19] impartiality, fairness, equity and non-discrimination (no bias);[20] public administration that is people-[21] and development-oriented;[22] public accountability;[23] and transparency.[24] What is more, section 197(1) of the 1996 Constitution provides that public servants "must loyally execute the lawful policies of the government of the day" (i.e. public/foreign service officials must be PROFESSIONAL and NON-PARTISAN).

82. The idea that the foreign service of a democratic South Africa must be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN did not find itself in the Constitution by happenstance. It was first articulated by the ANC in October 1993 in its Foreign Policy Discussion Paper 1993 (produced by the ANC Department of International Affairs), which paper became the foundational stone for the creation, management and conduct of a new "diplomatic service" when the Government of National Unity (GNU) under the leadership of the ANC took the reigns of government in 1994. The pertinent and relevant parts of that Discussion Paper stated (a quote at length):

> We believe that *this country needs a professional diplomat[ic] service which will be independent from the narrow confines of party politics*. We believe, too, that as far as possible *the activities of the foreign service should be open to public scrutiny and public accountability*. We will encourage an open, questioning culture within the Department of Foreign Affairs [DFA]. Only this can engender a robust exchange of ideas which, ultimately, will produce sustainable policy positions.

[18] Section 195(1)(a)
[19] Section 195(1)(b)
[20] Section 195(1)(d)
[21] Section 195(1)(e)
[22] Section 195(1)(c)
[23] Section 195(1)(f)
[24] Section 195(1)(g)

> We have taken careful note of recent experiences which have shaped diplomatic services in other parts of the world. In particular, we are concerned that our *professional* diplomats should not live a privileged life. [Professional diplomats] must master a range of managerial skills; without these, we believe, the modern diplomat, and South Africa, will be handicapped.
>
> We also believe – as this policy document attests – that trade and other economic issues are central to the modern diplomat. Accordingly, *we will take steps to ensure that the South African representatives abroad will be well skilled in economic and trade issues* which, amongst others, will help drive South Africa's international relations.
>
> We will immediately take steps to ensure that, within a reasonable period, the diplomatic corps will be fully representative of South Africa's people.
>
> Modern diplomacy has become an exacting and demanding *vocation*. It demands, in our opinion, knowledge, skilled communication, *strong commitment and complete integrity. We will foster the required professional ethos for our corps anticipating that it will take its place amongst the great services of the world.*
>
> As responsible global citizens, the ANC will encourage South Africans who are willing and able, to *pursue careers* in international civil service. [Emphasis added]

83. What is clear from the ANC Foreign Policy Discussion Document, 1993 is that there was a strong commitment – from the very dawn of our constitutional democracy – to ensure that South Africa's national interests in the realm of foreign relations will be pursued and championed by a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN foreign service. It was also clear that this foreign service would be equipped with a range of critical skills, including, economic and trade diplomacy, and effective and strategic communication in order to execute its mandate and diplomatic responsibilities. The ANC Foreign Policy Discussion Document, 1993 further underscored the kind of values and principles that would imbue the 'new' South African foreign service: professionalism,

loyalty, patriotism, integrity, public accountability, critical thinking, independence from narrow party politics, excellence, and an unwavering commitment to serving South Africa and its people.

84. The crisp questions to ask are: (a) what was the intention of the framers of our Constitution when they wrote into law that the foreign service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? (b) Why was it important for the framers of our Constitution to insist that the foreign service of the new South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? In answering these questions, it could be suggested that, in their wisdom to decide that the foreign service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, the framers sought to imbue public service and administration with the same ethos, norms, values, standards and principles that permeate the entire constitutional fabric of our new democracy.

85. I stated earlier that one of the key objectives of the framers of our Constitution (at Kempton Park) was to remodel the face of South Africa in the eyes of the international community from a pariah of yesteryears into a sovereign and responsible member in the family of nations committed to be bound by the rule of international law. In order to remodel the face of South Africa in the eyes of the international community, one of the fundamental questions that the framers considered was, what kind of foreign service does a democratic South Africa need in order to champion and pursue the foreign policy goals and objectives of a 'new' and democratic South Africa. And given the background from which South Africa came from (apartheid foreign policy), the framers were very clear about the kind of "apartheid ills" they wished to address with the new foreign service for

South Africa. The following are important considerations that framers took into account in fashioning a new public/foreign service for South Africa:

85.1 **First**, the framers sought **to make a clear separation between party and state**. During the days of apartheid, the civil service was literally at the beck and call of politicians who used and abused the machinery of government and its services to pursue and perpetrate illegal activities. With the adoption of a new constitution, the framers wanted to make a clean break with an apartheid system where the "ruling party and its elites" (the Nats) abused public/foreign service and administration for their own selfish and unlawful ends. In a new constitutional democracy, all that had to change! In order to ensure that the new public/foreign service does not fall into the same temptation as the apartheid public/foreign service, the framers of our Constitution demanded that the foreign service of democratic South Africa *shall be* CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. By 'legislating' that the public/foreign service of South Africa *shall be* CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, the framers further sought to ensure that the public/foreign service is free from unwarranted political interference and manipulation by party officials and politicians. When the Foreign Service Act provides that the foreign service of South Africa will also constitute those persons who may not be professional, not career-oriented and not non-partisan, it (the Act) runs the risk of creating a foreign service that will not be any different from the foreign service before 1994 (with potential disastrous consequences); a foreign service where diplomats will be at the beck and call of their political masters – the very phenomenon the framers of the Constitution sought to eradicate.

85.2 **Second**, with a new public/foreign service, the framers sought **to ensure accountability and avoid arbitrariness**. When the framers insisted that the public/foreign

service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, they wanted to instil the culture of accountability in public service and administration in a democratic South Africa. The framers sought to avoid a situation where government work (public service and administration) is directed by and dictated to by party officials who are not directly accountable to parliament or to the executive. In short, the framers wanted to avoid the possibility of the state been captured by private interests. [I don't know whether the term 'state capture' was in their minds at that early stage!] When the day-to-day affairs of public service and administration are under the direction of party officials, that gives rise to a culture of arbitrary decision-making (precisely because the whim of the party is more pronounced than the will of the people through their duly elected representatives). When the Foreign Service Act makes room for non-professional, non-career-oriented and partisan "diplomats", it runs the risk of preserving what the Constitution seeks to eradicate. The point here is not that "political appointees" are intrinsically corrupt, unaccountable and arbitrary in their work. The point is that the Act should not build into the foreign service the very risk the Constitution seeks to avoid. As Justice Albie Sachs said (in the lecture he gave on 22 February 2017 at the University of Pretoria to celebrate the 100th birthday of OR Tambo), "… we have constitutions because we mistrust not only the enemy, but also ourselves."

85.3 **Third**, with a new public/foreign service, the framers wanted **to ensure continuity and stability in public service and administration**. The framers understood that in a constitutional state - which South Africa became in 1994 - where multiparty system of democratic government is one of the key foundational values,[25] there is a strong possibility of power changing hands in a peaceful manner through regular elections. The

[25] Section 1(d) of the Constitution.

framers also understood that, if and when these changes do take place, the core function of government (public service and administration) should not be thrown into disarray as a result of political power changing hands. They understood that it was important that the normal governmental responsibilities be carried out even if/when power has changed hands and there are new "rulers" in government. The framers wanted to avoid a situation where a change in government disrupts society so much that public service and administration is paralysed because civil servants who would have been partisan and loyal to the ousted party enter the "political fray" by "destabilising" and "undermining" the new administration.

The Foreign Service Act seeks to continue the current status quo where the foreign service of South Africa (at ambassadorial level) is grotesquely dominated by persons who are non-career oriented, who are non-professional, and who are highly partisan. How can that be consistent with the intention of the framers, which was to provide for a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN public/foreign service in order to ensure that there is continuity and stability in public administration? The point here is that the Act should not import into the foreign service the risks the Constitution sought to avoid.

85.4 **Fourth**, with a new public/foreign service, the framers sought **to protect the morality of civil/public servants**. A point has already been alluded to in 85.1 above that since apartheid made no distinction between party and state, the officials were exposed to terrible moral hazards as they were obliged to engage in unlawful and illegal activities ordered by their political masters. The framers of our Constitution wanted to avoid those practices from happening in a constitutional democracy. They wanted to ensure that the public/foreign service is above narrow party politics and that civil servants concern

themselves only with executing in a loyal and patriotic manner the lawful policies of the government of the day free from manipulation and dictation by politicians and party officials. The Foreign Service Act seeks to protect the current status quo that has allowed "political appointees" and "party deployees" to swell the ranks of diplomats (at ambassadorial level). The moral hazards (which I discuss later below) that accompany this practice should be avoided.

85.5 **Fifth**, by coming up with new ethos that would govern the public/foreign service of a democratic South Africa, framers sought **to avoid a patronage system taking root in the public/foreign service**. A public/foreign service that is partisan, non-professional and not career-oriented is prone to manipulation and abuse by politicians with narrow vested interests. By demanding that the public/foreign service of South Africa be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, the framers wanted to avoid a system of public service and administration in the new South Africa that is rooted in patronage and the whim of the "ruling party" and its officials. The current system of ambassadorial appointments is disproportionately dominated by persons who come almost exclusively from one political party (the ANC). (See discussion below on the kind of moral hazards that this system of appointment engenders).

85.6 **Sixth**, when framers insisted on a truly transformed public/foreign service that would serve the interests of all South Africans, the framers sought **to protect the public/foreign service from political abuse**. (See discussion above.)

86. In light of the above discussion, it should be self-evident that the kind of foreign service envisaged by the Foreign Service Act is inconsistent with the kind of foreign service

envisaged by the Constitution (and the intention of its framers). The kind of foreign service envisaged by the Act is also at variance with the initial policy position of the ANC contained in its 1993 Foreign Policy Discussion Document.

87. Section 2 of the Constitution (the supremacy clause) provides that: "This Constitution is the supreme law of the Republic; law and conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." Now, what are the implications of the supremacy clause for the kind of foreign service envisaged by the Foreign Service Act? First, the supremacy clause would require that the Act be consistent with the Constitution, if not, it (the Act) is invalid. What this means is that the kind of foreign service envisaged by the Act should be consistent with the kind of foreign service envisaged by the Constitution. Conversely, the Act may not create the kind of foreign service the consequences of which are not authorised by the Constitution. Second, the supremacy clause demands that obligations imposed by the Constitution must be fulfilled. What this means is that when the Constitution orders that the foreign service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, Parliament (through the Act) may not decide on its own, almost willy-nilly, to ignore the prescripts of the Constitution and create its own rules which run counter to a clear and unambiguous constitutional injunction. If Parliament thinks that it can defy the Constitution, in this case, by creating its own foreign service different from the one ordered by the Constitution, then Parliament would be acting unconstitutionally. And when Parliament acts unconstitutionally, or fails to fulfil its constitutional obligation, then the Constitutional Court should, in terms of section 167(4)(e) of the Constitution, decide that Parliament has failed to fulfil a constitutional obligation.

III. The Second Topic: Criteria for appointment of Heads of Mission

88. I turn now to the **Second Topic** and discuss the criteria for appointment of Heads of Mission (HOMs) into the South African foreign service. My discussion under this topic is directly linked to and flows from the key point I made in the discussion of the First Topic above, namely, that the foreign service of South Africa at HOMs level should likewise be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN.

89. My discussion of the **Second Topic** will focus on the provisions of the Foreign Service Act which stipulate the criteria for appointment of South African Heads of Mission/ambassadors. It is important to point out that the provisions of the Foreign Service Act which stipulate the criteria to be applied when appointing ambassadors appear to be the first attempt by Parliament to try to clarify an important aspect that needs to be taken into account when South African ambassadors are appointed. It is worth noting that in the initial Foreign Service Bill (2015), there were no provisions in that Bill that stipulated the criteria for appointment of ambassadors/HOMs. It would appear therefore that the inclusion of provisions in the Foreign Service Act which stipulate the criteria to be used when appointing ambassadors would have been added after Parliament took into account the submissions and/or comments from the public which were made during the time when the Bill was still open for comments. I for one, in my submission to the Portfolio Committee on International Relations and Cooperation (Annexure "A" hereto) had made substantial comments on the criteria that should be used for appointing ambassadors.

90. In my statement in this affidavit, I wish to discuss the criteria stipulated in the Foreign Service Act; and most importantly, I wish to point out the differences between the criteria

for appointment stipulated in the Constitution and the criteria for appointment stipulated in the Foreign Service Act. The objective behind that 'comparative analysis' is to show how Parliament (through the Act) intends to preserve the status quo on the appointment of South African ambassadors, where the current system is still going to be run, by and large, by the ANC and where the foreign service would continue to be dominated by "political appointees" and "ANC party deployees" (to the total exclusion and marginalisation of career diplomats). In my statement, I shall suggest that the motive behind Parliament's intention to preserve the status quo as far as ambassadorial appointments are concerned, is to ensure that the ANC can continue to "run" the appointment of ambassadors, precisely because it is through these appointments that the ANC raises funds from appointed ambassadors for its own private gain.

91. Section 5(3) of the Foreign Service Act provides as follows:

> "All Heads of Mission-
>
> (a) must be fit and proper persons;
>
> (b) may have relevant knowledge, skills and experience; and
>
> (c) must reflect broadly the diversity of South Africa."

92. Section 5(3) of the Act stipulates the criteria for appointment as HOM. As can be seen, the three criteria for appointment as HOM stipulated in the Act are not quite the same as those stipulated in the Constitution, save for the criterion in section 5(3)(c) of the Act which requires that HOMs "must reflect broadly the diversity of South Africa." The important questions to ask are: (1) why did Parliament decide to come up with its own criteria when the Constitution is clear about the criteria to be used for appointment into the foreign service? (2) Specifically, why did Parliament deliberately exclude the criteria that foreign service officials should be CAREER-ORIENTED, PROFESSIONAL and NON-

PARTISAN? (3) What did Parliament hope to achieve by deliberately ignoring a clear constitutional injunction to ensure that the foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN?

93. As the discussion under the First Topic suggested, it is my submission here that when Parliament opened the door for HOMs to also be recruited into the foreign service "regardless of whether they are ordinarily employed by the Department or by any other national department or appointed by the Department on a contractual basis for a fixed period",[26] it (Parliament) acted in violation of the Constitution, precisely because Parliament paid scant attention to the criteria – of professionalism, career-orientation and non-partisanship – stipulated in the Constitution. The criteria stipulated in section 5(3) of the Act require closer scrutiny.

(a) The first criterion: "fit and proper persons" (section 5(3)(a) of the Foreign Service Act)

94. The first criterion the Act stipulates as a requirement for appointment as HOM in the foreign service is that the individuals "must be fit and proper persons". The "fit and proper person" is the criterion required for admission in many "professions" such as the legal profession in South Africa.[27] Magda Slabbert[28] says that "The requirement for being considered a "fit and proper" person is neither defined nor described in legislation, despite the fact that it is a stringent requirement." She says further that, "[g]iven the lack of

[26] Section 3(2) of the Act.
[27] See section 3 of the Admission of Advocates Act 74 of 1964 (as amended). See also section 15 of the Attorneys Act 53 of 1979. A person may also be removed from the roll of advocates and attorneys if/when that person ceases to be a "fit and proper person". Section 7(1)(d) of the Admission of Advocates Act provides that a court may remove an advocate from the roll of advocates, if the court "is satisfied that he is not a fit and proper person to continue to practice as an advocate." Section 22(1)(d) of the Attorneys Act provides that a practicing attorney may be struck off the roll of attorneys if that attorney "in the discretion of the court, is not a fit and proper person to continue to practice as an attorney."
[28] M Slabbert 'The requirement of being a "fit and proper" person for the legal profession' 2011 (14) 4 *PER/PELJ* 209, 209.

definition, it [the "fit and proper" requirement] has to be interpreted in a subjective manner and applied by seniors in the [legal] profession and ultimately by the courts."[29] In the legal profession, "it seems that it is not sufficient to have a law degree or a thorough knowledge of the law to become a legal practitioner."[30] "Applicants will be admitted to the legal profession only once they have proven that they are "fit and proper" persons for the legal profession. The burden of proof is on the applicant."[31]

95. Slabbert says further that "Membership to the profession is thus subjected to character screening, yet what exactly a "fit and proper" person is is not defined or described in legislation or regulations. It is commonly accepted that in order to be "fit and proper" a person must show integrity, reliability and honesty, as these are the characteristics which could affect the relationship between a lawyer and a client or a lawyer and the public."[32]

96. Du Plessis[33] suggests that the requirements of "fit and proper" include: *integrity* – meaning impeccable honesty or an antipathy to doing anything dishonest or irregular for the sake of personal gain; *objectivity* – meaning no irrelevant consideration whatsoever should bear upon one's judgment; *dignity* – meaning practitioners should conduct themselves in a dignified manner, and should also maintain the dignity of the court; *the possession of knowledge and technical skills*; *a capacity for hard work*; *a respect for legal order*; and *a sense of equity or fairness*.

97. "The concept of a "fit and proper" person is a fundamental one in many professions, jurisdictions and organisations as it is used to determine a person's honesty, integrity and

---

[29] Ibid.
[30] Ibid, 212.
[31] Ibid.
[32] Ibid.
[33] Du Plessis 'The ideal legal practitioner (from an academic angle)' 1981 *De Rebus* 424-427 (as referenced by Slabbert note 28, 216.

reputation in order to confirm that they are fit and proper for the role they are undertaking." There is however no single infallible test regarding what constitutes a "fit and proper" person. In some instances, this requirement is not defined in legislation." In *General Council of the Bar of South Africa v Jiba and Others*,[34] the Court held that in determining whether a person is "fit and proper" for the legal profession, such person should have integrity, dignity, the possession of knowledge and technical skills, a capacity for hard work, respect for legal order, and a sense of equality or fairness.

98. In *Australian Broadcasting Tribunal v Bond*,[35] the concept of "fit and proper" was described more aptly, as follows:

> "The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of activities, the question may be whether the improper conduct has occurred, whether it is likely to occur, or whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question."

[34] [2016] 4 All SA 443 (GP)
[35] (1990) CLR 321

99. From the opinions expressed by the courts in the above cases, it would appear that the meaning to be given to "fit and proper" person would entail some of the following considerations:

(a) That a "fit and proper" test aims to prevent corrupt or untrustworthy persons from serving in a particular organisation or body;

(b) That a "fit and proper" person would be regarded as honest and trustworthy and whose professional qualifications, background and experience, financial position, or business interests do not disqualify that person in the judgment of the appointing authority; and

(c) That a "fit and proper" person is one who, in the eyes of the Authority's opinion, has the knowledge and expertise to carry out the functions of the profession.

100. The Foreign Service Act (the Act) does not define the meaning of "fit and proper persons". The important question to ask is: what characteristics would qualify one to be regarded as "fit and proper" for the purposes of ambassadorial appointment in terms of section 5(3)(a) of the Act? Conversely, what type of behaviour, conduct, and background would disqualify a person from ambassadorial appointment on the grounds that that person is "unfit and improper"?

101. During the hearing at the Commission of Enquiry into State Capture (the Zondo Commission) on the unauthorised landing of a Gupta-chartered flight at Waterkloof Airforce base (in 2013), the Chairman of the Commission, Zondo DCJ questioned the

former Minister of International Relations and Cooperation, Ms Maite Nkoana-Mashabane on the criteria she and the Department used to recommend to President Zuma that Ambassador Bruce Koloane be appointed South Africa's ambassador to The Hague. It was common cause that Ambassador Koloane had acknowledged, among other facts, that:

(a) He had misrepresented the fact that the landing of the Gupta aircraft had been authorised by President Zuma;

(b) He acted out of his own volition when he deliberately misinformed officials at Waterkloof Airforce base that the landing of the Gupta aircraft was authorised;

(c) He deliberately "dropped" the name of President Zuma to create an impression that the President had authorised the landing of the aircraft;

(d) The unauthorised landing of the Gupta plane at a "national key point" was a serious breach of national security; and

(e) The unauthorised landing of that plane caused great embarrassment for the President and government of South Africa and was widely condemned.

102. In his questions to Minister Nkoana-Mashabane, Zondo DCJ wanted to know, among other considerations: why Ambassador Koloane was recommended for appointment when it was clear that he had compromised his integrity, competence, honesty, truthfulness, professionalism, and sound judgment through deliberate misrepresentation. Deputy Chief Justice Zondo further wanted to know how Ambassador Koloane could have been

recommended when he had clearly facilitated the breach of national security protocols and dragged the name of the Head of State into that fiasco. Further, Zondo DCJ wanted to know why if diplomacy or representing your country abroad as ambassador is such an "honour" the Minister would recommend someone who had been dishonest about his dealings with such important matters that had a serious negative impact on national security.

103. From the above questions posed to the Minister, it is clear that what Zondo DCJ was alluding to was that there must be certain criteria and requirements that a person should meet before they can be appointed as ambassadors to represent the President, the government and People of South Africa abroad. These criteria and requirements, which could be summarised under the rubric "fit and proper" include: honesty, high professional ethics, truthfulness, integrity, sound judgment, competence, knowledge and requisite skills.

104. If the Foreign Service Act aims to "professionalise" the South African foreign service (as it claims to be), then the requirement that HOMs "must be fit and proper persons" is perfectly in line with a similar requirement demanded by all other professions such as the legal, accounting, medical and other professions.

105. It is important to point out that, what I am saying here is *not* to suggest that the "fit and proper" test should not be demanded of South African ambassadors. On the contrary (and if I was a lawmaker), I would strongly endorse the application of that test/criterion as one of the fundamental requirements for appointment as ambassador/HOM. However, the crucial point is this: important as this criterion/test ("fit and proper") is, why has Parliament (through the Foreign Service Act) chosen to exclude the other important

criteria for appointment, namely, career-orientation, professionalism and non-partisanship, which criteria are clearly stipulated in the Constitution? Why has Parliament chosen to deliberately exclude career-orientation, professionalism and non-partisanship as requisite criteria for ambassadorial appointment, and chose instead to come up with a criterion i.e. "fit and proper" that is not specifically mentioned in the Constitution (but nevertheless applies almost across the board in all professions)? The "fit and proper" criterion cannot "replace" or substitute for any of the other three criteria of CAREER-ORIENTATION, PROFESSIONALISM and NON-PARTISANSHIP.

106. Flowing from the above paragraph, it cannot, in all honesty be suggested that the "fit and proper" criterion necessarily incorporates the CAREER-ORIENTATION, PROFESSIONALISM and NON-PARTISANSHIP criteria. As I stated earlier, the criteria of CAREER-ORIENTATION, PROFESSIONALISM and NON-PARTISANSHIP are specifically stipulated in the Constitution. At the very least, in addition to the "fit and proper" criterion, the Act should clearly, unambiguously and unashamedly mention CAREER-ORIENTATION, PROFESSIONALISM and NON-PARTISANSHIP as requisite criteria for ambassadorial/HOM appointment (as the Constitution clearly ordered). Any attempt on the part of Parliament (though the Act) to deliberately exclude the requirements of CAREER-ORIENTATION, PROFESSIONALISM and NON-PARTISANSHIP would cause the Act to stand on the quicksand of unconstitutionality.

107. Flowing from the paragraph above, the following questions should be asked: what was the intention of Parliament when it deliberately excluded the CAREER-ORIENTATION, PROFESSIONALISM and NON-PARTISANSHIP criteria in section 5(2) of the Foreign Service Act? In the absence of any plausible explanation, it could be suggested that when

Parliament in its wisdom decided to deliberately exclude the CAREER-ORIENTATION, PROFESSIONALISM and NON-PARTISANSHIP criteria from section 5(2) of the Act, it (Parliament) sought to keep the status quo of ambassadorial appointments alive where ambassadors/HOMs are appointed into the foreign service "regardless of whether they are ordinarily employed by the Department or by any other national department or appointed on a contractual basis for a fixed period." Parliament knew very well that had it included in section 5(2) of the Act the requirements of CAREER-ORIENTATION, PROFESSIONALISM and NON-PARTISANSHIP, that would close the door in the face of "political appointees" and other "party deployees" who keep streaming into the foreign service under the current system of ambassadorial appointments. Parliament cannot pick and choose the criteria it wants to use for the purposes of achieving objectives that are not authorised by the Constitution.

108. Section 2 of the Constitution (the supremacy clause) demands that "the obligations imposed by [the Constitution] must be fulfilled." When the Constitution imposes the obligation that the public/foreign service of South Africa must be PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN, Parliament would be obliged to fulfil that obligation, by ensuring that when it passes a law (in this case, the Foreign Service Act) which "creates" a foreign service that will prosecute South Africa's foreign policy objectives, that foreign service must be PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN. Parliament does not have a choice to decide that it will not fulfil an obligation imposed by the supreme law of the Republic. If Parliament thinks that it can openly defy the Constitution, then that means we still live in the dark ages of parliamentary sovereignty and not in the promised land of constitutional supremacy.

109. It is also important to consider the provisions of section 237 of the Constitution, which provide: "All constitutional obligations must be performed diligently and without delay." What the supremacy clause (section 2) and section 237 of the Constitution mean in the context of the Foreign Service Act is this: Parliament (through the Foreign Service Act) may not disobey the Constitution and thus fail to comply with a clear constitutional obligation. Any attempt by Parliament (through the Foreign Service Act) to openly defy the Constitution would be unwarranted (to put it rather mildly). In fact, when Parliament fails to fulfil a Constitutional obligation, section 167(4)(e) of the Constitution enjoins the Constitutional Court to declare that Parliament has failed to fulfil a constitutional obligation.

(b) The second criterion: "may have relevant knowledge, skills and experience" (section 5(2)(b) of the Act)

110. Section 5(2)(b) of the Foreign Service Act provides that all HOMs "*may* have relevant knowledge, skills and experience" (emphasis added). The requirement that one should have relevant knowledge, skills and experience is fundamental to all professions. One of the defining characteristics of professions (e.g. legal, accounting, engineering, medical) is that they are "born out of a social need for services which require specialised knowledge and skill."[36] It is therefore a fundamental requirement in all professions that for anyone to be admitted to a particular profession, she or he must possess specialised knowledge, skills and experience, often "in addition to having completed some focused academic preparation (such as college or technical classes) for their career." It would seem therefore that it is a requirement in all professions that one should have, at the very least, the basic requisite knowledge, skills and experience before admission to a particular profession.

[36] Slabbert note 28, 224.

111. Section 5(2)(b) of the Foreign Service Act acknowledges that in a professional foreign service of South Africa, all HOMs need to have requisite knowledge, skills and experience to represent the President, the government and people of South Africa abroad. But, and this is a very big but, what is interesting to note is that section 5(2)(b) of the Act *does not make it mandatory or compulsory for South African ambassadors/HOMs to possess requisite knowledge, skills and experience before they can be admitted/appointed into the foreign service*. On the contrary, the Act provides that HOMs *may*, but it is not mandatory or compulsory to possess relevant knowledge, skills and experience to perform the important function of representing the President, the government and people of South Africa in pursuing South Africa's national interests and promoting its values abroad. The crisp question to ask is: if diplomacy is such an important and honourable profession, what was the intention of Parliament and what was the rationale for not making mandatory the possession of requisite knowledge, skills and experience before admission/appointment into the foreign service? And if it is the objective of the Act to "professionalise" the South African foreign service, why does Parliament (through the Act) make possession of requisite diplomatic and professional knowledge, skills and experience *optional* and not one of the fundamental requirements just like other professions (and as demanded by the Constitution)?

112. The answers to all the questions posed in the paragraph immediately above could be gleaned from the following observations:

(a) It is clear that the Act wishes to preserve, protect and maintain the current status quo where the overwhelming majority of HOMs are "recruited" from outside the ranks of professional diplomatic corps (mainly from one political party, the ANC).

(b) Flowing from the point immediately above, it is also clear that Parliament (through the Act) is aware that ANC "deployees" and "cadres" would ordinarily not have the relevant knowledge, skills and experience to be appointed as ambassadors and HOMs, precisely because these "political appointees" and "party deployees" would ordinarily come from Parliament (politicians); from provincial and local governments; some would have been unemployed; and some would simply be relatives or children or siblings or friends or spouses of some big names in the ANC.

(c) The Act seeks to keep the door open for these "political appointees" and "party deployees" to continue streaming into the foreign service even when they lack the requisite knowledge, skills and experience. Put differently, Parliament knew that if it made possession of requisite knowledge, skills and experience one of the fundamental (compulsory/mandatory) criteria for ambassadorial appointment, then that requirement would stand in the way and squelch the possibility of appointing persons who would otherwise not have relevant knowledge, skills and experience to undertake the important responsibility of representing the President, the government and people of South Africa abroad.

113. The Foreign Service Act should be true and faithful to its mission, that is, to professionalise the South African foreign service. The commitment to professionalise the foreign service should not be half-hearted. When Parliament (through the Act) does not

make it mandatory for HOMs to possess relevant knowledge, skills and experience needed for the diplomatic career, then the legislative branch of government would be paying lip service to the stated objective (the commitment to professionalise the South African foreign service). It is important to recall that the ANC's 1993 Foreign Policy Discussion Document stated in no uncertain terms that:

> [Professional diplomats] must master a range of managerial skills; without these, we believe, the modern diplomat, and South Africa, will be handicapped. We also believe – as this policy document attests – that trade and other economic issues are central to the modern diplomat. Accordingly, *we will take steps to ensure that the South African representatives abroad will be well skilled in economic and trade issues* which, amongst others, will help drive South Africa's international relations.

114. The above-quoted text from the 1993 ANC Foreign Policy Discussion Document demonstrates that, from the very onset (even before the 1993 interim Constitution was adopted), the ANC was very clear about the kind of knowledge and skills that diplomats in a new foreign service should have. The ANC stated that these professional diplomats "*must master* a range of managerial skill…" and that professional diplomats "will be *well skilled* in economic and trade issues" which will help drive South Africa's international relations. The ANC was clear that professional diplomats in a new foreign service of South Africa (after apartheid) *must* and *should* possess the kind of knowledge, skills and experience that will be necessary to champion South Africa's foreign policy. But the Foreign Service Act on the other hand seeks to create a foreign service where ambassadors/HOMs and diplomats are not necessarily required to master the kind of skills diplomats need to do their work well. It would be interesting to hear a plausible

explanation as to why an ANC-dominated Parliament opted to go against the original ANC position on this point.

115. Further, the fundamental requirement that members of any profession (in this case, the diplomatic service) must possess requisite knowledge, skills and experience was clearly and unambiguously stated in CP XXX.1 in schedule 4 to the interim Constitution. CP XXX.1 provided, in part, as follows:

> There *shall* be an efficient, non-partisan, career-oriented public service broadly representative of the South African community, functioning on a basis of fairness and which *shall* serve all members of the public in an unbiased and impartial manner, and *shall*, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions.

116. Section 195(1)(a) of the 1996 Constitution provides in material terms that "Public administration *must* be governed by … values and principles enshrined in the Constitution, including a requirement that "A high standard of professional ethics *must* be promoted and maintained." (Emphasis added)

117. A close and careful reading of CP XXX.1 and section 195(1)(a) of the 1996 Constitution will show clearly that it was a firm intention of the framers of our Constitution that the public/foreign service of South Africa is/was supposed to be truly professional. The requirements of CAREER-ORIENTATION, PROFESSIONALISM and NON-PARTISANSHIP in the public/foreign service are stated in peremptory terms; which means that these key requirements for the diplomatic service, including knowledge, skills and experience were never intended to be optional. The ANC had warned in its 1993

Foreign Policy Discussion Document that "without these [skills], we believe, the modern diplomat, and South Africa, will be handicapped."

118. In light of the paragraph immediately above, the question to ask then should be: why did Parliament (through the Foreign Service Act) choose to ignore the peremptory injunction in the Constitution to provide for a PROFESSIONAL, CAREER-ORIENTED and NON-PARTISANSHIP foreign service, which requires knowledge, skills and experience; and opted instead to make requisite knowledge, skills and experience optional? Parliament should be aware that the Constitution is the supreme law of the Republic and that any law (in this case, the Foreign Service Act) inconsistent with it is invalid (section 2 of the Constitution). In the light of this, it should be self-evident that by making optional the requirement that HOMs may have relevant knowledge, skills and experience, that stipulation is not entirely consistent with the Constitution. It is further clear that the consequences of section 5(2)(b) of the Act are not authorised by the Constitution. Parliament (through the Foreign Service Act) should not "de-professionalise" the foreign service by going against the very constitutional injunction requiring that the foreign service of South Africa *should* be professional,[37] and that "good human-resource management and career-development practices, to maximise human potential, must be cultivated",[38] and that public administration must be based on "ability".[39]

119. What is clear though is this: the main reason why Parliament chose to make possession of relevant knowledge, skills and experience optional for appointment as HOM is simply that an ANC-dominated Parliament knew that if it made these requirements mandatory, it would close the door to "political appointees" and "party deployees" from entering the

[37] S195(1)(a) of the Constitution.
[38] S195(1)(h) of the Constitution.
[39] S195(1)(i) of the Constitution.

foreign service, precisely because the latter would ordinarily *not* have relevant knowledge, skills and experience. As can be seen, it is clear that the intention of Parliament was never to comply with the peremptory requirements for ambassadorial appointment stipulated in the Constitution. Just why?

(c) The third criterion: all HOMs "must reflect broadly the diversity of South Africa" (section 5(2)(c) of the Foreign Service Act)

120. Section 5(2)(c) of the Foreign Service Act provides that "All Heads of Mission must reflect broadly the diversity of South Africa." It is worth pointing out that the requirement that the public/foreign service of South Africa should reflect and be representative of the broader South African community was/is clearly stated in: (1) the ANC's 1993 Foreign Policy Discussion Document; (2) CP XXX.1 of the 1993 interim Constitution; and (3) the 1996 Constitution. First, in its 1993 Foreign Policy Discussion Document, the ANC declared that in the new dispensation (after the conclusion of negotiations and the installation of a democratic government), the new government (which was destined to be led by the ANC on the basis of a popular vote), would "take steps to *ensure that within a reasonable period, the diplomatic corps will be fully representative of South Africa's people*." (Emphasis added). Second, CP XXX.1 provided in material terms that "There shall be an efficient, non-partisan, career-oriented public service *broadly representative of the South African community*, functioning on a basis of fairness and which *shall serve all members of the public in an unbiased and impartial manner*. (Emphasis added). Third, section 195(1)(i) of the 1996 Constitution provides in essence that "Public administration *must be broadly representative of the South African people*, with employment and personnel management practices based on ability, objectivity, fairness, and *the need to redress the imbalances of the past to achieve broad representation*." (Emphasis added)

121. A close and careful reading of the Foreign Service Act, specifically section 5(2)(c) shows clearly that, at all material times of the drafting of this piece of legislation Parliament was always conscious of the "representativity" or "diversity" requirement as one of the critical criteria for appointment in the public/foreign service of South Africa as stipulated in the 1993 ANC Foreign Policy Discussion Document, CP XXX.1 of the 1993 interim Constitution, as well as section 195(1)(i) of the 1996 Constitution.

122. At first glance therefore, there is nothing wrong with the "representativity" or "diversity" requirement as provided for in section 5(2)(c) of the Act. The clear and *manifest* intention of Parliament when it enacted section 5(2)(c) of the Act was to make sure that it (Parliament) took into account and complied with the Constitution as far as the requirement for "representativity" and/or "diversity" in the foreign service is concerned. However, the *latent* intention of Parliament when it enacted section 5(2)(c) of the Act appears to be shrouded in mystery. First, it is not clear why Parliament picks and chooses the requirements for ambassadorial appointments which it prefers and jettisons those that the Constitution equally requires. While the Constitution requires that the public/foreign service of South Africa should represent and reflect the diversity of the South African people,[40] the Constitution equally (and in peremptory terms) requires that the public/foreign service of South Africa must be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. The question is: what was the intention of Parliament when it deliberately decided to exclude, set aside, and ignore the equally important requirements of CAREER-ORIENTATION, PROFESSIONALISM and NON-PARTISANSHIP in the foreign service at ambassadorial level?

[40] See section 195(1)(i) of the 1996 Constitution. See also CP XXX.1 of the 1993 interim Constitution; the 1993 Foreign Policy Discussion Document of the ANC.

123. When comparing the "representativity-diversity" requirement with the "career-orientation-professional-non-partisan" requirement, it would appear that in the context of ambassadorial appointments, the former (i.e. "representativity-diversity" requirement) is "normal", it is "uncontroversial", it is "harmless", it is "neutral", and "does not rock the boat" of the current system of ambassadorial appointments. However, the latter requirement (i.e. "career-orientation-professional-non-partisan") is "controversial", it is "harmful" and "unacceptable" under the current system of ambassadorial appointments as it would certainly "rock the boat" in the sense that, if Parliament had included it ("career-orientation-professional-non-partisan" requirement in section 5(2)(c) of the Act), that would put a stop to the continuing influx of "political appointees" and "party deployees" into the South African foreign service.

124. In the absence of any plausible explanation, it would seem that by enacting section 5(2)(c) of the Act, Parliament intended *not* "to rock the boat" by providing for an "uncontroversial" and "neutral" requirement for appointment into the foreign service, which requirement does not disturb the status quo in any way whatsoever. The deliberate decision by Parliament to include "representativity-diversity" as an important requirement for appointment as ambassador/HOM in section 5(2)(c) of the Act, and the simultaneous exclusion of the "career-orientation-professional-non-partisan" requirement in section 5(2) of the Act is suspect and amounts to "window-dressing" (to put it rather mildly).

125. It would seem that Parliament intended to come up with criteria of "some sort" to show that, at least, there was an attempt to comply with constitutional prescripts pertaining to ambassadorial appointments, but (and this is a very big but) without any desire whatsoever to address the "elephant in the room" and the "hard issues" that bedevil the current system of ambassadorial appointments i.e. the grotesque and disproportionate domination of the

foreign service by "political appointees" and "party deployees" at ambassadorial level in the foreign service of democratic South Africa. Important as the "representativity-diversity" requirement must be for appointment in the foreign service at ambassadorial level, it is fair to say that section 5(2)(c) of the Act adds nothing to the fundamental and pressing constitutional requirement that the foreign service of South Africa must be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN.

126. One of the "foundational values" of our constitutional democracy is "a multi-party system of democratic government, to ensure accountability, responsiveness and openness."[41] When the framers of our Constitution provided that the public/foreign service of South Africa should be PROFESSIONAL, CAREER-ORIENTED and BROADLY REFLECT THE DIVERSITY OF SOUTH AFRICA, by "broadly reflect the diversity of South Africa" they (framers) surely did not mean to suggest that the foreign service at ambassadorial level should broadly reflect the "political party" diversity of South Africa? By providing that the public/foreign service should be non-partisan, the framers intended to ensure that the public/foreign service of South Africa is free from unwarranted political interference and manipulation by party officials and politicians. On what constitutional basis can the current status quo of ambassadorial appointments be justified? Even if we were to accept, for the purposes of argument, that the "representativity" requirement at ambassadorial level included the need for "diversity" of political-party representation, how can the present status quo be consistent with the "representativity" requirement when ambassadorial positions are grotesquely dominated by ANC cadres/deployees to the total exclusion of politicians, deployees and cadres from other political parties?

[41] Section1(d) of the Constitution.

127. It is a public secret that it is the intention of the "ruling party" to ensure that, other than a few career diplomats who may be appointed here and there, the entire top echelon of the public service, including the foreign service (i.e. at ambassadorial level) should be occupied by ANC politicians, cadres, deployees, their relatives, friends, spouses, siblings, and associates. This is part of the ANC's 'cadre deployment' policy.

128. The foreign service of South Africa "must reflect broadly the diversity of South Africa" as section 5(2)(c) of the Foreign Service Act correctly provides. However, that requirement should not be put forward simply as a "make weight requirement" with the intention of side-stepping the requirements of PROFESSIONALISM, CAREER-ORIENTATION and NON-PARTISANSHIP ordered by the Constitution. The reason for Parliament (through the Act) to give greater weight to requirements stipulated in section 5(2) of the Act and simultaneously (and almost disingenuously) give no due consideration whatsoever to the requirements of PROFESSIONALISM, CAREER-ORIENTATION and NON-PARTISANSHIP stipulated in the Constitution is difficult to understand (to say the least). Parliament should explain its rationale for side-stepping and ignoring other fundamental constitutional requirements (such as PROFESSIONALISM, CAREER-ORIENTATION and NON-PARTISANSHIP) and justify its preference for the requirements stipulated in section 5(2) of the Act. And if Parliament thinks that it can explain its choices, then that explanation should meet the constitutional muster, taking into account the supremacy of the constitution (section 2 of the Constitution).

129. The decision of Parliament to pick and choose its own requirements for ambassadorial appointment and simultaneously and deliberately (and almost disingenuously) ignore all those other fundamental requirements stipulated in peremptory terms in the Constitution is without merit. In fact, it is irrational and arbitrary. Further, it would also appear that in

deciding which requirements to include in and which requirements to exclude from the Act for appointment as HOM, Parliament embarked on some "cost benefit analysis" and gave due weight to some considerations and, at the same time, gave no consideration to others. In view of the fact that Parliament chose instead to ignore those requirements demanded by the Constitution and opted for those requirements (important as they may also be, such as the "diversity" requirement) which are "neutral" and "non-invasive", Parliament appears to have:

(a) acted with bias or that bias should reasonably be suspected on its part;

(b) failed to comply with a mandatory and material provision/requirement of the Constitution;

(c) made an error of law;

(d) acted with ulterior purpose or motive;

(e) taken into account irrelevant considerations and/or ignored relevant ones;

(f) acted in bad faith;

(g) acted capriciously;

(h) acted in contravention of the law;

(i) taken action (legislated to create an unprofessional, non-career-oriented and highly partisan foreign service) not rationally connected to the purpose for which the foreign service was intended (a professional, career-oriented and non-partisan foreign service able and capable of pursuing South Africa's foreign policy goals and interests);

(j) exercised its law-making powers in a manner so unreasonable that no reasonable Parliament could have so exercised the power (make the law i.e. the Foreign Service Act) or performed the function (create a foreign service whose objects are inconsistent with the Constitution); and

(k) acted unconstitutionally or unlawfully.

130. A close and careful reading of the Act, specifically sections 3(2), 4(1) and 5(3) will show that the Act is fundamentally *not* aimed at providing for a foreign service that is intrinsically CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. It seeks, however, to create a foreign service so amorphous as to include anybody from anywhere. At first glance therefore, the objective of the Act is not to provide for a foreign service that is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. On the contrary, the Act provides for a foreign service (at ambassadorial level) that is inclusive of anyone who might be appointed from anywhere (outside the Department, from civil society, private sector, the unemployed, academia, and NGOs, to mention but a few – all associated with the ANC in one way or another).

131. A Foreign Service Act that departs from a base far removed from what the Constitution and the law provide runs the risk of being tainted with unlawfulness, illegality, unconstitutionality and invalidity *ab initio*. This Act must be rooted and must derive its legitimacy in the Constitution and the law from the very onset. It should avoid creating a situation which was never contemplated by the framers of our post-apartheid constitutional order. It should also avoid taking a stance that flies in the face of the authoritative decision of the Constitutional Court on this matter (the kind of public/foreign service South Africa requires). Further, it should avoid creating a set-up in the foreign service of South Africa that is potentially conflictual (see discussion below). In fact, this Act should, at the very least, correct the situation in the foreign service of South Africa which has been allowed (consciously or unconsciously) to persist for a very long time now, which is, the creation of a dominant layer of foreign service officials at HOM level who are overwhelmingly *not*

CAREER-ORIENTED, *not* PROFESSIONAL[42] and are palpably and manifestly PARTISAN.

IV The Third Topic: The President's power of appointment under section 84(2)(i) of the Constitution

132. Section 84(2)(i) of the Constitution provides that "The President is responsible for appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives."

133. Now, in the "informal" and "semi-formal" discussions that have taken place in meetings, seminars and workshops of the Department on the issue of appointment of HOMs – specifically on whether these HOMs should be drawn from the CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN corps or be "political appointees" from outside the Department - this discussion would be quickly (and summarily) dismissed as an issue that does not concern officials! The immediate reaction to any invitation to discuss or debate that issue would be met with disgust and anger and a stern warning to the effect that the appointment of HOMs is the exclusive *prerogative* of the President in terms of section 84(2)(i) of the Constitution(sic). I have heard this argument made by Minister Maite Nkoana-Mashabane, Minister Lindiwe Sisulu, and the current Minister, Dr Naledi Pandor. The same argument is made by Director General Mahoai and some officials in the Department of International Relations and Cooperation. That is also the argument that the ANC and its bigwigs repeat all the time every time when the issue of ambassadorial appointments is put under the spotlight. That view is also held by some MPs. It should be hastily added that, the attempt by the Foreign Service Act to provide for the inclusion of "political appointees" in the foreign service of South Africa is,

[42] By "non-professional" here I refer to "non career-oriented" diplomats.

(mis)informed by that very notion (that the appointment of HOMs is the exclusive *prerogative* of the President *and* that that discretion cannot be questioned)(more on this below).

134. In order to address the argument made by the "Presidential prerogative loyalists", I want to pause here for a moment and tell a story. I want to look down the corridors of South African legal history and explain what "prerogative" power is, where that legal concept came from, and most importantly, whether it has any place in the current South African constitutional-legal dispensation/order.

135. *Prerogative* power is a legal concept. Before 1994, one of the principles that governed the conduct of foreign policy in South Africa was the so-called "prerogative" (Presidential prerogative or Executive prerogative).[43] The common law prerogative power essentially constituted the power of the Crown (now the executive government) to act in the public interest, exercising discretionary power which is not regulated by statute law.[44] Some of the prerogative powers relevant to the conduct of foreign affairs included: (a) the power to conduct foreign relations; (b) **the power to appoint ambassadors**; (c) the defence of the realm; (d) the power to recognise foreign sovereigns; (e) the responsibility to receive ambassadors; and (f) the power to declare war. Under the common law, 'scrutiny of such

[43] N Botha 'The foreign affairs prerogatives and the 1996 Constitution' (2000) 25 *SAYIL* 265, 272; G Carpenter 'Prerogative powers in South Africa – dead and gone at last?' (1997) 22 *SAYIL* 104, 105. For earlier South African cases which followed the English common law on the Crown prerogative powers and acts of states in foreign policy matters, see *Van Deventer v Hancke & Mossop* 1903 TPD 401; *Ex parte Belli* 1914 CPD 742; *Verein fur Schultzgebietsanleihen EV v Conradie NO* 1937 AD 113; *Haak v Minister of External Affairs* 1942 AD 318; and *Vereeniging Municipality v Vereeniging Estates Ltd* 1919 TPD 159.

[44] Lord Denning in *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643 at 705B-C; See also Chaskalson CJ in *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 36 (and footnotes therein); G Bartlett & M Everett 'The Royal Prerogative', Briefing Paper No. 03861, (British) House of Commons Library (17 August 2017) 3.

'royal' residual powers was off-limits to the courts';[45] a phenomenon that led to the exclusion of the courts from foreign policy matters and concomitant impossibility of importing international law norms into the conduct of South Africa's pre-democratic foreign policy.

136. Because these powers were not regulated by statute, no one could challenge the Crown when prerogative powers were exercised. These powers could not be reviewed by Parliament or the courts or anyone. Once the Crown had decided, that was it! No one could interfere, or question, or debate the decisions taken by the Crown exercising the royal prerogative. In the case of ambassadorial appointments for example, no law or Constitution or criteria dictated to the Crown how and who should be appointed ambassadors. The decision to appoint ambassadors was the Crown's prerogative; it could not be questioned; it could not be 'reviewed' and it could not be challenged for unconstitutionality, irrationality, arbitrariness, and/or unlawfulness. Not Parliament, not the courts, and certainly no government official could tell the Crown (Head of State) that (s)he failed to follow a particular legal or constitutional procedure or criteria in appointing ambassadors.

137. When South Africa was still a member of the Commonwealth (i.e. during the period before it withdrew from that Organisation in 1961), the Crown (Queen of England) was the Head of the Commonwealth and Head of State and she had prerogative power over those areas of South African political life that fell under her royal prerogative. When South Africa left the Commonwealth in 1961 and became a Republic, the question before the South African Parliament at the time became: what are we going to do with the powers

[45] D Mullan 'Judicial review of the executive – principled exasperation' (2010) 8(2) *New Zealand J of Public & IL* 145, 161; *Van Deventer* at 409-410.

that were exercisable by the Crown by way of prerogative in view of the fact that she (the Crown) was no longer the Head of State (of the new Republic of South Africa)? Parliament took a decision and provided in section 7(4) of the *Republic of South Africa Constitution Act* 32 of 1961 (the 1961 Constitution) that "The State President shall in addition as head of state have such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen *by way of prerogative*." (Emphasis added). What had happened is that when South Africa left the British Commonwealth and became a Republic in 1961, Parliament drafted a new Constitution (the 1961 Constitution) and vested in the hands of the State President those powers that had hitherto rested in the hands of the Queen/Crown under the common law prerogative. When the apartheid Parliament created a tricameral parliament in 1984, it made a new constitution, namely, the *Republic of South Africa Constitution Act* 110 of 1983 (the 1983 Constitution). Section 6(4) of the 1983 Constitution was worded exactly the same as section 7(4) of the 1961 Constitution except that the word "Queen" in the 1961 Constitution was replaced by the word "State President" in the 1983 Constitution.

138. Before 1994 therefore, the President of South Africa still exercised prerogative power in limited areas of public responsibility, such as appointment of ambassadors. So, for all intents and purposes therefore, the President of South Africa before 1994 was legally empowered to exercise certain powers *by way of prerogative*. He could appoint ambassadors. And when he did, no Parliament or court or anyone could challenge, question, or review the exercise of that power. His decisions were absolute, and they could not be interfered with. Things changed radically when South Africa became a constitutional democracy under the rule of law in 1994.

139. When South Africa severed ties with apartheid and became a constitutional state/democracy in 1994, one of the founding values of the new South Africa became "supremacy of the constitution and the rule of law".[46] One of the questions that confronted the framers of the Constitution was: what are we to do with prerogative powers which were exercisable by the State President of South Africa until then (i.e. before the adoption of the 1993 interim Constitution). The answer was simple: since the Constitution of democratic South Africa had become the supreme law of the Republic, prerogative powers may no longer be exercised by any state functionary. The logic made sense: if the framers had maintained the *status quo ante* i.e. that the President of a new democratic Republic of South Africa would continue to exercise prerogative power, that would mean the President would have powers that are not regulated by law or Constitution! To grant the President power to act by way of prerogative would be inconsistent with the notion of a supreme Constitution! In other words, to provide that the President had prerogative power would have meant that the President was somehow above the Constitution; that he was not bound by the Constitution in some respects e.g. in the appointment of ambassadors. The framers then decided that those powers that were exercisable by the President by way of prerogative (before 1994) would then be made "constitutional powers" under the new constitutional dispensation. Section 84 of the 1996 Constitution lists some of these powers which were exercisable by way of prerogative (before 1994) but which are now "constitutional powers" exercisable under the supreme Constitution. What this means is that the President of the Republic of South Africa no longer exercises any "prerogative"; (s)he exercises only constitutionally granted powers which are subject to and are limited by the terms of the Constitution.

[46] Section 1(c) of the 1996 Constitution.

140. For those politicians who continue therefore to repeat the mantra that it is the President's "prerogative" to appoint ambassadors, they should realise that their view is based on an error of law. Their view is not constitutionally sound. Their view is incorrect. Their view is not borne by historical and legal facts. Their view is anti-constitutionalist. Their view is wrong-headed. Their view does not hold water. Their view should not be followed.

141. The view that the appointment of HOMs is the exclusive *responsibility* (note: not *prerogative*) of the President in terms of section 84(2)(i) of the Constitution is correct; because that is precisely what the Constitution provides. However, those officials and politicians who say that the appointment of HOMs is the responsibility of the President and that that power cannot be questioned make a mistake of *stretching that argument further* beyond the limits set by the Constitution with respect to the exercise of that presidential power of appointment. These officials hold the mistaken view that the President's power of appointment (of HOMs) is beyond scrutiny; that it cannot be "interfered with"; and that it cannot be "questioned" in anyway. In other words, these officials and politicians hold the mistaken view that the President's exercise of public power (to appoint HOMs) is "completely subjective" and "totally absolute". This is incorrect (see discussion below).

142. Notwithstanding the views expressed in the paragraph immediately above, my submission does *not* aim to challenge the President's constitutional powers to appoint HOMs. As section 84(2)(i) of the Constitution clearly states, the appointment of HOMs is the *responsibility* of the President, no one else. The crisp questions to ask though are the following: can the President appoint whomsoever he wishes as ambassador/Head of Mission? Is the President's power to appoint whomsoever (s)he wishes as HOM

"unconstrained"? Is that power untrammelled? Is it unlimited? Is it absolute? Conversely, are there any norms, values, standards and principles that the President is constitutionally and legally obliged to take into consideration and to apply her/his mind on when she/he appoints ambassadors/HOMs?

143. The argument that the President's power to appoint HOMs is "absolute", that it is "unconstrained", that it is "untrammelled" and that it rests "solely" with the President's "subjective view", and as a result, should not be "interfered" with, is, with respect, incorrect. Conversely, I submit that there are certain constitutional-legal norms, values and principles that bind the President's exercise of her/his powers to appoint HOMs, which the President must always take into consideration and over which (s)he must apply her/his mind. It is submitted that:

143.1 The President's power to appoint ambassadors/HOMs is, unlike in the old pre-democratic dispensation, **no longer governed by the common law prerogative**. In pre-democratic South Africa, the appointment of ambassadors constituted the Crown (now executive government) *prerogative power*, and the exercise of that prerogative power (under the common law) was beyond scrutiny by anyone. The President's decision to appoint whosoever *he* wished under the common law prerogative power was unquestionable; that decision could not be "interfered" with; that decision was absolute; that decision was "untrammelled". However, in the 'new' South Africa that became a constitutional state under the rule of law (in 1994), the situation governing the exercise of public power (in this case, the appointment of HOMs) is radically different from the way the apartheid system and government used to deal with this matter. Under the new constitutional dispensation, there are now clear norms, values and principles (e.g. accountability, rationality, openness, and high standard of

professional ethics) that are clearly spelled out in the Constitution and the law, including *Promotion of Administrative Justice Act* (PAJA) No. 3 of 2000, which must "guide", "inform" and "bind" state functionaries exercising public power (in this case, the President exercising her/his powers of appointment) (see detailed discussion below).

143.2 The appointment of HOMs should be consistent with (a) the letter and spirit of CP XXX.1; (b) the decision of the Constitutional Court in the *First Certification Judgment* and the *Second Certification Judgment*; as well as (c) all other relevant provisions in the Constitution that govern public administration, including the provisions of section 195 of the Constitution. Specifically, that the appointment of HOMs be reflective of and comport with the constitutional-legal obligation to provide a foreign service that is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, as opposed to the current practice where the appointment of HOMs is grotesquely disproportionate and heavily weighted in favour of "political appointees" who ordinarily do not fall within the definition of a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN service.

143.3 Parliament should have made it crystal clear (through the Foreign Service Act) that the South African foreign service (including its ambassadors/HOMs) is able to "take its [rightful] place amongst the great services of the world" (as the 1993 ANC Foreign Policy Discussion Document correctly suggested) by providing in unambiguous terms that the diplomatic service of South Africa will be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN at all levels, including HOM-level. But, as the discussion above demonstrated, Parliament chose instead to ignore a clear and binding constitutional injunction when it opted *not* to provide for a CAREER-

ORIENTED, PROFESSIONAL and NON-PARTISAN foreign service. What follows is a discussion of each of the three submissions made in paragraphs 143.1, 143.2, and 143.3 above.

First: Appointment of HOMs under apartheid and appointment of HOMs in democratic South Africa

144. Before 1994, South Africa's foreign policy and foreign affairs were conducted, inter alia, on the basis of **the old common law *prerogative* powers** derived from English law.[47] The prerogative power to conduct foreign affairs was governed by the so-called 'act of state' doctrine, which provided in part that the acts of the South African state in foreign affairs (in this case, the appointment of ambassadors) were beyond the reach of judicial review (the 'doctrine of the non-justiciability of 'acts of state").[48] In the case of *Pharmaceutical Manufacturers Association of South Africa & Another In Re the Ex Parte Application of the President of South Africa & Others*,[49] Chief Justice Chaskalson explained what the common law prerogative powers are by referring to the English case of *Laker Airways Ltd v Department of Trade*[50] where Lord Denning described the prerogative power as "[a] discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity [eg foreign affairs] for which the law has made no provision."[51] The common law prerogative power therefore, essentially constituted the power of the Crown (now the executive government) to act according to discretion, for the public good without the prescription of the law.[52] Some of the prerogative powers relevant

---

[47] J Dugard *International Law: A South African Perspective 4th ed* (2011) 71.
[48] Ibid, 71.
[49] 2000 (2) SA 674 (CC)
[50] [1977] 1 QB 643
[51] *Pharmaceutical Manufacturers Association* at para [36].
[52] John Locke *Second Treatise of Civil Government*. See also Lord Denning in *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643 at 705B-C referred to by Chaskalson CJ in *Pharmaceutical Manufacturers Association* at para 36 (and footnotes therein)

to the conduct of foreign affairs included, the power to conduct foreign relations,[53] the defence of the realm, **the power to appoint ambassadors**, the power to recognise foreign sovereigns, and the power to declare war.

145. Under the common law, scrutiny of such 'royal' residual powers was not possible.'[54] Since *prerogative* powers were discretionary powers for which the law made no provision, they (prerogative powers) could not be questioned by anyone or subjected to constitutional scrutiny/review by the courts or parliament. The law did not interfere with the exercise of the discretion by the executive in matters relating to foreign policy, including the appointment of ambassadors. The rationale for this policy was '[f]ounded upon the proposition that the very nature of the relations between states means that there are no judicial standards by which to determine the lawfulness of sovereign acts done in the sovereign's conduct of foreign relations.'[55] What this means is that, during the days of apartheid, no one (including the courts) could question any decision taken by the apartheid government and its leadership on matters of foreign policy, including the appointment of ambassadors. That is why the South African government could violate with impunity every known tenet of international law, international humanitarian law and international human rights law under the thin disguise of pursuing its national interests (national security, internal stability and "law and order") knowing very well that their foreign policy decisions could never be questioned or scrutinised by parliament or the courts or anyone.

146. However, with the advent (in 1994) of a constitutional democracy under the rule of law, the realm of foreign relations and the manner in which the new South African government

---

[53] See Dugard *supra* 71.
[54] D Mullan 'Judicial review of the executive – principled exasperation' (2010) 8 *New Zealand J of Public & IL* (No. 2) 145 at 161.
[55] Lord Sumpton 'Foreign affairs in the English courts since 9/11' Lecture at the Department of Government, London School of Economics, 14 May 2012 available at https://www.supremecourt.uk/docs/speech_120514.pdf

was to design, manage and conduct its foreign policy changed fundamentally. In 1994, South Africa moved from a dispensation where parliament was "sovereign" and its laws could not be challenged for constitutionality and where the decisions of the Executive in foreign affairs could not be questioned by anyone. In 1994, South Africa moved to a radically new system where the Constitution was supreme (supremacy of the constitution) and where the exercise of public power became subject to constitutional control. In *Pharmaceutical Manufacturers Association*, Chief Justice Chaskalson stated:

> [T]he interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. *But there has been a fundamental change*. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, *and the constraints subject to which power has to be exercised*. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed.[56] [Emphasis added]

147. Deputy Judge President Mahomed (as he then was) described the difference between the apartheid dispensation and the constitutional one in more graphic terms when he said:

> In some countries the Constitution only formalises, in a legal document, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past

[56] *Pharmaceutical Manufacturers Association* at para [45]

> to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, *authoritarian*, *insular*, and *repressive*, and a vigorous identification of a commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. *The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic*.[57] [Emphasis added]

148. Justice Ackerman also elaborated on the differences between the apartheid system and the constitutional system and their respective ways of doing business when he stated:

> *We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law* to a present and a future *in a constitutional state where state action must be such that it is capable of being analysed and justified rationally*. The idea of a constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. *Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order*.[58] [Emphasis added]

149. After 1994, and in line with the radical transformation brought about by the transition from apartheid to democracy, the conduct of South Africa's foreign policy was no longer subject to the common law prerogative but was now subject to a system that provided for *constitutional control of all exercises of public power, including exercise of public power in the realm of foreign policy* (and in this case, appointment of ambassadors).

---

[57] *S v Makwanyane & Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 at para 262.
[58] *Makwanyane* at para 156.

150. In the case of *Pharmaceutical Manufacturers Association*, Chief Justice Chaskalson authoritatively stated that, with the adoption of the new Constitution, South Africa had moved away from a system of law where some executive powers (e.g. foreign affairs powers) were governed by the common law prerogative to a new system of constitutional supremacy. The learned Chief Justice said: '*[P]owers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of power are now regulated by the Constitution.*'[59]

151. The **cardinal points** I wish to make – by explaining, as I do above - the differences between the apartheid and post-apartheid legal regimes that governed the conduct of foreign affairs in general and appointment of ambassadors in particular – are the following:

(a) The idea that the President's foreign affairs powers to appoint ambassadors (in terms of section 84(2)(i) of the Constitution) without any question whatsoever is not borne by the facts and is not supported by the legal and constitutional provisions governing the conduct of foreign policy (in this case, appointment of ambassadors) in South Africa. In other words, it is incorrect to suggest that the President's foreign affairs power to appoint ambassadors is absolute, cannot be questioned, is untrammelled, and cannot be interfered with. On the contrary - and because the appointment of ambassadors involves the exercise of public power - the President's foreign affairs

[59] *Pharmaceutical Manufacturers Assoc.* at para [41]. To make his point, Chief Justice Chaskalson stated further that: 'Thus, in *President of the Republic of South Africa & Another v Hugo* [1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC)] the power of the President to pardon or reprieve offenders had to be dealt with under section 82(1) of the interim Constitution, and not under the prerogative of the common law. In *Fedsure [Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others]* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC)], the question of legality had to be dealt with under the Constitution and not under the common law principle of ultra vires. In *Sarfu 3 [President of the Republic of South Africa & Others v SARFU & Others] 2000 (1) SA 1 (CC); 2000 (10) BCLR 1059 (CC)]*[,] the President's power to appoint a commission and the exercise of that power had to be dealt with under section 84(2)(f) of the Constitution and the doctrine of legality, and not under the common law principle of prerogative and administrative law.'

power to appoint ambassadors is subject to constitutional control.[60] In the circumstances, the President's foreign affairs powers should, at the very least, be 'guided by', 'informed by' and 'bound by' certain norms, values, and principles enshrined in the Constitution pertaining, among others, to the kind of foreign service South Africa requires. [In the state capture hearing on the unauthorised landing of a Gupta-chartered flight at Waterkloof Airforce Base in 2013, Zondo DCJ - in his questions to the former Minister of International Relations and Cooperation, Ms Maite Nkoana-Mashabane – seemed to suggest that it was perplexing in the extreme (to say the least) that an official who, among other "offences" and "breaches" had admitted to have been untruthful about who authorised the landing of that aircraft and who had violated the national security protocols relating to the use of a national key point (the Airforce base) could subsequently be "rewarded" with an ambassadorial post.]

(b) In pre-democratic South Africa (under apartheid), the President could appoint whomsoever *he* chose without any worry of being questioned about his appointments by anyone. This was so because the appointment of ambassadors constituted part of the executive's prerogative power under the common law, which power – because it fell within the domain of foreign affairs – was governed by the so-called "act of state" doctrine. In terms of this doctrine, the actions or decisions of the South African government/state/executive in the realm of foreign affairs were not justiciable (and could not be reviewed or questioned by anyone, including the courts of law). In pre-democratic South Africa therefore, the following decisions of

[60] See *Pharmaceutical Manufacturers Association* at paras [19], [33], and [51]

the President were, technically speaking, legitimate and could not be reviewed or questioned by anyone e.g.

(i) the President could choose whomsoever *he* wanted even if that person did not meet the 'fit and proper' requirement;

(ii) the President could literally overlook CAREER DIPLOMATS in favour of '*his* own people';

(iii) the President could deliberately appoint members of his own political party (including spouses, children and friends of relatives of party bigwigs) as ambassadors to the glaring exclusion and marginalisation of CAREER DIPLOMATS; and

(iv) The President could make all these appointments knowing that, legally speaking, he was on 'safe ground', precisely because his decisions and appointments - since they constituted part of his prerogative power in the realm of foreign policy/affairs - could not be questioned or challenged by anyone.

(c) In the democratic dispensation however – and unlike under apartheid - the President's power to conduct foreign policy and appoint ambassadors (as stated above) is no longer governed by the unassailable common law *prerogative*. Under the new dispensation, the power to appoint ambassadors is now subject to constitutional control. The President's foreign affairs power to appointment

ambassadors is now 'regulated', 'guided', 'informed' and 'bound' by certain norms, values and principles enshrined in the Constitution. And one of the key norms that should 'guide' and 'inform' the President in her/his appointment of ambassadors is the constitutional obligation that the public/foreign service of South Africa must be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN.[61]

(d) When the President appoints ambassadors from among CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN corps, (s)he will be acting consistent with the letter and spirit of the Constitution. (S)he will be acting lawfully. (S)he will be acting consistent with the constitutional obligation placed upon her/him to "uphold, defend and respect the Constitution as the supreme law of the Republic."[62] On the contrary, if/when the President does not appoint ambassadors from the PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN corps, but instead (like under apartheid) e.g. (i) appoints members of her/his political party; (ii) appoints spouses, children and relatives of friends and party members; (iii) consistently, deliberately and consciously overlooks PROFESSIONAL and CAREER DIPLOMATS and creates a bloated layer of "political appointees" and packs the foreign service at ambassadorial level with "officials" who are not career diplomats and are essentially partisan, then the President will be acting outside the scope of her/his powers and contrary to the letter and spirit of the Constitution as far as appointment of ambassadors is concerned.

(e) When the President deliberately ignores the obligations placed on him by the Constitution (in this case, to ensure that the foreign service of South Africa is

[61] See discussion above, specifically in the context of CP XXX.1. See also the *First Certification Judgment* at para [454].
[62] See section 83(b) of the 1996 Constitution.

PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN), (s)he will be acting in violation of the Constitution and her/his oath of office. Section 83(b) of the Constitution enjoins the President to "uphold, defend and respect the Constitution as the supreme law of the Republic." What is more, when the President assumed the highest office in the land, he swore/solemnly affirmed, inter alia, that he "will be faithful to the Republic of South Africa, and will obey, observe, uphold and maintain the Constitution and all other law of the Republic" and solemnly and sincerely promised that he "will *always* promote all that will advance the Republic, and oppose all that may harm it."[63]

(f) When the President exercises his power of appointment under section 84(2)(i) of the Constitution, and the President chooses instead to "side-step" a constitutional obligation (to ensure that he appoints PROFESSIONAL, CAREER-ORIENTED AND NON-PARTISAN diplomats), it is clear that the President will not be 'upholding, defending and respecting the Constitution as the supreme law of the Republic.' And he will also not be 'obeying, observing, upholding and maintaining the Constitution' as his oath of office enjoins him.

(g) In *Economic Freedom Fighters v Speaker of the National Assembly* (the *Nkandla* case),[64] Chief Justice Mogoeng held that when the President (Zuma) failed to comply with the remedial action taken against him by the Public Protector, the President acted in violation of his constitutional obligation to "uphold, defend and respect the Constitution as the supreme law of the Republic."[65] By parity of reasoning, when the President (Ramaphosa)(or any other President for that matter)

[63] Schedule 2: Oaths and Solemn Affirmations to the 1996 Constitution para 1.
[64] *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11; 2016(5) BCLR 618 (CC)
[65] *Nkandla* case at para 103.

continues to appoint "political appointees" and "party deployees" into the foreign service in violation of the constitutional obligation to ensure a PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN foreign service (at ambassadorial level), he will be acting in violation of his constitutional obligation to "uphold, defend and respect the Constitution as the supreme law of the Republic."

(h) The President is bound by his oath of office and the peremptory terms of section 83(b) of the Constitution. And when it can be demonstrated that the President failed to comply with his constitutional obligation (in this case, failure to ensure a PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN foreign service), then the Constitutional Court has the duty to declare that the President has failed to fulfil his constitutional obligation (as section 167(4)(e) of the Constitution provides). Chief Justice Mogoeng explained why this is the case:

> "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 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.[66] The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight.[67] To him is the executive authority of the entire Republic primarily

[66] See section 83(b) of the Constitution.
[67] Section 83(c) read with the affirmation or oath of office in Schedule 2 of the Constitution, in context.

> entrusted. He initiates and gives the final stamp of approval to all national legislation.[68] 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.[69] Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just 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."[70]

The Chief Justice further stated:

> "He [the President] is required to promise solemnly and sincerely to always connect 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 commitment to serve them well and with integrity. He is after all, the image of South Africa and the first to remember at its mention on any global platform."[71]

152. **I need to emphasise the following crucial point**: The above submissions do not seek to undermine or challenge the President's foreign affairs powers to appoint ambassadors in terms of section 84(2)(i) of the Constitution. What the submissions seek to do, is to point out the constitutional-legal norms, values and principles that should guide and inform the President's exercise of powers of appointment. Specifically, that the President should take into account the legal and constitutional obligation to ensure that the Foreign Service of

---

[68] See sections 84-5 of the Constitution.
[69] Ministers, Judges, Heads of Chapter Nine institutions and Directors General.
[70] *Nkandla* case at para 20.
[71] *Nkandla* case at para 21.

South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN (in this case, at ambassadorial level).

153. In the last 27 years of our constitutional democracy, the foreign service of South Africa has progressively been dominated by an overwhelming majority of "political appointees" at ambassadorial level in the missions abroad. Now, just from a quick glance at these numbers, it would be clear – in the context of the submissions above - that the appointment of ambassadors in the South African foreign service in the last 27 years:

a. does not reflect the letter and spirit of CP XXX.1;

b. is inconsistent with the decision of the Constitutional Court (or at least the Court's certification that the 1996 Constitution requires that the public/foreign service of South Africa is and should be consistent with CP XXX.1 i.e. CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN);

c. is not in sink with the ANC's 1993 policy position, which policy position formed the foundational stone of a new foreign service after 1994; and

d. is out of step with international good practice.

154. Following on the last point in (d) immediately above, the submission would be that this phenomenon of a foreign service at ambassadorial level completely populated with "political appointees" is out of step with the practices of other foreign services in other countries such as Brasil, India, China, Egypt, Singapore, Malaysia, Switzerland, Germany as well as other countries of the G-20. South Africa's foreign service which is dominated overwhelmingly by "political appointees" at ambassadorial level appears to stand alone (and others like it) in the face of modern diplomatic practice in a globalising world. Many countries in the world - at least those that have given considerable importance and

seriousness to their international relations and diplomacy - have consistently sent abroad diplomats (at ambassadorial level) who are recruited from their CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN corps.

155. A few countries that were sampled briefly for the purposes of this submission, whose foreign services are dominated by "political appointees" or where "political appointees" constitute a significant component of the foreign service showed somewhat similar characteristics. For instance, in these countries, there is a huge trust deficit between the ruling elites and civil servants; the former do not trust the latter with implementing the policies "of the government of the day". Further, these countries manifested a rather pronounced political influence and "interference" with "public service and administration" in the sense that the foreign service is seen as yet another vehicle to employment and other financial benefits for those who would have been "off-loaded" by the political system (either because they lost elections or their cabinet posts or had fallen out of favour with this or that faction of the "ruling party' and need to be taken out of "party structures" or need to be "rewarded" for something they did or did not do).

156. The ambassador of one of the countries which was sampled (east African country, name withheld), said that in his country, the foreign service - by virtue of it being populated overwhelmingly so by "political appointees" at ambassadorial level - is called with all sorts of derogatory names e.g. "retirement village for those who have outlived their time and utility in politics"(sic), "employment agency of the ruling party"(sic), and a "dumping site for failed ministers and other unwanted politicians"(sic).

157. In the case of South Africa, an impression should not be created that there is a trust deficit between the "ruling party" and civil servants. An impression should also not be created that the foreign service of South Africa at ambassadorial level is but another avenue for "politicians" and "party cadres" and their associates and friends and children of party bigwigs to be in gainful employment.

158. The ANC, way back in 1993, envisaged a South African Foreign Service that was "*professional*" and "*independent from the narrow confines of party politics*." Further, the ANC envisaged a foreign service that would be "*open to public scrutiny and public accountability*." Taking into account the important role that the 'new' foreign service of South Africa would play in an ever-changing and complex world of global politics and diplomacy, the ANC committed the new government to "*foster the required professional ethos for our corps anticipating that it will take its [rightful] place amongst the great services of the world.*" What is more, the ANC viewed diplomacy as a "*vocation*". In the circumstances, the foreign service of South Africa should, importantly so, even at ambassadorial level, be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN **(as the Constitution and the law require)**.

159. To sum up: The President of the Republic of South Africa does not exercise prerogative power when (s)he appoints ambassadors; (s)he only exercises constitutionally granted responsibility to do so. The *responsibility* to appoint ambassadors is limited by the terms of the Constitution i.e. it must be exercised in accordance with the Constitution. To say that the President of South Africa has "prerogative" power to appoint ambassadors (as many South African politicians erroneously believe) is untenable. That view is fundamentally flawed. It is factually and legally unsound, and inconsistent with the

constitutional-legal order of the "new" and democratic South Africa. The view that the President of South Africa has prerogative power to appoint ambassadors should be rejected and should not be followed. That view should not be used as justification for maintaining a system of ambassadorial appointments where HOMs are recruited into the foreign service from the ANC and those with close links with the "ruling party". A close and careful reading of the Foreign Service Act shows that this Act seeks to maintain this flawed system of ambassadorial appointments.

160. Before I move on to the next topic (Fourth Topic), I wish to mention and discuss some of the reasons put forward by some political leaders (e.g. Dirco Ministers and ANC leaders) for why they think the current system of ambassadorial appointments – where the so-called "ruling party" has such a pronounced role (and influence) – is considered to be "a good thing" and an "accepted practice around the world". In the course of my explanation of some of these reasons, it will become clear how and why diplomacy is such a misunderstood profession.

161. In the preceding paragraphs, I explained how ANC leaders, Dirco ministers and some government officials have erroneously used the idea that the President of South Africa exercises *prerogative power* to justify a system of ambassadorial appointments which is legally flawed. I have explained how, under our current constitutional-legal order the concept of *prerogative power* can no longer be used as justification for the kind of decisions South African Presidents have taken in the exercise of their section 84 responsibilities (in this case, the responsibility to appoint ambassadors under section 84(2)(i) of the Constitution). I believe that when state functionaries understand the implications for foreign policy of South Africa's shift (in 1994) from apartheid to

democracy (for example, that the foreign policy of South Africa is no longer governed by prerogative power), South African political leaders will have a better appreciation of the kind of principles and values that should guide their actions and decisions (in this case, their actions and decisions in the appointment of ambassadors/Heads of Mission).

162. One of the arguments put forward in support of "political appointments" is that the President can appoint anyone he wants. This is incorrect. The explanation in the preceding paragraphs has made it clear that the Constitution stipulates criteria that must be applied: professionalism, career-orientation, non-partisanship, representativity, and "loyally execute the lawful policies of the government of the day." The Foreign Service Act has added another important criterion; "fit and proper". The Constitution further (in section 195) stipulates the values which must govern public administration in South Africa, including a high standard of professional ethics (section 195(1)(a)), efficiency (section 195(1)(b), accountability (section 195(1)(f), good management and leadership skills (section 195(1)(h), and ability to perform well (section 195(1)(i)). The standards set by the Constitution and the law for appointment in the public/foreign service of South Africa are high (and high performance is what the people of South Africa expect from those who are appointed to serve them). Yet in South Africa and in rare cases, some of the appointments into the foreign service have left many bewildered (to say the least). For example, there are cases where an official who (admittedly) misused the name of the President to facilitate the unauthorised landing of a privately chartered aircraft to land in a military airforce base (a national key point) (the case of Ambassador Bruce Koloane), and another who was convicted of drug trafficking and spent time in a foreign jail (the case of Ms Hazel Francis Ngubeni (discussed below) but who were nevertheless appointed as South

African ambassadors. Such appointments can only occur in a system where the "ruling party" relishes its "power" to "reward" "party loyalty" and dispense patronage.

163. The other argument proffered in support of a system dominated by "political appointees" and "party deployees" is that "for strategic reasons, other nations welcome political appointees." This argument is usually made in ANC circles where it is believed that sending a person with strong links to the ANC to a country which is "ruled" by a party which has strong "liberation credentials" is "strategic" and "good". The belief here is that relations between South Africa and the "receiving state" will improve and flourish when South Africa is represented by an ambassador who comes from the ANC, because the two "ruling parties" have something in common (their "liberation credentials"). That may indeed be the case for part of the "political elites" and population, but host governments generally want to know that their business with South Africa is managed by a seasoned professional, not a new-comer without experience. It is true that in many instances, host governments will not complain openly about the ambassadors sent to their countries, but newspapers (at home and abroad) will have a field day about any ambassador who appears ill-qualified to be in that position (see cases of Ms TB Sunduza, current South African Consul General in Los Angeles; Ambassador Bruce Koloane (former ambassador to the Hague); and Ms Hazel Francis Ngubeni, former High Commissioner for South Africa to Singapore). Many host governments view the sending of an unqualified, inexperienced, "party loyalist" as demeaning (see the discussion below in the case of Ms Ngubeni, former High Commissioner for South Africa to Singapore).

164. The other reason put forward for favouring "political appointees" over career diplomats is this: since "political appointees" are "close to the President", or "they come from the same

party as the President" or "are friends with the President", they can raise issues directly with the President! This is conceivable, but are matters of state run on the basis of "friendship with the President"? The point was made repeatedly above that there are criteria for appointment that the Constitution and the law have set for appointment in the public/foreign service. "Friendship with the President" is not one of them. When appointments are based on considerations such as "friendship" or "proximity to the President", the ground becomes fertile for seeds of corruption, patronage and maladministration to grow.

165. In one of the Ministerial Management Meetings (in September 2020) at the Head Quarters of the Department of International Relations and Cooperation, Minister Naledi Pandor said something to the effect that, she has "consulted with my counterparts in other countries on the issue of appointment of ambassadors, and they all tell me that the appointment of ambassadors is the prerogative of the President!" Minister Pandor said that in the context where some senior officials were suggesting that the issue of ambassadorial appointments in Dirco should be discussed in order to address the current challenges where career diplomats are "marginalised" in favour of "political appointees". Minister Pandor effectively dismissed any suggestion that the issue of ambassadorial appointments could be discussed at senior officials level. There is one thing Minister Pandor does not fully appreciate; that the issue of ambassadorial appointments in various countries is governed by the laws (including the constitutions) and prescripts of those countries. The principles that govern the conduct of foreign policy in general and ambassadorial appointments in particular differ from one country to the next. In South Africa, the Constitution is clear about the criteria to be used. For Minister Pandor to suggest that the experiences of her "counterparts in other countries" should be used as a yardstick in the case of South Africa

shows an inchoate understanding on her part (and on the part of those who hold a similar view) of how the Constitution and the laws of South Africa apply in cases of appointment into the public/foreign service.

166. Another reason propounded in favour of "political appointees" is said to be this: "they can bring fresh ideas and fresh perspectives"! Diplomacy is an exacting profession and lack of experience can never be a qualification! Some of the issues that diplomats deal with, particularly matters relating to bilateral (and multilateral relations) are highly contentious, are convoluted, and are long-standing. To have a neophyte deal with such matters "from a fresh perspective" is rather wishful thinking. Whenever "fresh ideas" and "fresh perspectives" are needed, the capital i.e. Pretoria should provide such "fresh ideas" and "fresh perspectives".

167. There is a view that "political appointees" need only to be supported by a good and strong "Number Two" and junior diplomats in the mission to do a fantastic job! This is another argument (in favour of "political appointees") which shows a lack of appreciation for the demanding responsibility the ambassador carries on her/his shoulders. In the case of a recent appointment of a "number Two" to the South African mission in London, the South African government appointed an official from outside Dirco (Ms Charmaine Hendricks). The appointment of both ambassador and "Number Two" in this mission – who are both "political appointees" - will severely compromise the mission's ability to achieve its objectives. The "Number Two" in South African missions should always be occupied by a Dirco official for obvious reasons: the "Number Two" in a mission is essentially the "head of chancery" who must be well-versed with the day-to-day nitty gritties of mission management. That position cannot be headed by an official from another government

department or a "political appointee" who is not au fair with Dirco processes and 'business'. This latest appointment of Ms Charmaine Hendricks to London as our "number Two" is yet another manifestation of how diplomacy and the work of missions are misunderstood.

168. The last reason put forward for favouring "political appointees" over career diplomats: "there have been and there are some excellent political appointees"! This may indeed be true, and where this has been the case, the evidence has always pointed to an excellent team of diplomats in the mission, including the "Number Two". But in many other instances, "political appointees" have left a great deal to be desired.

169. I want to be clear: I do not wish to cast aspersions on the talents, skills, competence, character, patriotism, dedication, and other developed abilities of "political appointees". I also do not want to be seen to be painting a rosy picture about career diplomats. But some things should be clarified: (a) the Constitution is very clear about the kind of public/foreign service that South Africa needs and the criteria to be applied for appointments; (b) career diplomats know the business and have been in the field long enough to know the tools of trade; and (c) President Ramaphosa has made a clarion call that the public service of South Africa needs to be overhauled and be imbued with excellence, professionalism, career-orientation and that the system of appointment into the public service should be rid of corruption, maladministration, political interference, and patronage. (See discussion under **Topic Eight** below)

V The Fourth Topic: The hazards of an unprofessional, non-career oriented and partisan foreign service

170. The **Fourth Topic** of my submission looks at some of the worrying consequences of the kind of foreign service which has been cultivated under the trilateral cooperation of the Presidency, Dirco and the ANC. My point here would be that these consequences are not authorised by the Constitution. What is even more worrying is that the recently promulgated Foreign Service Act seeks to maintain the status quo; just that this time around, the status quo is sanctioned by a piece of legislation. It should be remembered that the Act provides for a foreign service that consists of persons "regardless of whether they are ordinarily employed by the Department or by any other national department or appointed on a contractual basis for a fixed period."[72] I made the point earlier that by providing for this amorphous foreign service, the Foreign Service Act seeks to preserve, protect, perpetuate and maintain the current status quo in the foreign service where the positions of HOMs/ambassadors are grotesquely dominated by "political appointees" who are ANC members or persons with close connections with the ANC and/or its bigwigs.

171. South Africa's foreign service - which is grotesquely and disproportionately dominated by "political appointees" - faces a number of challenges and negative consequences. These include the following: **First**, the foreign service envisaged by the Act, to the extent that it seeks to preserve the current status quo (political appointees) is:

(i) inconsistent with the letter and spirit of South Africa's post-apartheid constitutions;

(ii) inconsistent with the initial (1993) policy position of the ANC;

(iii) inconsistent with the decision of the Constitutional Court (*certification judgements*); and

(iv) out of step with international good practice.

[72] See sections 3(2) and 4(1) of the Act.

172. **Second**, the consistent and progressive recruitment and appointment of "political appointees" at ambassadorial level over the last 27 years necessarily means that there has been, simultaneously, a corresponding, deliberate and conscious "exclusion" and/or "marginalisation" of CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN DIPLOMATS at ambassadorial level in South Africa's missions abroad.

173. **Third**, and flowing from the point immediately above, the manifest "marginalisation" of CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN diplomats from ambassadorial positions in South Africa's foreign service **demoralises** those members of the Senior Management Service (SMS) (e.g. directors and chief directors) who have chosen diplomacy as their career/vocation and would ordinarily qualify to be appointed as ambassadors (but are not). That practice further sends a message to these officials that they are not valued and that the government in general and the Department in particular do not care too much about their career paths and development in the *vocation* of their choice.

174. **Fourth**, the consistent "overlooking" of CAREER-ORIENTED and PROFESSIONAL DIPLOMATS from ambassadorial positions exposes these officials to **serious moral hazards**. For instance, there are occasions where members of the senior management service (SMS) (and also some "political appointees") have (discreetly and openly) "lobbied" Luthuli House and/or the Director General and/or the Minister of International Relations and Cooperation for ambassadorial posts! In one of the Ministerial Management Meeting in the Department (during September 2020), Minister Pandor had confirmed that there are some "political appointees" who have written to her requesting her to either extend their tour of duty and/or transfer them to another country as ambassadors. In most cases, these "political appointees" mention their difficult financial situations as one of the

key considerations for their requests for extension of their tour of duty. This is highly irregular! It is undesirable. It is unprofessional. It is disgraceful.

175. **Fifth**, flowing from the point immediately above, when officials are made to believe that their "worth" to be considered for ambassadorial appointment is not dependent upon the content of their character and excellence as CAREER-ORIENTED, NON-PARTISAN and PROFESSIONAL DIPLOMATS, but on the whim of a party official (at Luthuli House) or the Director General or the Minister, then that situation could **engender the seeds of corruption, nepotism, favouritism, unfair discrimination, and unfair labour practices**. In parenthesis, section 195(1)(i) of the Constitution provides, among other requirements, that employment and personnel management practices in public administration in South Africa must be based on "ability", "objectivity" and "fairness". When officials are not appointed on the basis of ability, knowledge, skills, experience, excellence and merit, but on other grounds that do not talk to their "worth" and "pride" as professionals in the field of their choice (diplomacy), that could have **a serious negative impact on these officials' self-confidence and morale**. They would feel under-valued. They would feel undermined.

176. **Sixth**, the consistent "overlooking" of CAREER-ORIENTED and PROFESSIONAL diplomats for ambassadorial appointment does not only harm the professional and personal interests of SMS officials. That practice will also send a strong (and ugly message) to the junior officials in the Department that:

i. **their careers as diplomats will be limited** in the sense that, those who would rise through the ranks and possibly qualify to be appointed as ambassadors in the future

should forget about that possibility (precisely because the practice over many years has shown clearly that ambassadorial appointments are, for all intents and purposes, "reserved" for "political appointees");

ii. **they could be highly demoralised and demotivated** too when they know that some of their career aspirations (representing their country at ambassadorial level) might never see the light of day as a result of a system and practice that is "politically engineered" to work against their long-term professional interests and aspirations; and

iii. **they could also well be exposed to serious moral hazards**. For instance, it is a public secret in the Department that some middle management officials (e.g. deputy directors) are deliberately avoiding promotions to SMS level for fear that they might never have opportunities to serve abroad at HOM level; they prefer instead to remain deputy directors because at that level, there is, allegedly, no "political interference" with diplomatic appointments and these officials have some assurance that they would be appointed from time to time to serve abroad more frequently. [The general practice in the Department is that these junior officials get posted for a period of four years and thereafter return to Head Office for a period of two years before they become eligible for another posting. In the case of SMS officials, including those who had previously served as HOMs, some of them have been stationed at Head Office for more than five years since their last posting, while other SMS officials had never been considered for appointment (without any explanation at all)]

177. The moral hazards associated with favouring "political appointees" over CAREER DIPLOMATS do not only afflict SMS and junior officials in the Department; the

Presidency and the "ruling party" (the ANC) **are also exposed to the risk of serious moral hazards**. A close and careful look at the number of "political appointees" who have been appointed (or "deployed") to date will show that the overwhelming majority of them are ANC "deployees" ("cadres") or people with connections/links/associations with the ANC and/or connections/links/associations with leading figures in the ANC. These include, among others, former ANC MPs and ANC cabinet ministers, ANC city mayors and councillors, ANC premiers, members of the various leagues of the ANC (Women, Youth and Veterans). Down the years, there have also been "political appointees" from other political parties such as the Inkatha Freedom Party (IFP) and the Democratic Alliance (DA) and other sectors of civil society.

178. Someone would say that the appointment of ANC "deployees" and "cadres" should not be problematic at all, since the ANC is the majority "ruling party"(sic) in charge of government (sic). Another one would say that the ANC has every right to appoint whomsoever it wishes from its ranks to serve as ambassadors to implement the foreign policy of the government led by the ANC (sic). The argument here would be that these "deployees", allegedly, know the policies of the ANC government better than anyone else and that they (the "deployees") are been appointed to continue serving the party and government in whatever capacity and position the "ruling party" deems fit (sic).

179. In response to the above-mentioned arguments justifying the preponderant appointment of "political deployees", the following could be said:

(a) The fact that the ANC is the majority party should not automatically translate into the right to "deploy" its "cadres" into the foreign service. In fact, such a practice

and policy would be inconsistent with the constitutional obligation requiring that the foreign service be NON-PARTISAN, CAREER-ORIENTED and PROFESSIONAL.

(b) It would be incorrect to suggest that only ANC "deployees" and "cadres" know the foreign policy of the South African government better and that they are the only right people to be appointed into the foreign service in order to continue serving the party and the (ANC-led) government. It is important to note that, in addition to the requirement for a NON-PARTISAN foreign service, the Constitution is clear (in section 197(1)) that the public/foreign service of South Africa "must loyally execute the lawful policies of the government of the day" (and not "to execute the political mandate of the 'ruling party'"). In other words, it should be understood that anyone who has chosen diplomacy (and/or public service) as a career and has decided to join the South African public/foreign service will be expected to "loyally execute the lawful policies of the government of the day." What this means is that, *ceteris paribus*, it would be incorrect to suggest that the "lawful policies of the government of the day" can only be loyally implemented and championed by ANC "deployees" and/or "cadres".

180. Flowing from the two points made in (a) and (b) in paragraph 179 above, it is important to note what the Constitution (in section 197(3)) says about public service and political affiliation. Section 197(3) provides as follows: "*[N]o employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.*" (Emphasis added).

181. Section 197(3) of the Constitution covers "employees of the public service" and for the purposes of my submission herein, the term "employees of the public service" will be limited to "employees of the Department". What section 197(3) in essence means is that no employee of the public service may be favoured (in this case, appointed as HOM) only because that person supports a particular political party (in this case, the ANC). What this means is that, "political appointees" who might have been working as civil servants in other government departments who now constitute part of that large number of "deployees" who dominate the Foreign Service at ambassadorial level should not have been favoured "only because" they support the ANC.

182. Further, what section 197(3) means is that, the situation should be even harder for those "political appointees" who might not even have been in the public service for starters to be "favoured" with ambassadorial/HOM appointments "only because" they support or are linked in one way or another with the ANC and/or leading figures in the ANC.

183. Section 197(3) of the Constitution further means is that no employee of the public service may be prejudiced by being overlooked or by not been appointed to ambassadorial/HOM level "only because" that person supports a particular political party (in this case, any other party other than the ANC) or cause. What this means is that, no employee of the public service (say, who is currently employed as a CAREER DIPLOMAT in the Department and who would ordinarily qualify for appointment at HOM level) may be prejudiced ("overlooked in favour of a '"political appointee"') "only because" that person supports a particular party (other than the ANC).

184. Lastly, what section 197(3) of the Constitution means is that no employee of the public service may be favoured or prejudiced only because that person *does not* support a particular political party or cause. For the purposes of my submission, it is clear that the essence of section 197(3) is to put appointments (at ambassadorial/HOM) beyond the influence of political affiliation. What this means is that, the appointments in the foreign service of South Africa should not be dependent on the person's party/political affiliation, but on excellence, integrity as well as on the constitutional ethos, norms, values and principles of NON-PARTISANSHIP, PROFESSIONALISM and CAREER-ORIENTATION. In any event, the ANC's 1993 Foreign Policy Discussion Document had made it clear that South Africa "needs a professional diplomat[ic] service which will be independent from the narrow confines of party politics."

185. The practice where appointments of HOMs appear to be too skewed in favour of a category of people with certain political affiliation **exposes the Presidency and the ANC to serious moral and legal hazards**. First, CP XXX required "an efficient, NON-PARTISAN, CAREER-ORIENTED public service which functions on the basis of fairness, to serve all members of the public in an unbiased and impartial manner."[73] The ANC Foreign Policy Discussion Document of 1993 had also stated that "[T]he country needs a professional diplomat[ic] service *which will be independent from the narrow confines of party politics*." The Constitutional Court in the *Second Certification Judgment* held, after considering all issues before it, that the 1996 Constitution complied with all 34 CPs (and for the purposes of my submission, that the 1996 Constitution retains the constitutional obligation to ensure that the public service of South Africa is efficient, NON-PARTISAN and CAREER-ORIENTED). Now, a close and careful look at the

[73] See the *First Certification Judgment* at para [454].

practice of appointing "political appointees" at ambassadorial level to date, specifically that the overwhelming majority of them come from the ANC or are linked to the ANC in one way or another, suggests that there may be serious legal hazards here. For instance, it would be difficult to convince anyone that a practice of appointment to a specific position (HOM) in the foreign service which is palpably and manifestly so one-sided in favour of "political appointees" and other "deployees" from one specific party (the ANC) is consistent with the requirements of CP XXX, the ANC Foreign Policy Discussion Document, the decision of the Constitutional Court in this regard, and the letter and spirit of the Constitution. Specifically, the argument that the appointment or "deployment" of ANC cadres in the foreign service at ambassadorial level does not fall fowl of the constitutional and legal obligation to ensure that the foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN would be difficult to justify in the face of clear, unambiguous and peremptory terms of CP XXX, the authoritative decision of the Constitutional Court, as well as the letter and spirit of the Constitution.

186. The role that the ANC plays in the "appointment" of ambassadors is riddled with other **serious moral and financial hazards**. It is a public secret in the Department of International Relations and Cooperation that all appointed ambassadors and some diplomats at lower levels (i.e. at "deputy ambassador" or "Number Two" position in the South African embassies) are required by the ANC to pay "levies" back to the ANC once they have taken their posts in missions abroad. And these "levies" are payable to the ANC, essentially, in exchange for the ambassadorial posts.

187. When I was posted to India as High Commissioner in June 2005, I was never approached or requested by the ANC to pay "levies" back to the ANC upon my appointment as High Commissioner. But when I was posted to Sudan as ambassador there, I received an email, on Monday, June 08, 2015 (at 10:06 AM) addressed to me at my Dirco official email address (moloif@dirco.gov.za) as well as on my private email address (frances.moloi@gmail.com) (sic)[74] from a certain Cde Mehlo Elias Ntsinini (entsinini@anc.org.za)(mntsinini@gmail.com) at Luthuli House, 54 Pixley Seme Street, Johannesburg, P. O. Box 61884, Marshalltown, 2017. Copy of that email is attached hereto marked Annexure "F". The topic of that email is: "LEVEL 15DEBIT ORDER.docx" and reads as follows: "Dear Cde Moloi Kindly find attached ANC LEVY DEBIT ORDER FORM for completion then return it back for processing Regards Mehlo Ntsinini" In that email, Mehlo Ntsinini had indicated that he was a "Levies Clerk" in the "Finance Department" of the ANC (at Luthuli House).

188. Attached to the email referred to in paragraph immediately above was an "ANC LEVIES DEBIT ORDER APPLICATION FORM OF CIVIL SERVANT." Copy of that debit order form is attached hereto market Annexure "G". In terms of Annexure "G", I was supposed to provide my "contact details" (i.e. Title, First Name, Surname, Department [I worked for and in my case, Dirco], Designation [I guess in my case I was supposed to indicate that I was Ambassador/Head of Mission], Postal Address, Code, Contact Number (Tel: Cell:, Facsimile, and email address). The Debit order form further required me to provide my "Banking details" (i.e. Name of Account, Name of Bank, Branch, Branch Code, Account Number, Type of Account (Current, Savings, Transmission), First Payment, Date or….) According to this Debit order, levies were supposed to be paid on

[74] My private email address was incorrectly spelled. My correct private email address is francis.moloi@gmail.com

monthly basis. In my case, the amount of money that I was requested to authorise the ANC to debit from my bank account on monthly basis was R2842 (TWO THOUSAND EIGHT HUNDRED AND FORTY TWO RAND.)

189. The ANC Levies debit order form provides the following banking details: Beneficiary name: African National Congress, Name of Bank: Nedbank, Account number: 1979314691, Branch: 55 Fox Street, Business Central, Johannesburg, Branch: 128405.

190. According to the ANC Debit order form, the person completing that form must provide her/his Full names and ID number and declare as follows:

> "[I] [name]…agree to Debit Order as detailed above, and hereby authorise the ANC to deduct the above amount for the contribution towards the ANC Levies. I further agree and authorize the ANC to adjust the amount of this order as and when the salaries of Government Employees are revised."

The debit order form further states that "Should the need arise to cancel this debit order, written request to do so must be addressed to the Office of the Treasurer General of the African National Congress." The person authorising the ANC to deduct monthly "levies" is also required to sign the form and send it back to the ANC. The signed form would then be issued with a Reference, File No., recorded indicating the date when it was received and the person at Luthuli House processing that form would sign it and provide her/his name. According to the debit order form, "All queries to be addressed to Cde Mehlo Ntsinini Fax 086 583 5742 tel 011 376 8054 cel079 160465(sic), 079 520 1457 Email entsinini@anc.org.za, mntsinini@gmail.com"

191. When I received the email (June, 08 2015) from Mehlo Ntsinini, I was quite surprised by its contents as I could not figure out the reason why it may have been sent to me. I remember calling Mehlo Ntsinini around the same time requesting clarification from him. I remember asking Mehlo Ntsinini whether the form was not sent to me by mistake! In fact, I remember suggesting to him that he may have intended to send the form to my "brother", Ambassador Super Moloi (former Ambassador of South Africa to Algeria, Vietnam and Kenya)! (I know Ambassador Super Moloi to be a long-standing member of the ANC in good standing). In response, Mehlo Ntsinini confirmed that the email and debit order form were sent to "You, Ambassador, Comrade Moloi, in Khartoum!" or words to that effect. He explained to me that this is the debit order that "comrades" and ambassadors sign as their contributions "to the Movement". I asked why the debit form was sent to me because I was sure that my details would not appear in the ANC records as a member of the ANC. I said to Mehlo Ntsinini that I will think about this matter, obtain advice, and get back to him.

192. I did not get back to Mehlo Ntsinini as I had promised I would. About a month later, I received another email (on Tuesday, July 14, 2015 at 11:30 AM) from Elias Ntsinini, essentially reminding me of the debit order form he sent previously. In his email of July 14, 2015, Elias Ntsinini wrote: "Dear Cde Moloi In **Khartoum Sudan** Kindly find attached ANC PCF LEVY DEBIT ORDER FORM for completion then return it back for processing" The copy of that email is attached hereto marked Annexure "H". Attached to this email was the same debit order as the one which came with the first email (with the same information regarding details to be provided and the amount I was required to pay). I do not remember responding to this email. I simply ignored it. I did not sign the debit

order form and for the duration of my tour as ambassador in Sudan, I did not pay "levies" to the ANC.

193. At that time, I knew that (some) South African ambassadors/Heads of Mission were paying these "levies' to the ANC once appointed into that position. But I had thought at the time that these "levies" were paid only by ANC members who were "appointed" by the ANC, whether they were career diplomats or "political appointee members of the ANC" or just "ANC party deployees". I did not think that even those persons/officials who were not members of the ANC were requested to "make contributions to the Movement" in the form of these "levies" once they are appointed as ambassadors/ Heads of Mission. That is why I was surprised when the debit order form was also sent to me.

194. A number of my colleagues in the Department i.e. those who were posted as ambassadors told me that they were requested to pay and/or were paying these "levies' to the ANC. For example, the following colleagues confirmed to me (at different time) that they were paying, namely, Ambassador Victor Rambau, Ambassador Ndumiso Ntshinga, Ambassador Manelisi Genge, and Ambassador Tsengiwe. Mr Nyameko Goso was also requested to pay. I am sure that all the ambassadors (past and present) i.e. those that were and are still paying these "levies" will confirm this fact. I am sure that they too would have received the same debit order forms (but probably with differing amounts to be paid, I don't know). Their bank accounts would show these payments and the bank accounts of the ANC (as provided in the debit order form) would reflect these "receipts". When the Commission requests the Department to provide it (the Commission) with the list of all ambassadors/Heads of Mission and it requests these ambassadors to verify these facts and

provide their bank details in connection with these payments, these facts could indeed be confirmed.

195. It is important to state here that the ANC – and any other political party for that matter - is perfectly entitled to run its internal affairs the way it sees fit in terms of its constitution, including levying membership and other fees on its members. **But here is a moral hazard**: when the ANC has control and say over who gets appointed as ambassadors, it should be self-evident, is it not, that it (the ANC) is also in control of how much money it can raise from "deployees" at ambassadorial level? Under these circumstances, it is difficult to imagine that the ANC, or some of its officials and leaders, would not be interested in considering more ANC "cadres" appointed as ambassadors because that decision brings with it financial returns for the organisation? Put in crude terms, a practice like that – where the appointed officials are simultaneously expected to pay a portion of their salaries back to the "deploying agent" - could easily expose the "appointing agent" (in this case, the ANC and the President) and the "appointed official" to some serious moral hazards.

i. This appointment practice could easily be characterised as a "jobs-for-cadres/pals" scheme;

ii. The payment of "levies" under these circumstances could easily be characterised as "kickbacks";

iii. The officials and "ANC cadres" that are appointed under these circumstances might feel that their confirmation as ambassadors is dependent upon their agreement to pay back a portion of their salary/allowances;

iv. Those non-ANC members who are PROFESSIONAL and CAREER DIPLOMATS and are eligible for appointment as ambassadors might feel disadvantaged because their appointment to that position of HOM would not bring financial benefit to the ANC;

v. Those non-ANC members who might nonetheless be appointed as ambassadors (because they are career diplomats in the Department) and are asked to pay these levies might feel somewhat cajoled "to join the party" for fear that if/when they do not "contribute to the coffers of the movement" they might be prejudiced or victimised or overlooked for appointment in the future;

vi. The cumulative effect of this whole situation and practice creates a very unsavoury environment in the foreign service in the sense that CAREER DIPLOMATS **get terribly demoralised and a somewhat hostile atmosphere develops** towards "political appointees" who are seen as "outsiders" who come into the foreign service to close career and professional opportunities for CAREER DIPLOMATS;

vii. While CAREER DIPLOMATS get seriously demoralised when they are consistently overlooked for ambassadorial appointments, "political appointees" and other "party cadres" on the other hand feel increasingly "entitled" to "deployment" as ambassadors in the foreign service when they leave or are "redeployed" from their incumbent positions;

viii. The constant influx of "political appointees" into the foreign service creates an imbalance in the administration and management of the Department. For instance, the growing influx of "political appointees" does not come with additional financial resources (budget) for the Department, with the result that the allocated budget has to be stretched even more to accommodate "politically appointed" ambassadors. Further, some of these "politically appointed" ambassadors do express the desire to be employed in the Department or be send to another mission when their initial term/posting ends. In fact, there are cases in the Department where some HOMs first entered the foreign service as "political appointees" who have now gone to more than two consecutive (back-to-back) tours of duty as ambassadors. And when the Foreign Service Act says the South African foreign service will also consist of persons who are "appointed on a contractual basis for a fixed period" (see section 3(2) of the Act), it becomes difficult to comprehend the justification for the practice where "political appointees" and "ANC party deployees" are appointed for a fixed period on a permanent basis! (while career diplomats on the other hand are strictly limited to a 4-year tour of duty). The logic of the former practice is difficult to understand. It sounds like it is embedded in irrationality and arbitrariness.

ix. If and when "political appointees" are "absorbed" in the Department, that system of recruitment creates another layer of "diplomats" who would have been "parachuted" into the Department without following the normal procedures laid down in the recruitment and selection processes of the public service. And if and when "political appointees" are posted from one mission to the next (inter-mission

transfer), that system of appointment of ambassadors further closes the opportunities for CAREER DIPLOMATS for posting. The whole vicious cycle starts again!

196. The **system of appointment into the foreign service based on some financial inducement exposes the President to extremely worrying moral and constitutional hazards**. Political appointees who are "nominated" by the ANC and presented to the Minister for recommendation to the President pay "kickbacks" to the ANC once "confirmed" and appointed by the President and have taken their positions in the missions abroad. This amounts to corruption. A foreign service riddled with corrupt practices of this nature cannot be consistent with the Constitution and the values and principles governing public administration (see section 195 of the Constitution).

197. When the ANC "deploys" its own "cadres" and associates into the foreign service or makes recommendation to the Minister or "imposes" these appointees on the President with the clear intention of receiving "kickbacks" from these "deployees", the ANC will not only be violating the Constitution (see discussion below), but it will be engaging in a criminal conspiracy and corruption where it will be using a government institution (the foreign service) and resources for its own financial benefit.

198. When the Minister recommends to the President a person nominated by the ANC, knowing very well that an intrinsic aspect of that appointment would be the payment of "kickbacks" to the ANC, then the Minister will also be abetting conduct that is tainted with corruption and maladministration.

199. When the President exercises his power of appointment under section 84(2)(i) of the Constitution and appoints ANC "deployees" and "cadres" as ambassadors/HOMs knowing very well that his appointments will bring financial benefit to his own political party in the form of "kickbacks', then the President will also be participating in and abetting criminal conduct and promoting corruption and maladministration.

200. When the President continues to simply rubber stamp political party "nominations" and thus perpetuate the criminal and corrupt elements of such "politically motivated" decisions, the President will be violating the Constitution and his oath of office.

201. The President must be beyond reproach when it comes to his oath of office and exercise of his constitutional powers (in this case, power of appointment). He may not be found to be involved in or abetting activities and practices that promote consequences that are not authorised by the Constitution and the law. In *Mohamed v President of the Republic of South Africa & Others*,[75] the Constitutional Court warned about the threats posed to our constitutional democracy when government and its functionaries break the law and violate the Constitution. In *Mohamed*, the Constitutional Court had found that the South African government and its officials had acted unlawfully and violated Mohamed's constitutional rights when the South African authorities handed over Mohamed - who was arrested in Cape Town and accused of masterminding the bombings of the US embassies in Nairobi and Dar-es-Salam in 1998 - to the US government agents for removal from South Africa to stand trial in the US "without an assurance that he would not be executed and in relying on consent obtained from a person who was not fully aware of his rights and was moreover deprived of the benefit of legal advice."[76] The Constitutional Court said:

[75] 2001 (3) SA 893 (CC); [2001] ZACC 18; 2001 (7) BCLR 685 (CC)
[76] *Mohamed* at para 69.

> "South Africa is a young democracy and still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example."[77]

In order to underscore the importance of government and its functionaries obeying the law at all times, the Constitutional Court quoted with approval the "celebrated words" of Justice Brandeis (of the US Supreme Court) in the American case of *Olmstead et al v United States*[78] where the learned judge stated:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously … Government is the potent, omnipotent teacher. For good or for ill, it teaches the whole people by its example … If government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy"[79]

202. I just want to refer to one example (there are other examples) to demonstrate the kind of moral hazards that bedevil a foreign service that pays no regard for constitutional norms such as professionalism, career-orientation and non-partisanship, and where the appointment of ambassadors is based on patronage and abuse of power and abuse of state institutions. The example I want to refer to relates to the case of Ms Hazel Francis Ngubeni who was appointed by President Zuma as High Commissioner for South Africa to Singapore in 2013. I know some of the facts of this case closely precisely because when Ms Ngubeni was appointed High Commissioner for South Africa to Singapore in 2013, I was the Chief Director responsible for managing South African missions and ambassadors

[77] *Mohamed* at para 69.
[78] [1928] USSC 133; 277 US 438 (1928)
[79] *Mohamed* at para 69.

in Southeast Asia, including Singapore. In the introductory part of my affidavit/statement, I explained my responsibilities in this regard.

203. The first time I met Ms Ngubeni was in 2013 when she was attending the orientation program for appointed Heads of Mission at OR Tambo Building, the Head Quarters of our Department. Because she was going to my region (Southeast Asia, Singapore), one of the things I had to do for all my ambassadors, including Ms Ngubeni, was to sit down with them and brief them about the country/countries where they were going. I would brief them on matters such as: our political relations with that country; the main areas of work (trade, investment, cultural cooperation, and so forth); preparing business plans; the line of reporting; performance agreements and appraisals; mission management; and other matters relating to the responsibilities of a Head of Mission.

204. I had a chance during the orientation program in 2013 to meet with Ms Ngubeni to discuss some of the matters mentioned in the paragraph above. During our discussion – and I recall we were discussing the protocols of reporting to Head Office on the work the mission does - Ms Ngubeni mentioned something to the effect that she would report directly to President Zuma if/when the need arose because she has "been appointed by the President!" I mentioned to her that, yes, there are those instances where the Ambassador may be required to report or speak directly to the President when the circumstances or the issues to be discussed require the President's ear. I mentioned however that, under the normal reporting channels on any issue, the Ambassador posted abroad reports to her/his Chief Director at Head Office, and the latter would then communicate whatever message needs to be communicated through Head Office channels, including the message to the President. I explained to her that that would be the way she reports to Head Office i.e. to

me as the Chief Director responsible for Singapore (in her case). I explained further that she will sign her performance agreement with me and that I will also assess her performance.

205. During our discussion, Ms Ngubeni asked me, "Ambassador, do you know why President Zuma has appointed me High Commissioner to Singapore?" Before I could respond, she said, "My father and uBaba were prisoners at the same time and they shared a cell on Robben Island!" [by "uBaba", she meant President Zuma]. I was a bit puzzled why she had to tell me that. I did not know Ms Ngubeni and had not met her before the orientation program. I did not know why she told me that nor why she thought it was important for me to know that. I did not pay too much attention to what she said because I thought it was a matter that did not honestly concern me. All I was interested in was to brief my ambassador fully so that we are on the same page on all matters relating to her work as High Commissioner in Singapore and my responsibility as Chief Director who would be supervising her work.

206. I mentioned earlier in my affidavit/statement that when an ambassador is appointed to another country, the host country would ordinarily conduct its own security clearance on the nominated ambassador before it (the host country) issues the "Letter of Agreement" (the agrément). The Singaporeans would also have done the same on Ms Ngubeni. I recall one of my conversations with then High Commissioner for Singapore in South Africa, Mr Bernard Baker about Ms Ngubeni. High Commissioner Baker was asking me (and I don't know whether it was in jest): "But Francis, why are you sending Ms Ngubeni to us! Her CV does not say much, except that she was once an assistant at a retailer or something like that! Couldn't you find someone to send to Singapore! Why are you sending her to us!

And how does South Africa view Singapore! My government is angry with me, because they think I have done something wrong in South Africa, that's why South Africa is sending Ms Ngubeni to Singapore as High Commissioner!"(sic)

207. I was somewhat puzzled by High Commissioner Baker's statement. I knew we had requested agrément from Singapore. I did not know what was contained in Ms Ngubeni's CV, but it was clear that High Commissioner Baker (and the authorities back home) were not quite pleased! I explained to High Commissioner Baker that our system of appointment follows a particular process and that at the end of the day, it is the President who appoints ambassadors and Heads of Mission. I explained further that the decisions in that regard are not taken at our level and that in any event, the decision whether Ms Ngubeni is acceptable to Singapore or not will have to be made by Singapore! Sometime in 2013, Ms Ngubeni duly took up her post as High Commissioner for South Africa in Singapore.

208. Sometime in the latter half of 2016, major South African newspapers ran a story in which they reported that High Commissioner Hazel Francis Ngubeni was a convicted criminal who served prison time in an American (New York) jail in 1999 for smuggling a bag of cocaine when she was a cabin attendant for South African Airways (SAA). Copies of these newspaper reports can be accessed via the following links: for News24 (20 October 2016): https://www.news24.com/news24/southafarica/news/deputy-minister-slams-own-dept-for-making-drug-trafficker-an-ambassador-20161020; for the Sunday Times (02 October 2016) https://www.timeslive.co.za/sunday-times/news/2016-10-02-sa-high-commin=ssioner-past-as-drug-smuggler-exposed/; for The Citizen (19 February 2017) https://citizen.co.za/news/south-africa/1432521/disgraced-sa-high-commissioner-fired-

drug-conviction-exposed/amp/; for the Sowetan (03 October 2016) https://www.sowetanlive.co.za/amp/news/2016-10-03-dirco-looking-into-case-of-derug-smuggler-diplomat/

209. It was reported that the matter of Ms Ngubeni's criminal record and subsequent appointment as High Commissioner to Singapore was discussed in Parliament (courtesy of the Portfolio Committee on International Relations and Cooperation). It was reported (see News24 article) for instance, that then Deputy Minister of International Relations and Cooperation, Mr Luwellyn Landers "was critical of the appointment when asked by the committee, and said her [Ms Ngubeni] hiring was a disgrace." Deputy Minister Landers is further reported as having asked: "How did this person become an ambassador for the Republic of South Africa?" "It's an absolute disgrace." "This portfolio committee has raised issues in the past about ambassadors, but this is probably the worst case we've had to deal with." "It's an absolute disgrace, and I say this in my capacity as deputy minister." News24 reported further that Deputy Minister Landers had suggested that "the department and the SSA [State Security Agency] had a case to answer for hiring Ngubeni and he asked the committee to take firm action when holding those responsible for her hiring to account." The appointment of Ms Ngubeni in the light of her drug trafficking conviction and prison term appeared to have incensed Deputy Minister who understood the implications of that appointment for South Africa's relations with other countries. The Deputy Minister is reported as having said: "This is not about politics, this is about South Africa and its relations with people" and asked: "Now when we send a new ambassador somewhere, what are they going to say about us?"

210. The case of Ms Hazel Francis Ngubeni who was appointed High Commissioner for South Africa to Singapore (a country where conviction on drug trafficking charges calls for a death sentence) is a sad reminder of what could happen when such important decisions (appointment of South African ambassadors) for such important assignments (representing the President, the government and the People of South Africa) are taken with total disregard for the law and the norms and values stipulated in our Constitution. Such decisions can only be taken when other considerations such as patronage, "rewarding party loyalty", and "hiring friends, relatives, children of comrades" trump constitutional prescripts.

211. Matters relating to security clearances are strictly confidential and 'top secret'. Be that as it may, in the case of Ms Ngubeni, it would be interesting to know how her security clearance was conducted. And if it revealed any adverse information at all, which adverse information was only discovered by a newspaper (see the Sunday Times report above), it would be interesting to know what weight government (SSA, Dirco and the President to be precise) attached to it, if at all. It would also be interesting to see what recommendation the Minister of International Relations and Cooperation (Ms Maite Nkoana-Mashabane) made to the President (President Zuma) recommending the appointment of Ms Hazel Francis Ngubeni as High Commissioner for South Africa to Singapore.

212. In the News24 report referred to above, it was reported that Deputy Minister Landers appeared to have placed the blame on his department (International Relations and Cooperation) and the State Security Agency (SSA) for the hiring of Ms Ngubeni as High Commissioner to Singapore and demanded that responsible officials be called to account. That was interesting, to say the least, considering that the responsibility to appoint

ambassadors ultimately rests with the President (President Zuma then) in terms of section 84(2)(i) of the Constitution.

213. In the *Nkandla* judgment, Chief Justice Mogoeng took time to emphasise the need for the President to obey the law and the Constitution at all times. The Chief Justice drew attention to some of the important considerations that the President must bear in mind when he acts or takes decisions bearing in mind the critical position of President and the responsibilities that go with that high office. Chief Justice Mogoeng said:

> "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 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.[80] The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight.[81] To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation.[82] 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.[83] Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is

[80] See section 83(b) of the Constitution.
[81] Section 83(c) read with the affirmation or oath of office in Schedule 2 of the Constitution, in context.
[82] See sections 84-5 of the Constitution.
[83] Ministers, Judges, Heads of Chapter Nine institutions and Directors General.

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."[84]

The Chief Justice further stated:

"He [the President] is required to promise solemnly and sincerely to always connect 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 commitment to serve them well and with integrity. He is after all, the image of South Africa and the first to remember at its mention on any global platform."[85]

214. The above discussion seeks to make the following two points clear: **First**, the kind of foreign service which has been allowed to develop, and which the newly promulgated Foreign Service Act wishes to maintain, where the President exercises his powers of appointment under section 84(2)(i) of the Constitution under circumstances that perpetuate commission of a crime and promotion of corruption and maladministration (where ambassadorial appointments are made at the behest of a political party with its own private interests) cannot be consistent with the Constitution and the President's oath of office. **Second**, a foreign service that is riddled with all these sorts of practices and moral and financial hazards faces an additional **risk of being rooted on quicksand**. And, to put it rather mildly, the beauty of its image is likely to be dimmed somewhat. This should be avoided.

[84] *Nkandla* case at para 20.
[85] *Nkandla* case at para 21.

VI The Fifth Topic: The role of the ANC in ambassadorial appointments

215. I turn now to discuss the role of the ANC in ambassadorial appointments under **Topic number Five**. I have already touched upon the role of the ANC in ambassadorial appointments in some of the preceding paragraphs. Under Topic Five, the point I focus on relates to the *legal basis* for the ANC's role in these appointments, and the point I make is simply that there is no basis in law (or the Constitution) for the ANC (or any political party for that matter) to be nominating its "cadres" (or anyone) into the foreign service, or recommending to the Minister or the Director General or the President the appointment of anyone, or "imposing" the names of its "deployees" for appointment as ambassadors. The known practice over many years has been that the ANC ordinarily presents a list of names to the DG and/or to the Minister and/or to the President of those of its "cadres" and "political appointees" who should be appointed into the foreign service as officials/diplomats and/or HOMs/ ambassadors.

216. Flowing from the paragraph immediately above are the following questions: where does the ANC derive the power to nominate its cadres and "deployees" into the South African foreign service? Does that power, if any, derive from the Constitution? If so, which provision(s) of the Constitution give(s) the ANC the power to nominate HOMs for appointment (by the President) as ambassadors into the foreign service? Does the ANC derive its "power of nomination" from the notion that it (the ANC) is the "ruling party"; and because it is the "ruling party", it (the ANC) has the "prerogative" to "nominate/recommend" whomsoever it chooses into any position in the foreign/public service, including HOM position and any state owned enterprise (SOE) in order to ensure

that its policies (as the "ruling party" in government with a popular mandate) are implemented?

217. In parenthesis, the notion of a "ruling party" is inimical to the notion of a constitutional state under the rule of law. In a constitutional state (which South Africa is), there is only one "institution" that "rules"; it is "the law": that is why we speak of the "rule of law", and not the "rule of a political party". So, the ANC (or any political party for that matter) cannot, in law, be a "ruling party" in a constitutional state founded on values such as supremacy of the constitution and the rule of law.[86] What this means is that the ANC cannot claim "authority" to nominate ambassadors on the basis on its own self-professed (mis)perception as a "ruling party". But then, is the ANC a "governing party" (and therefore has the "authority" to nominate or recommend people for appointment as HOM/ambassadors)? According to the Freedom Charter, it is "the People" that "govern" in South Africa (and not a political party)! In any event, any power exercised by any branch of government or state functionary (e.g. the President) is "public power" (not "private power" or "political party power". Public officials and state functionaries can only exercise power that belongs to "the people" (i.e. "public power"). In the case of *United Democratic Movement v Speaker of the National Assembly and Others*,[87] (the *Secret Ballot* case), Chief Justice Mogoeng explained the concept of "public power" in the following terms:

> "Public office, in any of the three arms, comes with a lot of power. That power comes with responsibilities whose magnitude ordinarily determines the allocation of resources for the performance of public functions. The powers and resources assigned to each of these arms do not belong to the public office-bearers who occupy positions of high authority therein.

[86] See section 1(c) of the Constitution.
[87] [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) (22 June 2017)

> 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 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 [public] 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 system."[88] [Underlining added]

218. Going back to the founding principles of our constitutional democracy: Constitutional Principle XXI.3 of schedule 4 to the 1993 interim Constitution provided as follows:

> "Where there is a need for South Africa to speak with one voice, or to act as a single entity – in particular in relation to other states – *power should be allocated to the national government.*" (Emphasis added)

In the two *certification judgments*[89] delivered by the Constitutional Court in 1996, the Constitutional Court held, in essence, that the 1996 Constitution complies with all 34 Constitutional Principles (CPs), which were contained in schedule 4 to the 1993 interim Constitution, including the principle that when decisions are taken in relation to other states, the South African government should speak with one voice or act as a single entity, and that *foreign policy powers should be exercised by the national government.*

---

[88] *Secret ballot* case at paragraph 7.

[89] *Ex parte Chairperson of the Constitutional Assembly: Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); [1996] ZACC 26; 1996 (10) BCLR (CC) (the *First Certification Judgment*); and *Ex Parte Chairperson of the Constitutional Assembly: Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) (the *Second Certification Judgment*).

219. A decision to appoint ambassadors in terms of section 84(2)(i) of the Constitution is the kind of decision that the South African government takes "in relation to other states". Ambassadors are appointed by the President to represent her/him, the government and people of South Africa to countries where these ambassadors would be accredited, in order, among other responsibilities, to promote bilateral cooperation between South Africa and other countries. The Constitution has allocated foreign policy power (in this case, the appointment of ambassadors) to the "national government"; not to the provincial government, not to the local government; not to Luthuli House, and certainly not to a political party. And the branch of national government that has the power to appoint is the Executive (the President to be precise, in terms of section 84(2)(i) of the Constitution). In practice, the Minister of International Relations and Cooperation makes recommendation to the President of the person(s) to be appointed as ambassadors/ HOMs and the President ultimately appoints as empowered by section 84(2)(i) of the Constitution.

220. The ANC may argue that it is not involved in the "appointment" of ambassadors/HOMs since that responsibility rests solely in the hands of the President under section 84(2)(i) of the Constitution. The ANC may further say that all it does is to "recommend" the persons to be appointed and that the actual "appointment" is done by the President. Technically speaking, this may indeed be so. But, and this is a very big but, the practice paints a completely different picture. For starters, one of the ANC structures is called the Deployment Committee and one of the ANC NEC subcommittees is called International Relations. In the case of appointment of ambassadors, the Deployment Committee (as the name suggests), ordinarily submits a list to the Minister (or the DG?) who then recommends to the President (who duly appoints). This system of ambassadorial appointments is one way in which the ANC "deploys" its "cadres" into strategic positions

in various government structures, institutions, agencies, SOEs (and in this case, the foreign service).

221. While the ANC does not, technically speaking, "appoint" ambassadors/HOMs, the practice on the ground proves beyond any shadow of doubt that, in the final analysis, the President "appoints" ambassadors/HOMs based on the "recommendations", "instructions", "orders", and "directives" of the ANC and/or its Deployment Committee. If this is not so, it would be interesting to hear the explanation why the ambassadorial/ HOM positions in South African missions have been and continue to be grotesquely and disproportionately dominated by ANC "cadres" and "deployees", and why ANC "political appointees" continue to stream into the foreign service. What is clear is that the "recommendations" of the Deployment Committee (which is chaired by the ANC Deputy President who is also the Deputy President of the Republic) are routinely complied with by the President of the Republic (who is also the President of the ANC). Looking carefully at how this process (of appointment of ambassadors) works, it is crystal clear that the President appoints at the behest, direction and dictation of the ANC and/or the ANC's Deployment Committee.

222. The Constitution requires that foreign policy decisions which are taken "in relation to other states" (such as the appointment of ambassadors) should be made by the national government (the President to be precise under section 84(2)(i) of the Constitution). In light of this unambiguous constitutional injunction, it should be self-evident that political party meddling in the appointment of ambassadors/HOMs is not authorised by the Constitution. Any attempt by the ANC to "direct", "order" and "instruct" the President to appoint whomsoever the ANC "recommends" as ambassadors/HOMs would be tantamount to a naked usurpation of the President's power in terms of section 84(2)(i) of the Constitution

under the thin disguise of "only making recommendations". This usurpation of the President's constitutionally granted power is not authorised by the Constitution.

223. When the President "allows" his powers of appointment (under section 84(2)(i) of the Constitution) to be "dictated to" by the Deployment Committee of the ANC, he would be "abdicating" his constitutional responsibilities, powers and duties. And this is not authorised by the Constitution. According to the *Promotion of Administrative Justice Act* No. 3 of 2000 (PAJA), some of the grounds on which the decision of a state functionary (e.g. the President) could be reviewed and set aside include: (a) failure to comply with a mandatory and material procedure or condition;[90] (b) error of law;[91] (c) taking into account irrelevant considerations or ignoring relevant ones;[92] (d) acting under unwarranted or unauthorised dictation of another person or body;[93] (e) bad faith;[94] (f) acting arbitrarily or capriciously;[95] (g) acting in contravention of the law;[96] (h) action not rationally connected to the purpose for which it was taken;[97] (i) discretion/decision so unreasonable that no reasonable person could have so exercised the power or performed the function;[98] and (j) action tainted with unconstitutionality or unlawfulness.[99]

224. Some of the considerations that flow from the PAJA in relation to the President's power of appointment of ambassadors under circumstances where the ANC's Deployment Committee plays such a pronounced role (to put it rather mildly) include the following: **First**, when the President exercises his power of appointment under section 84(2)(i) of the

[90] S6(2)(b) PAJA
[91] S6(2)(d) PAJA
[92] S6(2)(e)(iii) PAJA
[93] S6(2)(e)(iv) PAJA
[94] S6(2)(e)(v) PAJA
[95] S6(2)(e)(vi) PAJA
[96] S6(2)(f)(i) PAJA
[97] S6(2)(f)(ii)(aa) PAJA
[98] S6(2)(h) PAJA. This test comes from the *Wednesbury* definition of unreasonableness.
[99] S6(2)(i) PAJA

Constitution, but does so at the behest of and under dictation and the beck and call of the ANC, that decision may be reviewed and set aside.

225. **Second**, when the President fails to comply with a clear constitutional injunction (that he must appoint and not be dictated to by another) or "surrenders" his powers to someone else in circumstances where the Constitution does not authorise such "delegation", then the President's decision may be reviewed and set aside.

226. **Third**, when the President appoints ambassadors based on an error of law (in this case, believing that the ANC can "recommend" to him the person(s) to be appointed as ambassadors on the basis of the (mis)perception that he should "obey" and "implement" the recommendations of the "ruling party"), then the President's decision may be reviewed and set aside.

227. **Fourth**, when the President appoints ambassadors and in the process of deciding who to appoint, he (the President) takes into account irrelevant considerations (such as the need to fulfil the wishes of his political party and to perpetuate a system where the ANC uses appointment and "deployment" of their cadres as a means of raising funds and giving "kickbacks" to the ANC) and ignores relevant ones (such as the obligation to ensure that the foreign service of South Africa is PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN), then the President's decision may be reviewed and set aside.

228. **Fifth**, when the President takes decisions which are not rationally connected to the purpose for which the power of appointment was given (i.e. to ensure efficiency, good governance, an effective foreign service that can pursue South Africa's national interests

and promote its values abroad), but instead, takes decisions aimed at benefiting his political party cadres, then the President's decision may be reviewed and set aside.

229. By providing that the foreign service of South Africa would consist of persons "regardless of whether they are ordinarily employed by the Department or by any other national department or appointed by the Department on a contractual basis for a fixed period",[100] the Foreign Service Act leaves the door open for the current status quo to persist, where the ANC's Deployment Committee will continue to "recommend" "cadres" to be appointed as ambassadors (with concomitant moral hazards mentioned above). This is not the kind of foreign service which is envisaged by the Constitution. The moral hazards associated with political party meddling in ambassadorial appointments are not authorised by the Constitution. And the Act should not create space which could inadvertently be filled with practices and consequences that the Constitution sought to eradicate.

VII The Sixth Topic: The foreign service, appointment of ambassadors and state capture

230. 'State capture' is a fairly new phenomenon in South Africa which has been popularised with the establishment of the Commission of Inquiry into Allegations of State Capture (the Zondo Commission). This Commission was established by President Zuma pursuant to the "Secure in comfort" Report by the former Public Protector, Advocate Thuli Madonsela. The Commission was launched by President Ramaphosa in August 2018 to investigate allegations of state capture, corruption, fraud and other allegations in the public sector, including organs of state.

[100] Section 3(2) of the Act.

231. There are many views on what constitutes or does not constitute "state capture". For the purposes of my present affidavit/statement, I do not think that is the debate I should be entertaining at this moment. In any event, my submission is to the Commission probing allegations of "state capture" in the South African public sector.

232. In the literature on the subject of "state capture", this phenomenon is said to exist when the following elements, practices and characteristics are extant, including:

(a) "a type of systemic political corruption in which private interests significantly influence a state's decision-making processes to their own advantage";

(b) A desire/attempt to influence the formation of laws, in order to protect and promote influential private interests. In this way it differs from most other forms of corruption which instead seek selective enforcement of already existing laws";

(c) A form of corruption in which businesses and politicians conspire to influence a country's decision-making processes to advance their own interests. As most democracies have laws to make sure this does not happen, state capture also involves weakening those laws, and neutralising any agencies that enforce them";

(d) A calculated and strategic "weakening [of] that part of the state's law enforcement mechanism that might crack down on corruption";

(e) "Full-on state capture is where corporations can influence the nature of the legislative process, and political actors allow them to do so for private gain. The whole policy-

making structure of the state becomes commodified – something that politicians are willing to sell";[101]

(f) In state capture, "Politics becomes the point of entry and exit into what is fundamentally a financial market for retaining control over the state and its assets";[102]

(g) "the way private individuals and companies [and political parties and their bigwigs] have commandeered organs of state to redirect public resources into their own hands, and have gutted those institutions responsible for protecting the country against such corruption. These include the police, the prosecution authority, the tax collection service and even parliament itself";

(h) State capture "refers to private companies [and politicians] colluding with public officials to shape the country's institutions in their favour";

(i) 'The efforts of a small number of people aiming to benefit from the illicit provision of private gains to public officials in order to profit from the workings of a government". The power to appoint cabinet ministers and board of state-owned enterprises [and ambassadors] comes standard";

(j) State capture "refers to rulers favouring their own ethnic or regional [or political] groups rather than the nation as such; the state is thus captured by a specific group; and

[101] Abby Innes, assistant professor of political economy at the LSE (speaking to BBC).
[102] Ibid.

(k) A situation in which decisions are made to appease specific interests, maybe even through illicit and non-transparent private payments to public officials, rather than to suit the national interest aggregated and mediated through a democratic process. State capture takes place when the basic rules are shaped by particularistic interests rather than by the aggregated national interest."

233. When one looks at the kind of foreign service the Foreign Service Act seeks to establish, which foreign service is rooted in a system where (a) the ANC, through its Deployment Committee nominates and plays a prominent role in the final decision (by the President) to appoint ambassadors; and (b) the ANC, through its appointed "cadres" raises funds for its own benefit as a result of an arrangement where "appointed cadres" pay "kickbacks" to the ANC, then it is clear that this system carries the seeds of unwarranted state capture.

234. The ANC has certainly played a key/influential role (as the majority party in Parliament) in the drafting of the Foreign Service Act. Given the ANC's long-term and established interest in packing the foreign service at ambassadorial level with its own "cadres" and "deployees" (with the objective of benefiting its own cadres with ambassadorial jobs so that the same cadres can, in return, pay "kickbacks" to the ANC), it is clear that the ANC had a huge interest in making sure that the kind of foreign service the Act creates protects and perpetuates the system of illicit gains, "kickbacks" and political corruption. For the ANC to (ab)use its majority in Parliament and actually engineer a piece of legislation (the Act) that perpetuates a well-calculated system of raising funds for the "ruling party" by using its "power" to influence decision-making (appointment of ambassadors) could be laden with seeds of state capture and corruption.

235. When a piece of legislation (in this case, the Foreign Service Act) deliberately side-steps the fundamental criteria set by the Constitution (in this case, PROFESSIONALISM, CAREER-ORIENTATION and NON-PARTISANSHIP), but instead, chooses "neutral" criteria (for appointment as ambassador) and thereby ensure that a system of patronage (jobs-for-cadres) and corruption ("kickbacks') which benefits the "ruling party" is not frustrated, that could amount to state capture.

236. When a piece of legislation (in this case, the Foreign Service Act) is drafted and passed by the majority ANC (in Parliament) and which legislation deliberately rejects the mandatory criteria set by the Constitution with the sole objective of "weakening" and "neutralising" constitutional imperatives and thereby commandeer organs of state (the foreign service) to redirect public resources into their own hands (through "kickbacks" and other illicit gains), then the ground is fertile for the seeds of state capture and corruption and maladministration to grow and take root.

237. The ANC clearly has reasons/motive why it seeks to continue to dominate the foreign service at ambassadorial level. It also has clear objectives it wishes to achieve with this practice, including (a) to gain financially from the "kickbacks" its "cadres" and "deployees" pay; (b) to keep its "cadres" and "deployees" and "associates" in gainful employment for reciprocal "kickbacks"; (c) to control the levers of state power for private gain; (d) to appease certain interests and "factions" within its ranks; and (e) to continue to redirect public resources into its coffers through the abuse of the foreign service and the President's powers of appointment.

238. The "appointment" of ambassadors by the ANC takes place "outside of" the process and purview of the Constitution and in a non-transparent manner. The criteria used in that process are inconsistent with the Constitution. And when the rules of the game are changed and shaped by particularistic interests (in the ANC) rather than by the aggregated national interests, the ground is fertile for state capture to take root.

239. In light of the above discussion, every effort must be made to stop the current practice of ambassadorial appointments which is commandeered by the ANC for the sole benefit of its cadres and coffers. South Africa should guard against a perception that its foreign service is "captured" by self-interested political interests. Further, South Africa should guard against subjecting public institutions (such as the foreign service) to potential abuse, where these institutions could be (ab)used by "political elites" and kleptocratic politicians for their own illicit gains. To the extent that the Act seeks to protect, preserve and perpetuate the kind of foreign service which leaves the door wide open for the ugly consequences of "state capture" to take root, the Foreign Service Act, I would submit, stands on the quicksand of unlawfulness and unconstitutionality.

VIII The Seventh Topic: Career diplomats and their right to legitimate expectation

240. Under **Topic Seven**, I wish to discuss **career diplomats and their right to legitimate expectation**. The consistent overlooking of CAREER DIPLOMATS for ambassadorial appointments and the concomitant practice of appointing "political deployees" in these positions, as well as the persistent partisan culture of such appointments (where HOMs are appointed predominantly from the ranks of one political party, the ANC) are not only inconsistent with the letter and spirit of the Constitution, the ANC Foreign Policy

Discussion Document, 1993, the decision of the Constitutional Court, and international good practice in this regard. These practices could, arguably, also be inconsistent with and could be violative of CAREER DIPLOMAT'S fundamental right to legitimate expectation enshrined in the Constitution (in this case, the legitimate expectation to be considered, *ceteris paribus*, for ambassadorial appointment by virtue of their chosen career in diplomacy and service of the Republic.)

241. The right to legitimate expectation became part and parcel of South African administrative law through fits and starts, specifically, following the decision of the Appellate Division (as it then was) in the famous case of *Administrator of the Transvaal v Traub and Others*[103] (a unanimous judgment delivered by one of South Africa's leading judicial minds, Chief Justice Michael Corbett). The importance and fundamental nature of this right was recognised with the enshrinement thereof in the 1993 interim Constitution and in the *Promotion of Administrative Justice Act* No. 3 of 2000 (PAJA) pursuant to section 33 of the 1996 Constitution. Section 24(b) of the 1993 interim Constitution provided that: "Every person shall have the right to procedurally fair administrative action *where any of his or her rights or legitimate expectations is affected* or threatened." [Emphasis added]. Section 3(1) of the PAJA provides that "Administrative action which *materially and adversely affects the rights or legitimate expectations* of any person must be procedurally fair." [Emphasis added]

242. Section 33 of the 1996 Constitution provides for 'just administrative action' and guarantees everyone the right to '[a]dministrative action that is lawful, reasonable and

[103] 1989 (4) SA 731 (A)

procedurally fair.'[104] Section 33 provides further that national legislation must be enacted to give effect to the right to just administrative action. In terms of s33(3), that legislation was supposed to (a) '[p]rovide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal';[105] (b) '*[i]mpose a duty on the state to give effect to the rights*'[ ] to administrative action that is lawful, reasonable and procedurally fair'[106] as well as the right of a person to be given written reasons;[107] and (c) '[p]romote an efficient administration.'[108] [Emphasis added]

243. The piece of legislation that was enacted pursuant to section 33(3) of the Constitution is the PAJA which has given judicial review a statutory basis for the first time in South Africa.[109] The cumulative effect of both section 33 of the Constitution and the provisions of the PAJA is that, at the moment therefore, the legal position in South Africa regarding the exercise of judicial review is that '[t]he Court's power to review administrative action no longer flows directly from the common law but from the PAJA and the Constitution itself.'[110]

244. The preamble to the PAJA provides that some of the objectives of promoting administrative justice in South Africa is to ensure, among other principles, efficient administration, good governance, '*[a] culture of accountability, openness and*

---

[104] S33(1) of the 1996 Constitution : '[E]veryone has a right to administrative action that is lawful, reasonable and procedurally fair.' S33(2) provides that '[E]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons.'
[105] S33(3)(a) of the 1996 Constitution.
[106] S33(3)(b) of the 1996 Constitution.
[107] S33(2) of the 1996 Constitution: '[E]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons.' See also s33(3)(b) of the 1996 Constitution.
[108] S33(3)(c) of the 1996 Constitution.
[109] C Hoexter, 'The principle of legality in South African administrative law' (2004) 4 *Macquarie L J* 165, 194 also cited as [2004] *MqLawJ* 8 available at http://www.austlii.edu.au/au/journals/MqLawL1/2004/8.html at page 9/18 (of pages printed from webpage)
[110] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 22, as quoted by Hoexter note 109, 194.

transparency in the public administration or in the exercise of a public power or the performance of a public function[.]' [Emphasis added]. Section 6 of the PAJA provides for judicial review of administrative action. Section 6(1) gives 'any person' the right of access to court or tribunal to institute proceedings for the judicial review of an administrative action. Section 6(2) provides the grounds on which an administrative action may be challenged on review. The grounds of review provided for in section 6(2) are essentially the old-age common law grounds which have now been given statutory imprimatur for the first time in South African administrative law.

245. The grounds for review mentioned in section 6(2) of the PAJA include the following,

(a) acting without authority;[111] (b) acting under unauthorised delegated powers;[112] (c) *bias or reasonably suspected bias on the part of the administrator*;[113] (d) failure to comply with a mandatory and material procedure or condition;[114] (e) procedural unfairness;[115] (f) error of law;[116] (g) unauthorised reason;[117] (h) *ulterior purpose or motive*;[118] (i) *taking into account irrelevant considerations or ignoring relevant ones*;[119] (j) acting under unwarranted or unauthorised dictation of another person or body;[120] (k) bad faith;[121] (l) *acting arbitrarily or capriciously*;[122] (m) *acting in contravention of the law*;[123] (n) *action not rationally connected to the purpose for which it was taken*;[124] (o) *discretion/decision so unreasonable that no reasonable person could have so exercised the power or*

[111] S6(2)(a)(i) PAJA
[112] S6(2)(a)(ii) PAJA
[113] S6(2)(a)(iii) PAJA
[114] S6(2)(b) PAJA
[115] S6(2)(c) PAJA
[116] S6(2)(d) PAJA
[117] S6(2)(e)(i) PAJA
[118] S6(2)(e)(ii) PAJA
[119] S6(2)(e)(iii) PAJA
[120] S6(2)(e)(iv) PAJA
[121] S6(2)(e)(v) PAJA
[122] S6(2)(e)(vi) PAJA
[123] S6(2)(f)(i) PAJA
[124] S6(2)(f)(ii)(aa) PAJA

performed the function;[125] and (p) *action tainted with unconstitutionality or unlawfulness*.[126]

246. It is now an established principle of South African administrative law that a person, who has a legitimate expectation, flowing from an express promise by an administrator *or a regular administrative practice*, has a right to be heard before administrative action affecting that expectation is taken. The doctrine, has however, by and large, remained one that provides procedural protection in South Africa. In a number of cases that have come before South African courts, ranging from the High Court to the Supreme Court of Appeal and the Constitutional Court, there have been increasing calls for the application of legitimate expectations beyond procedural claims.

247. It is fair to say that when officials choose diplomacy as their life-long career/vocation, they expect that when they rise through the ranks of the Department, and there is nothing that could constitute an impediment to their appointment – they would have an opportunity to serve at the highest diplomatic level as ambassadors and HOMs. This expectation is legitimate. Its legitimacy is based on the following considerations: **First**, South African constitutional and administrative law recognise that there is public administration in South Africa and that within that administration there is a public service "which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day."[127] What is more, the Constitution is clear about the kind of public service South Africa requires; a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN public service. Now, within public service there is a foreign service and the President has a constitutional *responsibility* to appoint

[125] S6(2)(h) PAJA. This test comes from the *Wednesbury* definition of unreasonableness.
[126] S6(2)(i) PAJA
[127] See section 197(1) of the 1996 Constitution.

ambassadors (section 84(2)(i) of the Constitution) who will represent her/him, the government and the People of South Africa to other nations to pursue the interests of our country and promote its values. It is axiomatic that the same rules that apply to public service apply to the foreign service. What this means is that the foreign service of South Africa should also be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. As a recognised career choice, it is fair to say that officials who choose this field (diplomacy) would have a legitimate expectation that if/when they rise through the ranks, apply themselves, and meet the necessary requirements for appointment as ambassador or HOM they would ordinarily be considered for such appointment. In other words, that they would not be ordinarily "overlooked", "ignored" and "marginalised" - without a rational explanation - in favour of a whole group of people from "outside" who are "political appointees" or "party deployees" (See the *Traub* case).

248. The **second** ground on which CAREER DIPLOMATS' legitimate expectation is founded has to do with their choice of "diplomacy as a career". In terms of international good practice, diplomacy (foreign service) is a recognised career that some people choose to practice for the rest of their professional life. These professionals would ordinarily pursue relevant academic qualifications that would open doors for them in their foreign services; just like doctors, engineers, and other professions. It is also an accepted international practice that serious foreign services appoint ambassadors and HOMs from the ranks of the PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN corps. Now, for these professionals to be deliberately and consciously "overlooked" and "marginalised" (without a plausible rational explanation) in favour of other people who would ordinarily not have chosen diplomacy as a career and would ordinarily not have devoted the same amount of energy to develop requisite skills for this career, but are nonetheless been

considered for appointment (e.g. only by virtue of their political connections or affiliation), would be unwarranted, to say the least. South African PROFESSIONAL DIPLOMATS should be in the same boat and be treated the same as their counterparts in comparative foreign services as far as their legitimate expectations are concerned.

249. The **third reason** why CAREER DIPLOMATS would have a legitimate expectation to be considered for appointment would be based on past "accepted practice". In the last ten years or so, the South African foreign service has witnessed an unprecedented domination (at ambassadorial and HOM level) by "political appointees" to the glaring "exclusion" and "marginalisation" of CAREER DIPLOMATS. Previously, CAREER DIPLOMATS could reasonably expect that they would do a tour of duty abroad (say 4 years?) and then return to South Africa for a while (say 2/3 years?) whereafter they would be eligible for another tour (provided of course they met all the requirements for a posting abroad, including a valid security clearance). Now, over and above the fact that the opportunities for posting as ambassadors abroad have shrunk incredibly for CAREER DIPLOMATS, there are those CAREER DIPLOMATS who had been stationed at Head Office for more than 5/6 years since their last tour of duty abroad. It is possible, is it not, that the latter group of CAREER DIPLOMATS cannot be posted because there has been a constant stream of "political appointees" into the foreign service?

250. In all fairness, it cannot be argued with confidence that CAREER DIPLOMATS do not have a legitimate expectation in this regard, but that, in the same breath, "political appointees" have such an expectation! On the other hand, to argue that neither CAREER DIPLOMATS nor "political appointees" have legitimate expectation (to be appointed as ambassadors/HOMs because that is the "sole prerogative" of the President, and hence no

group is being favoured), would be disingenuous. **Here is an important point**: I am not suggesting that CAREER DIPLOMATS have a legitimate expectation of a substantive nature (to be appointed as ambassadors/ HOMs). Although there is an attempt in South African courts (at least in some of the cases that have come before them)[128] to push boundaries and to open the legal gate for recognition of a substantive right to legitimate expectation, those boundaries, at the moment, are set on the foundation that the right to legitimate expectation is only available as a procedural right (say, right to be heard before an adverse administrative action or decision is taken against an individual).[129] Be that as it may, the conscious and deliberate practice of "overlooking" and "marginalising" a whole class of employees (in this case, CAREER DIPLOMATS) in ambassadorial/HOMs appointments in favour of a whole class of individuals – (a) who are not career diplomats and would ordinarily not have chosen diplomacy as a career; (b) who come from "outside" the Department; (c) who may not ordinarily be sufficiently steeped in matters diplomatic (generally speaking); (d) who are predominantly chosen from circles with a particular close connection with one particular political party; and (e) who are appointed as "pawns" on a political chessboard, which political chessboard is commandeered to redirect public resources (through "kickbacks" and corrupt practices) into the coffers of the "ruling party"– would definitely raise some eyebrows (to put it rather mildly).

251. The determination of whether a legitimate expectation exists that merits judicial protection in South African law is very similar to EU law. The requirements for the existence of such

[128] *Premier Mpumalanga v Executive Committee, Association of State Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (3) SA 265 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelihle Homes* 2010 (3) SA 454 (CC); *Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal* 2013 (4) SA 262 (CC).

[129] See M Murcott 'A future for the doctrine of substantive legitimate expectation? The implications of *Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal* (2015) 18(1) *PER/PELJ* 3133, 3134 and 3138.

an expectation in South African law were restated in *National Director of Public Prosecutions v Philips*.[130] These include:

(i) that there must be a representation which is "clear, unambiguous and devoid of relevant qualification";

(ii) that the expectation must be reasonable in the sense that a reasonable person would act upon it;

(iii) that the expectation must have been induced by the decision-maker; and

(iv) that it must have been lawful for the decision-maker to make such representation.

252. If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator's actions on the ground of procedural unfairness. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

253. **I need to make the following point crystal clear**: I am not suggesting that CAREER DIPLOMATS approach the courts of law to "protect" their supposedly substantive right to be appointed ambassadors/HOMs. That approach would be untenable and highly irregular. It is doubtful that a South African court would issue an order directing the President to appoint so-and-so ambassador/HOM by virtue of so-and-so's chosen diplomatic career! In terms of section 84(2)(i) of the Constitution, the power to appoint ambassadors and other HOMs is the responsibility of the President, not the courts.

[130] 2002 (4) SA 60 (W).

254. Be that as it may, and without departing from the generality of the last point mentioned in the paragraph immediately above, it is now trite, that the President's powers of appointment under the current constitutional order are no longer immune to constitutional-legal scrutiny. (see the case of *Pharmaceutical Manufacturers Association*). In fact, the Constitutional Court has drawn clear lines to demarcate the legal and constitutional boundaries within which the President may exercise her/his powers. One of the fundamental values upon which South Africa's constitutional democracy is founded, which fundamental value the Constitutional Court has employed to "scrutinise and control" the exercise of public (in this case, presidential) power is the RULE OF LAW. (see section 1(c) of the Constitution).[131] The Constitutional Court has stated that the "principle of legality" is an important component of the RULE OF LAW.

255. Flowing form the point immediately above, it is submitted that the President's power to appoint ambassadors in terms of section 84(2)(i) of the Constitution is also subject to and must be guided by the same legal and constitutional requirements and principles spelled out by the Constitutional Court in a number of cases dealing with the exercise of public power by state functionaries, including the President himself (see the *South African Rugby Football Union (SARFU)* case relating to the President's power to appoint commissions of inquiry in terms of section 84(2)(f)). This is what the Constitutional Court has said in some of these cases:

[131] Section 1(c) of the Constitution provides that "The Republic of South Africa is one, sovereign, democratic state founded on [the values of] supremacy of the constitution and the rule of law."

255.1 In *Matatiele Municipality v the President of the Republic of South Africa*,[132] the Constitutional Court stated, with reference to earlier judgments, that "[F]undamental to the rule of law is the notion that *government acts in a rational rather than an arbitrary manner*" and that government decisions and actions "be rationally related to a legitimate government purpose. If not, it is inconsistent with the rule of law and invalid."[133] (Emphasis added].

255.2 In *De Lange v Smuts,*[134] the Court held that "[I]n a constitutional democratic state, which ours now certainly is, and under the rule of law…citizens… are entitled to rely upon the state for the protection and enforcement of their rights."[135]

255.3 In *Van der Walt v Metcash Trading Ltd*,[136] the Constitutional Court listed the absence of arbitrary power, equality, the protection of fundamental rights and exclusion of unpredictability (legal certainty) as "some of [the] basic tenets" of the RULE OF LAW.[137]

255.4 In *Pharmaceutical Manufacturers Association*, Chaskalson P (as he then was), stated that one of the key requirements or constraints placed upon state functionaries exercising public power is "rationality", which he described as a "minimum threshold requirement applicable to the exercise of all public power."[138] Chaskalson P stated this principle in the following words:

---

[132] 2006 (5) SA 47 (CC)
[133] *Matatiele Municipality* at para [100].
[134] 1998 (3) SA 785 (CC)
[135] *De Lange* at para [31]
[136] 2002 (4) SA 317 (CC)
[137] See *Van der Walt* at paras [65], [66], [68] and [76].
[138] See *Pharmaceutical Manufacturers Association* at para [90].

> It is a requirement of the rule of law that the *exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the requirement.* It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.[139] [Emphasis added];

255.5 In *Pepkor Retirement Fund v Financial Service Board*,[140] the Supreme Court of Appeal employed the principle of legality to explain that this principle "[r]equires that the power conferred on a functionary to make a decision in the public interest, should be exercised properly, i.e. on the basis of true facts."[141]

256. What all these cases point to is this: "[o]ur Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective normative value system." This was stated by the Constitutional Court in the case of *Carmichelle v Minister of Safety and Security*.[142] What this means in the context of my affidavit/statement is that, the President's power to appoint ambassadors/HOMs in terms of section 84(2)(i) is not simply a constitutional power giving the President free licence to appoint whomsoever (s)he chooses based on her/his (President's) subjective view and without having any qualms about anything. No! What it means is that, the exercise of public power by the President when (s)he appoints ambassadors/HOMs must be guided and bound by certain norms, values and principles that embody this objective normative value system.

---

[139] *Pharmaceutical Manufacturers Association* at para [85]
[140] [2003] ZASCA 56; 2003 (6) SA 38 (SCA)
[141] *Pepkor* at para [59]
[142] 2001 (4) SA 938 (CC) at para [54]

257. The above principle was articulated by the Constitutional Court (per Chief Justice Mogoeng) in the case of *Law Society of South Africa v President of the Republic of South Africa & Other*,[143] (*SADC Tribunal*) where the Court recognised that, whilst it is important that "The President should … not be unnecessarily constrained in the exercise of constitutional powers",[144] that should "not to be understood as an endorsement of, or a solicitation for a licence to exercise presidential or executive powers in an unguided or unbridled way."[145] The Constitutional Court went further to say:

> "All presidential or executive powers must always be exercised in a way that is consistent with the supreme law of the Republic and its scheme, as well as the spirit, purport and objects of the Bill of Rights, our domestic legislative and international law obligations. Our President is never at large to exercise power that has not been duly assigned. Crucially, public power must always be exercised within constitutional bounds and in the best interests of all our people."[146]

258. To suggest that the President of South Africa (today in a constitutional state) can act willy-nilly in the exercise of her/his executive powers (in this case, to appoint ambassadors/HOMs) in the same way that the President of South Africa in an apartheid state did, would mean that we still live in the old days of adulterated parliamentary sovereignty (and its culture of impunity and unlawfulness) and not in the promised land of constitutional supremacy (and its concomitant culture of justification and accountability). The importance of South Africa's objective normative value system was reconfirmed by Ngcobo J (as he then was) in his minority judgment in *Thint v National Director of Public Prosecution; Zuma v National Director of Public Prosecutions.*[147] Some of the tenets of this objective normative value system would require that when state functionaries exercise

---

[143] [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018)
[144] *SADC Tribunal* at paragraph 2.
[145] Ibid.
[146] Ibid.
[147] 2009 (1) SA 1 (CC) at para [375]

powers granted to them by law, including the Constitution, that they would do so mindful of the requirements, among others, *to act lawfully*; *to be accountable*; *to be objectively rational*; *not to misconstrue the powers conferred on them*; **to protect fundamental rights**; *to apply the mind*; to consider relevant factors and not the irrelevant ones; **to avoid acting on the basis of ulterior motive or purpose**; and *to avoid acting arbitrarily*.

259. In the context of the appointment of ambassadors, the existing constitutional obligation to ensure that the foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN must always be taken into consideration as a guiding and binding principle in this regard. Any attempt on the part of the executive/President to side-step this constitutional imperative (by deliberately and consciously overlooking CAREER DIPLOMATS in favour of "political appointees") would be inconsistent with the Constitution and the law, and would fly in the face of the tenets of the objective normative value system that now define the constitutional state that South Africa became when we severed ties (in 1994) with the system of impunity and unlawfulness (apartheid).

260. To sum up: When the President exercises her/his powers to appoint ambassadors and other HOMs in terms of section 84(2)(i) of the Constitution, (s)he should bear the following considerations in mind, among others:

260.1 that her/his decisions must be based in law, not whim i.e. (s)he must act lawfully;

260.2 that there is a constitutional-legal obligation resting on the Executive to ensure that the public/foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and

NON-PARTISAN and that the Executive/President is obliged to respect and comply with that obligation (failing which the executive and the President will be acting unlawfully);

260.3 that in the exercise of her/his powers, (s)he should not act arbitrarily or capriciously;

260.4 that her/his powers (of appointment) must be exercised rationally;

260.5 that (s)he should not misconstrue the powers of appointment conferred on her/him by thinking that (s)he could appoint whomsoever (s)he wishes without consideration of the constitutional-legal boundaries within which her/his powers should be exercised;

260.6 that her/his decision (to appoint ambassadors/HOMs) must not be made willy-nilly but must be rationally related to the purpose for which those powers were granted (otherwise they are in effect arbitrary and inconsistent with one of South Africa's foundational values, viz. rule of law(see section 1(c) of the Constitution));

260.7 that her/his decisions do not violate fundamental rights, including the career diplomats' right to legitimate expectation;

260.8 that her/his decision should not be tainted with bias or reasonably suspected of bias;

260.9 that when (s)he appoints ambassadors/HOMs (s)he must take into account relevant considerations (e.g. that the Foreign Service must be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN) and not irrelevant ones;

260.10 that when (s)he exercises her/his power of appointment, (s)he should understand that that power is not simply a constitutional power giving the President free licence to appoint whomsoever (s)he chooses as ambassador/HOM based on her/his (President's)

subjective view and without any qualms at all; but that the exercise of that power must be guided and bound by certain principles (some enumerated above) that embody what the highest court on constitutional matters has described as South Africa's objective normative value system; and

260.11 that in discharging her/his constitutional obligations (in this case, appointment of ambassadors/HOMs), (s)he must always act with one intention and one intention only: "to uphold, defend and respect the Constitution as the supreme law of the Republic" (as section 83(b) of the Constitution enjoins her/him).

IX The Eighth Topic: President Ramaphosa and his views on the kind of public service South Africa needs

261. Under **Topic Eight**, I discuss and evaluate the views of President Ramaphosa on the kind of public/civil service that South Africa needs in order to serve the people of South Africa. The idea behind this discussion is to evaluate and try to reconcile, if possible, the President's views on the kind of public service South Africa needs and the kind of foreign service which has been created in the past fifteen years or so under the ANC government, which foreign service the Foreign Service Act seeks to maintain and preserve. The question here is: how do the President's views on the kind of public service South Africa needs square up with the kind of foreign service the ANC-led government has established, which foreign service Parliament now seeks to maintain and protect through the Foreign Service Act.

262. On 31 August 2020 - and in his recognition of the month of September as "Public Service Month" - President Ramaphosa, in his weekly "Dear Fellow South African" letter "From the Desk of the President" recounted, among other things, the kind of public service South Africa needs and the norms, values and ethos that should imbue public servants in their noble calling "to improve people's lives and change society for the better." Copy of President Ramaphosa's letter is attached hereto marked Annexure "I".

263. In the aforementioned letter, President Ramaphosa enumerated "some of [the] fundamental problems that [he, his cabinet and the whole government] are working to fix." One of the important points the President made is that "While the public service is required to implement the electoral mandate of the governing party and to account to the Executive, *they need to be able to do this work without undue political interference.*"(Emphasis added)

264. There are two things to say about the President's statement above. First, it is not immediately clear what the President means by "the public service is required to implement the electoral mandate of the governing party and to account to the Executive." What the President says here would resonate without qualms with the ANC party-faithful. It is axiomatic in ANC circles that the South African government is obliged "to implement" the electoral mandate of the ANC (as a "ruling party"), and that that mandate includes all the resolutions of the ANC elective conferences. Some of these resolutions include, the obligation on the part of government to "deploy cadres of the movement" in "strategic positions in government" and the obligation to withdraw from the International Criminal Court (ICC). There are many constitutional-legal issues that arise fom this thinking on the part of the ANC and its leaders, but that could be a discussion for another

day. What I want to take issue with though is this: Section 197(1) of the Constitution enjoins the public service to "loyally execute the *lawful policies* of *the government of the day*". (Emphasis added). That is what the Constitution demands of the public service. And that is the language that should be promoted, and not the language that says "the public service is required to implement the electoral mandate of *the governing party*". The public service is accountable to "the government of the day" and must only "execute the lawful policies" of that government. The public service is not accountable to the "governing party". Under the current constitutional-legal order, there is a clear division between party and state. And it is this separation that the framers of our Constitution sought to guard jealously when they wrote into the Constitution that the public/foreign service of democratic South Africa must be PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN. Any attempt to convolute this distinction (knowingly or unknowingly) should be avoided.

265. The second issue I want to talk to is the latter part of the President's statement in paragraphs 263 above (i.e. that "…the public service … *need[s] to be able to do this work without undue political interference*"). What the President is saying here is consistent with the initial position of the ANC in its 1993 Foreign Policy Discussion Document, where the ANC stated, as far as the new foreign service of democratic South Africa was concerned, that "We believe that *this country needs a professional diplomat[ic] service which will be independent from the narrow confines of party politics*." (Emphasis added). Further, what the President is saying when he states that public servants need to do their work "without undue political interference" is consistent with Constitutional Principle XXX.1 in schedule 4 to the interim Constitution which stated in clear terms that: "There *shall* be an efficient, *non-partisan, career-oriented public service* broadly representative of the South African

community, functioning on a basis of fairness and which *shall serve all members of the public in an unbiased and impartial manner*, and *shall*, in the exercise of its powers and in compliance with its duties, *loyally execute the lawful policies of the government of the day* in the performance of its administrative functions." (Emphasis added)

266. Further, what the President is saying in the above paragraph is consistent with section 197(1) of the 1996 Constitution which provides in essence that the public service of South Africa "must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day." Section 195(1)(a) of the Constitution also requires that public administration should be imbued with "a high standard of professional ethics." Given what the President is saying about the need for public servants to do their work without undue political interference, the following questions should be asked: (a) why is there so much "undue political interference" in the appointment and functioning of the foreign service (particularly at ambassadorial level)?; (b) is there a difference between the "public service" and the "foreign service" that could possibly justify "undue political interference" in the appointment of ambassadors and the functioning of the foreign service, and decry "undue political interference" in the general "public service" and in the functioning of that public service?; (c) does the ANC's involvement in the nomination and ultimate appointment of ambassadors not amount to "undue political interference" in the functioning of the foreign service?; and (d) when the President ultimately appoints ANC nominated/recommended "cadres" and "deployees" in a system where the President is fully aware that the appointed ambassadors/HOMs will pay "kickbacks" to benefit his political party, the ANC, is the President not participating in a system (of appointment of ambassadors) which is riddled with "undue political interference"? In light of these questions, it would be important that the President not be

accused of double standards: denouncing "undue political interference" in the functioning of the public service on the one hand, but promoting the same "undue political interference" in the appointment of ambassadors and the functioning of the foreign service on the other.

267. In his aforementioned weekly letter (of 31 August 2020), President Ramaphosa identified further one of the problems that his government wants to fix. He stated: "Senior appointments are sometimes made on political considerations rather than expertise." According to the President, when senior appointments are made on political considerations rather than expertise, "This severely limits the capacity and effective functioning of the state." The important questions to ask are: (a) what considerations does the President take into account when he persistently appoints into the foreign service those ambassadors/HOMs who come from his political party?; (b) why have career diplomats been consistently overlooked in favour of "political appointees" who (the latter) have been consistently favoured with ambassadorial jobs?; (c) just how can "political considerations" be justified, if at all, in the appointment of "political appointees" and "party deployees" into the foreign service; but at the same, "political considerations" should not be justified in senior appointments in the public service?; (d) how has the functioning of the foreign service been impacted by the system of ambassadorial appointments which has been steeped in "undue political interference" and guided solely by "political considerations" and "party interests"?

268. President Ramaphosa continues in his letter and says: "As much as the ranks of our civil service comprise individuals committed to driving government's programme of action, *it has also over the years been associated with patronage*." (Emphasis added). As far as

President Ramaphosa is concerned, patronage in the civil service has been allowed to take root because "This is manifested through the appointment of people into senior positions based on considerations other than their capability to execute the tasks of the office they are appointed to." The situation in which our foreign service finds itself today – where the ambassadorial/HOM positions in the missions abroad are grotesquely and disproportionately dominated by "political appointees" – did not come about by chance. It has come about as a result of a clearly calculated plan on the part of the ANC (and the ANC-led government) to ensure that the foreign service at ambassadorial/HOM level is dominated completely by "political appointees", "party deployees", and other "party faithful" and associates, friends, relatives, spouses, and children of the party bigwigs. And this has been going on for many years with no end in sight. There has not been any rational explanation for why this practice has been allowed to carry on for so long. What is clear though is that: (a) the ANC has used and continues to use deployment of its "cadres" into the foreign service as a means of deriving a financial benefit through "kickbacks" that these "deployees" pay to the ANC (isn't that what patronage is made of?); (b) the ANC has used and continues to use deployment of its "cadres" into the foreign service as an avenue to provide its members with gainful employment (isn't that what patronage is made of?); and (c) the ANC has used and continues to use deployment of its "cadres" into the foreign service as a means of "rewarding party loyalty"(?) (isn't that what patronage is made of?).

269. When President Ramaphosa says that one of the problems he and his government want to fix is to do away with a system of appointment into the ranks of the civil service based on patronage, His Excellency should be aware that the system of appointment into the foreign service (particularly at ambassadorial/HOM level) has been immersed in "politics of

patronage" for many rears (until now). President Ramaphosa should also be aware that he himself becomes embroiled in appointments based on patronage when he exercises his powers of appointment under section 84(2)(i) of the Constitution, and goes ahead and appoints ambassadors/HOMs who come from his party and who are not professionals, are not career-oriented, and are certainly partisan (who get "deployed" into the foreign service, among other reasons, for the sole purpose of transferring public resources to the ANC through "kickbacks"). The President needs to be aware that he cannot be heard to be condemning appointments based on patronage in the civil service, and, in the same breath, perpetuate a system of ambassadorial appointments based on patronage and corruption through the exercise of his constitutionally granted power (to appoint ambassadors) under section 84(2)(i) of the Constitution. To say that "patronage" should be done away with in the civil service, but that the same malady should be encouraged in the foreign service sounds contradictory. The impression should not be created that the President speaks with a split tongue when it gets to fixing the problem of patronage in the South African public/foreign service. When the President is heard saying one thing and is seen doing something completely different, that would not inspire confidence in his leadership and the people will doubt his commitment to fixing what he sees as a serious problem (patronage) in the civil service.

270. President Ramaphosa says: "The civil service should attract high-calibre and qualified candidates. As one of the ways of achieving this, the National Development Plan (NDP) proposes a formal graduate recruitment scheme for the public service. Our people want the best and the brightest in society to serve them." This is a noble goal indeed and it should also apply to the foreign service. One of the goals of the Foreign Service Act is said to be "to professionalise" the foreign service. The foreign service already has "candidates" who

have chosen diplomacy as a career and have been in the system for many years, and have developed the kind of knowledge, skill and experience which set them on a sound course to champion South Africa's foreign policy interests. The problem with these foreign service officers (who are professionals; who have chosen diplomacy as a career; and who are largely non-partisan) is that they are now caught-up in a system which "overlooks" and "marginalises" them (in favour of non-professional, non-career-oriented, and highly partisan "party deployees"). The career diplomats are demoralised. They are demotivated. Their career aspirations are rubbished (they are accused of "just wanting money and postings!"). They are ridiculed ("they just want to live a high life of ambassadors!"). They are despised ("apparently they were not even involved in the struggle!"). South Africa's interests abroad cannot be served by a diplomatic corps that bears such scars. It is important that the talents, knowledge, skills, expertise, and career aspirations of professional diplomats be recognised and respected and given due consideration.

271. In his weekly letter (31 August 2020), President Ramaphosa says clearly that: "The civil service must be seen as a career destination of choice by those who want to make a difference in the life of their country, and not merely as a comfortable 9-to-5 desk job or a place to earn a salary with minimal effort." What the President is saying here is consistent with the Constitution. In the case of the foreign service, the Constitution demands that it (the foreign service) must be PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN. That *constitutional* injunction should be respected. Diplomacy should be seen and treated as a career. In fact, the ANC, in its 1993 Foreign Policy Discussion Document viewed diplomacy as a *vocation*. It should therefore be self-evident that the kind of foreign service which has been created in the past fifteen or so years, which foreign service the Foreign Service Act seeks to maintain is inconsistent with the

requirement of "career orientation". The present system where the foreign service is dominated by "political appointees" and "party deployees" is inimical to what the President wishes to achieve (i.e. to make the civil service, including the foreign service "a career destination of choice"). In order for the President to demonstrate that he is serious about fixing the problem in the civil service (a) where people are appointed on political considerations rather than expertise; (b) where people are appointed on the basis of patronage; (c) where people are "parachuted" into the foreign service without requisite knowledge, skills and experience; and (d) where people are appointed so as to pay "kickbacks" to the ANC, the President should take a firm decision that he would not use his power of appointment under section 84(2)(i) of the Constitution to perpetuate a system that is based on the kind of ills he says he wants to fix and do away with.

272. In extoling the virtues of the civil service, President Ramaphosa said that "Being a public servant is an honour and a privilege. It demands dedication, selflessness, professionalism, commitment and the utmost faithfulness to the principles of Batho Pele, of putting people first." President Ramaphosa underscored the important work that public servants do in the following words: "Public servants are *entrusted with managing state resources for the benefit of the public and in guarding against them being misused and abused*. They are representatives of a government derived of the people and for the people, and are guardians of our Constitution." (Emphasis added)

273. South African diplomats must also commit to serve the people of South Africa with "dedication, selflessness, professionalism, commitment and the utmost faithfulness to the principles of Batho Pele, of putting people first." What President Ramaphosa is saying about the need to ensure that state resources are not being misused and abused is relevant

for the kind of foreign service South Africa has cultivated in the last fifteen or so years, or the kind of foreign service the Foreign Service Act seeks to maintain. The current system of ambassadorial appointments where the ANC keeps pouring its "party cadres" and "deployees" into the foreign service and expecting these "political appointees", in turn, to pay part of their salaries and allowances back to the ANC ("kickbacks') is inconsistent with President Ramaphosa's plea. The ANC should not use state resources and state institutions (the foreign service) for its own financial gain. The President should not be perpetuating a system of patronage and corruption where his political party is benefiting financially from the President's exercise of powers of appointment under section 84(2)(i) of the Constitution. When the President knows that his ambassadorial appointments are being (mis)used to benefit his party, he will also be participating in a system where state resources are being misused and abused. The President needs to avoid this conflict of interests. The President may not demand that civil servants should guard against abusing state resources when he, inadvertently, "facilitates" abuse of state resources and institutions by appointing partisan ambassadors who are required to pay "kickbacks" to his party in a system that is manifestly and palpably ridden with corruption, elements of state capture, maladministration, nepotism, discrimination, and unjustifiable marginalisation of PROFESSIONAL, CAREER-ORIENTED and NON-PARTISAN diplomats. In the light of recent reports "of scandals that point to clear complicity by certain public servants in acts of corruption", President Ramaphosa called upon civil servants – during the Public Service Month - to fight corruption and "to rededicate themselves to their calling and to fully comprehend what it truly means to be a servant of the people."

274. It is said that when the fish rots, it starts to rot from the head. It should also be true that if South Africa is to achieve the kind of civil service President Ramaphosa rightly demands,

that is, a foreign service that is fit for purpose (to serve the people of this great nation with "dedication, selflessness, professionalism, commitment and the utmost faithfulness to the principles of Batho Pele, of putting people first"), then charity must begin at home. It should be recalled that in the case of *Mohamed v President of the Republic of South Africa & Others*,[148] the Constitutional Court stated that "It is therefore important that the State lead by example",[149] because when government fails to live by its commitment (to fight corruption; to end maladministration; to stop state capture; to stop the abuse of state resources and state institutions for private gain), "existence of the government will be imperilled" (as Justice Brandeis of the US Supreme Court warned in *Olmstead et al v United States*[150]). In *Olmstead*, Judge Brandeis had stated that "Government is the potent, omnipotent teacher. For good or for ill, it teaches the whole people by its example … If government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy"[151] We should avoid this. The kind of foreign service which the Foreign Service Act seeks to create should not perpetuate a system that will sink South Africa further into the dark abyss of corruption, maladministration, unlawfulness, and anarchy.

X Conclusion

275. The nature of the foreign service which has been allowed to develop in the last fifteen years or so, which foreign service the newly promulgated Foreign Service Act wishes to maintain is inconsistent with the foreign service envisaged by the Constitution. The current public/foreign service appears to have departed from the criteria for appointment

[148] 2001 (3) SA 893 (CC); [2001] ZACC 18; 2001 (7) BCLR 685 (CC)
[149] *Mohamed* at para 69.
[150] [1928] USSC 133; 277 US 438 (1928)
[151] *Mohamed* at para 69.

set by the Constitution. Specifically, the current foreign service has turned out to be one that is grotesquely and disproportionately dominated by "political appointees" and "party deployees" who are recruited almost exclusively from the ANC and who had not chosen diplomacy as their careers, who are highly partisan, and who are not professional diplomats.

276. What is clear is that this important institution of state (the foreign service) has come under complete control of the ANC as far as appointment of ambassadors and other Heads of Mission are concerned. It is also clear that the ANC has (ab)used this institution for the purposes, inter alia, of (a) "deploying" its "cadres" into the foreign service; and (b) using the foreign service as a vehicle for raising funds through "kickbacks" that appointed "deployees" pay back to the ANC (very much like a *quid pro quo* for ambassadorial appointment).

277. What is also clear is that, for all intents and purposes, when it comes to appointment of ambassadors into the South African foreign service, the ANC plays such a pronounced role to the point where it appears: (a) that the ANC is almost the "appointing authority"; (b) that the ANC has almost "usurped" the President's power to appoint ambassadors under section 84(2)(i) of the Constitution; (c) that the President is almost "taking instructions" from and acting "under dictation" of the ANC when appointing ambassadors; and (d) that the members of the ANC and/or their associates, relatives, friends, and comrades consider themselves "entitled" to ambassadorial positions.

278. The kind of foreign service and the kind of practices (e.g. criteria for appointment) that have been allowed to take root in that area of public administration have created a fertile ground for corruption, maladministration, patronage, political interference, discrimination,

violation of rights, abuse of public resources and institutions to flourish. The moral hazards in an environment explained in this affidavit/statement are serious and have a detrimental impact on all concerned: career diplomats, "political appointees", the Minister, the DG, the President, and the ANC itself. What is more, these moral hazards impact negatively on public administration; on confidence of the public in government and its civil servants; on the moral fibre of our society; and erosion of values that underlie the kind of South Africa we envisaged at founding.

279. My affidavit/submission is in no way aimed at disparaging anyone. I have no scores to settle with anyone. I have no personal agenda or vendetta of any kind. As I said to President Ramaphosa in my letter of 14 March 2018 to him: "I wish to clarify that my submission of this Memo to you Honourable President, is part of my contribution to:

(a) promoting public participation in policy making as required by section 195(1)(e) of our Constitution;
(b) your call (in the SONA, Friday 16 February 2018) to all of us, South Africans, to put our shoulder to the wheel and "turn our country around" for the better; and
(c) the on-going process, where Parliament, courtesy of the Committee is engaging the public on the proposed Foreign Service Bill."

280. I am confident that the State Capture Commission is the proper forum to present the evidence I have presented and hope that it will help the Commission in realising its mandate. But more than that, I hope that this process will ultimately help our country and people, in the words of President Ramaphosa, "to turn our country around" for the better. Thank you.

.....
SEHLOHO FRANCIS MOLOI

Thus done at GARSFONTEIN on this day the 18th of February Two Thousand and Twenty One.

.....
Commissioner of Oaths

SOUTH AFRICAN POLICE SERVICE
GARSFONTEIN
2021 -02- 18
COMMUNITY SERVICE CENTRE
SUID-AFRIKAANSE POLISIEDIENS

PTA 2020 02 18 A 30

(HANDTEKENING) KOMMISSARIS VAN EDE
(SIGNATURE) COMMISSIONER OF OATHS

VOLLE VOORNAME EN VAN IN DRUKSKRIF
FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS

BESIGHEIDSADRES (STRAATADRES)
BUSINESS ADDRESS (STREET ADDRESS)

GARSFONTEIN

SA POLISIEDIENS

Annexure "A"

S. FRANCIS MOLOI

c/o Embassy of the Republic of South Africa
Amarat, Street 11, B9, House 6
P. O. Box 12137
KHARTOUM, Republic of the Sudan
Tel: +(249) 183 585 301/2/3/4 Mob: +(249) 92 900 900
E-mail: moloif@dirco.gov.za

5 February 2017

PER E-MAIL: Isigwela@parliament.gov.za

Hon. Moses Siphosezwe Amos Masango, MP
Chairperson of the Portfolio Committee on International Relations & Cooperation
Parliament of the Republic of South Africa
Plein Street
CAPE TOWN

Dear Honourable Masango

COMMENT ON THE PROPOSED FOREIGN SERVICE BILL, 2015

I refer to the above matter and enclose under cover hereof my Comment on the proposed Foreign Service Bill, 2015 (the Bill) for your kind attention and consideration. My submission of this Comment is pursuant to the process currently underway, where Parliament, courtesy of the Portfolio Committee on International Relations & Cooperation (the Committee) is engaging the public on the proposed Bill.

I confirm that should you and/or the Committee wish to receive my oral submissions in this regard, I shall be delighted to do so.

I thank you and trust you find this in order.

Sincerely,

S. FRANCIS MOLOI (Mr)
B.Soc.Sc., LLB, LLM (Commercial Law)(Cape Town), Diploma (Trade Policies)(WTO)(Geneva), LLM (Harvard)
Attorney of the High Court of South Africa and current Ambassador of South Africa to the Republic of the Sudan, Khartoum. Written **WITHOUT PREJUDICE** and in my capacity as an interested member of the public (service). The views expressed in this Comment are mine and should, unless otherwise stated, not be attributed directly or indirectly to the Embassy of South Africa in Khartoum or the Department of International Relations & Cooperation or any other official(s) in the Department.

COMMENT ON THE PROPOSED FOREIGN SERVICE BILL

1. I refer to the above matter and more specifically to:

(a) The current process initiated by Parliament (courtesy of the Portfolio Committee on International Relations & Cooperation (the Committee)) to solicit public comment and views on the proposed Foreign Service Bill, 2015 (the Bill) (as introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in *Government Gazette* No. 39211 of 17 September 2015) (The English text is the official text of the Bill);

(b) The recent seminar held on Thursday 26 January 2017 at the Head Quarters of the Department of International Relations & Cooperation (the Department), OR Tambo Building, Soutpansberg Road, Rietondale, Pretoria, where the Committee and the Department interacted, among others, with experts in the field and other interested members of the public to deliberate on the Bill and make proposals and comment;

(c) The invitation by the Department (courtesy of the Office of the Acting Director General, Mr KE Mahoai) to dirco officials to "familiarise [them]selves with the Bill, and if need be give inputs to [their] Head of Branch for consolidation and forwarding to the Portfolio Committee"; and

(d) The constitutional right and privilege given to every South Africa citizen, eligible and willing to do so, and without fear, favour or prejudice, to comment on proposed legislation and to engage in lawful, democratic and consultative processes of Parliament that encourage South Africans to participate in policy-making (see section 195(1)(e) and other relevant provisions of the Constitution).

2. This Comment is my contribution to the above-mentioned parliamentary process of public consultation on the Bill as well as my acceptance of the Director General's invitation to submit our views and input, if any. I should mention upfront that I did not take part in the afore-mentioned seminar held at the Department and am therefore unfamiliar with the contents and outcomes of the discussions that took place on that day. Be that as it may, had I had the opportunity to participate in that seminar, the contents of this Comment would have constituted my input and views during the seminar.

3. In this Comment, I wish to address a number of interrelated policy and legal issues, some of which are not explicitly provided for in the Bill, but which have a direct bearing on the management, administration and functioning of the envisaged Foreign Service and other matters the Bill aims to regulate. I would also propose some "amendments" to some of the provisions of the Bill with the objective of sharpening its aims and overall objectives.

4. My Comment proceeds in four main parts.

4.1 Part One covers what I shall call "**the nature of South Africa's Foreign Service**". The idea behind that discussion is to explain the kind of Foreign Service South Africa requires in order to carry out its diplomatic mandate and to pursue South Africa's interests in the context of the management and implementation of South Africa's foreign policy. In this discussion, the point will be made that the kind of Foreign Service South Africa requires must be defined and informed by (a) the relevant provisions of the 1996 Constitution read with the provisions of the 1993 interim Constitution governing public service and administration; (b) the decision of the Constitutional Court on the provisions of the 1993 interim Constitution, specifically, Constitutional Principle XXX contained in

Schedule 4 to the 1993 interim Constitution; (c) previous foreign policy position of the ANC (contained in the ANC's Foreign Policy Discussion Paper, 1993); and (d) international good practice.

4.2 Part Two focuses on **the appointment of Heads of Mission** (HOMs) in the South African Foreign Service. The idea behind this discussion is to provide the historical, legal and constitutional background and context within which HOMs should be appointed. For instance, this discussion will elaborate on the differences between the legal regimes that governed the conduct of foreign policy in general and the appointment of ambassadors in particular under apartheid and now under a constitutional dispensation. The submission would be that the manner of appointment of ambassadors in the apartheid era has now been replaced by a new system under the present constitutional dispensation that requires that certain constitutional-legal norms, values and principles be taken into consideration when the President appoints ambassadors and HOMs.

4.3 Part Three discusses CAREER DIPLOMATS and the right to legitimate expectation. The idea behind that discussion is to make a case for the reconsideration of the current system of appointment where the Foreign Service of South Africa has come to be dominated grotesquely by "political appointees" at ambassadorial and HOM level. The discussion in Part Three builds on and draws from the legal and constitutional issues traversed in Parts One and Two.

4.4 Part Four looks at a few provisions of the current Bill and makes suggestions on how they should be amended in order to sharpen the Bill's focus and objects. I shall conclude Part Four by commenting briefly on The *Memorandum on the objects of the Foreign Service Bill, 2015* (The Memo). I turn now to discuss these four topics in turn.

PART ONE: THE NATURE OF SOUTH AFRICA's FOREIGN SERVICE

5. The first issue I comment on is **the nature of the Foreign Service South Africa requires**.

5.1 During the negotiations for a new democratic dispensation (1990-1993), the negotiating parties at Kempton Park agreed, among other things, on 34 so-called "Constitutional Principles" (CPs), which CPs constituted what the parties called a "solemn pact". The parties had agreed that, when the elected representatives of all the people of South Africa draft the 'final' Constitution (within two years after the 1994 elections), they should adopt that 'final' Constitution "in accordance with a solemn pact recorded as Constitutional Principles."[1] These CPs were contained in Schedule 4 to the Constitution of the Republic of South Africa, Act 200 of 1993 (the 1993 interim Constitution).

5.2 In terms of the "solemn pact" concluded at Kempton Park, the Constitutional Assembly that was charged with the responsibility of drafting and adopting the 'final' Constitution was legally and constitutionally bound to ensure that the final text of the Constitution complied with *all* the CPs agreed to and contained in schedule 4 to the 1993 interim Constitution.[2] In other words, the 34 CPs contained in schedule 4 to the 1993 interim Constitution were "non-negotiables" and the Constitutional Assembly drafting the 'final' Constitution had no discretion and no mandate and no powers and no authority to depart from

[1] The preamble to the 1993 interim Constitution provided, in part: '[A]ND WHEREAS in order to secure the achievement of this goal [creation of a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms], elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with the solemn pact recorded as Constitutional Principles.'
[2] Ibid.

the letter and spirit of the CPs. In fact, the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: Re Certification of the Constitution of the Republic of South Africa, 1996*[3] (the *First Certification Judgment*), stated that the CPs were acknowledged by the preamble to the 1993 interim Constitution "to be foundational to the new constitution."[4]

5.3 The constitutional-legal obligation rested on the Constitutional Assembly to ensure that the 'final' Constitution complied with *all* CPs.[5] The obligation to ensure that the 'final' Constitution complied with all CPs was stated clearly and unambiguously in section 71 of the 1993 interim Constitution. Section 71(1) of the 1993 interim Constitution provided in peremptory terms that

> A new constitutional text *shall* (a) *comply with the Constitutional Principles* contained in Schedule 4; and (b) be passed by the Constitutional Assembly *in accordance with this Chapter*. [Emphasis added]

5.4 Section 71(2) underscored the importance of the constitutional-legal obligation placed on the Constitutional Assembly by providing that

> The new constitutional text passed by the Constitutional Assembly, or any provision thereof, *shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles* referred to in subsection (1)(a). [Emphasis added]

5.5 The firm commitment and obligation to ensure that the 'final' Constitution complied with all 34 CPs was buttressed by section 71(3) which provided that

---

[3] 1996 (4) SA 744 (CC); [1996] ZACC 26; 1996 (10) BCLR (CC)
[4] The *First Certification Judgment* at para [15].
[5] See also *First Certification Judgment* at para [2].

A decision of the Constitutional Court in terms of subsection (2) *certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.* [Emphasis added]

5.6 During the process of the drafting of the 'final' Constitution, the Constitutional Assembly was under an obligation, if petitioned to do so by at least one fifth of all its members, to refer any proposed draft of the constitutional text before the Constitutional Assembly to the Constitutional Court "in order to obtain an opinion from the Court as to whether such proposed text, or part or provision thereof, would, if passed by the Constitutional Assembly, *comply with Constitutional Principles*."[6] [Emphasis added]
The obligation to ensure that the draft 'final' Constitution complied with all 34 CPs was pressing. For instance, section 73(3) provided in essence that if the Constitutional Assembly failed to pass a proposed new constitutional text, the text should be referred to a panel of experts (constitutional lawyers) for advice on amendments to the proposed text, *"within the framework of the Constitutional Principles."*

5.7 The provisions of section 71 of the 1993 interim Constitution aimed to achieve one key objective; to ensure that the fundamental tenets of South Africa's new constitutional democracy and the values of that new society enshrined all the norms, values, ethos, principles, and commitments agreed to by the framers of our Constitution as encapsulated in the 'solemn pact' in the form of CPs in schedule 4 to the 1993 interim Constitution.

[6] Section 71(4) of the 1993 interim Constitution: "During the course of the proceedings of the Constitutional Assembly any proposed draft of the constitutional text before the Constitutional Assembly, or any part or provision of such text, shall be referred to the Constitutional Court by the Chairperson if petitioned to do so by at least one fifth of all the members of the Constitutional Assembly, in order to obtain an opinion from the Court as to whether such proposed text, or part of provision thereof, would, if passed by the Constitutional Assembly, comply with Constitutional Principles."

5.8 CP XXX.1 provided as follows:

> There shall be an efficient, *non-partisan*, *career-oriented public service* broadly representative of the South African community, functioning on a basis of fairness and which shall *serve all members of the public in an unbiased and impartial manner*, and shall, in the exercise of its powers and in compliance with its duties, *loyally execute the lawful policies of the government of the day* in the performance of its administrative functions. The structures and functions of the public service, as well as the terms and conditions of service of its members, *shall be regulated by law*. [Emphasis added]

5.9 CP XXX.1 enumerated some of the key values, norms, principles, requirements and attributes of the public service of a post-apartheid South Africa - which had become a constitutional state under the rule of law. These include, efficiency, professionalism (career-oriented), representativity, loyalty, fairness, non-discrimination, and lawfulness. In this Comment, I limit my submission to the kind of Foreign Service South Africa needs, which is, a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN Foreign Service (as required by CP XXX.1)

5.10 It is important to ask the following questions: (1) Is there a constitutional obligation to ensure that South Africa's public/foreign service is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? (2) Is government (or more precisely, the Executive) bound by the constitutional obligation to ensure that the public/foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN?

The immediate answer to both questions is an emphatic 'yes'. The following considerations bear testimony to the fact that there is a constitutional obligation on government to ensure that South Africa's public/foreign service is CAREER-ORIENTED,

PROFESSIONAL and NON-PARTISAN and that government is obliged to comply with that obligation.

5.10.1 First, the 1993 interim Constitution is unambiguous about the fact that it was the intention of the framers that the 'final' Constitution complies fully with all 34 CPs in Schedule 4 to the 1993 interim Constitution, including CP XXX.1.[7] For instance, while the preamble to the 1993 interim Constitution provided, in part, that "[e]lected representatives of all the people of South Africa should be mandated to adopt a new Constitution in *accordance with a solemn pact recorded as Constitutional Principles*", section 71(1) of the 1993 interim Constitution provided in peremptory terms that "[A] new constitutional text shall (a) comply with the Constitutional Principles contained in Schedule 4; and (b) be passed by the Constitutional Assembly in accordance with this Chapter."

5.10.2 Second, section 71(2) made the intention of the framers even clearer by insisting that '[T]he new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a).

5.10.3 Third, according to section 71(3), "[A] decision of the Constitutional Court in terms of subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and

[7] See *First Certification Judgment* at para [13].

binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof."

In the *First Certification Judgment*, the Constitutional Court was unanimous in holding that the 'final' draft constitutional text "[f]ailed to comply with all the 34 Constitutional Principles in respect of 12 areas."[8] In light of the Court's finding, the draft text was referred back to the Constitutional Assembly "[t]o amend the constitution in order to bring it in line with the decision of the Court."[9] In *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*[10] (the *Second Certification Judgment*), the Constitutional Court unanimously certified that the whole 'final' constitutional text complied with all the 34 Constitutional Principles, including CP XXX.[11]

5.10.4 Fourth (and flowing from the point immediately above), when the Constitutional Court certified that the final text of the 1996 Constitution complied with all 34 CPs, that 'certification decision' became *final and binding* (in terms of section 71(3) of the 1993 interim Constitution). What this means is that, when the Constitutional Court certified that the 1996 Constitution complied with all 34 CPs, no court of law could come later to enquire into or pronounce upon the validity of the Constitution or any of its provisions. What this also means is that, once certified to be compliant with all 34 CPs, the 1996 Constitution had finality and binding effect on all state functionaries, and the latter would have no power, discretion or authority whatsoever to question (or doubt) the validity or legitimacy of the 1996 Constitution or any of its provisions.

---

[8] See Justice Richard J Goldstone 'The first years of the South African Constitutional Court' (2008) 42 *Supreme Court L R (2d)* 25, 27.
[9] Goldstone Ibid.
[10] 1997 (2) SA 97 (CC); [1996] ZACC 24; 1997 (1) BCLR 1
[11] Goldstone note 8, 27.

Applying this logic to CP XXX would mean that, when the Constitutional Court finally certified the 1996 Constitution to be compliant with all 34 CPs, then no court of law or state functionary (in this case, the executive) had any authority whatsoever to undo or question the validity and legitimacy of the requirement to ensure that the public/foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN.

In the circumstances therefore, the obligation to ensure that the public/foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN is retained in the 1996 Constitution and that it is incumbent upon state functionaries to comply with that obligation. Any attempt on the part of state functionaries to act contrary to that obligation would be unlawful. They would also be acting unconstitutionally. Further, they would be acting beyond the scope of their powers. And their decisions would therefore be invalid.

The above discussion warrants the following questions:

(1) How can the practice of populating ambassadorial positions in South African missions with non-career, non-professional and partisan "appointees" or "deployees" be consistent with the constitutional obligation to ensure that the Foreign Service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN?

(2) What could be the rational justification, if any, for non-compliance with a clear constitutional obligation requiring a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN foreign service (in this case, at ambassadorial level)?

(3) When ambassadorial appointments are made contrary to the letter and spirit of the Constitution, would the Executive (the President to be precise) not be acting contrary to her/his responsibility to "uphold, defend and respect the Constitution as the supreme law of the Republic"? (see section 83(b) of the Constitution).

5.10.5 Fifth, the norms, values and principles (e.g. professionalism and non-partisanship) governing the new public/foreign service of South Africa are in any event enshrined in the 1996 Constitution. This is evidenced by the clear and straightforward provisions of section 195 of the Constitution. Section 195 provides for the "basic values and principles governing public administration". These include, "a high standard of professional ethics";[12] efficiency;[13] impartiality, fairness, equity and non-discrimination (no bias);[14] public administration that is people-[15] and development-oriented;[16] public accountability;[17] and transparency.[18]

6. The need to provide/maintain/cultivate a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN Foreign Service was articulated by the ANC in October 1993 in its Foreign Policy Discussion Paper 1993 (produced by the ANC Department of International Affairs), which paper became the foundational stone for the creation, management and conduct of a new "diplomatic service" when the Government of National Unity (GNU) under the leadership of the ANC took the reigns of government in 1994. The pertinent and relevant parts of that Discussion Paper stated (and I quote at length):

[12] Section 195(1)(a)
[13] Section 195(1)(b)
[14] Section 195(1)(d)
[15] Section 195(1)(e)
[16] Section 195(1)(c)
[17] Section 195(1)(f)
[18] Section 195(1)(g)

We believe that *this country needs a professional diplomat[ic] service which will be independent from the narrow confines of party politics*. We believe, too, that as far as possible *the activities of the foreign service should be open to public scrutiny and public accountability*. We will encourage an open, questioning culture within the Department of Foreign Affairs [DFA]. Only this can engender a robust exchange of ideas which, ultimately, will produce sustainable policy positions.

We have taken careful note of recent experiences which have shaped diplomatic services in other parts of the world. In particular, we are concerned that our professional diplomats should not live a privileged life. They must master a range of managerial skills; without these, we believe, the modern diplomat, and South Africa, will be handicapped.

We also believe – as this policy document attests – that trade and other economic issues are central to the modern diplomat. Accordingly, *we will take steps to ensure that the South African representatives abroad will be well skilled in economic and trade issues* which, amongst others, will help drive South Africa's international relations.

We will immediately take steps to ensure that, within a reasonable period, the diplomatic corps will be fully representative of South Africa's people.

Modern diplomacy has become an exacting and demanding *vocation*. It demands, in our opinion, knowledge, skilled communication, strong commitment and complete integrity. *We will foster the required professional ethos for our corps anticipating that it will take its place amongst the great services of the world.*

As responsible global citizens, the ANC will encourage South Africans who are willing and able, to *pursue careers* in international civil service. [Emphasis added]

7. What is clear from the ANC Foreign Policy Document, 1993 is that there was a strong commitment – from the very dawn of our constitutional democracy – to ensure that South Africa's national interests in the realm of foreign relations will be pursued and championed by a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN

foreign service. It was also clear that this foreign service would be equipped with a range of critical skills (including, economic and trade diplomacy, and effective and strategic communication) in order to execute its mandate and diplomatic responsibilities. The ANC Foreign Policy Document, 1993 further underscored the kind of values and principles that would imbue the 'new' South African foreign service: professionalism, loyalty, patriotism, integrity, public accountability, critical thinking, independence from narrow party politics, excellence, and an unwavering commitment to serving South Africa and its people.

8. The crisp questions to ask are: what was the intention of the framers of our Constitution when they wrote into law that the public/foreign service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? Why was it important for the framers of our Constitution to insist that the public/foreign service of the new South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? In answering these questions, I would suggest that, in their wisdom to decide that the Foreign Service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, the framers sought to imbue public service and administration with the same ethos, norms, values, standards and principles that permeate the entire constitutional fabric of our new democracy. I would also suggest that, by insisting that the Foreign Service of South Africa be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN the framers of our Constitution wanted to address the same concerns that other Foreign Services (e.g. India, Malaysia, Singapore) wanted to address when the latter decided to professionalise their services. In the case of South Africa, the framers took into account the following considerations, including:

8.1 **the need to make a clear separation between party and state.** During the days of apartheid, the civil service was literally at the beck and call of politicians who used and abused the machinery of government and its services to pursue and perpetrate illegal activities. With the adoption of a new constitution, the framers wanted to make a clean break with an apartheid system where the "ruling party and its elites" (the Nats) abused public service and administration for their own selfish and unlawful ends. In a new constitutional democracy, all that had to change! The framers sought to ensure that the new democratic government does not fall into the same temptation as the apartheid leadership by requiring that the public/foreign service be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. By 'legislating' that the public/foreign service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, the framers further sought to ensure that the public/foreign service is free from unwarranted political interference and manipulation by party officials and politicians.

8.2 **to ensure accountability and avoid arbitrariness.** When the framers insisted that the public/foreign service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, they wanted to instil the culture of accountability in public service and administration in a democratic South Africa. The framers sought to avoid a situation where government work (public service and administration) is directed by and dictated to by party officials who are not directly accountable to parliament or to the executive. When the day-to-day affairs of public service and administration are under the direction of party officials, that gives rise to a culture of arbitrary decision-making (precisely because the whim of the party is more pronounced than the will of the people through their duly elected representatives).

8.3 **to ensure continuity and stability in public service and administration.** The framers understood that in a constitutional state - which South Africa became in 1994 - where multiparty system of democratic government is one of the key foundational values (see section 1(d) of the Constitution), there is a strong possibility of power changing hands in a peaceful manner through regular elections. The framers also understood that, if and when these changes do take place the core function of government (public service and administration) should not be thrown into disarray as a result of political power changing hands. They understood that it was important that the normal governmental responsibilities be carried out even if/when power has changed hands and there are new "rulers"(sic) in government. The framers wanted to avoid a situation where a change in government disrupts society so much that public service and administration is paralysed because civil servants who would have been partisan and loyal to the ousted party enter the fray by "destabilising" and "undermining" the new administration. The framers wanted to ensure that there should still be continuity and stability in government; that is why there are provisions in the Constitution requiring that civil servants loyally execute the lawful policies of the government of the day (see e.g. section 197(1)).

8.4 **to protect the morality of civil/public servants.** A point has already been alluded to in 8.1 above that since apartheid made no distinction between party and state, the officials were exposed to terrible moral hazards as they were obliged to engage in unlawful and illegal activities ordered by their political masters. The framers of our Constitution wanted to avoid those practices from happening in a constitutional democracy. They wanted to ensure that the public/foreign service is

above narrow party politics and that civil servants concern themselves only with executing in a loyal and patriotic manner the lawful policies of the government of the day free from manipulation and dictation by politicians and party officials.

8.5 **to avoid a patronage system taking root in the public/foreign service**. A public/foreign service that is partisan, non-professional and not career-oriented is prone to manipulation and abuse by politicians with narrow vested interests. By demanding that the public/foreign service of South Africa be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, the framers wanted to avoid a system of public service and administration in the new South Africa that is rooted in patronage and the whim of the "ruling party" and its officials.

8.6 **to protect the public/foreign service from political abuse**. See discussion above.

9. In the circumstances therefore, it is my submission that the proposed Bill should state categorically and in no uncertain terms that the Foreign Service envisaged in the Bill shall be a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN one. This is required by the terms of CP XXX.1 as certified by the Constitutional Court in *the Second Certification Judgment*, and as retained in the 1996 Constitution courtesy of section 195 (and other relevant provisions having a bearing on public service and administration in South Africa). Providing for a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN Foreign Service will also be consistent with the initial (1993) policy statement of the ANC. It is my submission that, any oversight on the part of the Bill not to state this requirement in clear and unambiguous terms might fall short of the implicit constitutional requirement to provide for a

CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN foreign service. (See discussion in part four below)

PART TWO: APPOINTMENT OF HEADS OF MISSION

10. I move now to another important point of my submission, and that relates to **the appointment of Heads of Mission** in the diplomatic/foreign service of South Africa. My submission on this point is directly linked to and flows from the key point I have made in part one above, namely, that the Foreign Service of South Africa at Heads of Mission (HOMs) level should likewise be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN.

11. The Bill defines "Head of Mission", in part as, "an Ambassador, High Commissioner, Consul-General, Permanent Representative, and any other person appointed to represent the Republic as such in terms of [ ]" various international legal instruments governing international diplomatic and/or consular representation. The Bill provides (in section 4(1)) that "[T]he Head of Mission is responsible for the management and administration of the Mission and all members of the Foreign Service located at the Mission, including the locally-recruited personnel in the Mission." Section 4(2) on the other hand provides that "[T]he Head of Mission must act on the instructions and under the authority of the Director-General."

12. The Bill does not provide in categorical terms that HOMs should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. On the contrary, the Bill (in section 2(2)) suggests/implies that HOMs could be appointed from outside the ranks of the career corps i.e. the so-called "political appointees". Section 2(2) of the Bill provides, in essence, that members of the South African Foreign Service, including HOMs may be appointed to

hold a position in a South African mission abroad "regardless of whether they are ordinarily employed by the Department [dirco] of by any other national department *or appointed on a contractual basis for a fixed period.*" (Emphasis added). What is clear from section 2(2) of the Bill is that it (the Bill) opens the door for the possibility of appointment of members of the Foreign Service, including HOMs from outside the Department to accommodate those who could be "politically appointed" (for a lack of a better word) from outside the ranks of CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN corps.

While section 3(1) of the Bill appears to limit membership of the Foreign Service to "only citizens of the Republic, employed by the Department or by another national department", section 2(2) on the other hands opens the door for another category of individuals who might be appointed into the Foreign Service; these are those "officials" who might be appointed "on a contractual basis for a fixed period." The latter category would ordinarily refer to "political appointees" who might come from other national departments other than dirco, or completely from outside government structures e.g. business, academia, the unemployed, and NGOs.

In section 1 of the Bill (the definitions section), the term, "national department" is defined as "a national department or a national government component as referred to in section 7(2)(a) of the Public Service Act, 1994 (proclamation 103 of 1994), and includes the South African Revenue Service." Section 7(2)(a) of the Public Service Act, 1994 provides that "[F]or the purposes of the administration of the public service there shall be – national departments and offices of the Premier mentioned in column 1 of schedule 1[.]"

13. A close and careful reading of the Bill, specifically sections 2(2) and 3(1) will show that the Bill is fundamentally *not* aimed at providing for a Foreign Service that is intrinsically CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. However, it seeks to

create a Foreign Service so amorphous as to include anybody from anywhere. At first glance therefore, the objective of the Bill is not to provide for a Foreign Service that is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. On the contrary, the Bill provides for a Foreign Service that is inclusive of anyone who might be appointed from anywhere (outside the Department, from civil society, private sector, the unemployed, academia, and NGOs, to mention but a few). At first glance therefore, the Bill appears to be:

(a) inconsistent with the letter and spirit of CP XXX.1 as retained in the 1996 Constitution;

(b) inconsistent with the decision of the Constitutional Court in the *Second Certification judgment* which held, conversely, that the 1996 Constitution should comply with all CPs, including CP XXX.1;

(c) out of step with the original policy statement of the ANC i.e. that the Foreign Service of the new South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN (see further discussion below); and

(d) inconsistent with international good practice (see discussion below).

14. A Foreign Service Bill that departs from a base far removed from what the law and long-standing policy provide on this matter (i.e. the kind of Foreign Service South Africa requires) runs the risk of being tainted with unlawfulness, illegality, unconstitutionality and invalidity *ab initio*. This Bill must be rooted and must derive its legitimacy in law from the very onset. It should avoid creating a situation which was never contemplated by the framers of our post-apartheid constitutional order. It should also avoid taking a stance that flies in the face of the authoritative decision of the Constitutional Court on this matter (the kind of public/foreign service South Africa requires). Further, it should avoid creating a set-up in the Foreign Service of South Africa that is potential conflictual (see discussion below). In fact,

this Bill should, at the very least, correct the situation in the Foreign Service of South Africa which has been allowed (consciously or unconsciously?) to persist for a very long time now, which is, the creation of a dominant layer of Foreign Service officials at HOM level who are overwhelmingly *not* CAREER-ORIENTED, *not* PROFESSIONAL[19] and are palpably and manifestly PARTISAN.

15. Now, in the "informal" and "semi-formal" discussions that have taken place in meetings, seminars and workshops of the Department on the issue of appointment of HOMs – specifically on whether these HOMs should be drawn from the CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN diplomats or be "political appointees" from outside the Department - this point would be quickly dismissed as an issue that does not concern officials! The immediate reaction to any invitation to discuss or debate that issue would be met with a stern response to the effect that the appointment of HOMs is the exclusive prerogative and responsibility of the President in terms of section 84(2)(i) of the Constitution. I hasten to add that, the attempt in the Bill to provide for the inclusion of "political appointees" in the Foreign Service of South Africa is, I would submit, (mis)informed by that very notion (that the appointment of HOMs is the exclusive prerogative of the President *and* that that discretion cannot be questioned)(more on this below).

16. Section 84(2)(i) of the Constitution provides that "[T]he President is responsible for appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives." Those who argue that the appointment of HOMs is the exclusive responsibility of the President in terms of section 84(2)(i) of the Constitution are correct; that is what the Constitution provides. However, the very same officials who say that the appointment of HOMs is the responsibility of the President make a mistake of *stretching that argument*

[19] By "non-professional" here I refer to "non career-oriented" diplomats.

further beyond the limits set by the Constitution with respect to the exercise of that presidential power of appointment. These officials hold the mistaken view that the President's power of appointment (of HOMs) is beyond scrutiny; that it cannot be "interfered with"; and that it cannot be "questioned" in anyway. In other words, these officials hold the mistaken view that the President's exercise of public power (to appoint HOMs) is "completely subjective" and "totally absolute". This is incorrect (see discussion below).

17. Notwithstanding the views expressed in the paragraph immediately above, my submission herein is *not* aimed at challenging the President's constitutional powers to appoint HOMs. As section 84(2)(i) of the Constitution clearly provides, the appointment of HOMs is the responsibility of the President, no one else. The crisp question to ask though is: is the President's power to appoint whomsoever (s)he wishes as HOM "unconstrained"? Is that power untrammelled? Is it unlimited? Is it absolute? Conversely, are there any norms, values and principles that the President is constitutionally and legally obliged to take into consideration and to apply her/his mind over when she/he appoints HOMs?

18. The argument that the President's power to appoint HOMs is "absolute", that it is "unconstrained", that it is "untrammelled" and that it rests "solely" with the President's "subjective view", and as a result, should not be "interfered" with, is, with respect, incorrect. Conversely, it is my submission that there are certain constitutional-legal norms, values and principles that bind the President's exercise of her/his powers to appoint HOMs, which the President must always take into consideration and over which (s)he must apply her/his mind. It is my submission that:

18.1 The President's power to appoint HOMs is, unlike in the old pre-democratic

dispensation, **no longer governed by the common law prerogative**. In pre-democratic South Africa, the appointment of ambassadors constituted the Crown (now executive government) prerogative power, and the exercise of that prerogative power (under the common law) was beyond scrutiny by anyone. The President's decision to appoint whosoever *he* wished under the common law prerogative power was unquestionable; that decision could not be "interfered" with; that decision was absolute; that decision was "untrammelled". However, in the 'new' South Africa that became a constitutional state under the rule of law (in 1994), the situation governing the exercise of public power (in this case, the appointment of HOMs) is radically different from the way the apartheid system used to deal with this matter. Under the new constitutional dispensation, there are now clear norms, values and principles (e.g. accountability, rationality, openness, and high standard of professional ethics) that are clearly spelled out in the Constitution and the law, including *Promotion of Administrative Justice Act* (PAJA) No. 3 of 2000, which must "guide", "inform" and "bind" state functionaries exercising public power (in this case, the President exercising her/his powers of appointment) (see detailed discussion below).

18.2 The appointment of HOMs should be consistent with (a) the letter and spirit of CP XXX.1; (b) the decision of the Constitutional Court in the *First Certification Judgment* and the *Second Certification Judgment*; as well as (c) all other relevant provisions in the Constitution that govern public administration, including the provisions of section 195 of the Constitution. Specifically, that the appointment of HOMs be reflective of and comport with the constitutional-legal obligation to provide a Foreign Service that is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, as opposed to the current practice where the appointment of HOMs is grotesquely

disproportionate and heavily weighted in favour of "political appointees" who ordinarily do not fall within the definition of a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN service.

18.3 Parliament should, through this Bill, make it crystal clear that the South African Foreign Service (including its HOMs) is able to "take its [rightful] place amongst the great services of the world" (as the ANC Foreign Policy Discussion Paper, 1993 correctly suggested) by providing in unambiguous terms that the diplomatic service of South Africa will be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN at all levels, including HOM-level.

19. I turn now to address each of the submission points in paragraph 18 above in some detail.

19.1 Appointment of HOMs under apartheid and appointment of HOMs in democratic South Africa

19.1.1 Before 1994, South Africa's foreign policy and foreign affairs were conducted on the basis of **the old common law prerogative powers** derived from English law.[20] The prerogative power to conduct foreign affairs was governed by the so-called 'act of state' doctrine, which provided in part that the acts of the South African state in foreign affairs (in this case, the appointment of ambassadors) were beyond the reach of judicial review (the 'doctrine of the non-justiciability of 'acts of state").[21] In the case of *Pharmaceutical Manufacturers Association of South Africa & Another In Re the Ex Parte Application of the*

[20] J Dugard *International Law: A South African Perspective 4th ed* (2011) 71.
[21] Dugard *supra* 71.

President of South Africa & Others,[22] Chief Justice Chaskalson explained what the common law prerogative powers are by referring to the English case of *Laker Airways Ltd v Department of Trade*[23] where Lord Denning described the prerogative power as "[a] discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity [eg foreign affairs] for which the law has made no provision."[24] The common law prerogative power therefore, essentially constituted the power of the Crown (now the executive government) to act according to discretion, for the public good without the prescription of the law.[25] Some of the prerogative powers relevant to the conduct of foreign affairs included, the power to conduct foreign relations,[26] the defence of the realm, **the power to appoint ambassadors**, the power to recognise foreign sovereigns, and the power to declare war. Under the common law, scrutiny of such 'royal' residual powers was not possible.'[27] Since prerogative powers were discretionary powers for which the law made no provision, they (prerogative powers) could not be questioned by anyone or subjected to constitutional scrutiny/review by the courts or parliament. The law did not interfere with the exercise of the discretion by the executive in matters relating to foreign policy, including the appointment of ambassadors. The rationale for this policy was '[f]ounded upon the proposition that the very nature of the relations between states means that there are no judicial standards by which to determine the lawfulness of sovereign acts done in the sovereign's conduct of

[22] 2000 (2) SA 674 (CC)
[23] [1977] 1 QB 643
[24] *Pharmaceutical Manufacturers Association* at para [36].
[25] John Locke *Second Treatise of Civil Government* [full citation]. See also Lord Denning in *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643 at 705B-C referred to by Chaskalson CJ in *Pharmaceutical Manufacturers Association* at para 36 (and footnotes therein)
[26] See Dugard *supra* 71.
[27] D Mullan 'Judicial review of the executive – principled exasperation' (2010) 8 *New Zealand J of Public & IL* (No. 2) 145 at 161.

foreign relations.'[28] What this means is that, during the days of apartheid, no one (including the courts) could question any decision taken by the apartheid government and its leadership on matters of foreign policy, including the appointment of ambassadors. That is why the South African government could violate with impunity every known tenet of international law, international humanitarian law and international human rights law under the thin disguise of pursuing its national interests (national security, internal stability and "law and order") knowing very well that their foreign policy decisions could never be questioned or scrutinised by parliament or the courts or anyone.

19.1.2 However, with the advent (in 1994) of a constitutional democracy under the rule of law, the realm of foreign relations and the manner in which the new South African government was to design, manage and conduct its foreign policy changed dramatically. In 1994, South Africa moved from a dispensation where parliament was "sovereign" and its laws could not be challenged for constitutionality and where the decisions of the Executive in foreign affairs could not be questioned, to a radically new system where the Constitution was supreme (supremacy of the constitution) and where the exercise of public power was subject to constitutional control. In *Pharmaceutical Manufacturers Association*, Chief Justice Chaskalson stated:

> [T]he interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say the principles of common law have ceased to be material to the

[28] Lord Sumpton 'Foreign affairs in the English courts since 9/11' Lecture at the Department of Government, London School of Economics, 14 May 2012 available at https://www.supremecourt.uk/docs/speech_120514.pdf

development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. *But there has been a fundamental change*. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, *and the constraints subject to which power has to be exercised*. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed.[29] [Emphasis added]

Deputy Judge President Mahomed described the difference between the apartheid dispensation and the constitutional one in more graphic terms when he said:

In some countries the Constitution only formalises, in a legal document, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of a commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. *The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic*.[30] [Emphasis added]

Justice Ackerman also elaborated on the differences between the apartheid system and the constitutional system and their ways of doing things when he stated:

[29] *Pharmaceutical Manufacturers Association* at para [45]
[30] *S v Makwanyane & Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 at para 262.

> *We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law* to a present and a future *in a constitutional state where state action must be such that it is capable of being analysed and justified rationally.* The idea of a constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. *Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.*[31] [Emphasis added]

After 1994, and in line with the radical transformation brought about by the transition from apartheid to democracy, the conduct of South Africa's foreign policy was no longer subject to the common law prerogative but was now subject to a system that provided for *constitutional control of all exercise of public power, including exercise of public power in the realm of foreign policy* (and in this case, appointment of ambassadors).

19.1.3 In the case of *Pharmaceutical Manufacturers Association*, Chief Justice Chaskalson authoritatively stated that, with the adoption of the new Constitution, South Africa had moved away from a system of law where some executive powers (e.g. foreign affairs powers) were governed by the common law prerogative to a new system of constitutional supremacy. The learned Chief Justice said: '[P]owers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of power are now regulated by the Constitution.'[32]

---

[31] *Makwanyane* at para 156.

[32] 2000 (2) SA 674 (CC) at para [41]. To make his point, Chief Justice stated further that: 'Thus, in *President of the Republic of South Africa & Another v Hugo* [1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC)] the power of the President to pardon or reprieve offenders had to be dealt with under section 82(1) of the interim Constitution, and not under the prerogative of the common law. In *Fedsure [Life Assurance Ltd & Others v*

19.1.4 The **cardinal points** I want to make – by explaining, as I do above, the differences between the apartheid and post-apartheid legal regimes that governed the conduct of foreign affairs in general and appointment of ambassadors in particular – are the following:

(a) The idea that the President's foreign affairs powers to appoint ambassadors (in terms of section 84(2)(i) of the Constitution) without any question whatsoever is not borne by the facts and is not supported by the legal and constitutional provisions governing the conduct of foreign policy (in this case, appointment of ambassadors) in South Africa. In other words, it is incorrect to suggest that the President's foreign affairs power to appoint ambassadors is absolute, cannot be questioned, is untrammelled, and cannot be interfered with. On the contrary - and because the appointment of ambassadors involves the exercise of public power - the President's foreign affairs power to appoint ambassadors is subject to constitutional control.[33] In the circumstances, the President's foreign affairs powers should, at the very least, be 'guided by', 'informed by' and 'bound by' certain norms, values, and principles enshrined in the Constitution pertaining, among others, to the kind of Foreign Service South Africa requires.

(b) Under apartheid, the President could appoint whomsoever *he* chose without any worry of being questioned about his appointments by anyone. This was so

---

Greater Johannesburg Transitional Metropolitan Council & Others] 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC)], the question of legality had to be dealt with under the Constitution and not under the common law principle of ultra vires. In *Sarfu 3 [President of the Republic of South Africa & Others v SARFU & Others] 2000 (1) SA 1 (CC); 2000 (10) BCLR 1059 (CC)]*[,] the President's power to appoint a commission and the exercise of that power had to be dealt with under section 84(2) of the Constitution and the doctrine of legality, and not under the common law principle of prerogative and administrative law.'

[33] See *Pharmaceutical Manufacturers Association* at paras [19], [33], and [51]

because the appointment of ambassadors constituted part of the executive's prerogative powers under the common law, which power – because it fell within the domain of foreign affairs – was governed by the so-called "act of state" doctrine. In terms of this doctrine, the actions or decisions of the South African government/state/executive in the realm of foreign affairs were not justiciable (and could not be reviewed or questioned by anyone, including the courts of law). Under apartheid therefore, the following decisions of the President were, technically speaking, legitimate and could not be reviewed or questioned by anyone e.g.

(i) the President could choose whomsoever *he* wanted even if that person did not meet the 'fit and proper' requirement;

(ii) the President could literally overlook CAREER DIPLOMATS in favour of '*his* own people';

(iii) the President could deliberately appoint members of his own political party (including spouses, children and friends of relatives) as ambassadors to the glaring exclusion of CAREER DIPLOMATS; and

(iv) The President could make all these appointments knowing that, legally speaking, he was on 'safe ground', precisely because his decisions and appointments - since they constituted part of his prerogative powers in the realm of foreign policy/affairs - could not be questioned or challenged by anyone.

(c) In the democratic dispensation however – and unlike under apartheid - the President's power to conduct foreign policy and appoint ambassadors (as stated above) is no longer governed by the unassailable common law prerogative.

Under the new dispensation, the power to appoint ambassadors is now subject to constitutional control. The President's foreign affairs powers to appointment ambassadors is now 'regulated', 'guided', 'informed' and 'bound' by certain norms, values and principles enshrined in the Constitution. And one of the key norms that should 'guide' and 'inform' the President in her/his appointment of ambassadors is the constitutional obligation that the public/foreign service of South Africa must be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN.[34]

(d) When the President appoints ambassadors from among CAREER and PROFESSIONAL corps, (s)he will be acting consistent with the letter and spirit of the Constitution. (S)he will be acting lawfully. (S)he will be acting consistent with the constitutional obligation placed upon her/him to "uphold, defend and respect the Constitution as the supreme law of the Republic."[35] On the contrary, if/when the President does not appoint ambassadors from the PROFESSIONAL and CAREER-ORIENTED corps, but instead (like under apartheid) e.g. (i) appoints members of her/his political party; (ii) appoints spouses, children and relatives of friends and party members; (iii) consistently, deliberately and consciously overlooks PROFESSIONAL and CAREER DIPLOMATS and creates a bloated layer of "political appointees" and packs the Foreign Service at ambassadorial level with "officials" who are not career diplomats and are essentially partisan, then the President will be acting outside the scope of her/his powers and contrary to the letter and spirit of the Constitution as far as appointment of ambassadors is concerned.

[34] See discussion above, specifically in the context of CP XXX.1. See also the *First Certification Judgment* at para [454].
[35] See section 83(b) of the 1996 Constitution.

20. **The following crucial point needs to be emphasised**: The above submissions do not seek to undermine or challenge the President's foreign affairs powers to appoint ambassadors in terms of section 84(2)(i) of the Constitution. What the submissions seek to do, is to point out the constitutional-legal norms, values and principles that should guide and inform the President's exercise of powers of appointment. Specifically, that the President should take into account the legal and constitutional obligation to ensure that the Foreign Service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN (in this case, at ambassadorial level).

21. In the last 23 years of our constitutional democracy, the foreign service of South Africa has progressively been dominated by an overwhelming majority of "political appointees" at ambassadorial level in the missions abroad. Now, just from a quick glance at these numbers, it would be clear – in the context of the submissions above - that the appointment of ambassadors in the South African foreign service in the last 23 years:

(a) does not reflect the letter and spirit of CP XXX.1;

(b) is inconsistent with the decision of the Constitutional Court (or at least the Court's certification that the 1996 Constitution requires that the public/foreign service of South Africa is and should be consistent with CP XXX.1 i.e. CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN;

(c) is not in sink with the ANC's policy position, which policy position formed the foundational stone of a new foreign service after 1994; and

(d) is out of step with international good practice.

22. Following on the last point in (d) immediately above, the submission would be that

this phenomenon of a foreign service at ambassadorial level completely populated with "political appointees" is out of step with the practices of other foreign services in other countries such as Brasil, India, China, Russia, Egypt, Singapore, Malaysia, Switzerland, Germany as well as other countries of the G-20. South Africa's Foreign Service which is dominated overwhelmingly by "political appointees" at ambassadorial level appears to stand alone in the face of modern diplomatic practice in a globalising world. Almost all countries in the world - at least those that have given considerable importance and seriousness to their international relations and diplomacy - have consistently sent abroad diplomats (at ambassadorial level) who are recruited from their CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN corps.

A few countries that I sampled briefly, whose foreign services are dominated by "political appointees" or where "political appointees" constitute a significant component of the foreign service showed somewhat similar characteristics. For instance, in these countries, there is a huge trust deficit between the ruling elites and civil servants; the former do not trust the latter with implementing the policies "of the government of the day". Further, these countries manifested a rather pronounced political influence and "interference" with "public service and administration" in the sense that the foreign service is seen as yet another vehicle to employment and other financial benefits for those who would have been "off-loaded" by the political system (either because they lost elections or their cabinet posts).

The ambassador of one of the countries I sampled (east African country, name withheld), said to me that in his country, the foreign service - by virtue of it being populated overwhelmingly so by "political appointees" at ambassadorial level - is called with all sorts of derogatory names e.g. "retirement village for those who have outlived their time and utility in politics"(sic), "employment agency of the ruling party"(sic), and a "dumping site for failed ministers and other unwanted politicians"(sic).

In the case of South Africa, an impression should not be created that there is a trust deficit between the "ruling party" and the civil servants. An impression should also not be created that the Foreign Service of South Africa at ambassadorial level is but another avenue for "politicians" and "party cadres" and their associates to be in gainful employment.

The ANC, way back in 1993, envisaged a South African Foreign Service that was "*professional*" and "*independent from the narrow confines of party politics*." Further, the ANC envisaged a Foreign Service that would be "*open to public scrutiny and public accountability*." Taking into account the important role that the 'new' Foreign Service of South Africa would play in an ever-changing and complex world of global politics and diplomacy, the ANC committed the new government to "*foster the required professional ethos for our corps anticipating that it will take its [rightful] place amongst the great services of the world*." What is more, the ANC viewed diplomacy as a "*vocation*".

In the circumstances, the Foreign Service of South Africa should, importantly so, even at ambassadorial level, be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN **(as the Constitution and the law require)**.

23. South Africa's foreign service - which is grotesquely and disproportionately dominated by "political appointees" - faces a number of challenges and negative consequences. These include the following:

(a) The system has major legal and constitutional huddles to overcome to justify this state of affairs which, as pointed above, is:

(i) inconsistent with the letter and spirit of South Africa's post-apartheid constitutions;

(ii) inconsistent with the initial policy position of the ANC;

(iii) inconsistent with the decision of the Constitutional Court; and

(iv) out of step with international good practice.

(b) The consistent and progressive recruitment and appointment of "political appointees" at ambassadorial level over the last 23 years necessarily means that there has been, simultaneously, a corresponding, deliberate and conscious "exclusion" and/or "marginalisation" of CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN DIPLOMATS at ambassadorial level in South Africa's missions abroad.

(c) The manifest "marginalisation" of CAREER-ORIENTED DIPLOMATS from ambassadorial positions in South Africa's foreign service **demoralises** those members of the Senior Management Service (SMS) (e.g. directors and chief directors) who have chosen diplomacy as their career/vocation and would ordinarily qualify to be appointed as ambassadors (but are not). That practice further sends a message to these officials that they are not valued and that the government in general and the Department in particular do not care too much about their career paths and development in the vocation of their choice.

(d) The consistent "overlooking" of CAREER-ORIENTED and PROFESSIONAL DIPLOMATS from ambassadorial positions exposes these officials to **serious moral hazards**. For instance, there are occasions where members of the SMS have (discreetly and openly) "lobbied" Luthuli House and/or the Director General and/or the Minister for ambassadorial consideration! This is highly irregular! It is undesirable.

(e) Flowing from the point immediately above, when officials are made to

believe that their "worth" to be considered for ambassadorial appointment is not dependent upon the content of their character and excellence as CAREER-ORIENTED and PROFESSIONAL DIPLOMATS, but on the whim of a party official (at Luthuli House) or the Director General or the Minister, then that situation could **engender the seeds of corruption, nepotism, favouritism, unfair discrimination, and unfair labour practices**. In parenthesis, section 195(1)(i) of the Constitution provides, among other requirements, that employment and personnel management practices in public administration in South Africa must be based on "ability", "objectivity" and "fairness".

When officials are not appointed on the basis of ability, excellence and merit, but on other grounds that do not talk to their "worth" and "pride" as professionals in the field of their choice (diplomacy), that could have **a serious negative impact on these officials' self-confidence and morale**. They would feel under-valued. They would feel undermined.

(f) The consistent "overlooking" of CAREER-ORIENTED and PROFESSIONAL DIPLOMATS for ambassadorial appointment does not only harm the professional and personal interests of SMS officials. That practice will also send a strong (and ugly message) to the junior officials in the Department that:

i. **their careers as diplomats will be limited** in the sense that, those who would rise through the ranks and possibly qualify to be appointed as ambassadors in the future should forget about that possibility (precisely because the practice over many years has shown clearly that ambassadorial

appointments are, for all intents and purposes, "reserved" for "political appointees");

ii. **they could be highly demoralised and demotivated** too when they know that some of their career aspirations (representing their country at ambassadorial level) might never see the light of day as a result of a system and practice that is "politically engineered" to work against their long-term professional interests and aspirations; and

iii. **they could also well be exposed to serious moral hazards**. For instance, it is a public secret in the Department that some middle management officials (e.g. deputy directors) are deliberately avoiding promotions to SMS level for fear that they might never have opportunities to serve abroad at HOM level; they prefer instead to remain deputy directors because at that level, there is, allegedly, no "political interference" with diplomatic appointments and these officials have some assurance that they would be appointed from time to time to serve abroad more frequently. [The general practice in the Department is that these junior officials get posted for a period of four years and thereafter return to Head Office for a period of two years before they become eligible for another posting. In the case of SMS officials, including those who had previously served as HOMs, some of them have been stationed at Head Office for more than five years since their last posting.]

24. The moral hazards associated with favouring "political appointees" over CAREER

DIPLOMATS do not only afflict SMS and junior officials in the Department; the Presidency and the "ruling party" (the ANC) **are also exposed to the risk of serious moral and legal/constitutional hazards**. A close and careful reading of the number of "political appointees" who have been appointed (or "deployed") to date will show that the overwhelming majority of them are ANC "deployees" ("cadres") or people with connections/links/associations with the ANC and/or connections/links/associations with leading figures in the ANC. These include, among others, former ANC MPs and ANC cabinet ministers, ANC city mayors and councillors, ANC premiers, members of the various leagues of the ANC (Women, Youth and Veterans). Down the years, there have also been "political appointees" from other political parties such as the Inkatha Freedom Party (IFP) and the Democratic Alliance (DA) and other sectors of civil society.

Someone would say that the appointment of ANC "deployees" and "cadres" should not be problematic at all, since the ANC is the majority "ruling party"(sic) in charge of government (sic). Another one would say that the ANC has every right to appoint whomsoever it wishes from its ranks to serve as ambassadors to implement the foreign policy of a government led by the ANC (sic). The argument here would be that these "deployees", allegedly, know the policies of the ANC government better than anyone else and that they (the "deployees") are been appointed to continue serving the party and government in whatever capacity and position the "ruling party" deems fit (sic).

25. In response to the above-mentioned arguments justifying the preponderant appointment of "political deployees", the following could be said:

(a) The fact that the ANC is the majority party should not automatically translate into the right to "deploy" its "cadres" in the Foreign Service. In fact, such a practice

and policy would be inconsistent with the constitutional obligation requiring that the Foreign Service be NON-PARTISAN, CAREER-ORIENTED and PROFESSIONAL.

(b) It would be incorrect to suggest that only ANC "deployees" and "cadres" know the foreign policy of the South African government better and that they are the only right people to be appointed into the Foreign Service in order to continue serving the party and the (ANC-led) government. It is important to note that, in addition to the requirement for a NON-PARTISAN foreign service, the Constitution is clear (in section 197(1)) that the public/foreign service of South Africa "must loyally execute the lawful policies of the government of the day." In other words, it should be understood that anyone who has chosen diplomacy as a career and has decided to join the South African public/foreign service will be expected to "loyally execute the lawful policies of the government of the day." What this means is that, *ceteris paribus*, it would be incorrect to suggest that the "lawful policies of the government of the day" can only be implemented and championed by ANC "deployees" and/or "cadres".

(c) Flowing from the two points made in (a) and (b) above, it is important to note what the Constitution (in section 197(3)) says about public service and political affiliation. Section 197(3) provides as follows: "*[N]o employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.*" (Emphasis added). That section covers "employees of the public service" and for the purposes of my present Comment, I shall limit "employees of the public service" to "employees of the Department". What section 197(3) in essence means is that:

(i) no employee of the public service may be favoured (in this case, appointed as HOM) only because that person supports a particular political party (in this case, the ANC). What this means is that, "political appointees" who might have been working as civil servants in other government departments who now constitute part of that large number of "deployees" who dominate the Foreign Service at ambassadorial level should not have been favoured "only because" they support the ANC. Further, what section 197(3) means is that, the situation should be even harder for those "political appointees" who might not even have been in the public service for starters to be "favoured" with ambassadorial/HOM appointments "only because" they support or are linked in one way or another with the ANC and/or leading figures in the ANC.

(ii) no employee of the public service may be prejudiced by being overlooked or by not been appointed to ambassadorial/HOM level "only because" that person supports a particular political party (in this case, any other party other than the ANC) or cause. What this means is that, no employee of the public service (say, who is currently employed as a CAREER DIPLOMAT in the Department and who would ordinarily qualify for appointment at HOM level) may be prejudiced ("overlooked in favour of a ""political appointee"") "only because" that person supports a particular party (other than the ANC).

(iii) no employee of the public service may be favoured or prejudiced only because that person *does not* support a particular political party or cause. For

5.6 During the process of the drafting of the 'final' Constitution, the Constitutional Assembly was under an obligation, if petitioned to do so by at least one fifth of all its members, to refer any proposed draft of the constitutional text before the Constitutional Assembly to the Constitutional Court "in order to obtain an opinion from the Court as to whether such proposed text, or part or provision thereof, would, if passed by the Constitutional Assembly, *comply with Constitutional Principles*."[6] [Emphasis added]

5.7 The obligation to ensure that the draft 'final' Constitution complied with all 34 CPs was pressing. For instance, section 73(3) provided in essence that if the Constitutional Assembly failed to pass a proposed new constitutional text, the text should be referred to a panel of experts (constitutional lawyers) for advice on amendments to the proposed text, *"within the framework of the Constitutional Principles."*

5.8 The provisions of section 71 of the 1993 interim Constitution aimed to achieve one key objective: to ensure that the fundamental tenets of South Africa's new constitutional democracy and the values of that new society enshrined all the norms, values, ethos, principles, and commitments agreed to by the framers of our Constitution as encapsulated in the 'solemn pact' in the form of CPs in schedule 4 to the 1993 interim Constitution.

[6] Section 71(4) of the 1993 interim Constitution: "During the course of the proceedings of the Constitutional Assembly any proposed draft of the constitutional text before the Constitutional Assembly, or any part or provision of such text, shall be referred to the Constitutional Court by the Chairperson if petitioned to do so by at least one fifth of all the members of the Constitutional Assembly, in order to obtain an opinion from the Court as to whether such proposed text, or part of provision thereof, would, if passed by the Constitutional Assembly, comply with Constitutional Principles."

5.9 CP XXX.1 provided as follows:

> There shall be an efficient, *non-partisan*, *career-oriented public service* broadly representative of the South African community, functioning on a basis of fairness and which shall *serve all members of the public in an unbiased and impartial manner*, and shall, in the exercise of its powers and in compliance with its duties, *loyally execute the lawful policies of the government of the day* in the performance of its administrative functions. The structures and functions of the public service, as well as the terms and conditions of service of its members, *shall be regulated by law*. [Emphasis added]

5.10 CP XXX.1 enumerated some of the key values, norms, principles, requirements and attributes of the public service/foreign service[7] of a post-apartheid South Africa - which had become a constitutional state under the rule of law. These include efficiency, professionalism (career-oriented), representativity, non-partisanship, loyalty, fairness, non-discrimination, and lawfulness. In this Memo, I limit my submission to the kind of Foreign Service South Africa needs, which is, a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN Foreign Service (as required by CP XXX.1)

5.11 It is important to ask the following questions: (1) Is there a constitutional-legal obligation on the President to ensure that South Africa's foreign service (in this case, at ambassadorial and HOM level) is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? (2) If so, is the President bound by the constitutional-legal obligation to ensure that the foreign service of South Africa (at ambassadorial and HOM level) is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN?

[7] For the purposes of this Memo, I shall use the words 'public service' and 'foreign service' interchangeably. However, for the purposes of my submission, I shall refer only to the foreign service unless I indicate otherwise.

6. The immediate answer to both questions posed above is an emphatic 'yes'. The following considerations bear testimony to the fact that there is a constitutional-legal obligation on the President to ensure that South Africa's Foreign Service is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN and that the President and government are obliged to comply with that obligation when ambassadors and other HOMs are appointed in the Foreign Service of the Republic of South Africa.

6.1 **First**, the 1993 interim Constitution was unambiguous about the fact that it was the intention of the framers that the 'final' Constitution complies fully with all 34 CPs in Schedule 4 to the 1993 interim Constitution, including CP XXX.1.[8] For instance, while the preamble to the 1993 interim Constitution provided, in part, that "[e]lected representatives of all the people of South Africa should be mandated to adopt a new Constitution in *accordance with a solemn pact recorded as Constitutional Principles*", section 71(1) of the 1993 interim Constitution provided in peremptory terms that "[A] new constitutional text shall (a) comply with the Constitutional Principles contained in Schedule 4; and (b) be passed by the Constitutional Assembly in accordance with this Chapter." What this meant is that when the 1993 interim Constitution *ordered* that the 'final' Constitution must provide for a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN foreign service, then the latter Constitution (or at least the Constitutional Assembly drafting the 'final' Constitution) had no option but to ensure that it (the 'final' Constitution) also contains provision(s) or language to the effect that the Foreign Service of South Africa shall also be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN.

[8] See *First Certification Judgment* at para [13].

6.2 **Second**, section 71(2) made the intention of the framers even clearer by insisting that '[T]he new constitutional text [i.e. the 1996 Constitution] passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a), including CP XXX.1.

6.3 **Third**, according to section 71(3) of the 1993 interim Constitution, "[A] decision of the Constitutional Court in terms of subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof."

6.4 **Fourth**, in the *First Certification Judgment*, the Constitutional Court was unanimous in holding that the 'final' draft constitutional text "[f]ailed to comply with all the 34 Constitutional Principles in respect of 12 areas."[9] In light of the Court's finding, the draft text was referred back to the Constitutional Assembly "[t]o amend the constitution in order to bring it in line with the decision of the Court."[10] In *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*[11] (the *Second Certification Judgment*), the Constitutional Court unanimously certified that the whole 'final' constitutional text complied with all the 34 Constitutional Principles, including CP XXX.[12] What this meant is that, when the Constitutional Court certified that the 1996 Constitution complied with all 34 CPs including CP XXX.1, then the obligation to provide a CAREER-ORIENTED,

[9] See Justice Richard J Goldstone 'The first years of the South African Constitutional Court' (2008) 42 *Supreme Court L R (2d)* 25, 27.
[10] Goldstone Ibid.
[11] 1997 (2) SA 97 (CC); [1996] ZACC 24; 1997 (1) BCLR 1 (CC)
[12] Goldstone note 9, 27.

PROFESSIONAL and NON-PARTISAN Foreign Service is contained in the 1996 Constitution as well.

6.5 **Fifth** (and flowing from the point immediately above), when the Constitutional Court certified that the final text of the 1996 Constitution complied with all 34 CPs, including CP XXX.1 that 'certification decision' became *final and binding* (in terms of section 71(3) of the 1993 interim Constitution). What this means is that, when the Constitutional Court certified that the 1996 Constitution complied with all 34 CPs, no court of law could come later to enquire into or pronounce upon the validity of the Constitution or any of its provisions. What this also means is that, once certified to be compliant with all 34 CPs, the 1996 Constitution had finality and binding effect on all state functionaries, and the latter would have no power, discretion or authority whatsoever to question (or doubt) the validity or legitimacy of the 1996 Constitution or any of its provisions.

6.6 **Sixth**, applying the logic in 6.5 above to CP XXX.1 would mean that, when the Constitutional Court finally certified the 1996 Constitution to be compliant with all 34 CPs, then no court of law or state functionary (in this case, the executive) had any authority whatsoever to undo or question the validity and legitimacy of the requirement to ensure that the public/foreign service of South Africa shall be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN.

6.7 In the circumstances therefore, the obligation to ensure that the public/foreign service of South Africa shall be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN is retained in the 1996 Constitution. What this means is that it is incumbent upon state functionaries, including the President to comply with that constitutional obligation to ensure

that the public/foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL AND NON-PARTISAN. Needless to say that any attempt on the part of state functionaries to act contrary to that obligation would be unconstitutional and unlawful. Further, any conduct on the part of state functionaries to act contrary to that constitutional-legal obligation, in this case, by making appointments in the Foreign Service of South Africa which are inconsistent with the requirement for a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN service, they (state functionaries) would be acting beyond the scope of their powers. And their decisions would therefore be irrational and invalid.

6.8 The above discussion begs the following questions:

(a) How can the practice of populating ambassadorial positions in South African missions with non-career, non-professional and partisan "appointees" or "deployees" be consistent with the constitutional obligation to ensure that the Foreign Service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN?

(b) What could be the rational justification, if any, for non-compliance with a clear constitutional obligation requiring a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN Foreign Service (in this case, at ambassadorial level)?

(c) When ambassadorial appointments are made contrary to the letter and spirit of the Constitution, would the Executive (the President to be precise) not be acting contrary to his responsibility to "uphold, defend and respect the

Constitution as the supreme law of the Republic"? (see section 83(b) of the Constitution).

6.9 **Seventh**, the norms, values and principles (e.g. professionalism and non-partisanship) governing the new public/foreign service of South Africa are in any event enshrined in the 1996 Constitution. This is evidenced by the clear and straightforward provisions of section 195 of the Constitution. Section 195 provides for the "basic values and principles governing public administration". These include, "a high standard of professional ethics";[13] efficiency;[14] impartiality, fairness, equity and non-discrimination (no bias);[15] public administration that is people-[16] and development-oriented;[17] public accountability;[18] transparency;[19] "good human resource management and career development practices".[20]

7. The need to provide and/or maintain and/or cultivate a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN Foreign Service was articulated by the ANC in October 1993 in its Foreign Policy Discussion Paper 1993 (produced by the ANC Department of International Affairs), which paper became the foundational stone for the creation, management and conduct of a new "diplomatic service" when the Government of National Unity (GNU) under the leadership of the ANC took the reigns of government in 1994. The pertinent and relevant parts of that Discussion Paper stated (and I quote at length):

> We believe that *this country needs a professional diplomat[ic] service which will be independent from the narrow confines of party politics*. We believe, too, that as far as possible *the activities of the foreign service should be open to public scrutiny and public*

[13] Section 195(1)(a)
[14] Section 195(1)(b)
[15] Section 195(1)(d)
[16] Section 195(1)(e)
[17] Section 195(1)(c)
[18] Section 195(1)(f)
[19] Section 195(1)(g)
[20] Section 195(1)(h)

accountability. We will encourage an open, questioning culture within the Department of Foreign Affairs [DFA]. Only this can engender a robust exchange of ideas which, ultimately, will produce sustainable policy positions.

We have taken careful note of recent experiences which have shaped diplomatic services in other parts of the world. In particular, we are concerned that our *professional diplomats* should not live a privileged life. They must master a range of managerial skills; without these, we believe, the modern diplomat, and South Africa, will be handicapped.

We also believe – as this policy document attests – that trade and other economic issues are central to the modern diplomat. Accordingly, *we will take steps to ensure that the South African representatives abroad will be well skilled in economic and trade issues* which, amongst others, will help drive South Africa's international relations.

We will immediately take steps to ensure that, within a reasonable period, the diplomatic corps will be fully representative of South Africa's people.

Modern diplomacy has become an exacting and demanding *vocation*. It demands, in our opinion, knowledge, skilled communication, strong commitment and complete integrity. *We will foster the required professional ethos for our corps anticipating that it will take its place amongst the great services of the world*.

As responsible global citizens, the ANC will encourage South Africans who are willing and able, to *pursue careers* in international civil service. [Emphasis added]

8. What is clear from the ANC Foreign Policy Document, 1993 is that there was a strong commitment – from the very dawn of our constitutional democracy – to ensure that South Africa's national interests in the realm of foreign relations will be pursued and championed by a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN Foreign Service. It was also clear that this Foreign Service would be equipped with a range of critical skills (including, economic and trade diplomacy, and effective and strategic communication) in order to execute its mandate and diplomatic responsibilities. The ANC Foreign Policy

Document, 1993 further underscored the kind of values and principles that would imbue the 'new' South African foreign service: professionalism, loyalty, patriotism, integrity, public accountability, critical thinking, independence from narrow party politics, excellence, and an unwavering commitment to serving South Africa and its people.

9. The crisp questions to ask are: what was the intention of the framers of our Constitution when they wrote into law that the public/foreign service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? Why was it important for the framers of our Constitution to insist that the public/foreign service of the new South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN? In answering these questions, I would suggest that, in their wisdom to decide that the Foreign Service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, the framers sought to imbue public service and administration with the same ethos, norms, values, standards and principles that permeate the entire constitutional fabric of our new democracy. I would also suggest that, by insisting that the Foreign Service of South Africa be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN the framers of our Constitution wanted to address the same concerns that other Foreign Services (e.g. India, Malaysia, Singapore) wanted to address when the latter decided to professionalise their services. In the case of South Africa, the framers took into account the following considerations, including:

9.1 **The need to make a clear separation between party and state.**

In pre-democratic South Africa, the civil service was literally at the beck and call of politicians who used and abused the machinery of government and its services to pursue and

perpetrate illegal activities. With the adoption of a new constitution, the framers wanted to make a clean break with an apartheid system where the "ruling party and its elites" (the Nats) abused public service and administration for their own selfish and unlawful ends. In a new constitutional democracy, all that had to change! The framers sought to ensure that the new democratic government does not fall into the same temptation as the apartheid leadership did by requiring that the public/foreign service be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. By 'constitutionalising' the notion that the public/foreign service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, the framers further sought to ensure that the public/foreign service is free from unwarranted political interference and manipulation by party officials and politicians.

9.2 **To ensure accountability and avoid arbitrariness.**

When the framers of our Constitution insisted that the public/foreign service of South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, they wanted to instil the culture of accountability in public service and administration in a democratic South Africa. The framers sought to avoid a situation where government work (public service and administration) is directed by and dictated to by party officials who are not directly accountable to parliament or to the executive. When the day-to-day affairs of public service and administration are under the direction of party officials, that gives rise to a culture of arbitrary decision-making (precisely because the whim of the party becomes more pronounced than the will of the people through their duly elected representatives).

9.3 To ensure continuity and stability in public service and administration.

The framers understood that in a constitutional state - which South Africa became in 1994 - where multiparty system of democratic government is one of the key foundational values (see section 1(d) of the Constitution), there is a strong possibility of power changing hands in a peaceful manner through regular elections. The framers also understood that, if and when these changes do take place the core function of government (public service and administration) should not be thrown into disarray as a result of political power changing hands. They understood that it was important that the normal governmental responsibilities be carried out even if/when power has changed hands and there are new "rulers"(sic) in government. The framers wanted to avoid a situation where a change in government disrupts society so much that public service and administration is paralysed because civil servants who would have been partisan and loyal to the ousted party enter the fray and "start playing politics" by "destabilising" and "undermining" the new administration. The framers wanted to ensure that there should still be continuity and stability in government; that is why there are provisions in the Constitution requiring that civil servants remain true to their careers (public/foreign service), and maintain their professionalism and non-partisanship by loyally executing the lawful policies of the government of the day (see e.g. section 197(1)).

9.4 To protect the morality of civil/public servants.

A point has already been alluded to in 9.1 above that since apartheid made no distinction between party and state, the officials were exposed to terrible moral hazards as they were obliged to engage in unlawful and illegal activities ordered by their political masters. The

framers of our Constitution wanted to avoid those practices from happening in a constitutional democracy. They wanted to ensure that the public/foreign service is above narrow party politics and that civil servants concern themselves only with executing in a loyal and patriotic manner the lawful policies of the government of the day free from manipulation and dictation by politicians and party officials.

9.5 To avoid a patronage system taking root in the public/foreign service

The framers of our Constitution were very aware that a public/foreign service that is partisan, non-professional and not career-oriented is prone to manipulation and abuse by politicians and party officials with narrow vested interests. By demanding that the public/foreign service of South Africa be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, the framers wanted to avoid a system of public service and administration in the new South Africa that is rooted in patronage and the whim of the "ruling party" and its officials.

9.6 To protect the public/foreign service from political abuse.

The point has already been made above that the civil servants under apartheid were at the beck and call of their political masters. These public servants had no choice but to carry out their duties and functions even when some of these were palpably and manifestly illegal and unlawful. The abuse of public servants in this manner and creation of moral conflict in their conscience is what the framers of our Constitution wanted to avoid when they insisted, among other requirements, that the public/foreign service of democratic South Africa shall be CAREER-ORIENTED, PROFESSIONAL AND NON-PARTISAN.

10. In the circumstances therefore, it is my submission that the President should take into account and be guided by (a) the initial position of the ANC on the kind of Foreign Service South Africa needs; (b) the constitutional provisions in both the 1993 interim Constitution and the 1996 Constitution; (c) the intention of the framers of our Constitution; and (d) the decision of the Constitutional Court in the *Second Certification Judgement* to ensure, categorically and in no uncertain terms, that the Foreign Service of South Africa shall be a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN one. This is required by the terms of CP XXX.1 as certified by the Constitutional Court in *the Second Certification Judgment*, and as retained in the 1996 Constitution courtesy of section 195 (and other relevant provisions having a bearing on public service and administration in South Africa). Providing for a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN Foreign Service will also be consistent with the initial (1993) policy statement of the ANC. It is my submission that, any oversight on the part of the President to ensure that his appointment of ambassadors and other HOMs is consistent with the above-mentioned "obligations" would fall short of the explicit constitutional requirement to provide for a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN foreign service. (See discussion in part below)

PART TWO: APPOINTMENT OF AMBASSADORS AND OTHER HEADS OF MISSION IN THE FOREIGN SERVICE OF SOUTH AFRICA

11. I move now to the second part of my Memo/submission, and that relates to **the appointment of Heads of Mission** in the diplomatic/foreign service of South Africa. My submission on this point is directly linked to and flows from the key point I made in part one above, namely, that the Foreign Service of South Africa at Heads of Mission (HOMs) level should likewise be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN.

12. In addressing the issue of appointment of ambassadors and other HOMs, I shall refer briefly to some of the provisions of the proposed Foreign Service Bill - just for the purposes of providing a brief background and context to my submissions later on.

The Bill defines "Head of Mission", in part as, "an Ambassador, High Commissioner, Consul-General, Permanent Representative, and any other person appointed to represent the Republic as such in terms of [ ]" various international legal instruments governing international diplomatic and/or consular representation. The Bill provides (in section 4(1)) that "[T]he Head of Mission is responsible for the management and administration of the Mission and all members of the Foreign Service located at the Mission, including the locally-recruited personnel in the Mission." Section 4(2) on the other hand provides that "[T]he Head of Mission must act on the instructions and under the authority of the Director-General."

13. The Bill does not provide in categorical terms that HOMs should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. On the contrary, the Bill (in section 2(2)) suggests that HOMs could be appointed from outside the ranks of the career corps i.e. the so-called "political appointees". Section 2(2) of the Bill provides, in essence, that members of the South African Foreign Service, including HOMs may be appointed to hold a position in a South African mission abroad "regardless of whether they are ordinarily employed by the Department [dirco] of by any other national department *or appointed on a contractual basis for a fixed period.*" (Emphasis added). What is clear from section 2(2) of the Bill is that it (the Bill) opens the door for the possibility of appointment of members of the Foreign Service, including HOMs from outside the Department to accommodate those who could be "politically appointed" (for a lack of a better word) from outside the ranks of CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN corps.

While section 3(1) of the Bill appears to limit membership of the Foreign Service to "only citizens of the Republic, employed by the Department or by another national department", section 2(2) on the other hands opens the door for another category of individuals who might be appointed into the Foreign Service; these are those "officials" who might be appointed "on a contractual basis for a fixed period." The latter category would ordinarily refer to "political appointees" who might come from other national departments other than dirco, or completely from outside government structures e.g. business, academia, political parties, the unemployed, and NGOs.

In section 1 of the Bill (the definitions section), the term, "national department" is defined as "a national department or a national government component as referred to in section 7(2)(a) of the Public Service Act, 1994 (proclamation 103 of 1994), and includes the South African Revenue Service." Section 7(2)(a) of the Public Service Act, 1994 provides that "[F]or the purposes of the administration of the public service there shall be – national departments and offices of the Premier mentioned in column 1 of schedule 1[.]"

14. A close and careful reading of the Bill, specifically sections 2(2) and 3(1) will show that the Bill is fundamentally *not* aimed at providing for a Foreign Service that is intrinsically CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. However, it seeks to create a Foreign Service so amorphous as to include anybody from anywhere. At first glance therefore, the objective of the Bill is not to provide for a Foreign Service that is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. On the contrary, the Bill provides for a Foreign Service that is inclusive of anyone who might be appointed from anywhere (outside the Department, from civil society, private sector, political parties, the unemployed, academia, and NGOs, to mention but a few). At first glance therefore, the Bill appears to be:

a. inconsistent with the letter and spirit of CP XXX.1 as retained in the 1996 Constitution;

b. inconsistent with the decision of the Constitutional Court in the *Second Certification judgment* which held, conversely, that the 1996 Constitution should comply with all CPs, including CP XXX.1;

c. out of step with the original policy statement of the ANC i.e. that the Foreign Service of the new South Africa should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN and be free from narrow party politics (see further discussion below); and

d. inconsistent with international good practice (see discussion below).

15. A Foreign Service Bill that departs from a base far removed from what the Constitution, the law and long-standing policy provide on this matter (i.e. the kind of Foreign Service South Africa requires) runs the risk of being tainted with unlawfulness, illegality, unconstitutionality and invalidity *ab initio*. This Bill must be rooted in and must derive its legitimacy from the Constitution and the law from the very onset. It should avoid creating a situation which was never contemplated by the framers of our post-apartheid constitutional order. It should also avoid taking a stance that flies in the face of the authoritative decision of the Constitutional Court on this matter (the kind of public/foreign service South Africa requires). Further, it should avoid creating a set-up in the Foreign Service of South Africa that is potential conflictual (see discussion below). In fact, this Bill should, at the very least, correct the situation in the Foreign Service of South Africa which has been allowed (consciously or unconsciously?) to persist for a very long time now, which is, the creation of a dominant layer of Foreign Service officials at HOM level who are overwhelmingly *not*

CAREER-ORIENTED, *not* PROFESSIONAL[21] and are palpably and manifestly PARTISAN.

16. Now, the issue of appointment of ambassadors and other HOMs in the Foreign Service of South Africa has been of concern (to put it rather mildly) to DIRCO officials, but there has been no serious attempt, by the leadership of the Department to discuss it. Every time whenever the issue of appointment of ambassadors and other HOMs was touched, specifically whether these HOMs should be drawn from the CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN diplomats or be "political appointees" from outside the Department; this issue would be summarily dismissed as an issue that does not concern officials! The immediate reaction to any invitation to discuss or debate that issue would be met with a stern response to the effect that the appointment of HOMs is the exclusive prerogative and responsibility of the President in terms of section 84(2)(i) of the Constitution. I hasten to add that, the attempt in the Bill to provide for the inclusion of "political appointees" in the Foreign Service of South Africa is, I would submit, (mis)informed by that very notion (that the appointment of HOMs is the exclusive prerogative of the President *and* that the exercise of that power (of appointment) cannot be questioned by anyone in any way whatsoever)(more on this below).

17. Section 84(2)(i) of the Constitution provides that "[T]he President is responsible for appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives." Those who argue that the appointment of ambassadors and other HOMs is the exclusive responsibility of the President in terms of section 84(2)(i) of the Constitution are correct; that is what the Constitution provides. However, the very same officials who say that the

[21] By "non-professional" here I refer to "non career-oriented" diplomats.

appointment of ambassadors and other HOMs is the responsibility of the President make a mistake of *stretching that argument further* beyond the limits set by the Constitution with respect to the exercise of that presidential power of appointment. These officials hold the mistaken view that the President's power of appointment (of ambassadors and other HOMs) is beyond scrutiny; that it cannot be "interfered with"; and that it cannot be "questioned" in anyway. In other words, these officials hold the mistaken view that the President's exercise of public power (to appoint ambassadors and other HOMs) is "completely subjective" and "totally absolute". This is incorrect (see discussion below).

18. Notwithstanding the views expressed in the paragraph immediately above, my submission herein is *not* aimed at challenging the President's constitutional powers to appoint ambassadors and other HOMs. As section 84(2)(i) of the Constitution clearly provides, the appointment of ambassadors and other HOMs is the responsibility of the President, no one else. The crisp question to ask though is this: is the President's power to appoint whomsoever he wishes as ambassador and/or HOM "unconstrained"? Is that power untrammelled? Is it unlimited? Is it absolute? Conversely, are there any norms, values and principles at all which the President is constitutionally and legally obliged to take into consideration and to apply his mind over when he appoints ambassadors and other HOMs?

19. The argument that the President's power to appoint ambassadors and other HOMs is "absolute", that it is "unconstrained", that it is "untrammelled" and that it rests "solely" with the President's "subjective view", and as a result, should not be "interfered" with, is, with respect, incorrect. Conversely, it is my submission that there are certain constitutional-legal norms, values and principles that bind the President's exercise of his powers to appoint

ambassadors and other HOMs, which the President must always take into consideration and over which he must apply his mind. It is my submission that:

19.1 The President's power to appoint ambassadors and other HOMs is, unlike in the old pre-democratic dispensation, **no longer governed by the common law prerogative**. In pre-democratic South Africa, the appointment of ambassadors constituted the Crown (now executive government) prerogative power,[22] and the exercise of that prerogative power (under the common law) was beyond scrutiny by anyone. The President's decision to appoint whosoever he wished under the common law prerogative power was unquestionable; that decision could not be "interfered" with; that decision was absolute; that decision was "untrammelled". This was so because the appointment of ambassadors and other HOMs in pre-democratic South Africa was regarded as an 'act of state' in the conduct of foreign policy. Now, in terms of the so-called 'act of state' doctrine, the acts of the South African government in the realm of foreign affairs (including the appointment of ambassadors and other HOMs) were non-justiciable.[23]

---

[22] See for instance section 6(4) of the 1983 Constitution which re-echoed the provisions of section 7(4) of the 1961 Constitution, which provided in essence that the State President (of South Africa) 'shall in addition as head of State have such powers and functions as were immediately before the commencement of this Act [ie in terms of the 1961 Constitution] possessed by the State President by way of prerogative.' In *Sachs v Dönges NO* 1950 (2) SA 265 (A) at 276, Chief Justice Watermeyer described the common law prerogative essentially as a residue of powers that are excisable by the crown (executive government) in the absence of parliamentary authority for executive action ie where there is no parliamentary statute authorising executive action.

[23] See J Dugard *International Law: A South African Perspective 4th ed* (2011) at p. 71. See also AJGM Sanders 'The justiciability of foreign policy matters under English and South African law' (1974) 7 *CILSA* 215 at p. 216; H Booysen ' Has the act of state doctrine survived the 1993 interim Constitution?' (1995) 20 *SAYIL* 189 at p. 189. Sanders at p. 215 footnote 1 states that '[s]ince the establishment of South Africa as a unitary state the country's constitutional structure [and the rule governing the Crown's prerogative powers in foreign affairs have] been based on the English model.' The learned writer points out that even when South Africa left the British Commonwealth and became a Republic in 1961 and put in statutory form some of the foreign affairs prerogative powers, there was no material change in the legal principles that governed the conduct of its foreign policy from the old English common law. For instance, Sanders opines that '[a] rule of non-justiciability of foreign acts [of state] would seem to accord with English and South African constitutional law [before 1994] which assigns to the executive a leading role in the sphere of foreign affairs' (at p. 220). Dugard on the other hand (2011) states that before 1994, '[t]he application of international law in South Africa was subject to the constitutional rules and prerogative powers (eg the power to conduct foreign relations) derived from English law.' See also N Botha 'The foreign affairs prerogatives and the 1996 Constitution' (2000) 25 *SAYIL* 265, 265-272; G Carpenter 'Prerogative powers in South Africa – dead and gone at last?' (1997) 22 *SAYIL* 104, 104-111.

However, in the 'new' South Africa which became a constitutional state under the rule of law (in 1994), the situation governing the exercise of public power in the realm of foreign affairs (in this case, the appointment of ambassadors and other HOMs) is radically different from the way the apartheid system used to deal with this matter. Under the new constitutional dispensation, there are now clear norms, values and principles (e.g. accountability, rationality, openness, and high standard of professional ethics) that are clearly spelled out in the Constitution and the law, including *Promotion of Administrative Justice Act* (PAJA) No. 3 of 2000, which must "guide", "inform" and "bind" state functionaries exercising public power (in this case, the President exercising his powers of appointment) (see detailed discussion below).

19.2 The appointment of ambassadors and other HOMs should be consistent with (a) the letter and spirit of CP XXX.1; (b) the decision of the Constitutional Court in the *First Certification Judgment* and the *Second Certification Judgment*; as well as (c) all other relevant provisions in the Constitution that govern public administration, including the provisions of section 195 of the Constitution. Specifically, that the appointment of ambassadors and other HOMs be reflective of and comport with the constitutional-legal obligation to provide a Foreign Service that is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN, as opposed to the current practice where the appointment of ambassadors and other HOMs is grotesquely disproportionate and heavily weighted in favour of "political appointees" who ordinarily do not fall within the definition of a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN service.

19.3 Parliament should, through this Bill, make it crystal clear that the South African

Foreign Service is able to "take its [rightful] place amongst the great services of the world" (as the ANC Foreign Policy Discussion Paper, 1993 correctly suggested) by providing in unambiguous terms that the diplomatic service of South Africa shall be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN at all levels, including HOM-level.

20. I turn now to address each of the submission points in paragraph 19 above in some detail.

20.1 Appointment of ambassadors and other HOMs in pre-democratic South Africa and appointment of ambassadors and other HOMs in democratic South Africa

20.1.1 Before 1994, South Africa's foreign policy and foreign affairs were conducted on the basis of **the old common law prerogative powers** derived from English law.[24] The prerogative power to conduct foreign affairs was governed by the so-called 'act of state' doctrine, which provided in part that the acts of the South African state in foreign affairs (in this case, the appointment of ambassadors) were beyond the reach of judicial review (the 'doctrine of the non-justiciability of 'acts of state").[25] In the case of *Pharmaceutical Manufacturers Association of South Africa & Another In Re the Ex Parte Application of the President of South Africa & Others*,[26] Chief Justice Chaskalson explained what the common law prerogative powers are by referring to the English case of *Laker Airways Ltd v Department of Trade*[27] where Lord Denning described the prerogative power as "[a] discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity [eg foreign affairs] for which the law has made no provision."[28] The common law prerogative power therefore, essentially constituted the power of the Crown (now the executive government) to act according to discretion, for the public

[24] J Dugard *International Law: A South African Perspective 4th ed* (2011) 71.
[25] Dugard *ibid* 71.
[26] 2000 (2) SA 674 (CC)
[27] [1977] 1 QB 643
[28] *Pharmaceutical Manufacturers Association* at para [36].

the purposes of this Comment, it is clear that the essence of section 197(3) is to put appointments (at ambassadorial/HOM) beyond the influence of political affiliation. What this means is that, the appointments in the Foreign Service of South Africa should not be dependent on the person's party/political affiliation, but on excellence, integrity as well as on the constitutional ethos, norms, values and principles of NON-PARTISANSHIP, PROFESSIONALISM and CAREER-ORIENTED service.

26. The practice where appointments of HOMs appear to be too skewed in favour of a category of people with certain political affiliation **exposes the Presidency and the ANC to serious moral and legal-constitutional hazards**.

(a) First, CP XXX required "an efficient, NON-PARTISAN, CAREER-ORIENTED public service which functions on the basis of fairness, to serve all members of the public in an unbiased and impartial manner."[36] The ANC Foreign Policy Discussion Paper of 1993 had also stated that "[T]he country needs a professional diplomat[ic] service *which will be independent from the narrow confines of party politics*." The Constitutional Court in the *Second Certification Judgment* held, after considering all issues before it, that the 1996 Constitution complied with all 34 CPs (and for the purposes of the present Comment, that the 1996 Constitution retains the constitutional obligation to ensure that the public service of South Africa is efficient, NON-PARTISAN and CAREER-ORIENTED). Now, a close and careful look at the practice of appointing "political appointees" at ambassadorial level to date, specifically that the overwhelming majority of them come from the ANC or are linked to the ANC in one way or another, suggests that there may be serious legal hazards

[36] See the *First Certification Judgment* at para [454].

here. For instance, it could be difficult to convince anyone that a practice of appointment to a specific position (HOM) in the foreign service which is palpably and manifestly so one-sided in favour of "political appointees" and other "deployees" from one specific party (the ANC) is on all fours with the requirements of CP XXX, the ANC Foreign Policy Discussion Paper, the decision of the Constitutional Court in this regard, and the letter and spirit of the Constitution. Specifically, the argument that the appointment or "deployment" of ANC cadres in the foreign service at ambassadorial level does not fall fowl of the constitutional and legal obligation to ensure that the Foreign Service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN would be difficult to justify in the face of clear, unambiguous and peremptory terms of CP XXX, the authoritative decision of the Constitutional Court, as well as the letter and spirit of the Constitution.

(b) Second, the appointment of "party cadres" as HOMs in the foreign service has other **serious moral and financial hazards**. At the moment, the ANC collects levies from its members who are employed in government as civil servants? At the time of preparing this Comment, an ANC member in the position of HOM in the South African foreign service was required to pay monthly levies in the amount of R2842.00 (Two thousand eight hundred and forty two Rand). In terms of the debit order application that ANC members complete, the member signs the following declaration, in part,

> "[I] [name]…agree to Debit Order as detailed above, and hereby authorise the ANC to deduct the above amount for the contribution towards the ANC Levies. I further agree and authorize the ANC to adjust the amount of this order as and when the salaries of Government Employees are revised."

It is important to state here that the ANC – and any other political party for that matter - is perfectly entitled to run its internal affairs the way it sees fit in terms of its constitution, including levying membership and other fees on its members. **But here is a moral hazard**: when the ANC has control and say over who gets appointed as ambassadors, it should be self-evident, is it not, that it (the ANC) is also in control of how much money it can raise from "deployees" at ambassadorial level? Under these circumstances, it is difficult to imagine that the ANC, or some of its officials and leaders, would not be interested in considering more ANC "cadres" appointed as ambassadors because that decision brings with it financial returns for the organisation? Put in crude terms, a practice like that – where the appointed officials are simultaneously expected to pay a portion of their salaries back to the "deploying agent" - could easily expose the "appointing agent" (in this case, the ANC/the Presidency) and the "appointed official" to some serious moral hazards.

ii. This appointment practice could easily be characterised as a "jobs-for-cadres/pals" scheme;

iii. The payment of levies under these circumstances could easily be characterised as "kickbacks";

iv. The officials and cadres that are appointed under these circumstances might feel that their confirmation as ambassadors is dependent upon their agreement to pay back a portion of their salary;

v. Those non-ANC members who are PROFESSIONAL and CAREER DIPLOMATS and are eligible for appointment as ambassadors might feel

disadvantaged because their appointment to that position of HOM would not bring financial benefit to the ANC;

vi. Those non-ANC members who might nonetheless be appointed as ambassadors (because they are career diplomats in the Department) and are asked to pay these levies might feel somewhat cajoled "to join the party" for fear that if/when they do not "contribute to the coffers of the movement" they might be prejudiced or victimised or overlooked for appointment in the future;

vii. The cumulative effect of this whole situation and practice creates a very unsavoury environment in the foreign service in the sense that CAREER DIPLOMATS **get terribly demoralised and a somewhat hostile atmosphere develops** towards "political appointees" who are seen as "outsiders" who come into the foreign service to close career and professional opportunities for CAREER DIPLOMATS;

viii. While CAREER DIPLOMATS get seriously demoralised when they are consistently overlooked for ambassadorial appointments, "political appointees" and other "party cadres" on the other hand feel increasingly "entitled" to "deployment" as ambassadors in the foreign service when they leave or are "redeployed" from their incumbent positions;

ix. The constant influx of "political appointees" into the foreign service creates an imbalance in the administration and management of the Department. For instance, the growing influx of "political appointees" does not come with additional financial resources (budget) for the Department, with the result that

the allocated budget has to be stretched even more to accommodate "politically appointed" ambassadors. Further, some of these "politically appointed" ambassadors do express the desire to be employed in the Department or be send to another mission when their initial term/posting ends. If and when they are "absorbed" in the Department, that system of recruitment creates another layer of "diplomats" who would have been "parachuted" into the Department without following the normal procedures laid down in the recruitment and selection processes of the public service. And if and when "political appointees" are posted from one mission to the next (inter-mission transfer), that system of appointment of ambassadors further closes the opportunities for CAREER DIPLOMATS for posting. The whole vicious cycle starts again!

x. A foreign service that is riddled with all these sorts of practices and moral and financial hazards faces an additional **risk of being rooted on quicksand**. And, to put it rather mildly, the beauty of its image is likely to be dimmed somewhat. This should be avoided.

PART THREE: CAREER DIPLOMATS and their RIGHT TO LEGITIMATE EXPECTATION

27. I turn now to the Third Part of my Comment, and it covers **career diplomats and their right to legitimate expectation.**

The consistent overlooking of CAREER DIPLOMATS for ambassadorial appointments and the concomitant practice of appointing "political deployees" in these positions, as well as the persistent partisan culture of such appointments (where HOMs are appointed predominantly from the ranks of one political party, the ANC) are not only inconsistent with the letter and spirit of the Constitution, the ANC Foreign Policy Discussion Document, 1993, the decision

of the Constitutional Court, and international good practice in this regard. These practices could, arguably, also be inconsistent with and could be violative of CAREER DIPLOMAT'S fundamental right to legitimate expectation enshrined in the Constitution (in this case, the legitimate expectation to be considered, *ceteris paribus*, for ambassadorial appointment by virtue of their chosen career in diplomacy and service of the Republic.)

28. The right to legitimate expectation became part and parcel of South African administrative law through fits and starts, specifically, following the decision of the Appellate Division (as it then was) in the famous case of *Administrator of the Transvaal v Traub and Others*[37] (a unanimous judgment delivered by one of South Africa's leading judicial minds, Chief Justice Michael Corbett). The importance and fundamental nature of this right was recognised with the enshrinement thereof in the 1993 interim Constitution and in the *Promotion of Administrative Justice Act* No. 3 of 2000 (PAJA) pursuant to section 33 of the 1996 Constitution. Section 24(b) of the 1993 interim Constitution provided that: "Every person shall have the right to procedurally fair administrative action *where any of his or her rights or legitimate expectations is affected* or threatened." [Emphasis added]. Section 3(1) of the PAJA provides that "Administrative action which *materially and adversely affects the rights or legitimate expectations* of any person must be procedurally fair." [Emphasis added]

29. Section 33 of the 1996 Constitution provides for 'just administrative action' and guarantees everyone the right to '[a]dministrative action that is lawful, reasonable and procedurally fair.'[38] Section 33 provides further that national legislation must be enacted to give effect to the right to just administrative action. In terms of s33(3), that legislation was supposed to (a) '[p]rovide for the review of administrative action by a court or, where

[37] 1989 (4) SA 731 (A)

[38] S33(1) of the 1996 Constitution : '[E]veryone has a right to administrative action that is lawful, reasonable and procedurally fair.' S33(2) provides that '[E]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons.'

appropriate, an independent and impartial tribunal';[39] (b) '*[i]mpose a duty on the state to give effect to the rights*'[ ] to administrative action that is lawful, reasonable and procedurally fair'[40] as well as the right of a person to be given written reasons;[41] and (c) '[p]romote an efficient administration.'[42] [Emphasis added]

30. The piece of legislation that was enacted pursuant to section 33(3) of the Constitution is the PAJA which has given judicial review a statutory basis for the first time in South Africa.[43] The cumulative effect of both section 33 of the Constitution and the provisions of the PAJA is that, at the moment therefore, the legal position in South Africa regarding the exercise of judicial review is that '[t]he Court's power to review administrative action no longer flows directly from the common law but from the PAJA and the Constitution itself.'[44]

31. The preamble to the PAJA provides that some of the objectives of promoting administrative justice in South Africa is to ensure, among other principles, efficient administration, good governance, '*[a] culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function[.]*' [Emphasis added]. Section 6 of the PAJA provides for judicial review of administrative action. Section 6(1) gives 'any person' the right of access to court or tribunal to institute proceedings for the judicial review of an administrative action. Section 6(2) provides the grounds on which an administrative action may be challenged on review. The grounds of review provided for in section 6(2) are essentially the old-age common law

[39] S33(3)(a) of the 1996 Constitution.
[40] S33(3)(b) of the 1996 Constitution.
[41] S33(2) of the 1996 Constitution: '[E]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons.' See also s33(3)(b) of the 1996 Constitution.
[42] S33(3)(c) of the 1996 Constitution.
[43] Hoexter Ibid Note ? 194.
[44] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 22, as quoted by Hoexter Ibid Note ? 194.

grounds which have now been given statutory imprimatur for the first time in South African administrative law.

32. The grounds for review mentioned in section 6(2) of the PAJA include the following, (a) acting without authority;[45] (b) acting under unauthorised delegated powers;[46] (c) *bias or reasonably suspected bias on the part of the administrator*;[47] (d) failure to comply with a mandatory and material procedure or condition;[48] (e) procedural unfairness;[49] (f) error of law;[50] (g) unauthorised reason;[51] (h) *ulterior purpose or motive*;[52] (i) *taking into account irrelevant considerations or ignoring relevant ones*;[53] (j) acting under unwarranted or unauthorised dictation of another person or body;[54] (k) bad faith;[55] (l) *acting arbitrarily or capriciously*;[56] (m) *acting in contravention of the law*;[57] (n) *action not rationally connected to the purpose for which it was taken*;[58] (o) *discretion/decision so unreasonable that no reasonable person could have so exercised the power or performed the function*;[59] and (p) *action tainted with unconstitutionality or unlawfulness*.[60]

33. It is now an established principle of South African administrative law that a person, who has a legitimate expectation, flowing from an express promise by an administrator *or a regular administrative practice*, has a right to be heard before administrative action affecting

---

[45] S6(2)(a)(i) PAJA
[46] S6(2)(a)(ii) PAJA
[47] S6(2)(a)(iii) PAJA
[48] S6(2)(b) PAJA
[49] S6(2)(c) PAJA
[50] S6(2)(d) PAJA
[51] S6(2)(e)(i) PAJA
[52] S6(2)(e)(ii) PAJA
[53] S6(2)(e)(iii) PAJA
[54] S6(2)(e)(iv) PAJA
[55] S6(2)(e)(v) PAJA
[56] S6(2)(e)(vi) PAJA
[57] S6(2)(f)(i) PAJA
[58] S6(2)(f)(ii)(aa) PAJA
[59] S6(2)(h) PAJA. This test comes from the *Wednesbury* definition of unreasonableness.
[60] S6(2)(i) PAJA

that expectation is taken. The doctrine, has however, by and large, remained one that provides procedural protection in South Africa. In a number of recent decisions by South African courts, ranging from the High Court to the Supreme Court of Appeal and the Constitutional Court, there have been increasing calls for the application of legitimate expectations beyond procedural claims.

34. It is fair to say that when officials choose diplomacy as their life-long career/vocation, they expect that when they rise through the ranks of the Department, and there is nothing that could constitute an impediment to their appointment – they would have an opportunity to serve at the highest diplomatic level as ambassadors and HOMs. This expectation is legitimate. Its legitimacy is based on the following considerations:

(a) South African constitutional and administrative law recognise that there is public administration in South Africa and that within that administration there is a public service "which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day."[61] What is more, the Constitution is clear about the kind of public service South Africa requires; a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN public service. Now, within public service there is a foreign service. It is axiomatic that the same rules that apply to public service apply to the foreign service. What this means is that the Foreign Service of South Africa should also be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. As a recognised career choice, it is fair to say that officials who choose this field (diplomacy) would have a legitimate expectation that if/when they rise through the ranks, apply themselves, and meet the

[61] See section 197(1) of the 1996 Constitution.

necessary requirements for appointment as ambassador or HOM they would ordinarily be considered for such appointment. In other words, that (s)he would not be ordinarily "overlooked", without a rational explanation, in favour of people from "outside" who are "political appointees" or "deployees" (See the *Traub* case).

(b) In terms of international good practice, diplomacy (foreign service) is a recognised career that some people choose to practice for the rest of their professional life. These professionals would pursue relevant academic qualifications that would open doors for them in their foreign services. Just like doctors, engineers, and other professions. It is also an accepted international practice that serious foreign services appoint ambassadors and HOMs from the ranks of the PROFESSIONAL and CAREER-ORIENTED corps. Now, for these professionals to be deliberately and consciously "overlooked" (without a plausible rational explanation) in favour of other people who would ordinarily not have chosen diplomacy as a career and would ordinarily not have devoted the same amount of energy to develop requisite skills for this career, but are nonetheless been considered for appointment (e.g. only by virtue of their political connections or affiliation), would be unwarranted, to say the least. South African PROFESSIONAL DIPLOMATS should be in the same boat and be treated the same as their counterparts in comparative foreign services as far as their legitimate expectations are concerned.

(c) Although in the early years after 1994 the Foreign Service was largely professional and career-oriented (albeit small and dominated by career diplomats from the previous regime), in the last ten years or so, the South African Foreign Service has witnessed an unprecedented domination (at ambassadorial and HOM level) by "political appointees" to the glaring "exclusion" and "marginalisation" of CAREER

DIPLOMATS. Previously, CAREER DIPLOMATS could reasonably expect that they would do a tour of duty abroad (say 4 years?) and then return to South Africa for a while (say 2/3 years?) whereafter they would be eligible for another tour (provided of course they met all the requirements for a posting abroad, including a valid security clearance). Now, over and above the fact that the opportunities for posting as ambassadors abroad have shrunk incredibly for CAREER DIPLOMATS, there are those CAREER DIPLOMATS who had been stationed at Head Office for more than 5/6 years since their last tour of duty abroad. It is possible, is it not, that the latter group of CAREER DIPLOMATS cannot be posted because there has been a constant stream of "political appointees" into the Foreign Service?

35. In all fairness, it cannot be argued with confidence that CAREER DIPLOMATS do not have a legitimate expectation in this regard, but that, in the same breath, "political appointees" have such an expectation! On the other hand, to argue that neither CAREER DIPLOMATS nor "political appointees" have legitimate expectation (to be appointed as ambassadors/HOMs because that is the sole prerogative of the President, and hence no group is being favoured), would be disingenuous. **Here is an important point**: I am not suggesting that CAREER DIPLOMATS have a legitimate expectation of a substantive nature (to be appointed as ambassadors/ HOMs). Although there is an attempt in South African courts (at least in some of the cases that have come before them) to push boundaries and to open the legal gate for recognition of a substantive right to legitimate expectation, those boundaries, at the moment, are set on the foundation that the right to legitimate expectation is only available as a procedural right (say, right to be heard before an adverse administrative action or decision is taken against an individual). Be that as it may, the conscious and deliberate practice of "overlooking" a whole class of employees (in this case, CAREER DIPLOMATS)

in ambassadorial/HOMs appointments in favour of a whole class of individuals – who (a) are not career diplomats and would ordinarily not have chosen diplomacy as a career; (b) come from "outside" the Department; (c) may not ordinarily be sufficiently steeped in matters diplomatic (generally speaking); and (d) are predominantly chosen from circles with a particular close connection with one particular political party – would definitely raise some eyebrows (to put it rather mildly).

36. The determination of whether a legitimate expectation exists that merits judicial protection in South African law is very similar to EU law. The requirements for the existence of such an expectation in South African law were recently restated in *National Director of Public Prosecutions v Philips*. These include:

(i) that there must be a representation which is "clear, unambiguous and devoid of relevant qualification";

(ii) that the expectation must be reasonable in the sense that a reasonable person would act upon it;

(iii) that the expectation must have been induced by the decision-maker; and

(iv) that it must have been lawful for the decision-maker to make such representation.

37. If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator's actions on the ground of procedural unfairness. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

38. **The following point must be made crystal clear**: this Comment does not suggest that CAREER DIPLOMATS approach the courts of law to "protect" their supposedly substantive right to legitimate expectation (to be appointed ambassadors/HOMs). That approach would be untenable and highly irregular. It is doubtful that a South African court would issue an order directing the President to appoint so-and-so ambassador/HOM by virtue of so-and-so's chosen diplomatic career! In terms of section 84(2)(i) of the Constitution, the power to appoint ambassadors and other HOMs is the responsibility of the President, not the courts.

39. Be that as it may, and without departing from the generality of the last point mentioned in paragraph 38 immediately above, it is now trite, that the President's powers of appointment under the current constitutional order are no longer immune to constitutional-legal scrutiny. (see the case of *Pharmaceutical Manufacturers Association*). In fact, the Constitutional Court has drawn clear lines to demarcate the legal and constitutional boundaries within which the President may exercise her/his powers. One of the fundamental values upon which South Africa's constitutional democracy is founded, which fundamental value the Constitutional Court has employed to "scrutinise and control" the exercise of public (in this case, presidential) power is the RULE OF LAW. (see section 1(c) of the Constitution).[62] The Constitutional Court has stated that the "principle of legality" is an important component of the RULE OF LAW.

40. Flowing form the point immediately above, it is submitted that the President's power

[62] Section 1(c) of the Constitution provides that "The Republic of South Africa is one, sovereign, democratic state founded on [the values of] supremacy of the constitution and the rule of law."

to appoint ambassadors in terms of section 84(2)(i) of the Constitution is also subject to and must be guided by the same legal and constitutional requirements and principles spelled out by the Constitutional Court in a number of cases dealing with the exercise of public power by state functionaries, including the President himself (see the *South African Rugby Football Union (SARFU)* case relating to the President's power to appoint commissions of inquiry in terms of section 84(2)(f)). This is what the Constitutional Court has said in some of these cases:

40.1 In *Matatiele Municipality v the President of the Republic of South Africa*,[63] the Constitutional Court stated, with reference to earlier judgments, that "[F]undamental to the rule of law is the notion that *government acts in a rational rather than an arbitrary manner*" and that government decisions and actions "be rationally related to a legitimate government purpose. If not, it is inconsistent with the rule of law and invalid."[64] (Emphasis added].

40.2 In *De Lange v Smuts*,[65] the Court held that "[I]n a constitutional democratic state, which ours now certainly is, and under the rule of law…citizens… are entitled to rely upon the state for the protection and enforcement of their rights."[66]

40.3 In *Van der Walt v Metcash Trading Ltd*,[67] the Constitutional Court listed the absence of arbitrary power, equality, the protection of fundamental rights and exclusion of unpredictability (legal certainty) as "some of [the] basic tenets" of the RULE OF LAW.[68]

---

[63] 2006(5) SA 47 (CC)
[64] *Matatiele Municipality* at para [100].
[65] 1998 (3) SA 785 (CC)
[66] *De Lange* at para [31]
[67] 2002 (4) SA 317 (CC)
[68] See *Van der Walt* at paras [65], [66], [68] and [76].

40.4 In *Pharmaceutical Manufacturers Association*, Chaskalson P (as he then was), stated that one of the key requirements or constraints placed upon state functionaries exercising public power is "rationality", which he described as a "minimum threshold requirement applicable to the exercise of all public power."[69] Chaskalson P stated this principle in the following words:

> It is a requirement of the rule of law that the *exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the requirement.* It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.[70] [Emphasis added]

40.5 In *Pepkor Retirement Fund v Financial Service Board*,[71] the Supreme Court of Appeal employed the principle of legality to explain that this principle "[r]equires that the power conferred on a functionary to make a decision in the public interest, should be exercised properly, i.e. on the basis of true facts."[72]

41. What all these cases point to is this: "[o]ur Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective normative value system." This was stated by the Constitutional Court in the case of *Carmichelle v Minister of Safety and Security*.[73] What this means in the context of this

[69] See *Pharmaceutical Manufacturers Association* at para [90].
[70] *Pharmaceutical Manufacturers Association* at para [85]
[71] [2003] ZASCA 56; 2003 (6) SA 38 (SCA)
[72] *Pepkor* at para [59]
[73] 2001 (4) SA 938 (CC) at para [54]

Comment is that, the President's power to appoint ambassadors/HOMs in terms of section 84(2)(i) is not simply a constitutional power giving the President free licence to appoint whomsoever (s)he chooses based on her/his (President's) subjective view and without having any qualms about anything. No! What it means is that, the exercise of public power by the President when (s)he appoints ambassadors/HOMs must be guided and bound by certain norms, values and principles that embody this objective normative value system. To suggest that the President of South Africa (today in a constitutional state) can act willy-nilly in the exercise of her/his executive powers (in this case, to appoint ambassadors/HOMs) in the same way that the President of South Africa in an apartheid state did, would mean that we still live in the old days of adulterated parliamentary sovereignty (and its culture of impunity and unlawfulness) and not in the promised land of constitutional supremacy (and its concomitant culture of justification and accountability). The importance of South Africa's objective normative value system was reconfirmed by Ngcobo J (as he then was) in his minority judgment in *Thint v National Director of Public Prosecution; Zuma v National Director of Public Prosecutions.*[74] Some of the tenets of this objective normative value system would require that when state functionaries exercise powers granted to them by law, including the Constitution, that they would do so mindful of the requirements, among others, *to act lawfully*; *to be accountable*; *to be objectively rational*; *not to misconstrue the powers conferred on them*; **to protect fundamental rights**; *to apply the mind*; to consider relevant factors and not the irrelevant ones; **to avoid acting on the basis of ulterior motive or purpose**; and *to avoid acting arbitrarily*.

In the context of the appointment of ambassadors, the existing constitutional obligation to ensure that the Foreign Service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN must always be taken into consideration as a

[74] 2009 (1) SA 1 (CC) at para [375]

guiding and binding principle in this regard. Any attempt on the part of the executive/President to side-step this constitutional imperative (by deliberately and consciously overlooking CAREER DIPLOMATS in favour of "political appointees") would be inconsistent with the Constitution and the law, and would fly in the face of the tenets of the objective normative value system that now define the constitutional state that South Africa became when we severed ties (in 1994) with the system of impunity and unlawfulness (apartheid).

42. To sum up: When the President exercises her/his powers to appoint ambassadors and other HOMs in terms of section 84(2)(i) of the Constitution, (s)he should bear the following considerations in mind, among others:

42.1 that her/his decisions must be based in law, not whim i.e. (s)he must act lawfully;

42.2 that there is a constitutional-legal obligation resting on the Executive to ensure that the public/foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN and that the Executive/President is obliged to respect and comply with that obligation (failing which the executive and the President will be acting unlawfully);

42.3 that in the exercise of her/his powers, (s)he should not act arbitrarily or capriciously;

42.4 that her/his powers (of appointment) must be exercised rationally;

42.5 that (s)he should not misconstrue the powers of appointment conferred on her/him by thinking that (s)he could appoint whomsoever (s)he wishes without consideration of the constitutional-legal boundaries within which her/his powers should be exercised;

42.6 that her/his decision (to appoint ambassadors/HOMs) must not be made willy-nilly but must be rationally related to the purpose for which those powers were granted (otherwise they are in effect arbitrary and inconsistent with one of South Africa's foundational values, viz. rule of law(see section 1(c) of the Constitution));

42.7 that her/his decisions do not violate fundamental rights, including the career diplomats' right to legitimate expectation;

42.8 that her/his decision should not be tainted with bias or reasonably suspected of bias;

42.9 that when (s)he appoints ambassadors/HOMs (s)he must take into account relevant considerations (e.g. that the Foreign Service must be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN) and not irrelevant ones;

42.10 that when (s)he exercises her/his power of appointment, (s)he should understand that that power is not simply a constitutional power giving the President free licence to appoint whomsoever (s)he chooses as ambassador/HOM based on her/his (President's) subjective view and without any qualms at all; but that the

exercise of that power must be guided and bound by certain principles (some enumerated above) that embody what the highest court on constitutional matters has described as South Africa's objective normative value system; and

42.11 that in discharging her/his constitutional obligations (in this case, appointment of ambassadors/HOMs), (s)he must always act with one intention and one intention only: "to uphold, defend and respect the Constitution as the supreme law of the Republic" (as section 83(b) of the Constitution enjoins her/him).

PART FOUR: COMMENTS ON SOME OF THE PROVISIONS OF THE BILL.

43. I now move to the fourth part of this Comment and here I focus on the actual provisions of the Bill and make a few proposals on the language to sharpen some of its objects.

44. In the context of the preceding discussion in parts one, two and three of this Comment, it is proposed that language be inserted in the Bill that will spell out in clear and unambiguous terms that the Foreign Service of the Republic of South Africa shall, as required by law, be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. That language should be inserted as part of the preamble to the Bill in the following words, **"to provide for the career-oriented, professional and non-partisan Foreign Service of the Republic of South Africa"**.

45. Notwithstanding the generality of the paragraph immediately above, it should be

noted however that a mere statement in the Bill that the Foreign Service of South Africa shall be **career-oriented, professional and non-partisan** does not *ipso facto* and *ipse dixit* mean that that Foreign Service is indeed **career-oriented, professional and non-partisan!** There is a lot that must go into the professionalisation of a Foreign Service and this would entail, among other things, institutional changes; redesigning of the training and curriculum for diplomatic service; and the reconceptualisation of the diplomatic service as a "profession". Don Suider, a professor in the Strategic Studies Institute of the Army War College and a senior fellow in the Centre for the Army Profession and Ethic at West Point (USA) suggested that there are certain criteria that a profession must have before it can be properly understood as a "profession". He suggested that professionals (and this would also be relevant when considering the professionalisation of the South African Foreign Service) are those who:

- "provide a vital service to society that it cannot provide for itself but must have to flourish";
- "work with expert (abstract) knowledge developed into human expertise (i.e., not routine or repetitive work) that takes years of study and experiential learning";
- "earn and maintain the trust of their society by the effective and ethical application of their work's art and expertise"; and
- "enjoy relative autonomy in the application of the work's art and expertise."[75]

Charles A. Ray suggests that another important criterion of a profession is that it must have "a formalised code of ethical behaviour that is easily accessible and understood by members of the profession and by the general public."[76] The point here is that, the professionalisation of South Africa's Foreign Service will require a concerted effort that must also address the kind of institutional arrangements we should put in place in order to achieve

[75] See http://www.afsa.org/america-needs-professional-foreign-service
[76] Ibid.

that objective. The Bill in its current form does not suggest that sufficient time and expertise were engaged in the conceptualisation of the kind of Foreign Service South Africa requires. It would be my proposal that the drafters pause at this moment and go back to the drawing board in order to canvass every necessary opinion and advice on how a **career-oriented, professional and non-partisan** Foreign Service could be achieved and realised.

46. Section 2(1)(a) of the Bill provides, in part, that the Foreign Service of South Africa "[s]hall promote and advance *the international relations and cooperation* of the Republic by representing…" [Emphasis added]. It is proposed that the Bill spells out the core of the function of the Foreign Service, which is, **to pursue the national interests** of the Republic. In other words, the Bill should provide in section 2(1)(a) that the Foreign Service of South Africa shall perform its functions "in the national interest of the Republic of South Africa". It is submitted that the language that provides that the Foreign Service "shall perform its functions in the national interests of the Republic" is more precise and clearly states the essence of what the Foreign Service of South Africa is expected to do. Further, the words, "international relations and cooperation" and "effective, coherent and comprehensive" in section 2(1)(a) are not defined in the definitions section of the Bill (section 1). They should be, otherwise the Bill runs the risk of providing in a statute of this nature *indeterminate language* that could engender complicated challenges of interpretation. As far as the words, "international relations and cooperation" are concerned, these could be deleted and replaced by the words, "the national interests of the Republic".

47. Section 2(1)(b) of the Bill provides, in part, that "[T]he *Department* [of International Relations and Cooperation] is responsible for conducting and coordinating the international relations and cooperation of the Republic [at various levels]" [Emphasis added]. It should be

borne in mind that in terms of section 85(1) and (2)(b) and (c) of the Constitution, the executive authority of the Republic is vested in the President and that the President exercises that authority "together with the other members of the Cabinet" by developing and implementing national policy and coordinating the functions of state departments. As far as section 2(1)(b) of the Bill is concerned, one gets the impression that the Bill places the responsibility of "conducting and coordinating the international relations and cooperation of the Republic" in the hands of *the Department* (dirco)? That responsibility should be in the hands of the President (see section 85(1) and (2)(b) and (c) of the Constitution) acting "together with" the Minister of International Relations and Cooperation (in this case). To say that the foreign policy of South Africa shall be conducted and coordinated by the Department (dirco) could amount to usurpation of constitutional power placed in the hands of the President, which power the latter exercises "together with" the member of Cabinet (not **the** department). It is proposed that appropriate language be found in this section to reflect the correct position in law in relation to **who** exercises public power in the realm of foreign relations. The present language in the Bill on this point is not consistent with the provisions of the Constitution; specifically section 85(1) and (2)(b) and (c).

48. As suggested in paragraph immediately above, the allocation of the responsibility (or power to conduct foreign affairs of the Republic) to dirco is incorrect as it is inconsistent with the Constitution. Be that as it may, the important question to ask here would be: what about the international work done by other departments such as the dti (e.g. WTO), health (e.g. WHO), agriculture (e.g. WTO, FAO), and labour (e.g. ILO)? Does the Bill now place the responsibilities of these other departments under dirco? Does the dirco have the capacity and human resources to take up all that work and would dirco be able to conduct South Africa's work in this regard in an "effective, coherent and comprehensive manner"? What type of

reporting channels will be followed in this regard between the missions and Head Office? In parenthesis, it is fair to say that South Africa's international work i.e. where various departments send their own representatives abroad has not been smooth-sailing; there have been challenges of coherence, coordination, reporting channels, and overlapping responsibilities. In some missions, serious challenges were encountered as transferred officials could not see eye-to-eye on these and other critical issues of representation abroad. Does the Bill hope to address these challenges once and for all? In the case of the dti for instance, and in an attempt to stem some of the "conflicts" and "disagreements" that cropped up (in the past) on certain matters of policy between the dti and dirco, a proposal was made (but was never followed) to consider transforming the erstwhile Department of Foreign Affairs (DFA) into the Department of Foreign Affairs and Trade. There is a need for Government to take a policy position on these matters before this Bill is finalised. In other words, the proposal would be that Government take a policy decision that all international work done by South Africa abroad will now fall under dirco. And in order to operationalise that decision, the proposal could be that all components in other national departments dealing with "international relations and cooperation" (like dti dealing with "multilateral trade negotiations" in the WTO as well as other regional integration negotiations (e.g. the tripartite SADC-ECOWAS-COMESA negotiations)) be transferred to dirco (with their budgets and staff). That way South Africa could, at the very least, place all international work under one roof.

49. It is proposed that the last few words in section 2(1)(b) of the Bill, "in accordance with the foreign policy of the Republic", be taken out. It should be remembered that, strictly speaking, if the Bill is passed, it will become a piece of legislation (statute). It must therefore be crafted in clear and simple terms. The Bill should avoid language that is more located in

the "policy field". The suggestion to insert the words, "in the national interests of the Republic" in section 2(1)(a) should cover the need to have the words, "in accordance with the foreign policy of the Republic" in section 2(1)(b).

50. Section 2(2) of the Bill stipulates the persons who constitute the Foreign Service. They are, "persons who serve in a position in the South African Missions and who are accredited to a foreign state for the period of time that they hold that position, *regardless of whether they are ordinarily employed by the Department or by any other national department or appointed on a contractual basis for a fixed period.*" [Emphasis added]. In simple terms, section 2(2) provides in essence that the Foreign Service of South Africa consists of dirco officials posted abroad as well as other officials from other government departments and "political appointees" (at ambassadorial level). It is not the intention, at this stage, to regurgitate the submissions made in parts one, two and three of this Comment in support of a South African Foreign Service that is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. Suffice to say that, it is important that the Bill provides in clear and unambiguous terms that the Foreign Service of South Africa shall be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. The appointment of "political appointees" who are "appointed on a contractual basis for a fixed period" should be revisited in the light of the submissions above. It is submitted that the Presidency, the Department, and the "ruling party" reconsider the issue of appointment of "political appointees" into the Foreign Service, particularly at HOM level. As suggested above, the current practice where the Foreign Service of South Africa at HOM level is overwhelmingly dominated by "political appointees" is essentially inconsistent with the Constitution and the law and flies in the face of the foundational policy of the ANC on diplomatic service and is out of step with international good practice. It was further suggested that, the overwhelming domination of the Foreign

Service at HOM level by "political appointees" presents very serious moral and financial hazards for the Presidency, the Minister, the Director General, the "ruling party" and the officials themselves. A Foreign Service exposed to such moral and financial hazards may quickly find itself standing on quicksand; a phenomenon which will have serious implications on the capacity of that Foreign Service to perform its functions "in an effective, coherent and comprehensive manner."

51. In section 3(1) of the Bill, reference to officials employed by "another national department who meet the prescribed requirements, are eligible to become a member of the Foreign Service" should be reconsidered in the light of the submissions made herein with respect to a South African Foreign Service that should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. There is no need to repeat the submissions here. Please see discussion in parts one, two and three of this Comment.

52. Section 3(2) of the Bill should provide for minimum and maximum periods for the tour of duty of members of the Foreign Service abroad (say, four years). The Bill should also provide for the minimum and maximum periods that officials may spend at Head Office (say, two years) after the first posting before being eligible to apply for the next posting (provided of course that the official meets all the requirements).

53. Section 4 of the Bill deals with Head of Mission (HOM). Section 4 stipulates the responsibilities of the HOM (section 4(1)) and that (s)he "must act on the instructions and under the authority of the Director-General." (section 4(2)). The submission would be that the appointment of these HOMs be provided for in light of the legal and constitutional issues canvassed above (in parts one, two and three of this Comment).

54. Section 11 of the Bill deals with "offences". The proposal would be that this section be deleted. This Bill is not a "penal statute". On the contrary, it is "an enabling statute". Section 11(2) is simply just too broad. Based on the experiences in missions, if this Bill is allowed to have a penal provision so wide, it would create a "class of criminals" in the Foreign Service of officials in missions, particularly the HOM and Corporate Service managers. For instance, every single audit report that is done at the mission is bound to come up with some "findings". Some of these 'findings" may be minor while others may be major. Obviously, if there are serious contraventions, action must be taken and normal disciplinary proceedings should be instituted. Subjecting "minor infringements" to criminal sanction involving the possibility of criminal conviction and a fine "not exceeding R50 000" is just too harsh and too broad a measure considering the kind of work and environment foreign service personnel work under.

BRIEF COMMENT ON "MEMORANDUM ON THE OBJECTS OF THE FOREIGN SERVICE BILL, 2015

55. The *Memorandum on the objects of the Foreign Service Bill, 2015* (The Memo) states (in paragraph 1.1) that one of the key objectives of the Bill is "to provide for a single Foreign Service system for the Republic of South Africa." According to the Memo, the establishment of a single Foreign Service would help address the challenges associated with the "current fragmented Foreign Service system." This objective is commendable. However, the Bill does not state this objective in clear and unambiguous terms. As suggested (in Part Four herein), government needs to take a clear policy decision to bring all international relations work (security and defence are different?) under one roof. A mere insertion of that objective in the Bill without the backing of a clear government policy on the matter would be counter-productive and would not achieve the set objective.

56. The Memo states further (in paragraph 1.1) that a related objective for the creation of a single Foreign Service under the proposed legislative framework (the Bill) is to enable the Foreign Service of South Africa "to respond appropriately and adequately to the ever changing environment" in "an increasingly complex world." This objective was stated as early as October 1993 by the ANC in its Foreign Policy Discussion Paper, 1993. That Discussion Paper provided, in part, that:

> Modern diplomacy has become an exacting and demanding vocation. It demands, in our opinion, knowledge, skilled communication, strong commitment and complete integrity. We will foster the required professional ethos for our corps anticipating that it will take its [rightful] place amongst the great services of the world.

57. The Memo states further (in paragraph 1.3) that "[I]n preparing the Bill, extensive research was done in respect of the Foreign Services of comparable countries." I would imagine that this 'comparative survey' sought to obtain 'good practices' to be infused in the envisaged Foreign Service of South Africa so that it (the Foreign Service) could, as the ANC correctly proposed, "take its [rightful] place amongst the great services of the world." It would be interesting to obtain information from this 'comparative survey' specifically on what the ratios are in 'comparable countries' (which are they?) of career diplomats versus "political appointees" at HOM level. What is known for sure is that countries like India, Malaysia and Singapore (to mention but three) are almost exclusively career-oriented at HOM level. Does the Memo have information about the advantages and disadvantages of a Foreign Service dominated by career diplomats on the one hand and "political appointees" on the other? The failure of the Bill *not* to provide in categorical terms that the envisaged Foreign Service of South Africa shall be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN might be attributable to the failure(?) of the 'comparative survey' to

appreciate true facts in 'comparable countries' of positive developments (in these countries) to increasingly professionalise their Foreign Services, particularly at HOM level.

58. The Memo states further (in paragraph 2.3) that "[T]he Bill will be operationalised within the existing legislative framework governing the public service sector and the security services in South Africa and the Constitution of the Republic of South Africa, 1996." The suggestion that the Bill must be anchored on the provisions of the Constitution and the law is correct. In any event, every piece of legislation in South Africa must be consistent with the Constitution, otherwise it is of no force and effect. Now, one of the key constitutional-legal obligation resting on government is to ensure that the public/foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. The same constitutional-legal obligation rests on the President in particular that when (s)he appoints HOMs in terms of section 84(2)(i) of the Constitution, to ensure that the Foreign Service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. A close and careful reading of the Bill as it stands at the moment will show that its provisions are very far removed from the commitment expressed in the Memo i.e. to operationalise the Bill within the existing legislative framework governing the public service sector and the Constitution of the Republic of South Africa. A Foreign Service Bill that fails to comply with key constitutional-legal provisions exposes itself to the possibility of being unconstitutional and invalid *ab initio*.

59. In paragraph 3.4, the Memo states that "[C]lause 4 [of the Bill] regulates the appointment of Heads of Mission and the requirements that a person should have in order to be appointed as Head of Mission at a South African Mission." This is simply not the case! Clause 4 of the Bill does not regulate the appointment of HOMs. That clause does also not

provide for the requirements that a person should have in order to be appointed as HOM at a South African mission. All clause 4 does is to stipulate the responsibilities of a HOM (in clause 4.1) and demands that the HOM act on the instructions and under the authority of the Director General.

60. It should be remembered that the responsibility to appoint HOMs rests with the President in terms of section 84(2)(i) of the Constitution. It should also be remembered (and this is important) that the Constitution of South Africa is very clear on the nature of a public/foreign service South Africa requires; a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN service. In other words, the President's power of appointment is not subjectively absolute; it is limited by the constitutional-legal requirement that (s)he ensures that the public/foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. The Bill must provide for this requirement in unambiguous terms. When the Bill provides in clear, simple and straight-forward terms that the Foreign Service of South Africa shall be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN at all levels, including HOM level, it (the Bill) shall neither be interfering with the President's power of appointment nor "prescribing" in anyway whatsoever to her/him whom (s)he (the President) should appoint as HOM. On the contrary, the Bill would simply be stating what the Constitution and the law already provide for and require.

END

Annexure "B'

Moloi, SF Amb : CD: Human Rights & Humanitarian Affairs, DIRCO

From: Moloi, SF Amb, Khartoum, Ambassador, DIRCO
Sent: 22 May 2017 11:11 AM
To: lsigwela@parliament.gov.za
Subject: Comment on the Foreign Service Bill
Attachments: Sanned Comment on the proposed Foreign Service Bill 2015.pdf

Importance: High

Dear Lubabalo,

I refer to the above matter and more specifically to our brief telephonic discussion of 5 minutes ago. Kindly receive, herewith, my Comment on the Foreign Service Bill addressed to Honourable Moses Masango, MP Chairperson of the Portfolio Committee on International Relations and Cooperation for his attention and consideration. The contents of this Comment are self-explanatory. I trled previously to send it to you but for some reason it was always "undelivered"!
I shall appreciate it very much if you could kindly acknowledge receipt and also confirm that you will kindly transmit same to Honourable Masango's office.

I thank you and trust you find this in order.

Regards

Francis

Annexure "C"

S. FRANCIS MOLOI

c/o Embassy of the Republic of South Africa
Amarat, Street 11, B9, House 6
P. O. Box 12137
KHARTOUM, Republic of the Sudan
Tel: +(249) 183 585 301/2/3/4 Mob: +(249) 92 900 900
E-mail: moloif@dirco.gov.za

14 March 2018

PER E-MAIL:
Courtesy of the Office of the Director General in the Presidency

His Excellency Mr Cyril Ramaphosa
President of the Republic of South Africa
The Presidency
The Union Buildings
PRETORIA

Your Excellency

AMBASSADORIAL AND OTHER HEADS OF MISSION APPOINTMENTS IN THE FOREIGN SERVICE OF SOUTH AFRICA: THE URGENT NEED FOR CHANGE!

I refer to the above matter and enclose under cover hereof a Memorandum (a Memo) for your kind attention and consideration. The contents of the Memo are self-explanatory and are based on my initial Comment on the proposed Foreign Service Bill, 2015 (the Bill), which Comment I submitted in February 2017 to Parliament courtesy of Hon. Moses Siphosezwe Amos Masango, MP and Chairperson of the Portfolio Committee on International Relations and Cooperation (the Committee).

I have chosen to address this Memo to you Honourable President, because the issues it addresses and the recommendations it makes, including how ambassadors and other Heads of Mission should be appointed in the Foreign Service of the Republic of South Africa, rest squarely within your constitutional powers, specifically, section 84(2)(i) of the Constitution and do not need to wait for the passing of the Bill into law before the President can act upon the recommendations herein.

The gist of my submission is that there is an urgent need to change the manner in which ambassadors and other Heads of Mission are appointed in the Foreign Service of South

Africa. My submission is that South Africa needs to move away from the current practice - where ambassadorial positions in South African missions abroad are disproportionately and grotesquely dominated by "political appointees" and other "party deployees" - to a system where the Foreign Service (at ambassadorial level) is properly staffed with **career-oriented, professional and non-partisan diplomats**.

In this Memo, I demonstrate that the current practice of ambassadorial appointments is inconsistent with: (a) the letter and spirit of our Constitution; (b) the decision of the Constitutional Court in *the Second Certification Judgement*; (c) the previous foreign policy position of the ANC (contained in the ANC's Foreign Policy Discussion Paper, 1993); and (d) is out of step with international good practice.

In the circumstances, I implore you Honourable President, to take into account the submissions in this Memo and consider seriously the constitutional and legal obligations resting on you as you exercise your powers of appointment (of ambassadors) in terms of section 84(2)(i) of the Constitution. Specifically, that Honourable President ensure that the exercise of your powers of appointment under section 84(2)(i) is consistent with the Constitution and the law and other tenets of our constitutional democracy such as respect for the rule of law, transparency, rationality, accountability, non-discrimination and non-arbitrariness.

I wish to clarify that my submission of this Memo to you Honourable President, is part of my contribution to:

(a) promoting public participation in policy making as required by section 195(1)(e) of our Constitution;
(b) your call (in the SONA, Friday 16 February 2018) to all of us, South Africans, to put our shoulder to the wheel and "turn our country around" for the better; and
(c) the on-going process, where Parliament, courtesy of the Committee is engaging the public on the proposed Foreign Service Bill.

I am aware that Your Excellency has undertaken to visit government departments and engage with them on various matters. I trust that when you visit dirco, Your Excellency will have an opportunity to address some of the issues raised in this Memo with the leadership and officials of that department.

I confirm that should Your Excellency wish to receive any further clarifications and inputs on any issue raised in this Memo, I shall be delighted to do so.

I thank you and trust you find this in order.

In the meantime, please accept, Your Excellency, the assurances of my highest consideration.

Sincerely,

S. FRANCIS MOLOI (Mr)
B.Soc.Sc., LLB, LLM (Commercial Law)(Cape Town), Diploma (Trade Policies)(WTO)(Geneva), LLM (Harvard)
Attorney of the High Court of South Africa and current Ambassador of South Africa to the Republic of the Sudan, Khartoum. Written **WITHOUT PREJUDICE** and in my capacity as an interested member of the public (service). The views expressed herein are mine, and should, unless otherwise indicated, not be attributed directly or indirectly to the Embassy of South Africa in Khartoum or the Department of International Relations & Cooperation or any other official(s) in the Department. I take full responsibility for the contents of this Memo.

MEMORANDUM ADDRESSED TO
HIS EXCELLENCY PRESIDENT CYRIL RAMAPHOSA
ON THE APPOINTMENT OF HEADS OF MISSION IN THE FOREIGN SERVICE OF THE REPUBLIC OF SOUTH AFRICA

From: Sehloho Francis Moloi(Mr)
Ambassador of South Africa to Sudan (Khartoum)

Copied to: Her Excellency Dr Lindiwe Sisulu
Minister of International Relations and Cooperation
OR Tambo Building
Soutpansberg Road
Rietondale

PER E-MAIL: Isigwela@parliament.gov.za
Hon. Moses Siphosezwe Amos Masango, MP
Chairperson of the Portfolio Committee on International Relations & Cooperation
Parliament of the Republic of South Africa
Plein Street
CAPE TOWN

Mr Aziz Pahad
Chairperson
South African Council on International Relations
Pretoria

1. I refer to the above matter and more specifically to:

(a) The current process initiated by Parliament (courtesy of the Portfolio Committee on International Relations & Cooperation (the Committee)) to solicit public comment and views on the proposed Foreign Service Bill, 2015 (the Bill) (as introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in *Government Gazette* No. 39211 of 17 September 2015) (The English text is the official text of the Bill);

(b) The seminar held on Thursday 26 January 2017 at the Head Quarters of the Department of International Relations & Cooperation (the Department), OR Tambo Building, Soutpansberg Road, Rietondale, Pretoria, where the Committee and the Department interacted, among others, with experts in the field (of foreign policy) and other interested members of the public to deliberate on the Bill and make proposals and comment;

(c) The invitation by the Department (courtesy of the Office of the Acting Director General (as he then was), Mr KE Mahoai) to dirco officials to "familiarise [them]selves with the Bill, and if need be give inputs to [their] Head of Branch for consolidation and forwarding to the Portfolio Committee";

(d) The constitutional right and privilege given to every South African citizen, eligible and willing to do so, and without fear, favour or prejudice, to comment on proposed legislation and to engage in lawful, democratic and consultative processes of Parliament that encourage South Africans to participate in policy-making (see section 195(1)(e) of the Constitution); and

(e) Your Excellency's state of the nation address (SONA) on Friday 16 February 2018 wherein you stated, among other things, that "[I]t is critical that the structure and size of the state is optimally suited to meet the needs of the people and ensure the most efficient allocation of public resources [and that government] will therefore initiate a process to review the configuration, number and size of national government departments."

2. This Memo is my contribution to the above-mentioned processes, invitations and

statements. In this Memo, I do not wish to address each and every issue I covered in my afore-mentioned Comment to the Committee. However - and this is important - I wish to focus only on one issue, which is, the need to relook the whole issue of appointment of Heads of Mission (HOMs) into the Foreign Service of the Republic of South Africa. The Bill purports to be providing for the appointment of HOMs, but a close and careful reading of the Bill shows major gaps and shortcomings on that score. I address this Memo to you Respected President, because the issue of appointment of HOMs is the sole responsibility of the President in terms of section 84(2)(i) of the Constitution, and this matter does not need the finalisation of the Bill into law before this issue could be addressed properly by your Good Self in the manner I shall propose hereunder.

3. The main purposes behind this Memo are the following:

a. To explain the kind of Foreign Service that was envisaged by the African National Congress (ANC) in the early 1990s and in the run-up to the first all-inclusive national election that paved the way for a new constitutional dispensation in 1994;

b. To identify *binding* constitutional-legal principles and values which the President should take into account when he exercises his powers of appointment under section 84(2)(i);

c. To make a case for the President to consider implementing with immediate effect the constitutional injunction to ensure that the Foreign Service of South Africa, particularly at HOM level shall henceforth be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN; and

d. To initiate a dialogue among all interested and relevant stakeholders, including the executive, parliament, government officials, and foreign policy experts,

with the view to looking seriously at how South Africa should restructure/reconfigure and truly professionalise its Foreign Service at all levels, including at ambassadorial and Head of Mission (HOM) level in order to respond effectively to that vast area of governmental responsibility beyond the territorial jurisdiction of the Republic (foreign affairs).

4. This Memo proceeds in three main parts.

4.1 Part One covers "**the nature of South Africa's Foreign Service**" envisaged in the Constitution of the Republic of South Africa after 1994. The idea behind that discussion is to explain the kind of Foreign Service South Africa requires – and as contemplated in the Constitution - in order to carry out its diplomatic mandate and to pursue South Africa's interests in the context of the management and implementation of South Africa's foreign policy. In this discussion, the point will be made that the kind of Foreign Service South Africa requires must be defined and informed by:

(a) the relevant provisions of the Constitution;

(b) the decision of the Constitutional Court in this regard;

(c) previous foreign policy position of the ANC (contained in the ANC's Foreign Policy Discussion Paper, 1993); and

(d) international good practice.

4.2 Part Two focuses on "**the appointment of Heads of Mission**" (HOMs) in the South African Foreign Service. The idea behind this discussion is to provide the historical, legal and constitutional background and context within which HOMs should be appointed. For instance, this discussion will elaborate on the differences between the legal regime that

governed the conduct of foreign policy in general and the appointment of ambassadors in particular in pre-democratic South Africa, and the legal regime which now (after 1994) governs this area of governmental responsibility in a constitutional dispensation under the rule of law. The submission would be that the manner of appointment of ambassadors in the pre-1994 era has now been replaced by a new system - under the present constitutional dispensation - which requires that certain constitutional-legal norms, values and principles such as rationality, non-arbitrariness, professionalism and non-partisanship be taken into consideration when the President appoints ambassadors and HOMs.

4.3 Part Three discusses **"career diplomats and their right to legitimate expectation"**. The idea behind that discussion is to make a case for the reconsideration of the current system of appointment where the Foreign Service of South Africa has come to be dominated grotesquely by "political appointees" and "party deployees" at ambassadorial and HOM level. The discussion in Part Three builds on and draws from the legal and constitutional issues traversed in Parts One and Two.

I turn now to discuss these three topics in turn.

PART ONE: THE NATURE OF SOUTH AFRICA's FOREIGN SERVICE AS ENVISAGED IN THE CONSTITUTION

5. The first issue I wish to bring to Your Excellency's kind attention is **the nature of the Foreign Service South Africa requires** and as contemplated in our Constitution. And what follows is a historical background that will explain the origins of the constitutional imperative that the Foreign Service of South Africa in the current constitutional-legal order (after 1994) should be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN.

5.1 During the negotiations for a new democratic dispensation (1990-1993), the negotiating parties at Kempton Park agreed, among other things, on 34 so-called "Constitutional Principles" (CPs), which CPs constituted what the parties called a "solemn pact". The parties had agreed that, when the elected representatives of all the people of South Africa draft the 'final' Constitution (within two years after the 1994 elections), they should adopt that 'final' Constitution "in accordance with a solemn pact recorded as Constitutional Principles."[1] These CPs were contained in Schedule 4 to the Constitution of the Republic of South Africa, Act 200 of 1993 (the 1993 interim Constitution).

5.2 In terms of the "solemn pact" concluded at Kempton Park, the Constitutional Assembly that was charged with the responsibility of drafting and adopting the 'final' Constitution was legally and constitutionally bound to ensure that the final text of the Constitution complied with *all* the CPs agreed to and contained in schedule 4 to the 1993 interim Constitution.[2] In other words, the 34 CPs contained in schedule 4 to the 1993 interim Constitution were "non-negotiables" and the Constitutional Assembly drafting the 'final' Constitution had no discretion and no mandate and no powers and no authority whatsoever to depart from the letter and spirit of the CPs. In fact, the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: Re Certification of the Constitution of the Republic of South Africa, 1996*[3] (the *First Certification Judgment*), stated that the CPs were

[1] The preamble to the 1993 interim Constitution provided, in part: '[A]ND WHEREAS in order to secure the achievement of this goal [creation of a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms], elected representatives of all the people of South Africa *should be mandated to adopt a new Constitution in accordance with the solemn pact recorded as Constitutional Principles.*' [Emphasis added]
[2] Ibid.
[3] 1996 (4) SA 744 (CC); [1996] ZACC 26; 1996 (10) BCLR (CC)

acknowledged by the preamble to the 1993 interim Constitution "to be foundational to the new constitution."[4]

5.3 The constitutional-legal obligation rested on the Constitutional Assembly to ensure that the 'final' Constitution complied with *all* CPs.[5] The obligation to ensure that the 'final' Constitution complied with all CPs was stated clearly and unambiguously in section 71 of the 1993 interim Constitution. Section 71(1) of the 1993 interim Constitution provided in peremptory terms that

> A new constitutional text *shall* (a) *comply with the Constitutional Principles* contained in Schedule 4; and (b) be passed by the Constitutional Assembly *in accordance with this Chapter*. [Emphasis added]

5.4 Section 71(2) underscored the importance of the constitutional-legal obligation placed on the Constitutional Assembly by providing that

> The new constitutional text passed by the Constitutional Assembly, or any provision thereof, *shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles* referred to in subsection (1)(a). [Emphasis added]

5.5 The firm commitment and obligation to ensure that the 'final' Constitution complied with all 34 CPs was buttressed by section 71(3) which provided that

> A decision of the Constitutional Court in terms of subsection (2) *certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.* [Emphasis added]

[4] The *First Certification Judgment* at para [15].
[5] See *First Certification Judgment* at para [2].

good without the prescription of the law.[29] Some of the prerogative powers relevant to the conduct of foreign affairs included, the power to conduct foreign relations,[30] the defence of the realm, **the power to appoint ambassadors**, the power to recognise foreign sovereigns, and the power to declare war. Under the common law, scrutiny of such 'royal' residual powers was not possible.[31] Since prerogative powers were discretionary powers for which the law made no provision, they (prerogative powers) could not be questioned by anyone or subjected to constitutional scrutiny/review by the courts or parliament. The law did not interfere with the exercise of the discretion by the executive in matters relating to foreign policy, including the appointment of ambassadors. The rationale for this policy was '[f]ounded upon the proposition that the very nature of the relations between states means that there are no judicial standards by which to determine the lawfulness of sovereign acts done in the sovereign's conduct of foreign relations.'[32] What this means is that, during the days of apartheid, no one (including the courts) could question any decision taken by the apartheid government and its leadership on matters of foreign policy, including the appointment of ambassadors. That is why the South African government could violate with impunity every known tenet of international law, international humanitarian law and international human rights law under the thin disguise of pursuing its national interests (national security, internal stability and "law and order") knowing very well that their foreign policy decisions could never be questioned or scrutinised by parliament or the courts or anyone.

---

[29] John Locke *Second Treatise of Civil Government* [full citation excluded]. See also Lord Denning in *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643 at 705B-C referred to by Chaskalson CJ in *Pharmaceutical Manufacturers Association* at para [36] (and footnotes therein)

[30] See Dugard *supra* 71.

[31] D Mullan 'Judicial review of the executive – principled exasperation' (2010) 8 *New Zealand J of Public & IL (No. 2)* 145 at 161.

[32] Lord Sumpton 'Foreign affairs in the English courts since 9/11' Lecture at the Department of Government, London School of Economics, 14 May 2012 available at https://www.supremecourt.uk/docs/speech_120514.pdf

20.1.2 However, with the advent (in 1994) of a constitutional democracy under the rule of law, the realm of foreign relations and the manner in which the new South African government was to design, manage and conduct its foreign policy changed dramatically. In 1994, South Africa moved from a dispensation where parliament was "sovereign" and its laws could not be challenged for constitutionality and where the decisions of the Executive in foreign affairs could not be questioned, to a radically new system where the Constitution was supreme (supremacy of the constitution) and where the exercise of public power was subject to constitutional control. In *Pharmaceutical Manufacturers Association*, Chief Justice Chaskalson stated:

> [T]he interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. *But there has been a fundamental change*. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, *and the constraints subject to which power has to be exercised*. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed.[33] [Emphasis added]

20.1.3 Deputy President (of the Constitutional Court), Justice Mahomed (as he then was) described the difference between the apartheid dispensation and the constitutional one in more graphic terms when he said:

[33] *Pharmaceutical Manufacturers Association* at para [45]

> In some countries the Constitution only formalises, in a legal document, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of a commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. *The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.*[34] [Emphasis added]

20.1.4 Justice Ackerman also elaborated on the differences between the apartheid system and the constitutional system and their ways of doing things when he stated:

> *We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law* to a present and a future *in a constitutional state where state action must be such that it is capable of being analysed and justified rationally*. The idea of a constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. *Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.*[35] [Emphasis added]

20.1.5 After 1993, and in line with the radical transformation brought about by the transition from apartheid to democracy, the conduct of South Africa's foreign policy was no longer subject to the common law prerogative but was now subject to a system that provided for *constitutional control of all exercise of public power, including exercise of public power in the realm of foreign policy* (and in this case, appointment of ambassadors).

---

[34] *S v Makwanyane & Another* 1995 (30 SA 391 (CC); 1995 (6) BCLR 665 at para 262.
[35] *Makwanyane* at para 156.

20.1.6 In the case of *Pharmaceutical Manufacturers Association*, Chief Justice Chaskalson authoritatively stated that, with the adoption of the new Constitution, South Africa had moved away from a system of law where some executive powers (e.g. foreign affairs powers) were governed by the common law prerogative to a new system of constitutional supremacy. The learned Chief Justice said: '[P]owers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of power are now regulated by the Constitution.'[36]

20.1.7 In *Earthlife Africa-JHB & Ano v Minister of Energy & Others*,[37] the court reconfirmed the authoritative principle of our constitutional law, which is that the exercises of all public power are justiciable "in that they must be lawful and rational [and that these] include exercises of public power relating to foreign affairs."[38]

20.1.8 The **cardinal points** I want to make – by explaining, as I do above, the differences between the apartheid and post-apartheid legal regimes that govern(ed) the conduct of foreign affairs in general and appointment of ambassadors in particular – are the following:

(a) The idea that the President's foreign affairs powers to appoint ambassadors (in terms of section 84(2)(i) of the Constitution) without any question whatsoever is not borne by

---

[36] *Pharmaceutical Manufacturers Association* at para [41]. To make his point, Chief Justice Chaskalson stated further that: 'Thus, in *President of the Republic of South Africa & Another v Hugo* [1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC)] the power of the President to pardon or reprieve offenders had to be dealt with under section 82(1) of the interim Constitution, and not under the prerogative of the common law. In *Fedsure [Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others]* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC)], the question of legality had to be dealt with under the Constitution and not under the common law principle of ultra vires. In *Sarfu 3 [President of the Republic of South Africa & Others v SARFU & Others]* 2000 (1) SA 1 (CC); 2000 (10) BCLR 1059 (CC)][,] the President's power to appoint a commission of inquiry and the exercise of that power had to be dealt with under section 84(2) of the Constitution and the doctrine of legality, and not under the common law principle of prerogative and administrative law.'

[37] Case No. 19529/2015, Western Cape High Court, judgment delivered on 26 April 2017.

[38] *Earthlife* at para 103.

the facts and is not supported by the legal and constitutional provisions governing the conduct of foreign policy (in this case, appointment of ambassadors) in South Africa. In other words, it is incorrect to suggest that the President's foreign affairs power to appoint ambassadors is absolute, cannot be questioned, is untrammelled, and cannot be interfered with. On the contrary - and because the appointment of ambassadors involves the exercise of public power - the President's foreign affairs power to appoint ambassadors is subject to constitutional control.[39] In the circumstances, the President's foreign affairs powers should, at the very least, be 'guided by', 'informed by' and 'bound by' certain norms, values, and principles enshrined in the Constitution pertaining, among others, to the kind of Foreign Service South Africa requires.

(b) In pre-democratic South Africa, the President could appoint whomsoever *he* chose without any worry of being questioned by anyone about his appointments. This was so because the appointment of ambassadors constituted part of the executive's prerogative powers under the common law, which power – because it fell within the domain of foreign affairs – was governed by the "act of state" doctrine. As stated earlier, in terms of this doctrine, the actions or decisions of the South African government/state/executive in the realm of foreign affairs were not justiciable (and could not be reviewed or questioned by anyone, including the courts of law). In pre-democratic South Africa therefore, the following decisions of the President were, technically speaking, legitimate and could not be reviewed or questioned by anyone e.g.

(i) the President could choose whomsoever *he* wanted even if that person did not meet the 'fit and proper' requirement;

[39] See *Pharmaceutical Manufacturers Association* at paras [19], [33], and [51]

(ii) the President could literally overlook CAREER DIPLOMATS in favour of '*his* own people';

(iii) the President could deliberately appoint members of his own political party (including spouses, children and friends of relatives) as ambassadors to the glaring exclusion of CAREER DIPLOMATS; and

(iv) the President could make all these appointments knowing that, legally speaking, he was on 'safe ground', precisely because his decisions and appointments - since they constituted part of his prerogative powers in the realm of foreign policy/affairs - could not be questioned or challenged by anyone.

(c) In the democratic dispensation however – and unlike under apartheid - the President's power to conduct foreign policy and appoint ambassadors (as stated above) is no longer governed by the unassailable common law prerogative. Under the new dispensation, the power to appoint ambassadors is now subject to constitutional control. The President's foreign affairs powers to appoint ambassadors is now 'regulated', 'guided', 'informed' and 'bound' by certain norms, values and principles enshrined in the Constitution. And one of the key norms that should 'guide' and 'inform' the President in his appointment of ambassadors is the constitutional obligation that the public/foreign service of South Africa must be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN.[40]

(d) When the President appoints ambassadors from among CAREER and PROFESSIONAL corps, he will be acting consistent with the letter and spirit of the Constitution. He will be acting lawfully. He will be acting consistent with the constitutional

[40] See discussion above, specifically in the context of CP XXX.1. See also the *First Certification Judgment* at para [454].

obligation placed upon him to "uphold, defend and respect the Constitution as the supreme law of the Republic."[41] However, if/when the President does not appoint ambassadors from the PROFESSIONAL and CAREER-ORIENTED corps, but instead (like under apartheid) (i) appoints members of his political party; (ii) appoints spouses, children and relatives of friends and party members; (iii) consistently, deliberately and consciously overlooks PROFESSIONAL and CAREER DIPLOMATS and creates a bloated layer of "political appointees" and "party deployees" and packs the Foreign Service at ambassadorial level with "officials" who are not career diplomats and who are essentially partisan, then the President will be acting outside the scope of his powers and contrary to the letter and spirit of the Constitution as far as appointment of ambassadors is concerned. He will be acting irrationally.

21. **The following crucial point needs to be emphasised**: The above submissions do not seek to undermine or challenge the President's foreign affairs powers to appoint ambassadors in terms of section 84(2)(i) of the Constitution. What the submissions seek to do, is to point out the constitutional-legal norms, values and principles that should guide and inform the President's exercise of powers of appointment. Specifically, that the President should take into account the legal and constitutional obligation to ensure that the Foreign Service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN (in this case, at ambassadorial level).

22. In the last 23 years of our constitutional democracy, the foreign service of South Africa has increasingly been dominated by an overwhelming majority of "political appointees" and "party deployees" at ambassadorial level in the missions abroad. Now, just

[41] See section 83(b) of the 1996 Constitution.

from a quick glance at these numbers, it would be clear – in the context of the submissions above - that the appointment of ambassadors in the South African Foreign Service in the last 23 years:

a. does not reflect the letter and spirit of CP XXX.1;
b. is inconsistent with the decision of the Constitutional Court (or at least the Court's certification that the 1996 Constitution requires that the public/foreign service of South Africa is and should be consistent with CP XXX.1 i.e. CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN;
c. is not in sink with the ANC's policy position, which policy position formed the foundational stone of a new foreign service after 1994; and
d. is out of step with international good practice.

23. Following on the last point in (d) immediately above, the submission would be that this phenomenon of a foreign service at ambassadorial level grotesquely populated with "political appointees" and "party deployees" is out of step with the practices of other foreign services in other countries such as Brasil, India, China, Russia, Egypt, Singapore, Malaysia, Switzerland, Germany as well as other countries of the G-20. South Africa's Foreign Service, which is dominated overwhelmingly by "political appointees" and "party deployees" at ambassadorial level appears to stand alone in the face of modern diplomatic practice in a globalising world. Almost all countries in the world - at least those that have given considerable importance and seriousness to their international relations and diplomacy - have consistently sent abroad diplomats (at ambassadorial level) who are recruited from their CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN corps.

24. A few countries that I sampled briefly, whose foreign services are dominated by "political appointees" or where "political appointees" constitute a significant component of the foreign service showed somewhat similar characteristics. For instance, in these countries, there is a huge trust deficit between the ruling elites and civil servants; the former do not trust the latter with implementing the policies "of the government of the day". Further, these countries manifested a rather pronounced political influence and "interference" with "public service and administration" in the sense that the foreign service is seen as yet another vehicle to employment and other financial benefits for those who would have been "off-loaded" by the political system (either because they lost elections or their cabinet posts).

25. The ambassador of one of the countries I sampled (east African country, name withheld), said to me that in his country, the foreign service - by virtue of it being populated overwhelmingly so by "political appointees" at ambassadorial level - is called with all sorts of derogatory names e.g. "retirement village for those who have outlived their time and utility in politics"(sic), "employment agency of the ruling party"(sic), and a "dumping site for failed ministers and other unwanted politicians"(sic).

26. In the case of South Africa, when ambassadorial appointments are made, an impression should not be created that there is a trust deficit between the "ruling party" and the civil servants. An impression should also not be created that the Foreign Service of South Africa at ambassadorial level is but another avenue for "politicians" and "party cadres" and their associates and family members to be in gainful employment. The ANC, way back in 1993, envisaged a South African Foreign Service that was "*professional*" and "*independent from the narrow confines of party politics*." Further, the ANC envisaged a Foreign Service that would be "*open to public scrutiny and public accountability*." Taking into account the

important role that the 'new' Foreign Service of South Africa would play in an ever-changing and complex world of global politics and diplomacy, the ANC committed the new government to "*foster the required professional ethos for our corps anticipating that it will take its [rightful] place amongst the great services of the world.*" What is more, the ANC viewed diplomacy as a "*vocation*".

27. In the circumstances therefore, the Foreign Service of South Africa should, importantly so, even at ambassadorial level, be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN **(as the Constitution and the law require)**.

28. South Africa's foreign service - which is grotesquely and disproportionately dominated by "political appointees" and "party deployees" - faces a number of challenges and negative consequences. These include the following:

(a) The system has major legal and constitutional huddles to overcome to justify this state of affairs which, as pointed above, is:

(i) inconsistent with the letter and spirit of South Africa's post-apartheid constitutions;

(ii) inconsistent with the initial policy position of the ANC;

(iii) inconsistent with the decision of the Constitutional Court; and

(iv) out of step with international good practice.

(b) The consistent and increasing recruitment and appointment of "political appointees" and "party deployees" at ambassadorial level over the last 23 years necessarily means that there has been, simultaneously, a corresponding, deliberate and conscious "exclusion" and/or "marginalisation" of CAREER-ORIENTED,

PROFESSIONAL and NON-PARTISAN DIPLOMATS at ambassadorial level in South Africa's missions abroad.

(c) The manifest "marginalisation" of CAREER-ORIENTED DIPLOMATS from ambassadorial positions in South Africa's foreign service **demoralises** those members of the Senior Management Service (SMS) (e.g. directors and chief directors) who have chosen diplomacy as their career/vocation and would ordinarily qualify to be appointed as ambassadors (but are not). That practice further sends a message to these officials that they are not valued and that the government in general and the Department in particular do not care too much about their career paths and development in the vocation of their choice.

(d) The consistent "overlooking" of CAREER-ORIENTED and PROFESSIONAL DIPLOMATS from ambassadorial positions exposes these officials to **serious moral hazards**. For instance, there are occasions where members of the SMS have (discreetly and openly) "lobbied" Luthuli House and/or the Director General and/or the Minister for ambassadorial consideration! This is highly irregular. It is undesirable.

(e) Flowing from the point immediately above, when officials are made to believe that their "worth" to be considered for ambassadorial appointment is not dependent upon the content of their character and excellence as CAREER-ORIENTED and PROFESSIONAL DIPLOMATS, but on the whim of a party official (at Luthuli House) or the Director General or the Minister, then that situation could **engender the seeds of corruption, nepotism, favouritism, unfair discrimination,**

and unfair labour practices. In parenthesis, section 195(1)(i) of the Constitution provides, among other requirements, that employment and personnel management practices in public administration in South Africa must be based on "ability", "objectivity" and "fairness". When officials are not appointed on the basis of ability, excellence and merit, but on other grounds that do not talk to their "worth" and "pride" as professionals in the field of their choice (diplomacy), that could have **a serious negative impact on these officials' self-confidence and morale**. They would feel under-valued. They would feel undermined.

(f) The consistent "overlooking" of CAREER-ORIENTED and PROFESSIONAL DIPLOMATS for ambassadorial appointment does not only harm the professional and personal interests of SMS officials. That practice will also send a strong (and an ugly message) to the junior officials in the Department that:

i. **their careers as diplomats will be limited** in the sense that, those who would rise through the ranks and possibly qualify to be appointed as ambassadors in the future should forget about that possibility (precisely because the practice over many years has shown clearly that ambassadorial appointments are, for all intents and purposes, "reserved" for "political appointees" and "party deployees");

ii. **they could be highly demoralised and demotivated** too when they know that some of their career aspirations (representing their country at ambassadorial level) might never see the light of day as a result of a

system and practice that is "politically engineered" to work against their long-term professional interests and aspirations; and

iii. **they could also well be exposed to serious moral hazards**. For instance, it is a public secret in the Department that some middle management officials (e.g. deputy directors) are deliberately avoiding promotions to SMS level for fear that they might never have opportunities to serve abroad at HOM level; they prefer instead to remain deputy directors because at that level, there is, allegedly, no "political interference" with diplomatic appointments and these officials have some assurance that they would be appointed from time to time to serve abroad more frequently. [The general practice in the Department is that these junior officials get posted for a period of four years and thereafter return to Head Office for a period of two years or so before they become eligible for another posting. In the case of SMS officials, including those who had previously served as HOMs, some of them have been stationed at Head Office for more than five years since their last posting.]

28. The moral hazards associated with favouring "political appointees" and other "party deployees' over CAREER DIPLOMATS do not only afflict SMS and junior officials in the Department. It is my considered view that the Presidency and the "ruling party" (the ANC) **are also exposed to the risk of serious moral and constitutional-legal hazards**. A close and careful reading of the number of "political appointees" who have been appointed (or "deployed") to date will show that the overwhelming majority of them are ANC "deployees" ("cadres") or people with connections/links/associations with the ANC and/or

connections/links/associations with leading figures in the ANC. These include, among others, former ANC MPs and ANC cabinet ministers, ANC city mayors and councillors, ANC premiers, ANC officials, and members of the various leagues of the ANC (Women, Youth and Veterans). Down the years, there have also been "political appointees" from other political parties such as the Inkatha Freedom Party (IFP) and the Democratic Alliance (DA) and other sectors of civil society.

Someone would say that the appointment of ANC "deployees" and "cadres" should not be problematic at all, since the ANC is the majority "ruling party"(sic) in charge of government(sic). Another one would say that the ANC has every right to appoint whomsoever it wishes from its ranks to serve as ambassadors to implement the foreign policy of a government led by the ANC(sic). The argument here would be that these "deployees", allegedly, know the policies of the ANC government better than anyone else and that they (the "deployees") are been appointed to continue serving the party and government in whatever capacity and position the "ruling party" deems fit(sic).

29. In response to the above-mentioned arguments justifying the preponderant appointment of "political deployees", the following could be said:

(a) The fact that the ANC is the majority ("ruling") party should not automatically translate into the right to "deploy" its "cadres" in the Foreign Service. In fact, such a practice and policy would be inconsistent with the constitutional obligation requiring that the Foreign Service be NON-PARTISAN, CAREER-ORIENTED and PROFESSIONAL.

(b) It would be incorrect to suggest that only ANC "deployees" and "cadres" know the foreign policy of the South African government better and that they are the only right people to be appointed into the Foreign Service (at ambassadorial level) in order to continue serving the party and the (ANC-led) government. It is important to note that, in addition to the requirement for a NON-PARTISAN foreign service, the Constitution is clear (in section 197(1)) that the public/foreign service of South Africa "must loyally execute the lawful policies of the government of the day." In other words, it should be understood that anyone who has chosen diplomacy as a career and has decided to join the South African public/foreign service will be expected to "loyally execute the lawful policies of the government of the day." What this means is that, *ceteris paribus*, it would be incorrect to suggest that the "lawful policies of the government of the day" can only be implemented and championed by ANC "deployees" and/or "cadres". The policies of the South African government are the policies of the South African *government* and these should be executed, as the Constitution requires, by a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN civil service.

(c) Flowing from the two points made in (a) and (b) above, it is important to note what the Constitution (in section 197(3)) says about public service and political affiliation. Section 197(3) provides as follows: "*[N]o employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.*" (Emphasis added). That section covers "employees of the public service" and for the purposes of my present Memo, I shall limit "employees of the public service" to "employees of the Department". What section 197(3) in essence means is that:

(i) no employee of the public service may be favoured (in this case, appointed as ambassador and/or HOM) only because that person supports a particular political party (in this case, the ANC). What this means is that, "political appointees" who might have been working as civil servants in other government departments who now constitute part of that large number of "deployees" who dominate the Foreign Service at ambassadorial level should not have been favoured "only because" they support the ANC. Further, what section 197(3) means is that, the situation should be even harder for those "political appointees" who might not even have been in the public service for starters to be "favoured" with ambassadorial/HOM appointments "only because" they support or are linked in one way or another with the ANC and/or leading figures in the ANC.

(ii) no employee of the public service may be prejudiced by being overlooked or by not been appointed to ambassadorial/HOM level "only because" that person supports a particular political party (in this case, any other party other than the ANC) or cause. What this means is that, no employee of the public service (say, who is currently employed as a CAREER DIPLOMAT in the Department and who would ordinarily qualify for appointment at HOM level) may be prejudiced ("overlooked in favour of a ""political appointee"") "only because" that person supports a particular party (other than the ANC).

(iii) no employee of the public service may be favoured or prejudiced only because that person *does not* support a particular political party or cause. For

the purposes of this Memo, it is clear that the essence of section 197(3) is to put appointments (at ambassadorial/HOM) beyond the influence of political affiliation. What this means is that, the appointments in the Foreign Service of South Africa should not be dependent on the person's party/political affiliation, but on excellence, integrity as well as on the constitutional ethos, norms, values and principles of NON-PARTISANSHIP, PROFESSIONALISM and CAREER-ORIENTED service.

30. The practice where appointments of HOMs appear to be too skewed in favour of a category of people with certain political affiliation **exposes the Presidency and the ANC to serious moral and constitutional-legal hazards**.

(a) First, CP XXX required "an efficient, NON-PARTISAN, CAREER-ORIENTED public service which functions on the basis of fairness, to serve all members of the public in an unbiased and impartial manner."[42] The ANC Foreign Policy Discussion Paper of 1993 had also stated that "[T]he country needs a professional diplomat[ic] service *which will be independent from the narrow confines of party politics*." The Constitutional Court in the *Second Certification Judgment* held, after considering all issues before it, that the 1996 Constitution complied with all 34 CPs (and for the purposes of the present Memo, that the 1996 Constitution retains the constitutional obligation to ensure that the public service of South Africa is efficient, PROFESSIONAL, NON-PARTISAN and CAREER-ORIENTED). Now, a close and careful look at the practice of appointing "political appointees" at ambassadorial level to date, specifically that the overwhelming majority of them come

[42] See the *First Certification Judgment* at para [454].

from the ANC or are linked to the ANC in one way or another, suggests that there may be serious legal hazards here. For instance, it would be difficult to convince anyone that a practice of appointment to a specific position (HOM) in the foreign service which is palpably and manifestly so one-sided in favour of "political appointees" and other "deployees" from one specific party (the ANC) is consistent with the requirements of CP XXX, the ANC Foreign Policy Discussion Paper, the decision of the Constitutional Court in this regard, and the letter and spirit of the Constitution. Specifically, the argument that the appointment or "deployment" of ANC cadres in the foreign service at ambassadorial level does not fall fowl of the constitutional and legal obligation to ensure that the Foreign Service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN would be difficult to justify in the face of clear, unambiguous and peremptory terms of CP XXX, the authoritative decision of the Constitutional Court, as well as the letter and spirit of the Constitution.

(b) Second, the appointment of "party cadres" as HOMs in the foreign service has other **serious moral and financial hazards**. At the moment, the ANC collects levies from its members who are employed in government as civil servants? At the time of preparing my Comment to the Parliamentary Committee, an ANC member in the position of HOM in the South African foreign service was required to pay monthly levies in the amount of R2842.00 (Two thousand eight hundred and forty two Rand). In terms of the debit order application that ANC members complete, the member signed the following declaration, in part,

> "[I] [name]…agree to Debit Order as detailed above, and hereby authorise the ANC to deduct the above amount for the contribution towards the ANC Levies. I further

agree and authorize the ANC to adjust the amount of this order as and when the salaries of Government Employees are revised."

It is important to state here that the ANC – and any other political party for that matter - is perfectly entitled to run its internal affairs the way it sees fit in terms of its constitution, including levying membership and other fees on its members. **But here is a moral hazard**: when the ANC has control and say over who gets appointed as ambassadors, it should be self-evident, is it not, that it (the ANC) is also in control of how much money it can raise from "deployees" at ambassadorial level? Under these circumstances, it is difficult to imagine that the ANC, or some of its officials and leaders, would not be interested in considering more ANC "cadres" appointed as ambassadors because that decision brings with it financial returns for the organisation? Put in crude terms, a practice like that – where the appointed officials are simultaneously expected to pay a portion of their salaries and/or allowances back to the "deploying agent" - could easily expose the "appointing agent" (in this case, the ANC and the Presidency) and the "appointed official" to some serious moral hazards.

i. This appointment practice could easily be characterised as a "jobs-for-cadres/pals" scheme;

ii. The payment of levies under these circumstances could easily be characterised as "kickbacks";

iii. The officials and cadres that are appointed under these circumstances might feel that their confirmation as ambassadors is dependent upon their agreement to pay back a portion of their salary or allowances;

iv. Those non-ANC members who are PROFESSIONAL and CAREER DIPLOMATS and are eligible for appointment as ambassadors might feel disadvantaged because their appointment to that position of HOM would not bring financial benefit to the ANC;

v. Those non-ANC members who might nonetheless be appointed as ambassadors (because they are career diplomats in the Department) and are asked to pay these levies might feel somewhat cajoled "to join the party" for fear that if/when they do not "contribute to the coffers of the movement" they might be prejudiced or victimised or overlooked for appointment in the future;

vi. The cumulative effect of this whole situation and practice creates a very unsavoury environment in the foreign service in the sense that CAREER DIPLOMATS **get terribly demoralised and a somewhat hostile atmosphere develops** towards "political appointees" who are seen as "outsiders" who come into the foreign service to close career and professional opportunities for CAREER DIPLOMATS;

vii. While CAREER DIPLOMATS get seriously demoralised when they are consistently overlooked for ambassadorial appointments, "political appointees" and other "party cadres" on the other hand feel increasingly "entitled" to "deployment" as ambassadors in the foreign service when they leave or are "redeployed" from their incumbent positions;

viii. The constant influx of "political appointees" and "party deployees" into the foreign service creates an imbalance in the administration and management of the Department. For instance, the growing influx of "political appointees" does not come with additional financial resources (budget) for the Department, with the result that the allocated budget has to be stretched even more to accommodate "politically appointed" ambassadors. Further, some of these "politically appointed" ambassadors do express the desire to be employed in the Department or be send to another mission when their initial term/posting ends. If and when they are "absorbed" in the Department, that system of recruitment creates another layer of "diplomats" who would have been "parachuted" into the Department without following the normal procedures laid down in the recruitment and selection processes of the public service. And if and when "political appointees" are posted from one mission to the next (inter-mission transfer), that system of appointment of ambassadors further closes the opportunities for CAREER DIPLOMATS for posting. The whole vicious cycle starts again!

ix. A foreign service that is riddled with all these sorts of practices and moral and financial hazards faces an additional **risk of being rooted on quicksand.** And, to put it rather mildly, the beauty of its image is likely to be dimmed somewhat. This should be avoided.

PART THREE: CAREER DIPLOMATS and their RIGHT TO LEGITIMATE EXPECTATION

31. I turn now to the Third Part of my Memo, and it covers **career diplomats and their right to legitimate expectation.**

The consistent overlooking of CAREER DIPLOMATS for ambassadorial appointments and the concomitant practice of appointing "political deployees" in these positions, as well as the persistent partisan culture of such appointments (where HOMs are appointed predominantly from the ranks of one political party, the ANC) are not only inconsistent with the letter and spirit of the Constitution, the 1993 ANC Foreign Policy Discussion Document, the decision of the Constitutional Court, and international good practice in this regard. These practices could, arguably, also be inconsistent with and could be violative of CAREER DIPLOMAT'S fundamental right to legitimate expectation enshrined in the Constitution (in this case, the legitimate expectation to be considered, *ceteris paribus*, for ambassadorial appointment by virtue of their chosen career in diplomacy and service of the Republic.)

32. The right to legitimate expectation became part and parcel of South African administrative law through fits and starts, specifically, following the decision of the Appellate Division (as it then was) in the famous case of *Administrator of the Transvaal v Traub and Others*[43] (a unanimous judgment delivered by one of South Africa's leading judicial minds, Chief Justice Michael Corbett). The importance and fundamental nature of this right was recognised with the enshrinement thereof in the 1993 interim Constitution and in the *Promotion of Administrative Justice Act* No. 3 of 2000 (PAJA) pursuant to section 33 of the 1996 Constitution. Section 24(b) of the 1993 interim Constitution provided that: "Every person shall have the right to procedurally fair administrative action *where any of his or her rights or legitimate expectations is affected* or threatened." [Emphasis added]. Section 3(1) of the PAJA provides that "Administrative action which *materially and adversely affects the rights or legitimate expectations* of any person must be procedurally fair." [Emphasis added]

[43] 1989 (4) SA 731 (A)

33. Section 33 of the 1996 Constitution provides for 'just administrative action' and guarantees everyone the right to '[a]dministrative action that is lawful, reasonable and procedurally fair.'[44] Section 33 provides further that national legislation must be enacted to give effect to the right to just administrative action. In terms of s33(3), that legislation was supposed to (a) '[p]rovide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal';[45] (b) '*[i]mpose a duty on the state to give effect to the rights*'[ ] to administrative action that is lawful, reasonable and procedurally fair'[46] as well as the right of a person to be given written reasons;[47] and (c) '[p]romote an efficient administration.'[48] [Emphasis added]

34. The piece of legislation that was enacted pursuant to section 33(3) of the 1996 Constitution is the PAJA which has given judicial review a statutory basis for the first time in South Africa.[49] The cumulative effect of both section 33 of the Constitution and the provisions of the PAJA is that, at the moment therefore, the legal position in South Africa regarding the exercise of judicial review is that '[t]he Court's power to review administrative action no longer flows directly from the common law but from the PAJA and the Constitution itself.'[50]

35. The preamble to the PAJA provides that some of the objectives of promoting

---

[44] S33(1) of the 1996 Constitution : '[E]veryone has a right to administrative action that is lawful, reasonable and procedurally fair.' S33(2) provides that '[E]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons.'
[45] S33(3)(a) of the 1996 Constitution.
[46] S33(3)(b) of the 1996 Constitution.
[47] S33(2) of the 1996 Constitution: '[E]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons.' See also s33(3)(b) of the 1996 Constitution.
[48] S33(3)(c) of the 1996 Constitution.
[49] Hoexter at 194.
[50] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 22, as quoted by Hoexter at 194.

administrative justice in South Africa is to ensure, among other principles, efficient administration, good governance, '*[a] culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function[.]*' [Emphasis added]. Section 6 of the PAJA provides for judicial review of administrative action. Section 6(1) gives 'any person' the right of access to court or tribunal to institute proceedings for the judicial review of an administrative action. Section 6(2) provides the grounds on which an administrative action may be challenged on review. The grounds of review provided for in section 6(2) are essentially the old-age common law grounds which have now been given statutory imprimatur for the first time in South African administrative law.

36. The grounds for review mentioned in section 6(2) of the PAJA include the following, (a) acting without authority;[51] (b) acting under unauthorised delegated powers;[52] (c) *bias or reasonably suspected bias on the part of the administrator*;[53] (d) failure to comply with a mandatory and material procedure or condition;[54] (e) procedural unfairness;[55] (f) error of law;[56] (g) unauthorised reason;[57] (h) *ulterior purpose or motive*;[58] (i) *taking into account irrelevant considerations or ignoring relevant ones*;[59] (j) acting under unwarranted or unauthorised dictation of another person or body;[60] (k) bad faith;[61] (l) *acting arbitrarily or capriciously*;[62] (m) *acting in contravention of the law*;[63] (n) *action not rationally connected to*

[51] S6(2)(a)(i) PAJA
[52] S6(2)(a)(ii) PAJA
[53] S6(2)(a)(iii) PAJA
[54] S6(2)(b) PAJA
[55] S6(2)(c) PAJA
[56] S6(2)(d) PAJA
[57] S6(2)(e)(i) PAJA
[58] S6(2)(e)(ii) PAJA
[59] S6(2)(e)(iii) PAJA
[60] S6(2)(e)(iv) PAJA
[61] S6(2)(e)(v) PAJA
[62] S6(2)(e)(vi) PAJA
[63] S6(2)(f)(i) PAJA

the purpose for which it was taken;[64] (o) *discretion/decision so unreasonable that no reasonable person could have so exercised the power or performed the function;*[65] and (p) *action tainted with unconstitutionality or unlawfulness.*[66]

37. It is now an established principle of South African administrative law that a person, who has a legitimate expectation, flowing from an express promise by an administrator *or a regular administrative practice*, has a right to be heard before administrative action affecting that expectation is taken. I may be exposing my ignorance when I say, I am not aware of any firm governmental policy that is transparent and known to all current career diplomats that it is the official policy of the South African government that the disproportionate number of ambassadorial appointments will be made almost exclusively from the ranks of the ANC, or that those who will be given preference are "deployees" or individuals with links to the ANC? All that is visible to everyone in dirco is the constant stream of "political appointees" into the Foreign Service every time whenever ambassadors are send abroad. The doctrine of legitimate expectation, has however, by and large, remained one that provides procedural protection in South Africa. In a number of recent decisions by South African courts, ranging from the High Court to the Supreme Court of Appeal and the Constitutional Court, there have been increasing calls for the application of legitimate expectations beyond procedural claims.

38. It is fair to say that when officials choose diplomacy as their life-long career/vocation, they expect that when they rise through the ranks of the Department, and there is nothing that could constitute an impediment to their appointment – they would have an opportunity to serve at the highest diplomatic level as ambassadors and HOMs. This expectation is legitimate. Its legitimacy is based on the following considerations:

[64] S6(2)(f)(ii)(aa) PAJA
[65] S6(2)(h) PAJA. This test comes from the *Wednesbury* definition of unreasonableness.
[66] S6(2)(i) PAJA

(a) South African constitutional and administrative law recognise that there is public administration in South Africa and that within that administration there is a public service "which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day."[67] What is more, the Constitution is clear about the kind of public service South Africa requires; a CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN public service. Now, within public service there is a foreign service. It is axiomatic that the same rules that apply to public service apply to the foreign service. What this means is that the Foreign Service of South Africa should also be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN. As a recognised career choice, it is fair to say that officials who choose this field (diplomacy) would have a legitimate expectation that if/when they rise through the ranks, apply themselves, and meet the necessary requirements for appointment as ambassador or HOM they would ordinarily be considered for such appointment. In other words, that they would not be ordinarily "overlooked", without a rational explanation, in favour of people from "outside" who are "political appointees" or "party deployees" (See the *Traub* case).

(b) In terms of international good practice, diplomacy (foreign service) is a recognised career that some people choose to practice for the rest of their professional life. These professionals would pursue relevant academic qualifications that would open doors for them in their foreign services; just like doctors, engineers, and other professions. It is also an accepted international practice that serious foreign services appoint ambassadors and HOMs from the ranks of the PROFESSIONAL and CAREER-

[67] See section 197(1) of the 1996 Constitution.

ORIENTED corps. Now, for these professionals to be deliberately and consciously "overlooked" (without a plausible rational explanation) in favour of other people who would ordinarily not have chosen diplomacy as a career and would ordinarily not have devoted the same amount of energy to develop requisite skills for this career, but are nonetheless been considered for appointment (e.g. only by virtue of their political connections or affiliation), would be unwarranted, to say the least. South African PROFESSIONAL DIPLOMATS should be in the same boat and be treated the same as their counterparts in comparative foreign services as far as their legitimate expectations are concerned.

(c) Although in the early years after 1994 the Foreign Service was largely professional and career-oriented (albeit small and dominated by career diplomats from the previous regime), in the last ten years or so, the South African Foreign Service has witnessed an unprecedented domination (at ambassadorial and HOM level) by "political appointees" to the glaring "exclusion" and "marginalisation" of CAREER DIPLOMATS. Previously, CAREER DIPLOMATS could reasonably expect that they would do a tour of duty abroad (say 4 years?) and then return to South Africa for a while (say 2/3 years?) whereafter they would be eligible for another tour (provided of course they met all the requirements for a posting abroad, including a valid security clearance). Now, over and above the fact that the opportunities for posting as ambassadors abroad have shrunk incredibly for CAREER DIPLOMATS, there are those CAREER DIPLOMATS who had been stationed at Head Office for more than 5/6 years since their last tour of duty abroad. It is possible, is it not, that the latter group of CAREER DIPLOMATS cannot be posted because there has been a constant stream of "political appointees" into the Foreign Service?

39. In all fairness, it cannot be argued with confidence that CAREER DIPLOMATS do *not* have a legitimate expectation in this regard, but that, in the same breath, "political appointees" have such an expectation! On the other hand, to argue that neither CAREER DIPLOMATS nor "political appointees" have legitimate expectation (to be appointed as ambassadors/HOMs because that is the sole prerogative of the President, and hence no group is being favoured), would be disingenuous. **Here is an important point**: I am not suggesting that CAREER DIPLOMATS have a legitimate expectation of a substantive nature (to be appointed as ambassadors/ HOMs). Although there is an attempt in South African courts (at least in some of the cases that have come before them) to push boundaries and to open the legal gate for recognition of a substantive right to legitimate expectation, those boundaries, at the moment, are set on the foundation that the right to legitimate expectation is only available as a procedural right (say, right to be heard before an adverse administrative action or decision is taken against an individual). Be that as it may, the conscious and deliberate practice of "overlooking" a whole class of employees (in this case, CAREER DIPLOMATS) in ambassadorial/HOMs appointments in favour of a whole class of individuals – who (a) are not career diplomats and would ordinarily not have chosen diplomacy as a career; (b) come from "outside" the Department; (c) may not ordinarily be sufficiently steeped in matters diplomatic (generally speaking); and (d) are predominantly chosen from circles with a particular close connection with one particular political party – would definitely raise some eyebrows (to put it rather mildly).

40. When a legitimate expectation exists, it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator's actions on the ground of procedural unfairness. If the court finds

that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

41. **The following point must be made crystal clear**: this Memo does not suggest that CAREER DIPLOMATS approach the courts of law to "protect" their supposedly substantive right to legitimate expectation (to be appointed ambassadors/HOMs). That approach would be untenable and highly irregular. It is doubtful that a South African court would issue an order directing the President to appoint so-and-so ambassador/HOM by virtue of so-and-so's chosen diplomatic career! In terms of section 84(2)(i) of the Constitution, the power to appoint ambassadors and other HOMs is the responsibility of the President, not the courts.

42. Be that as it may, and without departing from the generality of the last point mentioned in paragraph 41 immediately above, it is now trite, that the President's powers of appointment under the current constitutional order are no longer immune to constitutional-legal scrutiny. (see the case of *Pharmaceutical Manufacturers Association*). In fact, the Constitutional Court has drawn clear lines to demarcate the legal and constitutional boundaries within which the President may exercise his powers. One of the fundamental values upon which South Africa's constitutional democracy is founded, which fundamental value the Constitutional Court has employed to "scrutinise and control" the exercise of public (in this case, presidential) power is the RULE OF LAW. (see section 1(c) of the

Constitution).[68] The Constitutional Court has stated that the "principle of legality" is an important component of the RULE OF LAW.

43. Flowing form the point immediately above, it is submitted that the President's power to appoint ambassadors in terms of section 84(2)(i) of the Constitution is also subject to and must be guided by the same legal and constitutional requirements and principles spelled out by the Constitutional Court in a number of cases dealing with the exercise of public power by state functionaries, including the President himself (see the *South African Rugby Football Union (SARFU)* case relating to the President's power to appoint commissions of inquiry in terms of section 84(2)(f)). This is what the Constitutional Court has said in some of these cases:

43.1 In *Matatiele Municipality v the President of the Republic of South Africa,*[69] the Constitutional Court stated, with reference to earlier judgments, that "[F]undamental to the rule of law is the notion that *government acts in a rational rather than an arbitrary manner*" and that government decisions and actions "be rationally related to a legitimate government purpose. If not, it is inconsistent with the rule of law and invalid."[70] (Emphasis added].

43.2 In *De Lange v Smuts,*[71] the Court held that "[I]n a constitutional democratic state, which ours now certainly is, and under the rule of law…citizens… are entitled to rely upon the state for the protection and enforcement of their rights."[72]

[68] Section 1(c) of the Constitution provides that "The Republic of South Africa is one, sovereign, democratic state founded on [the values of] supremacy of the constitution and the rule of law."
[69] 2006(5) SA 47 (CC)
[70] *Matatiele Municipality* at para [100].
[71] 1998 (3) SA 785 (CC)
[72] *De Lange* at para [31]

43.3 In *Van der Walt v Metcash Trading Ltd*,[73] the Constitutional Court listed the absence of arbitrary power, equality, the protection of fundamental rights and exclusion of unpredictability (legal certainty) as "some of [the] basic tenets" of the RULE OF LAW.[74]

43.4 In *Pharmaceutical Manufacturers Association*, Chaskalson P (as he then was), stated that one of the key requirements or constraints placed upon state functionaries exercising public power is "rationality", which he described as a "minimum threshold requirement applicable to the exercise of all public power."[75] Chaskalson P stated this principle in the following words:

> It is a requirement of the rule of law that the *exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the requirement.* It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.[76] [Emphasis added]

43.5 In *Pepkor Retirement Fund v Financial Service Board*,[77] the Supreme Court of Appeal employed the principle of legality to explain that this principle "[r]equires that the power conferred on a functionary to make a decision in the public interest, should be exercised properly, i.e. on the basis of true facts."[78]

---

[73] 2002 (4) SA 317 (CC)
[74] See *Van der Walt* at paras [65], [66], [68] and [76].
[75] See *Pharmaceutical Manufacturers Association* at para [90].
[76] *Pharmaceutical Manufacturers Association* at para [85]
[77] [2003] ZASCA 56; 2003 (6) SA 38 (SCA)
[78] *Pepkor* at para [59]

44. What all these cases point to is this: "[o]ur Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective normative value system." This was stated by the Constitutional Court in the case of *Carmichelle v Minister of Safety and Security.*[79] What this means in the context of this Memo is that, the President's power to appoint ambassadors/HOMs in terms of section 84(2)(i) is not simply a constitutional power giving the President free licence to appoint whomsoever he chooses based on his (President's) subjective view and without having any qualms about anything. No! What it means is that, the exercise of public power by the President when he appoints ambassadors/HOMs must be guided and bound by certain norms, values and principles that embody this objective normative value system. To suggest that the President of South Africa (today in a constitutional state) can act willy-nilly in the exercise of his executive powers (in this case, to appoint ambassadors/HOMs) in the same way that the President of South Africa in pre-democratic era did, would mean that we still live in the old days of adulterated parliamentary sovereignty (and its culture of impunity and unlawfulness) and not in the promised land of constitutional supremacy (and its concomitant culture of justification, transparency and accountability). The importance of South Africa's objective normative value system was reconfirmed by Ngcobo J (as he then was) in his minority judgment in *Thint v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions.*[80] Some of the tenets of this objective normative value system require that when state functionaries exercise powers granted to them by law, including the Constitution, that they should do so mindful of the requirements, among others, *to act lawfully*; *to be accountable*; *to be objectively rational*; *not to misconstrue the powers conferred on them*; **to protect fundamental rights**; *to apply the mind*; to consider relevant

[79] 2001 (4) SA 938 (CC) at para [54]
[80] 2009 (1) SA 1 (CC) at para [375]

factors and not the irrelevant ones; **to avoid acting on the basis of ulterior motive or purpose**; and *to avoid acting arbitrarily*.

45. In the context of the appointment of ambassadors, the existing constitutional obligation to ensure that the Foreign Service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN must always be taken into consideration as a guiding and binding principle in this regard. Any attempt on the part of the executive/President to side-step this constitutional imperative (by deliberately and consciously overlooking CAREER DIPLOMATS in favour of "political appointees" and "party deployees") would be inconsistent with the Constitution and the law, and would fly in the face of the tenets of the objective normative value system which now defines the constitutional state that South Africa became when we severed ties (in 1994) with the system of impunity and unlawfulness (apartheid).

46. **To sum up**: When the President exercises his powers to appoint ambassadors and other HOMs in terms of section 84(2)(i) of the Constitution, he should bear the following considerations in mind, among others:

46.1 that his decisions must be based in law, not personal or party whim i.e. he must act lawfully;

46.2 that there is a constitutional-legal obligation resting on the Executive/President to ensure that the public/foreign service of South Africa is CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN and that the Executive/President is obliged

to respect and comply with that obligation at all times (failing which the executive and the President will be acting unlawfully);

46.3 that in the exercise of his powers, he should not act arbitrarily or capriciously;

46.4 that his powers (of appointment) must be exercised rationally and not irrationally;

46.5 that he should not misconstrue the powers of appointment conferred on him by thinking that he could appoint whomsoever he wishes without consideration of the constitutional-legal boundaries within which his powers should be exercised;

46.6 that his decision (to appoint ambassadors/HOMs) must not be made willy-nilly and at the behest of the "ruling party" but must be rationally related to the purpose for which those powers were granted (otherwise they are in effect arbitrary and inconsistent with one of South Africa's foundational values, viz. rule of law (see section 1(c) of the Constitution));

46.7 that his decisions do not violate fundamental rights, including the career diplomats' right to legitimate expectation;

46.8 that his decision should not be tainted with bias (in favour of his party members) or reasonably suspected of bias;

46.9 that when he appoints ambassadors/HOMs, he must take into account relevant considerations (e.g. that the Foreign Service must be CAREER-ORIENTED, PROFESSIONAL and NON-PARTISAN) and not irrelevant ones (e.g. using the Foreign Service as a vehicle for providing employment opportunities for party cadres and loyalists and financial benefit for the "ruling party");

46.10 that when he exercises his power of appointment, he should understand that that power is not simply a constitutional power giving the President free licence to appoint whomsoever he chooses as ambassador/HOM based on his (President's) subjective view and without any qualms at all; but that the exercise of that power must be guided and bound by certain principles (such as accountability, non-arbitrariness and lawfulness) that embody what the highest court on constitutional matters has described as South Africa's objective normative value system; and

46.11 that in discharging his constitutional obligations (in this case, appointment of ambassadors/HOMs), he must always act with one intention and one intention only: "to uphold, defend and respect the Constitution as the supreme law of the Republic" (as section 83(b) of the Constitution enjoins him).

END

Annexure "D"

S. FRANCIS MOLOI

c/o Embassy of the Republic of South Africa
Amarat, Street 11, B9, House 6
P. O. Box 12137
KHARTOUM, Republic of the Sudan
Tel: +(249) 183 585 301/2/3/4 Mob: +(249) 92 900 900
E-mail: moloif@dirco.gov.za

My copy
Delivered by Hand
Tue 19th June 2018

14 March 2018

PER E-MAIL:
Courtesy of the Office of the Director General in the Presidency

His Excellency Mr Cyril Ramaphosa
President of the Republic of South Africa
The Presidency
The Union Buildings
PRETORIA

Your Excellency

AMBASSADORIAL AND OTHER HEADS OF MISSION APPOINTMENTS IN THE FOREIGN SERVICE OF SOUTH AFRICA: THE URGENT NEED FOR CHANGE!

I refer to the above matter and enclose under cover hereof a Memorandum (a Memo) for your kind attention and consideration. The contents of the Memo are self-explanatory and are based on my initial Comment on the proposed Foreign Service Bill, 2015 (the Bill), which Comment I submitted in February 2017 to Parliament courtesy of Hon. Moses Siphosezwe Amos Masango, MP and Chairperson of the Portfolio Committee on International Relations and Cooperation (the Committee).

I have chosen to address this Memo to you Honourable President, because the issues it addresses and the recommendations it makes, including how ambassadors and other Heads of Mission should be appointed in the Foreign Service of the Republic of South Africa, rest squarely within your constitutional powers, specifically, section 84(2)(i) of the Constitution and do not need to wait for the passing of the Bill into law before the President can act upon the recommendations herein.

The gist of my submission is that there is an urgent need to change the manner in which ambassadors and other Heads of Mission are appointed in the Foreign Service of South Africa. My submission is that South Africa needs to move away from the current practice - where ambassadorial positions in South African missions abroad are disproportionately and grotesquely dominated by "political appointees" and other "party deployees" - to a system

where the Foreign Service (at ambassadorial level) is properly staffed with **career-oriented, professional and non-partisan diplomats.**

In this Memo, I demonstrate that the current practice of ambassadorial appointments is inconsistent with: (a) the letter and spirit of our Constitution; (b) the decision of the Constitutional Court in *the Second Certification Judgement*; (c) the previous foreign policy position of the ANC (contained in the ANC's Foreign Policy Discussion Paper, 1993); and (d) is out of step with international good practice.

In the circumstances, I implore you Honourable President, to take into account the submissions in this Memo and consider seriously the constitutional and legal obligations resting on you as you exercise your powers of appointment (of ambassadors) in terms of section 84(2)(i) of the Constitution. Specifically, that Honourable President ensure that the exercise of your powers of appointment under section 84(2)(i) is consistent with the Constitution and the law and other tenets of our constitutional democracy such as respect for the rule of law, transparency, rationality, accountability, non-discrimination and non-arbitrariness.

I wish to clarify that my submission of this Memo to you Honourable President, is part of my contribution to:

(a) promoting public participation in policy making as required by section 195(1)(e) of our Constitution;
(b) your call (in the SONA, Friday 16 February 2018) to all of us, South Africans, to put our shoulder to the wheel and "turn our country around" for the better; and
(c) the on-going process, where Parliament, courtesy of the Committee is engaging the public on the proposed Foreign Service Bill.

I am aware that Your Excellency has undertaken to visit government departments and engage with them on various matters. I trust that when you visit dirco, Your Excellency will have an opportunity to address some of the issues raised in this Memo with the leadership and officials of that department.

I confirm that should Your Excellency wish to receive any further clarifications and inputs on any issue raised in this Memo, I shall be delighted to do so.

I thank you and trust you find this in order.

In the meantime, please accept, Your Excellency, the assurances of my highest consideration.

Sincerely,

S. FRANCIS MOLOI (Mr)
B.Soc.Sc., LLB, LLM (Commercial Law)(Cape Town), Diploma (Trade Policies)(WTO)(Geneva), LLM (Harvard)
Attorney of the High Court of South Africa and current Ambassador of South Africa to the Republic of the Sudan, Khartoum. Written **WITHOUT PREJUDICE** and in my capacity as an interested member of the public (service). The views expressed herein are mine, and should, unless otherwise indicated, not be attributed directly or indirectly to the Embassy of South Africa in Khartoum or the Department of International Relations & Cooperation or any other official(s) in the Department. I take full responsibility for the contents of this Memo.

MY COPY

Annexure "E"

S. FRANCIS MOLOI

c/o Department of International Relations and Cooperation
Chief Directorate: Human Rights & Humanitarian Affairs
OR Tambo Building
Soutpansberg Road, Rietondale
E-mail: moloif@dirco.gov.za

MINISTRY
2020 -03- 02
International Relations and Cooperation
Republic of SouthAfrica

2 March 2020

BY HAND

Her Excellency Dr Naledi Pandor
Minister of International Relations and Cooperation
OR Tambo Building
Soutpansberg Road
Rietondale
Pretoria

Dear Honourable Minister

Submission of earlier correspondence addressed to His Excellency President Cyril Ramaphosa on the important issues of the nature of foreign service South Africa needs and the appointment of ambassadors in the South African foreign service

On Thursday 20 February 2020, I attended the meeting of the Director General's Forum (DGF) representing Ambassador Nkosi: Deputy Director General: Global Governance and Continental Agenda (GG&CA)(who was abroad at the time). I hasten to add that the views expressed herein are mine and should not, unless indicated otherwise, be attributable, directly or indirectly, to Ambassador Nkosi or Branch: GG&CA or my Chief Directorate: Human Rights & Humanitarian Affairs or any officials in the Department.

One of the key agenda items for discussion in the DGF was the 'Revised Draft Policy Framework for the Placement of SMS Abroad'.

The professionalisation of the South African foreign service, with particular reference to the nature of foreign service South Africa requires and the appointment of ambassadors in our missions abroad are important issues on which I made written submissions to the Portfolio Committee on International Relations and Cooperation during the time when the Foreign Service Bill was open for public comment. I also addressed a letter and memo to President Ramaphosa in this regard outlining reasons why there is an urgent need to change the current system of appointment of South African Heads of Mission.

My views on the two issues i.e. the kind of foreign service South Africa requires and the appointment of ambassadors in the South African foreign service were based on: (a) the prescripts of our Constitution and the law governing appointments into the public/foreign service; (b) the decisions of the Constitutional Court in relation to these matter; (c) the history of constitution-making in South Africa as well as earlier ANC policy positions with specific reference to the kind of foreign service South Africa needs and the kind of personnel and skills that must imbue that service; and (d) international good practice.

I enclose under cover hereof copy of the aforementioned letter and memo to President Ramaphosa (marked "A") dated 14 March 2018, the contents whereof are self-explanatory. I submit this correspondence to you, Honourable Minister, as a small contribution to the discussions our government needs to have in order, among other objectives, to professionalise the South African foreign service and to ensure that 'We [put] more of the right people in the right positions' (as President Ramaphosa said in his weekly newsletter to South Africans, Monday 3 March 2020). But more importantly, the letter and memo to President Ramaphosa seek to ensure that the way South Africa manages its foreign policy, particularly the appointment of Heads of Mission, is consistent with the supreme law of the Republic, the Constitution.

I trust you find this in order. In the meantime, should you, Honourable Minister, wish that I clarify any of the contents of the enclosed documents, I shall be pleased to do so.

PS: As I said in my letter to the President, I take full responsibility for the contents of my letter and attachment to you.

Respectfully,

S Francis Moloi
Chief Director: Human Rights and Humanitarian Affairs

Cc: Her Excellency Ms Kwati C Mashego-Dlamini
Deputy Minister of International Relations and Cooperation

His Excellency Mr Alvin Botes
Deputy Minister of International Relations and Cooperation

Mr K Mahoai
Director General
Department of International Relations and Cooperation
OR Tambo Building
Soutpansberg Road
Rietondale
Pretoria

Annexure "F"

ANC LEVIES
Elias Ntsinini [entsinini@anc.org.za]
Sent: Monday, June 08, 2015 10:06 AM
To: Moloi, SF Amb, Khartoum, Ambassador, DIRCO
Cc: frances.moloi@gmail.com

Attachments: LEVEL 15DEBIT ORDER.docx (38 KB)[Open as Web Page];

Dear Cde Moloi

Kindly find attached ANC LEVY DEBIT ORDER FORM for completion then return it back for processing

Regards Mehlo Ntsinini

Chief Albert Luthuli House,
54 Pixley Seme Street, Johannesburg
P O Box 61884, Marshalltown, 2017
Finance Department
Levies Clerk

Annexure "G"

ANC LEVIES

DEBIT ORDER APPLICATION FORM OF CIVIL SERVANT.

Contacts Details:

Title: _____ First Name _____

Surname: _____

Designation: _____ Department: _____

Postal Address: _____

_____

_____ Code: _____

Contact Number: Tel: _____ Facsimile: _____

Cell: _____ email address: _____

Banking Details:

Name of Account: _____

Name of Bank: _____ Branch: _____

Account Number: _____ Branch Code: _____

Type of Account: *Current* *Savings* *Transmission*

First Payment: *Date:* ..... *or* .....

Frequency: *Monthly*

Amount Payable 2 842.00

Amount Payable in words: TWO THOUSAND EIGHT HUNDRED AND FORTY TWO

Beneficiary Details

Beneficiary Name: African National Congress

Name of Bank: Nedbank

Account Number: 1979 314 691

Branch: 55 Fox Street, Business Central, Johannesburg

Branch: 1284 05

Declaration

I,(full Name) _____ ,ID No: _____

Agree to Debit Order as detailed above, and hereby authorize the ANC to deduct the above amount for the contribution towards the ANC Levies. I further agree and authorize the ANC to adjust the amount of this order as and when the salaries of Government Employees are revised.

Should the need arise to cancel this debit order, written request to do so must be addressed to the Office of the Treasurer General of the African National Congress.

Signature **Date**

Office Use Only

Reference: _____ File No. _____

Date: _____ Signature: _____

Received: _____ Name: _____

NB: All queries to be addressed to Cde Mehlo Ntsinini Fax 086 583 5742 tel 011 376 8054 cel079 160465,079 520 1457 E-mail entsinini@anc.org.za,mntsinini@gmail.com

Annexure "H"

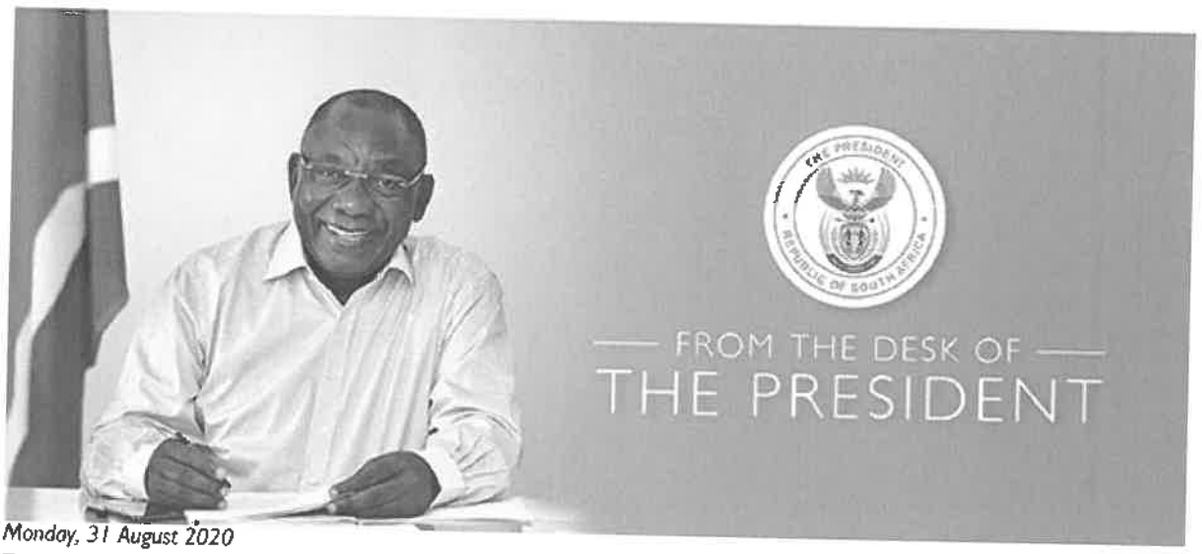
ANC LEVIES
Elias Ntsinini [entsinini@anc.org.za]
Sent: Tuesday, July 14, 2015 11:30 AM
To: Moloi, SF Amb, Khartoum, Ambassador, DIRCO
Attachments: LEVEL 15DEBIT ORDER.docx (38 KB)[Open as Web Page];

Dear Cde Moloi

In **KHARTOUM Sudan**

Kindly find attached ANC PCF LEVY DEBIT ORDER FORM for completion then return it back for processing

ANNEXURE "I"



Monday, 31 August 2020

Dear Fellow South African,

There are few callings more important for a person than the call to public service.

It is an opportunity to improve people's lives and change society for the better. It carries great responsibility and often demands much of individuals and their families.

Tomorrow is the start of Public Service Month, which is held in September each year to promote a culture of pride and ethics in the public service and improvement in all facets of service provision.

A streamlined, efficient and well-integrated civil service is the hallmark of a capable state. Likewise, an unproductive, inefficient and cumbersome civil service can frustrate the implementation of even the best policies.

Public servants are the first interface between government and citizens. Their encounters, whether positive or negative, are crucial in how the state is perceived by the wider population.

Our key priority is to build a capable state. If we are to build a more capable state we have to seriously and urgently address the shortcomings in the organisation and the capacity of the public service.

The view that the public service is bloated is misplaced. Public servants include officials and administrators, but they also include doctors, nurses, police men and women and teachers who play an invaluable role in keeping the wheels of our country turning.

The real issue is whether – given its size, cost and needs of our country – the public service is performing as it should. The experience of our people is that in several areas, the state is falling short of expectations.

There are some fundamental problems that we are working to fix.

One of the areas to which we're giving attention is known as the 'political-administrative' interface, where lines of accountability at the most senior levels of the state have become blurred. Political office bearers such as Ministers, MECs and Mayors often veer towards getting involved in administrative matters that

should be the responsibility of professional public servants.

While the public service is required to implement the electoral mandate of the governing party and to account to the Executive, they need to be able to do this work without undue political interference.

Public service managers must be given the space, the means and the resources to manage.

Senior appointments are sometimes made on political considerations rather than expertise. This severely limits the capacity and effective functioning of the state.

As much as the ranks of our civil service comprise individuals committed to driving government's programme of action, it has also over the years been associated with patronage. This is manifested through the appointment of people into senior positions based on considerations other than their capability to execute the tasks of the office they are appointed to.

The building of a capable, ethical and developmental state is among our foremost priorities. We want the public service to be oriented towards efficiency, performance and developmental outcomes.

The civil service should attract high-calibre and qualified candidates. As one of the ways of achieving this, the National Development Plan (NDP) proposes a formal graduate recruitment scheme for the public service. Our people want the best and the brightest in society to serve them.

The civil service must be seen as a career destination of choice by those who want to make a difference in the life of their country, and not merely as a comfortable 9-to-5 desk job or a place to earn a salary with minimal effort.

Should some still harbour this view they should take advantage of opportunities to exit the public service to make way for those who are up to the task.

Training and upskilling is critical to professionalising the civil service.

The National School of Government is playing an important role in building a culture of lifelong learning for those already in the ranks. As an example, the school offers a certificate programme for anyone who wants to be appointed into senior management. Many of the school's programmes – from advanced project management to financial management and budgeting to change leadership – are offered online.

The school is also engaged in collaboration with international training institutes to offer courses on wider governance issues.

Being a public servant is an honour and a privilege. It demands dedication, selflessness, professionalism, commitment and the utmost faithfulness to the principles of Batho Pele, of putting the people first.

Public servants are entrusted with managing state resources for the benefit of the public and in guarding against them being misused and abused. They are representatives of a government derived of the people and for the people, and are guardians of our Constitution.

At a time when we have been confronted with a series of scandals that point to clear complicity by certain public servants in acts of corruption, this Public Service Month should be an opportunity for the men and women tasked with this weighty responsibility to set themselves apart – to rededicate themselves to their calling and to fully comprehend what it truly means to be a servant of the people.

As the NDP reminds us, a capable developmental state cannot be created by decree: "It has to be built, brick by brick, institution by institution, and sustained and rejuvenated over time."

Our ability to steadily acquire a high level of capability as envisaged by the NDP is a defining characteristic of what a capable developmental state should have to become an economically prosperous, socially inclusive and a well-governed state that is able to meet the needs of our people.

With best wishes,

Cyril Ramaphosa

FP-JGZ-4253

46.

NKWINTI, GE

FP-JGZ-4254

COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE. AFFIDAVIT: Per Chairperson's Directive in terms of Regulation 10(6) of the Regulations of the Commission.

THIS IS AN AMENDED VERSION OF THE AFFIDAVIT SUBMITTED ON THE 11 AUGUST, 2020. Confer the Declaration immediately below my name; and, paragraphs 32 and 74 of the Text.

I, the undersigned,

GUGILE ERNEST NKWINTI

ADDRESS: 24 NORTHWOOD ROAD, KENTON-ON-SEA.

TELEPHONE: 046 648 2212 / 082 773 7706

EMAIL: gugsnkwinti@telkomsa.net

Do hereby make oath and state that:

1. I am an adult male and the former Minister of the Department of Rural Development and Land Reform (The DRDLR), in which position I served for the period from August, 2009, to February, 2018.

2. The principal objective of this Affidavit is to tender evidence for purposes of submission to the Commission of Inquiry into State Capture, with regard to certain activities and events I encountered during my tenure as the Minister of Rural Development and Land Reform.

3. The facts set out in this Affidavit are within my personal knowledge, unless stated otherwise or appear from the context, and are, to the best of my knowledge and belief, both true and correct.

GEN

4. To the extent that I make submissions of a legal nature in this Affidavit, I do so on the basis of advice from my legal representatives.

A. INTRODUCTION AND OVERVIEW.

5. When I was appointed Minister for the Department of Rural Development and Land Reform in August, 2009, I was charged with the responsibility of establishing the Department from scratch.

6. The DRDLR inherited two functions, each with a full contingent of staff, from the then Department of Agriculture and Land Affairs. The Land Affairs function was integrated into the Land Reform Programme; and, the Land Rights Commission remained a stand-alone, accountable to the Minister.

7. Our main task during the first two years of the Department were mainly the following: establish the Administration, at both national and provincial levels; develop policies, strategic plans, programmes of action and implementation plans; and, in addition to the officials inherited from the Department of Land Affairs and Commission on the Restitution of Land Rights, employ staff to carry out the duties and responsibilities contained in the mandate of the Department.

8. The second most important task was to meet and engage Members of Executive Councils (MECs) of Provincial Governments; Farmers' as well as Traditional Leaders' Organizations, for mutual briefings and charting the way forward; and, to the extent that such was desirable and possible, incorporate or integrate existing and planned programmes that were relevant to DRDLR's mandate.

9. The third layer for consultations was the Municipal Sphere – both District and Local Municipalities. This was a critical layer because all projects take place in their spaces.

10. In all areas where projects were either going on or had already been planned (e.g. Land Affairs or Land Claims projects), as well as new ones from DRDLR, direct consultations with affected communities took place.

GEN

As could be imagined, most, if not all of the above participants had direct experience of working with some of the officials of both Land Affairs and the Land Claims Commission; and, they did not shy away from speaking out on some of their experiences, both positive and negative, in working with them. They did that, in part, to alert the Minister and his Deputies of what to expect, as well as requesting them to follow up on some of their allegations; and, where necessary, take appropriate measures.

B. A TRANSPARENT AND PARTICIPATORY APPROACH TO SERVICE DELIVERY ADOPTED.

11. I made my Cell-phone number known to all the participants, so that they could contact me (preferably via sms) when they were experiencing problems regarding service delivery in their areas.

12. The second thing I did was to create District Land Reform Committees (DLRCs) that were chaired by stakeholders on the ground. This was to ensure that stakeholders of the Department participated directly in the processing of land applications and land claims in their Districts.

13. Provided regular reports to Premiers on land allocations in their Provinces, for information sharing and projects co-ordination. This was in addition to the standing meetings of the Minister and MECs – the MinMECs.

14. As we started getting into grips with the work of the Department; and, the conduct of its officials, I strengthened institutional controls with respect to the processing of land applications; land acquisition; and, land allocation, including land under claims, by establishing a National Land Allocation and Redistribution Control Committee (NLARCC), chaired by one of the Deputy Ministers. This Committee started picking up corrupt practices, as it interacted with officials, from the Provinces and national office, who presented reports to it.

15. The NLARCC reports would be presented to meetings of Deputy Directors-General, chaired by the Director-General, for consideration, before being tabled at a meeting of the Minister, Deputy-Ministers, the Director-General, the Chief Land Claims Commissioner, Minister's Advisors, the Department's Legal Advisor and the Head of Security

GEN

Management Services. This Ministerial Co-ordinating Meeting (MCM) would deal with each case for concurrence or sending it back to the Province of its origin to correct whatever that needed to be corrected; and, bring it back for finalization.

16. I would submit the final reports on all land allocations, including land claims, to the two Ministers in the Presidency, one of which was responsible for Women, Children and People with Disabilities; as well as the Minister of Agriculture, Forestry and Fisheries for co-ordination purposes.

17. One of the criteria for land allocation, including land claims, was equity across gender, generation and people with disabilities. The purpose of forwarding the reports to the Minister of Women, Children and People with Disabilities was to enable the Minister to follow up and enforce accountability on our part.

C. OCCUPYING A PUBLIC OFFICE IS NOT A RIGHT BUT AN HONOUR AND PRIVILEGE, WHICH COMES WITH A HUGE MORAL, ETHICAL AND CONSTITUTIONAL/LEGAL RESPONSIBILITY.

18. This is what prompted me to write the kind of letter I did to The Speaker of the National Assembly, Madame Baleka Mbete, which I attached to the Deloitte and Touche' Forensic Investigation's Draft and Final Reports; and, requested her to forward to the Public Protector (PP), Advocate Busisiwe Mkhwebane, on my behalf (**ANNEXURE A**). Four days after receiving the documents from me, the Speaker handed them back to me, saying that I should rather send them myself, because the PP reports to her. I referred the said letter and documents to the Public Protector.

19. I referred the same letter and Reports referred to above to the following political leaders and institutions: Mr. Gwede Mantashe, the Secretary-General of the African National Congress (ANC), the Political Party that had deployed me to the Public Office; and, the ANC's Integrity Commission, in addition to the Public Protector.

20. Regrettably, none of the above leaders and institutions ever engaged me over the said documents. Yet, the PP made a negative finding against me (**ANNEXURE B**), despite

GEN

failing to adhere to the *audi alteram partem* principle. What the PP did, before making her findings, were two things: (a) she requested that she combines the investigation on my request with that of the DA's complaint; and, (b) that she did not have the resources to conduct a lifestyle audit on me, from 1994, when I first occupied a Public Office. I rejected (a) because, as I said, '*The DA had already concluded that I had committed a corrupt act*', whereas I was requesting her to investigate the allegation against me. The two were in conflict with each other. I never heard from her, until she sent me her findings, asking me to respond to them. When I requested an extension of time, to enable me to respond to her findings, she refused. My Legal Team successfully interdicted her from publishing her findings. The Judge ordered that the whole report of the PP be reviewed. The matter is still before Court.

21. I appreciate what the DA's complainant, the Honourable T. Walters, did. At the end of one Portfolio Committee meeting, he and his Colleague – also a member of the Committee – walked across to me. After greeting me, Mr Walters said: '*Minister, we know that you have not done anything wrong. You are one of a few Ministers that we trust. But, please understand that we are doing our job.*' I thanked them; and, they left.

22. Even more surprising, if embarrassing. In November, 2019, the PP served me with a subpoena on Estina Dairy Farm, claiming that during her investigations she came across information that I am the person who had initiated the Project (**ANNEXURE C**). She instructed me to submit to her office all information, including minutes, about meetings I had held about the Project.

23. Just as I was preparing my response to her, another version of the subpoena came through (**ANNEXURE D**). It was, also, incorrect. My response to her was that I had never been involved with the Estina Dairy Farm. I, thus, did not visit her office; and, I never heard from her since!

I have, deliberately, started my Affidavit by relating my interactions with critical political leaders and institutions: the Speaker of the National Assembly; the Public Protector – one of the Chapter Nine Institutions in our Country's Constitution; the Office of the S-G of the Governing Party, the ANC; and, the Integrity Commission of the ANC. The reason is that,

GEN

the success or failure of the fight against corruption in our country rests squarely on the shoulders of these and other institutions of similar stature.

D. WORKING WITH THE LAW ENFORCEMENT AGENCIES, INCLUDING THE ANT-CORRUCPTION TASK TEAM (ACTT).

24. Based on information we received from the stakeholders on the ground, as well as information out of analyzing reports from DRDLR's National Office and Provinces; and, in some instances, reports from the media, we approached the Law Enforcement Agencies (LEAs) to assist us with investigations on specific cases.

25. One of the major breakthroughs brought about by this working relationship was the repossession of 29 farms – 26 from Kwazulu-Natal; 2 from the Free State; and, 1 from the Eastern Cape – by the Asset Forfeiture Unit (AFU), because their allocation was found to have been tainted by corruption. After discussions with the Department, the AFU, with the concurrence of the National Prosecuting Authority (NPA); and, under strict conditions, agreed to hand these farms back to the Department.

26. The handover ceremony, which was attended by the media, was held in Cape Town. The then National Director of Public Prosecutions (NDPP), Advocate Shaun Abrahams, performed the task of handing over the farms to the Minister.

27. Having repossessed these farms, the expectations were that the alleged perpetrators of corruption would be arrested and prosecuted. HOWEVER, THAT NEVER HAPPENED!

E. REQUESTING A PROCLAMATION (R118 OF 2001) FROM THE PRESIDENT FOR THE SIU TO CONDUCT INVESTIGATIONS.

28. With our support, the Special Investigating Unit (SIU) submitted a request for the Proclamation from President Jacob Zuma. The request was granted by the President; and,

GEN

work started in earnest, led by the SIU. The scope of investigations was national. At the time, the SIU was headed by Advocate Willie Hofmeyr.

29. We met regularly with the Law Enforcement Agencies (LEAs) to assess progress. My Department's Team would include the Director-General (D-G), Mduduzi Shabane. However, during the course of the investigations, the Head of The Hawks, General Anwar Dramat, requested a meeting with me alone.

30. During the said meeting, he advised me that his investigators had come across evidence that implicated my D-G in serious malpractices. He requested that the D-G be excluded from future briefing meetings. I obliged. He also advised me that he appointed Brigadier K. Moodley to initiate processes towards the arrest of people implicated in wrong-doing. Subsequent briefings were without my D-G.

31. Unfortunately, just at that time, when things were warming up, Advocate Willie Hofmeyr was transferred to head the Legal Services in the NPA; General Anwar Dramat was suspended; and, ultimately, left the Service.

32. There is no doubt that the removal of these two key figures in the fight against corruption destabilized the process, but did not kill it. Indeed, the good working relationship with the LEAs continued unabated, as exemplified by the following two referrals: One dated Monday 7 April, 2014 (ANNEXURE E), to the Anti-Corruption Task Team (ACTT); and, the other dated May, 2014 (ANNEXURE F).

F. ADVOCATE VAS SONI'S SHORT STINT AS HEAD OF THE SPECIAL INVESTIGATING UNIT.

33. Adv. Hofmeyr was replaced by Adv. Vas Soni. Soon after taking over, he requested a meeting with me. During the meeting, he advised me that President Zuma had instructed him to submit the investigation reports directly to him; and, that he would brief the Minister. We continued submitting reports to the SIU, as had happened before. However, not a single briefing by the President, or his Aides, ever took place.

GEN

34. During the meeting, Adv. Soni came up with a brilliant suggestion regarding the management of the investigations, given that they were national in scope. He suggested that hot-spot cases should be isolated and prioritized; conduct a scoping exercise on each case; where corruption pointers were identified, such cases should be subjected to external forensic investigations; and, only refer to the SIU and other Law Enforcement Agencies audited reports that would have confirmed corrupt activities.

35. We instructed the Internal Audit Unit Head, Ms De La Rouviere, to carry out the responsibility. She appointed Director Rikus Janse van Rensburg to lead the process. The Department's Head of Security Management Services, Dumisani Lupungela, provided the back-up support. I signed off on all the Scoping Exercise Reports, including those that were referred to forensic investigation. Briefings with the Law Enforcement Agencies on all investigations continued.

36. Unfortunately, Adv. Soni lost his dear wife (MAY HER SOUL REST IN ETERNAL PEACE!); and, soon thereafter, he left the Service.

37. He was replaced by Adv. Andy Mothibi, the current Head of the SIU. Adv. Mothibi continued the working relationship with the Department.

G. HANDLING THE SCOPING EXERCISE REPORTS; AND, CONSEQUENCE MANAGEMENT RESULTING FROM THEM.

38. One of these reports, which was brought to me for my signature, is one which was implicating me – BEKENDVLEI FARM. Director Rikus Janse van Rensburg left it for last among those in his list of presentation for that day. He said, as he prepared to present: 'Minister, this one implicates you. What should I do with it?' I responded: 'let me see!' After going through it, I said: 'When I instructed you to perform this task, I did not say that when I am implicated the report should be hidden. Send it for forensic investigation, like all the others!' I signed off on the list for the day; and, handed it back to him. On 10 March, 2017,

GEN

I directed D-G Shabane to immediately commission a fully-fledged forensic investigation on these Reports, including Bekendvlei.

39. All these reports were to be contracted out for forensic investigation. As standard practice, an advertisement would be published to which interested companies would respond. Two companies responded: Deloitte en Touche and Nexis Forensic Services. I learnt from reports that the latter could not be considered because the officials dealing with the adverts received a letter from the South African Revenue Service (SARS) stating that the company could not be considered because it did not have a Clearance Certificate from SARS.

40. This resulted in Deloitte en Touche being the only company eligible for consideration; and, it was appointed on December 15, 2017 (with principal members Gregory Rammego and Burt Botha), nine (9) months after the directive given the D-G by me on March 10, 2017.

41. When this was reported to me I felt uncomfortable with the reasons given by SARS, leading to Nexis's non-consideration. Not that I even knew that company – just the reason. I had a conversation with Minister Pravin Gordan about it. He advised me to speak to the then Acting Commissioner at SARS, Ivan Pillay. I wrote the latter a letter and attached a copy of the letter from SARS. About two weeks later, I received a letter from Ivan Pillay, stating that SARS did not write such a letter. If there was a letter like that, purportedly from SARS, it would be fraudulent. By that time, Deloitte had already been appointed; and, had commenced work.

42. Unfortunately, however, we could not take the matter of the 'SARS letter' any further, because Acting Commissioner Pillay, like Adv. Willie Hofmeyr (SIU) and General Anwar Dramat (Hawks), were removed from office.

43. Internal disciplinary actions, resulting from these Scoping Exercise Reports and other malpractices, were taken; and, some of the officials who were implicated were dismissed. Among the officials who were dismissed during this time was Deputy Director-General Vusi Mahlangu. However, soon after his dismissal at the DRDLR, the Public Protector appointed him to a position in her office.

GEN

44. However, not a single soul has been arrested and charged with corruption, despite the very good work done by the Law Enforcement Agencies, working with the Department. And, as has been pointed out in this Affidavit, some of the officials of the DRDLR, who had been taken through Disciplinary Processes; and, dismissed, have been brought back to work by the Department.

H. THE SO-CALLED PROJECT MANGAUNG.

45. Among the charges against DDG Mahlangu was what he called Project Mangaung. He surprised me while I was visiting rural development projects in Muyexe Village in Giyani, Limpopo. He had driven all the way from Pretoria to Muyexe Village to report to me why he had purchased certain farms – Mike's Chicken, Harmonie and Uitkyk. He was very agitated, as he requested to speak to me. He had a document in his hand.

46. I realized that the matter must be serious; and, asked him to hold on until we concluded our work in the Village. I said we should meet in the Parking Area at the Shell Garage outside Polokwane, on our way to Pretoria at the end of our activities in the Village.

47. We met at the Shell Garage's Parking Area. He gave me a document; and, started speaking to it, making reference to what he called Project Mangaung. I interrupted him and asked 'what was Project Mangaung?'

48. He explained that he had been called to a meeting by the Director-General, Mduduzi Shabane. When he arrived for the meeting, he found that the D-G was with Muzi Twala and Mzobe. The D-G instructed him to buy the three farms, as part of fundraising for what he called Project Mangaung. He said that the aim of the Project was to raise funds for the political campaign to have ANC President Jacob Zuma re-elected at the 2012 National Conference of the ANC.

49. He bought the three farms; and, he was now being charged for doing so. Yet he had acted on the Director-General's directives. He wanted me to intervene on his behalf. I said the matter is very serious; and, we cannot take any decision about it here. Let us deal with it in the Office in Pretoria. The interaction adjourned on that point.

GEN

50. I had never heard of this Project Mangaung, until that afternoon. Needless to say that ANC President Jacob Zuma was re-elected President of the ANC in Mangaung. Whether the so-called Project Mangaung had a role in that outcome, I do not know.

51. I SHOULD DECLARE TO THE COMMISSION, HON. CHAIRPERSON: I was also elected to the National Executive Committee (NEC) of the ANC at that Conference.

52. When his Disciplinary Hearings commenced, I saw it fit to inform both the Presidency and the leadership of the Governing Party. I did not want them to learn about the so-called Project Mangaung through the media. I requested a meeting with the then Deputy President, President Cyril Ramaphosa. I presented him with a copy of the Project Mangaung document; and, indicated to him that disciplinary action is being taken against DDG Mahlangu. I said that should the President seek a briefing, I was available. The President never made the call.

53. I sent a copy of the same document to the Secretary-General of the ANC, Mr Gwede Mantashe; and, made the same offer as I with the President. He asked for five more copies of the document, so that each member of the Top Six gets a copy. That, I did. Again, there was never a call from Luthuli House.

I. PARTICIPATION IN MASIBAMBISANE COMMUNITY PROGRAMME IN NKANDLA

54. I was one of two or three Ministers who had been invited by President Zuma to his home village of Nkandla. There, we joined the President in a meeting with members of the Community. During the meeting's proceedings, the President introduced the Programme and its Committee Members. It turned out that he was the Chairman of the Committee of Masibambisane; and, a gentleman by the name of Mzobe, was introduced as the Vice Chairman.

55. The President introduced the Ministers in attendance; and, announced that he had brought them. There, so that they could pledge their support for the Programme. He called upon each Minister to come forward and pledge their support. He pleaded with them not to use the Public Finance Management Act (PFMA) as a stumbling block.

GEN

56. Each Minister had to stand up and pledge her / his support for the Programme, as well as stating what they could possibly do. I did the same, except that I started by saying to the meeting that while the Chairman is saying that we should not use the PFMA as the stumbling block, in Pretoria he is the Chairman of the PFMA; and, he is very strict on its observance. I pledged my support and stated that I would send a Team of officials over there to assess what the Department could do in support of the Programme.

57. After visiting Nkandla, the Departmental Team developed a Fencing Project, focusing on ploughing fields and, so that when the planting season arrived they were ready for planting. The Department approved the Project; and, work started.

58. When on a visit to inspect work on the Fencing Project, I was taken to a Youth Development Project in one of the villages. The Project was still under construction. The Departmental officials informed me that it was another one of our Department's projects. It was quite impressive!

59. Thus, the Department had initiated two projects in Nkandla, at least that I came to be aware of the Fencing Project; and, the Youth Development Centre, subsequent to the initial meeting that was initiated by the President.

J. FURTHER PRESIDENTIAL VISITS TO PROJECTS IN OTHER PROVINCES.

60. VISITS TO THE EASTERN CAPE PROVINCE.

60.1 Visit to Chief Dumisani Mgudlwa of abaThembu in the Chris Hani District Municipality.

The President had been invited by the Member of the Executive responsible for Agriculture in the Province, MEC Capha. The President pulled along the Minister of Agriculture Forestry and Fisheries and myself. When we arrived there, the President paid a courtesy call to the Chief at his home. My colleague, Minister Tina Joemaat-Petterson, accompanied the President. I went to the ploughing fields, where there were two tractors harvesting maize; and, there found a number of people, including the District Mayor, Cllr Koyo. During our conversation he asked why I did not join the

GEN

President. I said there were two of us; and, that one of us is there with him. He said 'but this is your project. Your Department spent R5m on it. I was shocked by the news, as nobody had told me that. I played the matter down. A week later, I received a call from a gentleman who said his name and that he lives in KwaZulu-Natal. He said that the two tractors that were used to harvest at one of Chief Mgudlwa's villages, during the visit of the President's, belonged to him. They had been hired from him, but he had not been paid. He was phoning to ask for his payment. I replied that I had been invited there by MEC Capha. I suggested that he spoke to her. He acknowledged that they had been hired by her; and, we ended the conversation.

60.2 About a month later, a second visit was scheduled for Ngcingwana Village in Dutywa, still in the Eastern Cape. Once again, the same two Ministers accompanied the President. When we arrived in Dutywa, the venue had been changed to another village, but still in Dutywa. During the proceedings, I realized that all the equipment that was displayed there is that which I had purchased for the Village Farmers, when I was MEC for Agriculture in the Province. At the end of the displays, as the entourage was going to the public meeting in the tent, the DRDLR's Head of the Province must have noticed that I had questions in my mind, because she came to me greeted and said: Minister why are you looking surprised at the equipment? This is equipment you bought when you were the MEC in the Province. This Occasion is yours as well. Your Department spent R97m on it. I was shocked, but did not pursue the matter any further.

60.3 Another invitation, this time for us to go to Mpumalanga. I turned down the invitation, out of shock from my two Eastern Cape experiences.

61. The visit to Mpumalanga was on a Saturday. The following day, the City Press had a big front page article that said that the Department of Rural Development and Land Reform had spent R350m on Masibambisane Projects.

K. STOPPING FUNDS TO MASIBAMBISANE PROJECTS: The President's Response.

62. On Monday morning I called a meeting with all the officials at Head Office who are involved with Masibambisane Projects, including the D-G and DDG Moshe Swartz, the DDG

GEW

responsible for rural development programmes in the Department. I wanted an explanation on the article. I related to my experiences in the Eastern Cape.

63. After listening to their inputs; and, from that input, learning for the first time that funds from the Department to Masibambisane Projects were channeled through the Independent Development Trust (IDT), I asked DDG Swartz to go home for seven days; and, think carefully if he wanted to continue working in the DRDLR. I instructed the D-G to stop all payments to Masibambisane Projects, with immediate effect. I closed the meeting.

64. During this period I came to know that the Treasurer of Masibambisane Programme, one Alex Methi, was working, on contract, in the D-G's Office. This was the second senior official of Masibambisane Programme directly involved in departmental 'project management' – reference Mzobe, the Vice Chairman of the same Programme, and Project Mangaung - through the Director-General!

65. At the end of Methi's contract, the D-G submitted a Memorandum requesting the extension of the contract. I rejected that; and, discontinued the contract.

66. I was called by the President, in his office. When I arrived in his office, he was alone. So we had a one-to-one engagement. He said he had heard that I had stopped funding for Masibambisane projects; and, that I had suspended the DDG responsible for the projects. I responded by saying: 'That is correct, Mr President; and, I hope that they also told you that I said I am ready to take a fall for it. You are my President; and, I am loyal to you, as my President. I am not going to allow corruption to be done in your name.'

67. He dropped the topic and said he had called me because he wanted to introduce to me an official in his Office, who is responsible for rural development projects. He called the official; and, in walked Mr Mashinini (the current Chairperson of the IEC). The President introduced him to me; and, released him after the formalities.

68. As we stood up to leave, I requested the President to convene a meeting to be attended by Minister Joemaat-Petterson, Mzobe and myself. I requested him to tell Mzobe, at that meeting, to stop interfering in the work of the two Departments, causing confusion. The

GEN

President said fine, as we were walking to the door. He opened the door; and, as I was walking out, he said: 'I know who is using my name in your Department'. I said nothing; and, walked through the door.

69. To my sweet surprise, the President convened the meeting I had requested, in his Office in Pretoria. He spoke firmly to Mzobe, instructing him to stop interfering in the activities of the two Departments. When the President finished speaking to Mzobe. The meeting came to an end. We thanked the President; and, walked back to our offices.

L. THE DISCIPLINARY ACTION AGAINST THE DIRECTOR-GENERAL AND ITS OUTCOME.

70. It was during Adv. Andy Mothibi's time as Head of the SIU that the latter issued a scathing report about my D-G, Mduduzi Shabane, with a recommendation that I take disciplinary action against him. Accordingly, I initiated the disciplinary action. My first step was to seek a Presidential approval for me to place the D-G on a Precautionary Leave, pending the outcome of the intended Disciplinary Action. At the time, President Zuma was in Cuba, attending the funeral of the late Cuban President, Fidel Castro; and, then Deputy President, Mr Cyril Ramaphosa, was the Acting President. The Acting President gave me the go-ahead. I appointed Mr Mxolisi Myambo of De Swardt Myambo as our Attorney of record; and, Adv. Ernst van Graan SC as our Advocate and evidence leader.

71. Advocate Nazeer Cassim SC was appointed Chairperson of the Disciplinary Hearings; and, he set the date for the Hearing. However, before the sitting of the Hearing, three things happened:

71.1 President Zuma, who had returned from Cuba and returned to his position, wrote me a letter (**ANNEXURE G**), in which he chastised me for taking a disciplinary action against the D-G, stating that he had not delegated that responsibility to any Minister. However, President Zuma did not order me to stop the disciplinary action. He gave me guidance on what to do – that I should approach the Minister of Public Service and Administration, then being Adv. Ngoako Ramathlodi, to give me guidance on how to proceed. I, accordingly, wrote a letter to the Minister requesting his guidance on how to proceed further with the Action;

GBN

71.2 The D-G applied to the Pretoria High Court for an Interdict against me; and,

71.3 On the 22/06/2017, the President called me to his office (in Cape Town). At the said meeting the President was accompanied by his Legal Advisor, Adv. Makhene. The first comment by the President was that I was going to lose the Interdict and embarrass the Government, because I did not have a case. People were going to say 'There you are! The Government has lost another case again'. Adv. Makhene took over from the President. She pointed to a letter on the table before her; and, said that Adv. Ramathlodi had written to the President, requesting him to approve my action against the D-G. However, she pointed out, the President cannot approve your actions after the fact, because that would be unlawful. I should withdraw the action against the D-G. I responded by indicating that I was acting in terms my responsibility, as enshrined in the Public Finance Management Act (PFMA); that I was acting in terms of a strong recommendation by the SIU, which had conducted investigations that seriously implicate the D-G; and, that the SIU has recommended that I take disciplinary action against the D-G. I indicated that Adv. Richard Sizani, the Chairperson of the Public Service Commission (PSC) had met with me, having been requested to do so by the D-G to persuade me to have the matter settled amicably, out of Court or Disciplinary Hearings. I explained to the President and his Legal Advisor, as I had done to Adv. Sizani, that I was unable to withdraw my action against the D-G, because I have received an investigation report from the SIU, which implicates the D-G in serious wrong-doings; with a recommendation to take disciplinary action against him. I suggested that Adv. Bonisiwe Makhene and Adv. Sizani be the ones who approach the Chairperson of the Disciplinary Hearing; and, motivate for the stoppage of the Disciplinary Hearings. I could not stop the Action. We agreed on that action. That is how the meeting ended.

72. On the 23/06/2017 I had a scheduled meeting with Farmers Organisations in Johannesburg. I took the first flight from Cape Town. On disembarking from the Plane I felt dizzy. Fortunately, one of my Deputy Ministers, Mcebisi Sikwatsha, was on the same flight. We used the same car from the Plane to our cars. He suggested that I don't attend

GEN

the meeting; he would inform the farmers; and, they would manage the meeting. I went to a Doctor in Pretoria; and, I was diagnosed with high fever, with temperature of 42 Degrees. The Doctor referred me to the Pretoria Medi-Clinic, where I was admitted. I spent six nights there. On either my third or fourth night at the Medi-Clinic, I received a call from then Deputy-President Cyril Ramaphosa. He said he was in trouble because he gave me permission to suspend the D-G. He asked if I could not withdraw the action. My response was that I was sorry that he was in trouble because of me. However, I could not withdraw my action against the D-G; and, that 'I was ready to go home tomorrow' for it. We ended the conversation.

73. When I was discharged from hospital, on the 29/06/2017, I was given a six weeks sick leave. I was still on sick leave when the Disciplinary Hearings against my D-G were concluded, with his summary dismissal. However I felt it prudent that I be the one to write to President Zuma, advising him of the outcome of the Disciplinary Hearings; and, that I was committed to implementing that decision. President Zuma did not stop me from implementing that decision. I requested Minister Thulasizwe Nxesi, who was acting for me during the period of my absence, to write the dismissal letter to the Director-General, which he did.

74. However, notwithstanding the serious allegations leveled against him by the SIU's investigation report, allegations which led to his dismissal in 2017; and, notwithstanding Shabane's applications to the High Court and the Labour Court against me and the Department which had been dismissed, Shabane had been brought back to his former position as the D-G of the DRDLR.

M. ATTEMPTS TO MEET WITH THE HEAD OF DELOITTE EN TOUCHE RE: THE DRAFT REPORT AND THE MANNER IN WHICH IT HAD BEEN HANDLED.

75. After the release of the Draft Report by Deloitte, saying that I was guilty and should be charged, without ever talking to me about the matter, I decided to have a meeting with the Head of the Company. My attempts fell through.

GEW

76. Instead, the two Investigators availed themselves for the meeting, which took place in my office. They apologized for their Head, saying he was in New York.

77 I said: 'The reason I wanted to meet your Boss is that I wanted to tell him two things. Firstly, that you have been captured by corrupt officials of my Department; and, secondly, that your Company was appointed by default, because its competitor was fraudulently disqualified by people, pretending to be SARS.

78. They said they did not know that the Investigation into Bekendvlei Farm had been ordered by me. They said if they had known, things would have been different.

79. I said: 'You do not have to do things to please anyone. You have to do things right'. I pointed at my Advisers and other senior Departmental officials and said: 'Do you see these people sitting here with me? They are all my advisors; and, they know that they must tell me NOT what they think I want to hear. They must tell me WHAT I need to know. Otherwise they would not be worth being my Advisors'.

80. They apologized profusely; and, the meeting was over.

N. CONCLUSION

Let me conclude by referring to the letter that I wrote to the Speaker; and, distributed to some political leaders and institutions that are critical in the fight against corruption, without repeating their names.

"I believe firmly that, as a Public Representative, when such serious allegations are made about me, I should subject myself to public scrutiny.

I, therefore, request The Speaker to (a) refer the matter to the Office of the Public Protector for investigation; and, (b) subject me to a lifestyle audit, from 1994, when I became a Public Representative as Speaker of the Eastern Cape Provincial Legislature (1994-

GEN

FP-JGZ-4272

1999); as MEC: Housing, Local Government and Traditional Affairs (1999-2005); as MEC: Agriculture (2005-2009); and, as Minister for Rural Development and Land Reform (2009 to date). I am available to provide any information that may be required in this regard."

Thank you very much for the opportunity, Honourable Chairperson.

SIGNATURE:

DATE OF SUBMISSION: 15 AUGUST, 2020

SIGNED and SWORN to at Kenton-on-Sea on this 15th day of August 2020 by the Deponent, who stated that:

He knows and understands the contents of the Declaration;

He has no objection to taking the prescribed oath; and,

He considers the prescribed oath as binding on his conscience.

And Government Notice Regulation 1258, as amended by the Government Notice Regulation 1628, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

A. N. BARNARD
702782-2681
OFFICER

COMMISSIONER OF OATH

SUID-AFRIKAANSE POLISIEDIENS
COMMUNITY SERVICE CENTRE
2020 -08- 15
KENTON ON SEA
SOUTH AFRICAN POLICE SERVICE

FULL NAMES: ASHLEY BARNARD

BUSINESS ADDRESS: No. 01 OETTLE STREET
KENTON-ON-SEA

AREA: 6190

DESIGNATION: SERGEANT

State Security

State Security Agency
REPUBLIC OF SOUTH AFRICA

SSA/DG01/1/5/2

SSA/DG01/4/14/5 Office of the Director-General

20 May 2021

Prof: Itumeleng Mosala
Secretary of the Judicial Commission of Inquiry
2nd Floor, Hillside House
17 Empire Road
Parktown
Per e mail: frankd@commissionsc.org.za

Dear Prof Mosala

RE: REQUEST FOR DECLASSIFICATION FOR THE PURPOSE OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING THE ORGANS OF THE STATE ("THE COMMISSION")

1. The above matter, specifically your letter dated 12 April 2021, refers.

2. As requested , permission is hereby granted for the declassification of the Summary of the Pan Report (for ease of reference kindly find attached declassified report for your attention)

3. It is hoped the above will be found to be in order.

4. Thank you for your attention.

Kind regards,

Ambassador TS Msimanga
Acting Director-General:
State Security Agency

NARRATIVE REPORT ON THE FINDINGS: PAN PROGRAMME INVESTIGATION

1. The purpose of this report is to provide a summary of the findings as contained in the final report of the PAN Programme investigation with reference SSA/6/1/4/5 dated May 2012 that was presented to the Minister of State Security (the Minister) and the Acting Director-General on 19 June 2012. The report will also reflects on previous decisions that were taken concerning the handing over of the matter to law enforcement agencies for finalisation of the investigation and the interaction with such agencies.

2. Background

2.1 During September 2009, the Minister indicated that he wanted an investigation into alleged irregularities in the National Intelligence Agency (NIA) Principal Agent Network (PAN) programme. His concern related to the Covert Support Unit's (CSU) overspending of its own allocated budget and subsequent use of NIA's rollover funds and budget savings. Flowing from this the former Head of NIA, Mr Njenje instituted a preliminary inquiry by the internal auditors.

2.2 Based on the findings of the internal auditors, Mr Njenje appointed an investigation team during February 2010 to investigate alleged acts of maladministration and financial irregularities within the PAN programme.

2.3 During the course of the investigation the investigators identified numerous incidents of breach of the State Security Agency's (SSA) regulatory framework, as well as the irregular authorisation and utilisation of funds. The result of the investigation indicates that there is sufficient

indication to institute criminal investigations against the following persons as well as against certain persons still unknown:

2.3.1 Mr M Manzini: Former DG of the NIA.

2.3.2 Mr Arthur Fraser: Former Deputy Director-General: Operations of the NIA.

2.3.3 Mr Philani: Former Manager of the CSU.

2.3.4 Mr Garth: Former Manager at the Operational Coordination Unit.

2.3.5 Ms Mary: Former financial officer at the CSU.

2.3.6 Mr Map: Member of the CSU.

2.3.7 Mr Tell: Member of the CSU.

2.3.8 Mr Jail: Former NIA member who acted as a service provider for the CSU.

2.3.9 Mr Grant: Former NIA member who acted as a service provider for the CSU.

2.3.10 Mr Wayne: Was a PAN.

2.3.11 Mr Real: Former member of COMSEC who acted as a service provider for the CSU

2.3.12 Mr Nate: Acted as a service provider for the CSU.

2.3.13 Mr Nada: Former consultant of COMSEC and service provider to the CSU.

2.3.14 Mr Bart: XXX and service provider to the CSU under the name of a third person

3. Internal audit report

3.1 The key findings of the internal auditors are as follows:

3.1.1 There was misapplication and non-compliance with the Operational Directive dealing with the authorisation and conduct of cover as well as with the Operational Directive dealing with the procedures for the authorisation and management of agents and contacts.

3.1.2 Non-compliance with finance and asset directives.

3.1.3 Non-compliance with the Ministerial Payment Directive (MPD).

3.1.4 Incomplete financial transaction recording.

3.1.5 Inadequate supporting documentation and mispresentation in regard to operational projects.

3.1.6 Inadequate supporting documentation for the issuing of Special Temporary Advances.

3.1.7 Discrepancies on temporary advances for the amount of R85 000 000.00.

3.1.8 In order to fully understand the financial processes and extent of expenditure by the CSU, a full independent forensic audit should be conducted.

3.2 It was established that during the audit process the boardroom at the CSU where the internal auditors worked was illegally bugged in order to monitor the conversations

of the internal auditors. The instruction to bug the boardroom was issued by Mr Philani and Ms Mary and Messrs Garth, Map and Tell were actively involved in the bugging process and the monitoring of conversations. This action constitutes a criminal offence in terms of the Regulation of Interception of Communications and Provision of Communication- related Information Act, 2002.

4. Formation and management of the PAN programme

4.1 Mr Manzini was desirous of enhancing and expanding the NIA's covert collection capacity. He shared this need with Mr Fraser, who then presented him with a operational model outlining certain conceptual projects to bolster the NIA's covert capacity. One of the suggested projects was indeed the creation and establishment of a PAN programme. Mr Manzini consequently approved the concept project as well as the subsequent submission for the allocation of funding for the envisaged project.

4.2 During an interview with former Minister R Kasrils, he said that he had not approved the PAN programme as it was implemented. He agreed with the concept of a Principal Agent Network as it is traditionally understood. He further said that even if he had agreed in principle, submissions would have had to be submitted requesting approval for the establishment of a new cover structure.

4.3 Personnel expenditure (salary, medical aid, pension, tax, bonus) in regard to the principal agents was R32 911 326.98 per financial year and this did not include any rentals, operating costs or operational funding.

4.4 The employment contracts of the 72 PANS were all signed by Mr Philani who was the Manager of the CSU. He did not have the authority to sign these contracts and acted in

contradiction with the relevant prescripts. Although, the contracts indicated that the persons were employed as contract workers, the correct authorisations and prescripts were not followed and this resulted in a situation that these persons could not be categorised as agents, sources, contract workers or members. However, due to the legal principle of *estoppel* the SSA was forced to recognise these contracts. A number of the appointed PANS were children and other family members of the members of the CSU and senior members of the NIA.

4.4.1 The expenditure arising from these contracts may in terms of the Public Finance Management Act, 1999 be regarded as financial misconduct.

4.5 Although the PANS received vehicle allowances they were also issued with vehicles that were bought from operational funds and they also submitted fuel claims in regard to these vehicles. They have also received undertakings from Messrs Fraser and Philani that after a period of four years they will become the owners of these vehicles and new vehicles will be issued to them.

4.6 Most of the PANS had medical and pension benefits that were subsidised from operational funds.

4.7 The investigation found that there was no correlation between the establishment of the PAN programme and individual projects *vis a vis* the prevailing intelligence requirements. In fact a number of the projects implemented were duplicating initiatives already underway within the NIA.

4.8 No evidence was found that any of the projects had individual authorisations, operational plans or budgets as required in terms of the applicable regulatory framework. The majority of the PANS have engaged in environmental

scanning which is not justifiable as a reason for establishing a cover project.

4.9 Projects were often initiated on the verbal instruction of Mr Fraser, thereby not fulfilling the criteria of being individually authorised by the Director-General.

4.10 The Chief Financial Officer (CFO), Mr Appel, was not consulted by Mr Fraser in regard to the financial implications of the projects as is required by the regulatory framework. The CFO was also forced by Messrs Manzini and Fraser to release millions of rands to the CSU by way of verbal approvals which is absolutely in contradiction with the regulatory framework.

4.11 The PANS were not appointed in post establishment positions as per the regulatory framework, resulting in all personnel related expenses having to be paid from the operational budget. This lead directly to the utilisation of rollover funds and savings as this expenditure was never budgeted for.

4.12 The PANS received much better remuneration packages than NIA members and these packages were approved by Mr Fraser in contradiction with the relevant regulatory framework.

4.13 An expensive communication system was put in place at Mr Fraser's private residence and he has been the sole recipient of information gathered by the PANS. The system was installed and maintained by the company Isa of which former COMSEC consultant, Mr Nada is the director. Unconfirmed information indicated that Mr Manzini was a silent partner in Isa.

4.14 All raw information was provided to Mr Fraser in an encrypted electronic format which was linked to the server

at his private residence. The information was not disseminated or integrated into the NIA's information management system and the Analysis unit of the NIA never received any of this information.

4.15 Besides that the installation of the server in a private residence and the non-submitting of information into the official system are in contradiction of the internal regulatory framework, it also indicates transgressions of the Protection of Information Act, 1982 as well as possible charges of treason. It also gives clear indications of the intent to establish an alternative intelligence structure for purposes unknown.

4.16 It was also established that during October 2011, a company called Mage was registered of which the directors are Mr Manzini, Mr Arthur Fraser, Mr Bart and Mr Nada.

5. Operational projects

5.1 The investigation team's assessment indicates that the manner in which most of the PANs were operating was costly to the NIA when in fact operational employees could collect similar data.

5.2 The PAN's collection functions, processes and operations were not effectively planned, managed and conducted. The investigation team is of the opinion that the resources could have been applied to existing agent handlers to improve their operational processes and practices.

5.3 One of the projects was Project: Community Peace Programme (CPP). The CPP is a community based organisation that was originally established by the University of Cape Town which dealt with conflict

resolution, especially at schools. Ms XXX, the XXX of XXX is a board member of the CPP. Although, this project did not resort under the mandate of the NIA, the CSU paid an amount of R10 000 000.00 over to the CPP for absolutely no product in return. All indications are that criminal offences in terms of the Prevention and Combating of Corrupt Activities Act, 2004 as well as the Public Finance Management Act, 1999 have been committed.

5.4 In another project one Gage received in excess of R12 000 000.00 from the CSU. The products received from Gage were later evaluated and it was established that the information could have been obtained through open sources. Although, the NIA has reported for a long period on Gage as a subject, he was still recruited by Mr Fraser. Unconfirmed information indicates that Gage utilised the money to buy a stake in a BMW dealership in Claremont, Cape Town. There are strong indications that offences in terms of the Prevention and Combating of Corrupt Activities Act, 2004 have been committed.

6. Immovable property

6.1 The CSU leased various properties from Cherry via Umango Rentals. The CSU paid around R50 000 000.00 in cash over to Umango which handed it over to XXX Grant, who is a former SASS and NIA member and who is the owner of Cherry. Cherry purchased various properties to the amount of R18 000 000.00 just before and after the cash amount was received. Most of these properties were then leased to the CSU via Umango which was registered by Mr Nate on request of Mr Grant in terms of pre-paid lease agreements. However, Umango was only registered on a date after it has entered into the lease agreements. In the lease agreements Umango utilised a registration number of another company that was previously registered by Nate. It is clear that forgery and

uttering, fraud and various offences in terms of the Prevention and Combating of Corrupt Activities Act, 2004 as well as the Companies Act, 2008 have been committed.

6.2 The CSU also entered into a lease agreement with Ugli Warehousing for the leasing of a warehouse. Although, it was indicated that Mr Scheme is the director of Ugli it was established that the real director is in fact Mr Bart who have paid Scheme to front for him. It was also established that Mr XXX who is the XXX was employed as the floor manager in the warehouse. Once, the investigation started the lease agreement was terminated but if it has run for the full term, the value of the lease agreement would have been R24 000 000.00. It is clear that fraud and offences in terms of the Prevention and Combating of Corrupt Activities Act, 2004 as well as the Companies Act, 2008 have been committed.

6.3 In another instance Ms Mary, the financial officer of the CSU, took R1 200 000.00 in cash from the CSU. These funds were utilised to purchase two properties in the name of a company that was registered by her brother Mr Wayne, who was a PAN. A false lease agreement in the name of a housing rental company was created in terms of which one of the properties was leased to the CSU for R1 200 000 in terms of a pre-paid lease. It is clear that the offences of theft, fraud and forgery and uttering have been committed. Mr Wayne and the husband of Ms Mary, who is a private businessman, are accomplices to these offences.

6.4 A a housing rental company tax invoice was also forged in relation to another property that was allegedly leased by the CSU. The property in question was in fact never leased by the CSU for an amount of R5 898 584.00 as indicated. Mr Real, a former member and the director of a

housing rental company indicated that he has received the money from Mr Philani and that he paid it into the trust account of his attorney, whose details he has forgotten. It is clear that the offences of theft, fraud and forgery and uttering have been committed by Messrs Philani and Real

7. Movable property

7.1 A total of 293 vehicles were purchased by the CSU for operational use. A company Sap, of which Mr Grant is the director, was utilised for the purchasing of a vast amount of these vehicles. Some of these vehicles were stored in warehouses for the last four years without being utilised.

7.2 Three surveillance vehicles were purchased from Made in a foreign country for an amount of R45 721 527.77. Mr Philani signed the contract on behalf of the NIA without the necessary authorisation as required in terms of the regulatory framework. Made has provided proof to the investigation team that the payment was received. However, due to the importation of these vehicles in the name of NIA, the vehicles had to be registered in the name of NIA which is a compromising factor in terms of surveillance operations. The correct supply chain management procedures were not followed in regard to the purchasing of these vehicles.

8. Pybus

8.1 The installation of security equipment and renovations at safe houses were conducted by the company Pybus. The director of Pybus is Mr Jail who is a former NIA member. Mr Fraser requested Mr Jail to resign and start a company to render services to the CSU. Mr Fraser has recommended the utilisation of Pybus as a preferred

service provider while Mr Jail was still a member and before Pybus was registered.

8.2 Mr Jail conducts his business from his private residence; he has no employees and is rendering services by way of sub-contractors. Over a period of 18 months he has received R58 000 000.00 from the CSU of which he has received R11 000 000.00 while he was still a member. The services that were rendered are of poor quality and in some cases these services cannot be verified. Mr Jail has in a span of 20 months acquired immovable property to the value of R11 000 000.00.

8.3 There are clear indications of a corrupt relationship between Messrs Fraser and Jail and possibly also Mr Philani. All indications are that numerous offences in terms of the Prevention and Combating of Corrupt Activities Act, 2004 have been committed.

9. Liaison with law enforcement agencies

9.1 During a meeting at OR Tambo Airport with the Minister of State Security on 9 November 2010 it was resolved that the CSU matter will be referred to the National Prosecuting Authority forthwith for a criminal investigation into the alleged irregularities in the PAN programme.

9.2 On 30 November 2010, a letter was forwarded to the National Director of Public Prosecutions (NDPP) requesting the assistance of the NPA concerning a criminal investigation of the PANS programme. Thereafter the investigation team was contacted by the NDPP and informed that the NPA is not responsible for criminal investigations but for the prosecution of criminal offences and that the SSA must approach the SAPS.

9.3 On 20 January 2011, a letter requesting assistance with the criminal investigation was send to the National Commissioner of the SAPS for the attention of the Head of the HAWKS. Thereafter the investigation team was contacted by Genl. Dramat who has informed him that Genl. Dramat has arranged a meeting for the investigation team with Genl. Meiring who is in charge of all commercial crimes investigations.

9.4 The meeting with Genl. Meiring took place on 10 February 2011. Lt Col Van der Merwe was allocated to the investigation. On 15 February 2011, Lt Col Van der Merwe visited the investigation team at Musanda to evaluate the audit and investigation reports. Lt Col Van der Merwe recommended that the matter must be investigated by a multi-disciplinary task team and a next meeting was arranged for 21 February 2011.

9.5 On 21 February 2011, the investigation team met with representatives of the Commercial Crimes Unit, the Asset Forfeiture Unit and the Crimes Against the State Unit. At this meeting it was resolved that the Special Investigation Unit (SIU) is best suited to deal with the investigation due to the sensitive nature of the investigation and the SIU's access to the Anti-Corruption Task Teams.

9.6 On 23 February 2011, the investigation team met with representatives of the SIU and it was resolved that the SIU will conduct a pre-assessment investigation, commencing on 28 February 2011.

9.7 On 31 March 2011, the SIU submitted its business proposal to the Head: NIA, Mr Njenje. At that stage Mr Njenje had a concern about the cost of R15 063 899.00 as indicated in the business proposal. This cost was for the outsourcing of the forensic audit. Thereafter, Mr Njenje personally entered into negotiations with the SIU and at

some stage informed the investigation team that the cost will come down to around R6 000 000.00.

9.8 Thereafter, Mr Njenje suddenly left the SSA and all liaison with the SIU has come to a halt. During a telephonic conversation during March 2012 between members of the investigation team and Mr Peter Bishop of the SIU it was mentioned by Mr Bishop that the SIU has now established an in-house forensic audit capacity and therefore there will be no cost anymore but the investigation can take a bit longer.

9.9 During 2011, the investigation team also made a presentation in regard to the CSU matter to the Minister of Justice and Constitutional Development, Minister J Radebe, in Cape Town on instruction and in the presence of the Minister of State Security. Even before the conclusion of the presentation, Minister Radebe indicated that he has heard and seen enough and that it is a *prima facie* case that must be dealt with by law enforcement. The Minister also indicated that his Department will render such assistance as may be required.

NN2

National Treasury and the Project Spider Web

The National Treasury is responsible for managing South Africa's national government finances. Supporting efficient and sustainable public financial management is fundamental to the promotion of economic development, good governance, social progress and a rising standard of living for all South Africans. The Constitution of the Republic (Chapter 13) mandates the National Treasury to ensure transparency, accountability and sound financial controls in the management of public finances. The Ministry of Finance is at the heart of South Africa 's economic and fiscal policy development. The Minister of Finance and Deputy Minister of Finance are responsible for a range of state entities that aim to advance economic growth and development, and to strengthen South Africa 's democracy.

The white establishment through the private sector has a huge influence in the running of the National Treasury. The history of this Influence dates back during the early 90's when the ANC and the National Party were negotiating the talks about talks. The white establishment felt it was too risky to leave the running of the government solely in the hands of the ANC. The white establishment came with the first project to influence the fiscal and monitory position of the country through a project known as "Project

Grapevine". The project's objective was to attract high level ANC officials to agree to hold economic transformation talks in Stellenbosch. When the ANC was winning the political war in Kempton Park, the ANC was also losing the economic war in Stellenbosch. Roeloef Meyer and Professor Andre Kriel of Stellenbosch were the key drivers of Project Grapevine.

Post 1994, Project Grapevine was handed to Professor Hugo Nel from the University of Stellenbosch. Professor Hugo changed the structure of Project Grapevine and renaming it Project Spider Web. Professor Hugo restructured the project with new objectives and a new structure. The new project also attracted funding from the Rupert, Oppenheimer and the Rothschild families. The Oppenheimers withdraw their funding for project Spider Web in 2010. The Ruperts are still the biggest funders of Project Spider Web. Professor Hugo Nel was instrumental in ensuring that Johan Rupert is appointed the vice chancellor of the University of Stellenbosch. Since Rupert's appointments, Project Spider Web has grown from strength to strength. The project has the following objectives:

- Influence the design and Implementation of the economic, fiscal and economic policy

- Influence the appointment of key leaders in Reserve Bank, National Treasury, DTI and SOE's that fall under these three Institutions.
- Manage the outcomes of these institutions
- Defend the position of the Spider Web through the media
- Attack and prosecute critics of project spider web through SARS and the other means

This paper focuses on how National Treasury is managed and influenced through project spider web. The project is responsible for coordinating macroeconomic policy and promoting the national fiscal policy framework. The project also coordinates intergovernmental financial relations, manages the budget preparation process and exercises control over the implementation of the annual national budget, including any adjustments budgets.

Project Spider Web has a codename membership system allocated to different members who play a key role in this project. Trevor Manuel is codenamed as the King of Leaves and Maria Ramos as the Queen of Leaves. Members of the project who work in different position in government are also coded through various names, for instance, Dr Dan Majila is coded as the Iron Master. There are different levels of disclosure for members. Most members of this project are not aware

that they are part of a covert project to influence fiscal and monitory policy since they are handled through various handlers. This paper will identify Individuals who are key members of Project Spider Web. These indivuduals are being handled through various means to achieve the objectives of Project Spider Web.

Members of the Project Spider Web inside National Treasury

Government Technical Advisory Centre (GTAC)

Andrew Donaldson
Spider Web Code Name: The Emperor

Andrew Donaldson studied at the University of Stellenbosch for a degree in economics, he studied together with Professor HugoNel. Andrew also studied in UNISA and Cambridge University. He taught Economics at the former University of Transkei, Rhodes University and the University of the Witwatersrand. Before 1991, He was also the strategic planner for the National Intelligence and Secret Services (NISS) for the Apartheid government.

He joined the then Department of Finance in 1992, and in 2001 was appointed Deputy Director-General with responsibility for the Budget Office and Public Finance in the National Treasury. His work covered spending

policy, social development and reform of the budget process and budget documentation.

He contributed to the work of the Katz Commission on tax policy, served on the Committee of Inquiry into a National Health Insurance System, was a member of the team that drafted the 1996 macroeconomic strategy and served on the Interdepartmental Task Team on Social Security and Retirement Reform.

In 2013 he was appointed Acting Head of the Government Technical Advisory Centre, an agency of the National Treasury which supports public finance management, public-private partnerships, employment facilitation and infrastructure investment.

He is chairperson of the Steering Committee of the Research Project on Employment, Income Distribution and Inclusive Growth located at the University of Stellenbosch. Andrew is the key player in Project Spider Web. Some of the people that find themselves at Treasury were once students of the Emperor at Rhodes university. The Fox and the Iron Master were once handled by the Emperor at Rhodes university when they were members of IESEC.

Asset and Liability Unit

Asset and Liability Management division manages government's asset and liability portfolio in order to ensure prudent cash management, asset restructuring, financial management and optimal management of government's domestic and foreign debt portfolio.

Ms. Avril Halstead

Spider Web Code Name: The Fog

Ms Halstead holds an MSC in Economic Policy from the University of London, an MBA from the University of Cape Town and an MA in Organisational Consulting from the City University, London she also holds a B Com honors and Scocial Science degrees.Ms Halstead is a Chief Director at the National Treasury in South Africa

where she has responsibility for overseeing approximately 40 of the largest state owned enterprises (SOEs).Prior to joining the National Treasury, Ms Halstead worked for McKinsey & Company, Old Mutual and Wipcapital, a subsidiary of Wiphold. She has also worked with a number of NGOs, notably the Nelson Mandela Foundation as well as the Family and Marriage Association of South Africa (FAMSA) and Ikageng, an organisation responsible for caring for HIV/AIDS orphans. She was nominated as a Young Global Leader and one of the Mail & Guardian's Top 200 Young South Africans in 2011.

Anthony Julies

Spider Web Code Name: The Jackal

The team is still searching for the CV. This is one member of the spider web who is the most secretive and extra careful.

Budget office

Coordinates the national budgeting process. This includes coordinating the allocation of resources to meet the political priorities set by government. While the standard of documentation produced with the budget is already impressive, the Budget Office constantly strives to improve the quality, usability and coverage of the publications produced. The division also provides fiscal policy advice, oversees expenditure planning and the national budget process, leads the budget reform programme, coordinates international technical assistance and donor finance, supports public-private partnerships (PPPs) and compiles public finance statistics.

Marissa Moore

Spider Web Code Name: The Hustler

University of Johannesburg

Johannesburg, South Africa | 1990 - 1993
Bachelor of Science (BSc) (Honorary) Cum Laude - Industrial Sociology

University of Witswatersrand
Johannesburg, South Africa | 1990 - 1993
Master of Science (M.Sc.) - Social Science

Corporate Services

The Corporate Services division is responsible for the department's governance framework, and aims to create a productive and creative working environment that enhances effectiveness.**No presence of the spider web, it's not a strategic unit.**

Economic Policy

The Economic Policy division plays a central role in formulating and coordinating appropriate growth-enhancing policies that strengthen employment creation. The key responsibility of the Economic Policy division is to provide policy advice on macroeconomic developments, international economic developments and microeconomic issues. The division does this through policy analysis, scenario testing and the production of macroeconomic forecasts, in particular on growth, the external account and inflation. The forecasts inform economic policy, the fiscal framework, tax forecasts and debt management strategy. **Still**

searching for the presence of the spider web.

Tax and Financial Sector Policy

The Tax Policy unit is responsible for advising the Minister of Finance on tax policy issues that arise in all three spheres of government.The Financial Sector Policy unit is responsible for the design and legislative framework of the financial sector as a whole, and works closely with regulatory agencies such as the Financial Services Board, Banking Supervision and Exchange Control (now to be called Financial Surveillance) departments of the Reserve Bank, and the Financial Intelligence Centre. The unit is responsible for liaison between the National Treasury and the Reserve Bank on matters related to bank supervision, financial stability and the national payments system.

Mr Ismail Momoniat

Spider Web Code Name: The Bull

International and Regional Economic Policy

The division comprises of two chief directorates: International Finance and Development and Africa Economi Integration.

South Africa aims to promote reform of the IMF and the World Bank. Policy is focused on exploring ways to reduce global financial market volatility and promote balanced global growth and development, including through government's participation in the G20, which South Africa chaired in 2008.

South Africa also plays an important role in encouraging these institutions to seek innovative solutions for poverty alleviation, and to promote regional and African growth and development with strategic alliances on the continent and with other emerging economies.

Intergovernmental Relations

This division is responsible for coordinating fiscal relations between national, provincial and local government as well as promoting sound provincial and municipal financial planning, reporting and management

Office of the Accountant General

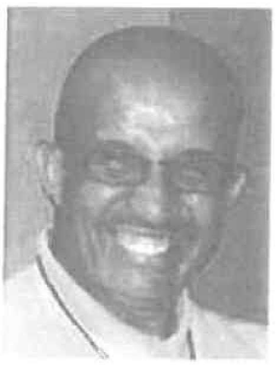
The division seeks to achieve accountability to the general public by promoting transparency and effectiveness in the delivery of services. It sets new government accounting policies and practices, and improves on existing ones, to ensure compliance with the standards of Generally Recognised Accounting Practice. It also focuses on the preparation of consolidated financial statements and an improvement in the timeliness, accuracy and efficiency of financial reporting.

Public Finance

Public Finance is primarily responsible for assessing budget proposals and reviewing service delivery trends in national government depatments and their entities. The division alsc manages the National Treasury's relations with other national departments, provides budgetary support to departments, and advises the Minister and the National Treasury on departmental and government cluster matters.

Office of the Chief Procurement Officer(O-CPO)

The purpose of the O-CPO is to: Modernise the state procurement system to be fair, equitable, transparent, competitive and cost-effective; enable the efficient, economic, effective and transparent utilisation of financial and other resources; including state assets, for improved service delivery; and promote, support and enforce the transparent and effective management of state procurement and the sound stewardship of government assets and resources.



Kenneth Brown

Spider Web Code Name: The Tiger

Mr Kenneth Brown is deputy director general: Intergovernmental Relations, a position he has held since July 2009. He has a MSc in Public Policy from the University of Illinois in the United States (USA),

BA (Hons) in Economics from the University of the Western Cape, and a primary teacher's diploma. After a career in teaching, Mr Brown joined National Treasury in 1998 as a deputy director: Financial Planning. He then went to the USA to study for his Master's degree and returned to National Treasury in 2001 as director: Provincial Policy, a role that underpins national transfers to provinces. Mr Brown was later appointed the chief director: Intergovernmental Policy and Planning, a responsibility which involves sector policies that impact on provinces and local government. He was a Vula operative.

SOE's Under National Treasury and under the Influence of the spider web

The South African Revenue Service (SARS) is mandated by the South African Revenue Service Act (1997) to collect all tax revenues that are due, to provide a customs service, to protect national borders and to facilitate trade. SARS also works to expand the pool of tax contributors by promoting awareness of the obligation to voluntarily comply with tax and customs laws. SARS aims to conduct its activities in a way that enhances economic growth and social development. SARS reports to Deputy Minister of Finance. **At the present moment the Spider Web suffered a huge setback when their top members were suspended by the new commissioner. This unit was regarded as the enforcers of the spider web.**

The Public Investment Corporation (PIC)

PIC is a government-owned investment management company – and one of the largest investment managers in the country. Founded in 1911, it became a corporate entity in terms of the Public Investment Corporation Act (2004). The PIC invests funds on behalf of public-sector entities. Its largest client is the Government Employees Pension Fund.PIC is governed by a Board of Directors with 10 members, of whom 7 are non-executive directors, excluding the traditionally

non executiveChairman. The Board's overarching role is to maintain sound corporate governance within PIC. As such, its responsibilities include appointing executive management, developing and approving corporate strategies, ensuring an effective governance framework, overseeing risk management and ensuring that PIC's business is managed prudently and responsibly.

The Board is assisted by six Board committees, namely the Audit and Risk Committee, the Investment Committee, the Human Resources and Remuneration Committee, the Directors' Affairs Committee, the Social and Ethics Committee and the Property Committee. The Board has also established four Fund Investment Panels to assist the Board in discharging its statutory duties and responsibilities in relation to investment in South Africa and the rest of the African continent. Board members are appointed by the Minister of Finance, who represents PIC's shareholder, the South African government, on the grounds of their knowledge and experience, mainly in the financial services environment. No fewer than seven Directors on the current Board are chartered accountants, with the other six Directors holding advanced qualifications in fields such as financial economics, business leadership, applied mathematics and tax law. The

members of project spider web have been identified through codenames.

The spider web has huge Influence in the PIC. This unit it's very important for the white establishment since the PIC owns 34% of the JSE. White asset management firms rely on the PIC for the mandates. PIC has placed more than R70 Billion with Investec alone. The spider web being controlled by the queen of Leaves, she has started making moves to ensure that ABSA benefits from the Asset Management mandates.

Spider Web Code Name: The Fox

MrMcebisi Jonas, Chairperson

- Chairperson of the PIC Board of Directors
- Chairperson of the Directors' Affairs Committee
- Bachelor of Arts in History & Sociology (Rhodes)
- Higher Diploma in Education
- Deputy Minister of Finance at National Executive (Executive)
- Member at National Assembly (Parliament)
- Member at African National Congress (ANC) Party

Spider Web Code Name: The Iron Master

Mr Daniel Matjila, Chief Executive Officer

- Member of the Investment Committee
- Member of the Property Committee
- Member of the Fund Investment Panels
- BSc (Hons) in Applied Mathematics (Fort Hare)
- MSc Applied Mathematics (Rhodes)
- PhD in Mathematics (WITS)
- Postgraduate Diploma in Mathematical Finance (Oxford)
- Senior Management Programme (University of Pretoria)
- Advanced Management Programme (Harvard)
- Member of the Board of Comprop
- Member of the Board of Ecobank Transnational Incorporated

Spider Web Code Name: The Mistress

MsMatshepo More, Chief Financial Officer

- Member of the Fund Investment Panels
- CA(SA)
- Bachelor of Business Science (Finance)
- Certificate in the Theory in Accounting (CTA)
- Member of the Board of CBS Property Management (Pty) Ltd
- Member of the Board of Pareto Limited
- Member of the Board of ADR International Airports Company South Africa
- Member of the Board of ABASA

Spider Web Code Name: The Countess

Ms Moira Moses, Independent Non-Executive Director

- Chairman of the Property Committee
- Member of the Directors' Affairs Committee
- Member of the Audit and Risk Committee

- Member of the Human Resources and Remuneration Committee
- Member of the Investment Committee
- BA
- Management Advancement Programme (Wits Business School)
- Member of the GEPF Board of Trustees
- Member of the Thusanang Trust, a non-profit organisation focused on Development Phase Education

The Government Employees Pension Fund (GEPF) was established in terms of the Government Employees Pension Law (YEAR) to manage and administer pension matters/schemes related to government employees. The GEPF is self-funded. With a membership of about 1,2 million and 225 000 pensioners, it is one of South Africa 's largest pension funds. This is one unit that the queen of leaves has placed an agent.

HemalNaran

Head of Investments and Actuarial

Spider Web Code Name: The Professor

- Bachelor of Commerce degree in Actuarial Science
- Insurance and Risk Management from the University of the Witwatersrand and CAIA Charter holder
- He serves on the Investment Committee of the Pan African Infrastructure Development Fund
- Member of the Social Finance and Impact Investing

Committee of the Institute of Actuaries (UK).
- Previously with ABSA Investments

Ms Adri van Niekerk
Head: Board Secretariat

Spider Web Code Name: The Fixer

- University of Pretoria: BAdmin Public Management
- University of Pretoria: Honours Degree in Public Management
- Member of the Integrated Reporting Committee of South Africa
- Previously with the University of Stellenbosch as the head of admissions

Key actions moving forward

The spider web has brought back the queen of leaves to restructure National Treasury moving forward. There are talks with the white establishment to position treasury as a strategic benchmark for most African Treasuries. Cyril Ramaphosa is seen as one of the most important events in the history of the Spider Web. There is a believe that once he is appointed the state president of South Africa, he will be able to achieve most objectives of the spider web that Thabo Mbeki failed to implement. Cyril has a long relationship with the King of leaves. They have worked together in many projects including the establishment of the NDP. Cyril's younger brother also worked with the Queen of leaves at ABSA bank for a brief period. Minister Nene is being handled by the Queen of Leaves.

During the recent World Economic Forum in Cape Town, Nene assembled all the DDG's and Chief Directors from National Treasury at a Cape Town hotel for a brief meeting. The Deputy Minister was not part of the meeting since he was travelling to Paris. These are the outcomes of the meeting:

The DG's position

LungisaFuzile, the current DG for National Treasury will not be extending his contract at the end of August 2015. He will be joining the faculty of economics at the University of Stellenbosch. His departure will be a catalyst for some big changes inside National Treasury. It is being heard through the grapevine that Avril Halstead will be promoted to the position of DG at treasury. She will be promoted to position of DDG very soon as a stepping stone for her to become the next DG. Michael Saks, the current DDG will be transferred to one of the SOE's. TumiMoleko, will be transferred to another ministry as a DDG that works with treasury.

State Owned Enterprises

Minister Nene stated that treasury must play a key role in the management of SOE's. He expects his officials to play a firm hand in managing the affairs of the SOE's. A number of changes will be happening at the SOE's. One the key actions that treasury must do, is to facilitate the participation of the private sector in the SOE's. Minister Nene stated that GTAC from treasury will be given a huge task of identifying private sector companies to partner with the SOE's.

SAA

Minister stated that the board of SAA must be terminated by September 2015. He also indicated that Maria Ramos was helping him to identify the new board members for the board of SAA.

The former CEO of Kulula.Kom has been identified as a replacement for Niko at SAA.

GTAC will be given the task of Identifying a strategic equity partner for SAA.

Eskom

Treasury must support the appointment of Brian Molefe. Eskom will be creating a position of COO and Koko Matshele will be filling in that position. Treasury is very close to sell the government stake in Vodacom and Eskom will be getting some cash injection.

Maria Ramos

Maria Ramos was also invited by the Minister to give a word of support to the staff at National Treasury. Maria praised the staff for the wonderful work they are doing. She stated that she will be assisting Minister Nene to identify skills for the key positions at treasury. She has already assisted in placing the key Chief Investment Officer at the GEPF. She will be assisting in

identifying the CEO of GTAC, since Andrew Donaldson will be the Chairman.

Part I - Text

"Minister Pravin Gordhan and Deputy Minister Mcebisi Jonas and Treasury Director General Lungisa Fuzilehis and timing of the trip. They will embark on a "international investor roadshow" to sell South Africa as an investment destination." They will spend two days in London (27 - 28 March), one day in Boston (29 March) and two days in New York (30-31 March). This is what they are really doing: Very prominent UK bankers and others have set up meetings with Banks and investment bankers in the UK and the USA to have official meetings to discuss the South Africa financial markets. They have also set up secret meetings to start what is called "Operation Check Mate". The bankers are going to be told that the Ministry of Finance and Treasury stand together against the President and the Corruption of the Gupta's. They will also be told that there is a movement to fire Minister Pravin Gordhan and Deputy Minister Mcebisi Jonas and Treasury Director General Lungisa Fuzilehis by the President. They will be given some proof

bankers in the UK and the USA to have official meetings to discuss the South Africa financial markets. They have also set up secret meetings to start what is called "Operation Check Mate". The bankers are going to be told that the Ministry of Finance and Treasury stand together against the President and the Corruption of the Gupta's. They will also be told that there is a movement to fire Minister Pravin Gordhan and Deputy Minister Mcebisi Jonas and Treasury Director General Lungisa Fuzilehis by the President. They will be given some proof of what they are selling of the corruption by the Gupta's and how the investment banks need to stand to fight the President. They will inform the banks that if they are fired the financial markets in South Africa will collapse and the rand will go to 18 to 20 to the dollar. They will also tell the banks that they have the support of the of many in ANC and other parties to force the President out. By having them all stand together they are attending to show unity so that the UK and USA banks will join in with the South African banks Against the President.

3


Part I - Text
"Minister Pravin Gordhan and Deputy
Minister Mcebisi Jonas and Treasury
Director General Lungisa Fuzilehis and
timing of the trip. They will embark on a
"international investor roadshow" to sell
South Africa as an investment
destination." They will spend two days in
London (27 - 28 March), one day in
Boston (29 March) and two days in New
York (30-31 March). This is what they
are really doing: Very prominent UK
bankers and others have set up
meetings with banks and investment
bankers in the UK and the USA to have
official meetings to discuss the South
Africa financial markets. They have also
up secret meetings to start what is
ed "Operation Check Mate". The
bankers are going to be told that the
Ministry of Finance and Treasury stand
together against the President and the
Corruption of the Gupta's. They will also
be told that there is a movement to fire
Minister Pravin Gordhan and Deputy
Minister Mcebisi Jonas and Treasury
Director General Lungisa Fuzilehis by the

RUBBISH INTELLIGENCE

This is what the report, supposedly raised by Jacob Zuma as one reason for firing Pravin Gordhan and Mcebisi Jonas in meetings with ANC leaders, actually said. The spelling and grammar is deliberately kept incorrect, as it was in the original message.

"Minister Pravin Gordhan and Deputy Minister Mcebisi Jonas and Treasury Director General Lungisa Fuzilehis and timing of the trip. They will embark on a "international investor roadshow" to sell South Africa as an investment destination."

They will spend two days in London (27 - 28 March), one day in Boston (29 March) and two days in New York (30 - 31 March). This is what they are really doing: Very prominent UK bankers and others have set up meetings with Banks and investment bankers in the UK and the USA to have official meetings to discuss the South Africa financial markets. They have also set up secret meetings to start what is called "Operation Check Mate".

The bankers are going to be told that the Ministry of Finance and Treasury stand together against the President and the Corruption of the Gupta's. They will also be told that there is a movement to fire Minister Pravin Gordhan and Deputy Minister Mcebisi Jonas and Treasury Director General Lungisa Fuzilehis by the President. They will be given some proof of what they are selling of the corruption by the Gupta's and how the investment banks need to stand to fight the President.

They will inform the banks that if they are fired the financial markets in South Africa will collapse and the rand will go to 18 to 20 to the dollar. They will also tell the banks that they have the support of the of many in ANC and other parties to force the President out. By having them all stand together they are attending to show unity so that the UK and USA banks will join in with the South African banks Against the President.

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

STATEMENT OF MR ISMAIL MOMONIAT

TABLE OF CONTENTS

ACRONYMS

ABSIP	Association of Black Securities and Investment Professionals
AGSA	Auditor-General South Africa
ANC NEC	African National Congress National Executive Committee
ANC	African National Congress
BASA	Banking Association South Africa
BBC	Black Business Council
BLF	Black First Land First
CASAC	Council for the Advancement of the South African Constitution
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CMLAC	Counter-Money Laundering Advisory Council
CNN	Cable News Network
COSATU	Congress of South African Trade Unions
COVID-19	Coronavirus disease 2019
CTRs	Cash Threshold Reports
DDG	Deputy Director-General
DG	Director-General
EPIFR	Economic Policy and International Financial Relations Division of National Treasury
ESEID	Economic Sectors, Investment, Employment and Infrastructure Development Cabinet Committee
FATF	Financial Action Task Force
FIC Act	Financial Intelligence Centre Act, 2001
FIC Amendment Act	Financial Intelligence Centre Amendment Act, 2017
FIC	Financial Intelligence Centre
FICA Bill	Financial Intelligence Centre Amendment Bill, 2015
FSCA	Financial Sector Conduct Authority
FSR Act	Financial Sector Regulation Act, 2017
FSR Bill	Financial Sector Regulation Bill, 2015
G20	Group of Twenty Countries
GDP	Gross Domestic Product
ICTS	International Cooperation, Trade and Security Cabinet Committee
IFFs	Illicit Financial Flows
IMC	Inter-Ministerial Committee
IMF	International Monetary Fund
IRBA	Independent Regulatory Board of Auditors

JCPS	Justice, Crime Prevention and Security Cabinet Cluster
JSE	Johannesburg Stock Exchange
MER	Mutual Evaluation Report
MFMA	Municipal Finance Management Act, 2003
MP	Member of Parliament
NCOP	National Council of Provinces
NCR	National Credit Regulator
NDPP	National Director of Public Prosecutions
NGOs	Non-Governmental Organisations
NICOC	National Intelligence Co-ordination Committee
NPA	National Prosecuting Authority
NUM	National Union of Mineworkers
OECD	Organisation for Economic Co-operation and Development
PEPs	Politically-Exposed Persons
PFMA	Public Finance Management Act, 1999
PIPs	Prominent Influential Persons
POCA	Prevention of Organised Crime Act, 2002
POCDATARA	Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004
PPF	Progressive Professionals Forum
PRECCCA	Prevention and Combating of Corrupt Activities Act, 2004
RI	Reportable Irregularities
SA	South Africa
SABC	South African Broadcasting Corporation
SACP	South African Communist Party
SARB	South African Reserve Bank
SARS	South African Revenue Service
SASSA	South African Social Security Authority
SC	Senior Counsel
SCOF	Parliamentary Standing Committee on Finance
SIFIs	Systemically-Important Financial Institutions
SOEs	State-Owned Entities
SONA	State of the Nation Address
SSA	State Security Agency
STRs	Suspicious Transaction Reports
UK	United Kingdom
UNCAC	United Nations Convention Against Corruption
USA	United States of America

INTRODUCTION

I, the undersigned,

ISMAIL MOMONIAT

make the following statement on oath:

1 I am the Deputy Director-General: Tax and Financial Sector Policy ("DDG") at the National Treasury in the Government of the Republic of South Africa. I have held the position of Deputy Director-General since 2001, and have been in the National Treasury (or its predecessor) for over 26 years since 1995.

2 I make this affidavit in order to assist the Commission of Inquiry into Allegations on State Capture ("the Commission") in fulfilling its mandate particularly in respect of paragraph 1.7 of the Commission's Terms of Reference.

3 The facts described in this affidavit fall within my personal knowledge, unless I state otherwise, or the context of this affidavit makes it clear that they do not. I confirm that the facts are true and correct to the best of my knowledge and belief. Where I use the pronoun 'we, it is because it is my understanding that it was an institutional view of the Treasury, and depending on the context, the view of the team at the National Treasury who were working with me and/or that of top management in National Treasury at the time, including the Director-General and Minister.

4 To the extent necessary, I rely on the documents at my disposal and information made available to me in order to support the facts that I describe in this affidavit. I believe that such information and documents are both true and correct.

5 I leave it to the Commission to determine the form of corruption or state capture that we experienced. Whilst I generally try and avoid using the term "state capture", it is difficult to have no reference to it whatsoever, and where it is used, it is not meant to pre-empt the findings of this Commission.

6 Paragraph 1.7 of the Terms of Reference states:

"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".

7 In this respect, my evidence relates to:

7.1 My background, my employment history at National Treasury, and why I believe I am well-placed to make this statement;

7.2 The weakening of National Treasury after 2015 which I only deal with briefly;

7.3 The Financial Intelligence Centre Amendment (FICA) Bill [B33-2015], its importance in strengthening our anti-corruption and anti-money laundering system and how I believe the Gupta family exerted influence to stall the passage of the Bill;

7.4 The closure of the bank accounts of Gupta-related companies, and how such action triggered a political fight back by the Gupta family who posed as victims of "white monopoly capital";

7.5 How Cabinet rushed to protect Gupta-owned businesses by launching an illegal investigation on 13 April 2016 against banks that terminated their services, by establishing a Ministerial Task Team led by Minister Mosebenzi Zwane;

7.6 How Minister Zwane used the Task Team to protect Gupta-owned businesses so that they could continue with their illicit transactions by blaming the banks, SA Reserve Bank, Financial Intelligence Centre (FIC) and the National Treasury, and prevent banks from upholding anti-money laundering and anti-corruption laws;

7.7 How the actual decision taken by Cabinet at its 6 July 2016 meeting on the report of the Ministerial Task Team was never made public, even after Mr Zwane rushed to make his own announcement and was reprimanded by President Zuma;

7.8 The attempt by the Gupta associates to buy their own bank, and force the SA Reserve Bank and the Minister of Finance to approve their application;

7.9 The attempt by the Justice, Crime Prevention and Security (JCPS) Cluster Ministers and the National Director of Public Prosecutions (NDPP) to change, delay and stop the FICA Bill; and

7.10 I conclude my evidence with by noting that Chapters 13 and 14 of the National Development Plan still offer a credible path to reverse the effects of corruption and rebuild the capability and integrity of the state and the economy. Annexure **IM1** provides a few proposals on a way forward, and possible questions to explore, for the consideration of the Commission.

MY BACKGROUND AND WHY I MAKE THIS STATEMENT

8 I began working at National Treasury (or one of its two precursors, the then Department of Finance) on 1 January 1995, following the 1994 elections. My first year of employment was a one-year contract. I was then appointed permanently a year later from 1 January 1996 as Chief Director: Intergovernmental Relations. When the Departments of Finance and State Expenditure were merged into the new National Treasury in 2001, I was promoted to Deputy Director-General ("DDG"): Intergovernmental Relations with effect from 1 January 2001. I have been employed as a DDG since then, but from 1 July 2005 I was laterally transferred to be the DDG: Economic Policy and International Financial Relations (EPIFR), and since 1 April 2008 the DDG: Tax and Financial Sector Policy.

9 Prior to working for the National Treasury and the Department of Finance, I was privileged to be employed by the ANC's Department of Economic Planning (DEP) towards the end of 1993, which was then under the leadership of Mr Trevor Manuel and Mr Tito Mboweni. We worked at the then ANC headquarters in Shell House in central Johannesburg, where we were preparing for the ANC to govern after the 1994 elections. This followed short stints of working for the ANC in its

national campaign office after its unbanning in 1990, and studying various courses in the USA and the UK in 1992-93.

10 A few years before the unbanning of the ANC, I was employed at the University of the Witwatersrand as a junior lecturer in Mathematics, and also worked for the Transvaal Indian Congress and the United Democratic Front. I became politically conscious in high school, and was involved in founding various anti-Apartheid organisations like the Black Students Society at Wits University (1975), the Transvaal Anti-South African Indian Council Committee (1981), the Transvaal Indian Congress (1983) and the United Democratic Front (1983).

11 Towards the end of 1993, I was involved in the process led by Mr Trevor Manuel within the ANC to prepare for the first post-democratic budget, which involved meeting with the outgoing government in the transition process before the 1994 elections. I formally joined the Department of Finance as soon as the recruitment of black professionals became possible after 1994.

The weakening of National Treasury as an institution

12 Having been at the National Treasury (and Department of Finance) for over 26 years, and having been part of the ANC team that shepherded the transition of the country's treasury function in 1994, I have witnessed the strengthening of National Treasury from 1994 to its height in 2008/9, reaching its lowest points after the firing of Ministers Nene and Gordhan in 2015 and 2017, and their replacement with Mr van Rooyen and Mr Gigaba respectively. The Treasury maintained its strength and stability as an institution between 2009-2016 under Ministers Gordhan and Nene, despite the increasingly hostile environment, but

remained continually on the defensive. Such pressures, including attempts to fragment it, started as soon as President Zuma took office in 2009, to shift critical functions like macroeconomic policy and performance monitoring to newly-created departments.

13 I am currently the last-remaining manager from the group of Directors-General (DGs) and DDGs that were present at National Treasury in 2009 when President Zuma took office. The Treasury was then led by Mr Lesetja Kganyago as DG, with Lungisa Fuzile, Andrew Donaldson, Kuben Naidoo, Freeman Nomvalo amongst the DDGs. Mr Fuzile replaced Mr Kganyago as Director-General in 2011 after Mr Kganyago was appointed as Deputy Governor at the SA Reserve Bank. Our current Director-General, Mr Dondo Mogajane, was a Treasury official representing South Africa in Washington DC at the Executive Board of the World Bank as a senior advisor for Africa 1 countries during 2007-2009.

14 After Mr Gigaba was appointed as Minister of Finance in 2017, DG Fuzile and DDG Donaldson left soon thereafter, followed by DDG Michael Sachs. Mr Sachs left at the end of October, a few months after the first (and only) strategic session that the Ministry convened over 19/20 July 2017 at Leriba Lodge in Centurion, which was termed "Strategic Session on Transformation and Inclusive Growth". It was attended by Minister Gigaba, Deputy Minister Buthelezi and the Minister"s advisors and senior staff, and the DG, DDGs and some chief directors. The Minister and DG were only able to attend the opening session on the first day, as the Minister was ill and the DG had other commitments. The first session after they left was very heated, after DDG Sachs raised ten critical budget risks and pressures that we faced in his presentation, and raised his concern about the

lack of support from the Ministry to deal with the fragmentation of the Budget process and weakening of the Treasury. Several of my colleagues and I also responded strongly in challenging the Ministry, pointing to the lack of trust between management and the Ministry, following the failure of the Ministry to defend the integrity of our colleagues after the Gupta-led attack against Treasury management over the Integrated Financial Management System (IFMS) project at the end of May 2016. This attack, in my view, was an orchestrated attack similar to the successful attack to weaken SARS[1],[2] over its high-risk investigation unit in 2014.

15 There was no attempt by Minister Gigaba to retain expertise and protect the Treasury's institutional capacity that had been built up for over two decades. Fortunately, National Treasury, under the leadership of DG Dondo Mogajane and a much younger and dedicated team of professionals, are working hard to rebuild the Treasury and overcome the new, and more difficult, fiscal and economic challenges we face.

16 Indeed, I too would probably not be at National Treasury today, as I could feel that I was not really wanted under Mr Gigaba. I was made aware by my colleague, DDG: Corporate Services, Mr Stadi Mngomezulu, that one of the Minister's advisors had actively enquired from our Corporate Services division about whether I had not reached retirement age. I suspect that Mr Gigaba wanted to see many of us in top management leave, to give effect to what Deputy

1 https://www.dailymaverick.co.za/article/2020-12-10-sars-rogue-unit-court-outcome-is-a-milestone-says-ivan-pillay/

2 https://www.news24.com/news24/southafrica/investigations/intelligence-watchdogs-sars-rogue-unit-report-set-aside-van-loggerenberg-calls-on-police-npa-to-act-20200609

Minister Jonas had alerted me to in the days following Mr Nene's firing in December 2015. Mr Jonas told me that he had been approached by one of the Gupta brothers in October 2015 to be Minister of Finance, and that they expected him to remove the DG, Lungisa Fuzile, DDGs Andrew Donaldson, Mr Kenneth Brown and myself, and that they would provide him with "replacements". All this is outlined in paragraph 26 of the affidavit dated 8 August 2018 submitted by Mr Jonas to the Commission, where he also states *"Mr Gupta said that they had determined that the National Treasury was a stumbling block for their growth and they wanted to 'clean up the Treasury'."*

17 It is important to note that the building of the National Treasury and the South African Revenue Service (SARS) into world-class institutions in the period 1997 to 2009, was not an accident of history, but the outcome of a deliberate and sustained policy and strategic priority driven by the ANC as the ruling party under President Mandela, which recognised the critical role of both institutions to support our emerging democracy and nationhood. The process to build these two institutions was led by Mr Trevor Manuel when he was Minister of Finance from 1997 to 2009. His approach was to appoint highly competent and dedicated professionals as DGs, SARS Commissioner and senior managers. The ANC leadership in government also had a similar approach to the South African Reserve Bank in 1994 and beyond, appointing Mr Tito Mboweni as its Governor after the retirement of Mr Chris Stals in 1999. The three institutions and their heads (Minister, Commissioner and Governor) enjoyed the strong support and backing of the President, even as the ANC continually debated the need for the most appropriate economic policy to implement the Reconstruction and Development Plan to transform the economy and the country. It should be borne

in mind that in 1994, very few of us black South Africans had the relevant experience to head state institutions, but even then, the first set of appointments in 1994-99 for departments and entities were based on relevant qualifications and experience to the extent possible.

18 In addition to the poverty, gross inequality and deprivation of basic human rights affecting the majority of citizens of our country, South Africa was also stuck in a low growth economic trap in 1994, with very low economic growth, high inflation and high unemployment. SA was forced to approach the IMF for balance of payments support in 1993, as we experienced negative real GDP growth in the early 1990s, going as low as -2,1% in 1992 before becoming positive at 1,2% in 1993. The first three democratic administrations were able to commit to policies that they implemented to improve economic growth, increasing it from 1,2% in 1993 to over 5% per year in 2005 and 2006 and around 5.4%[3] in 2007, reducing poverty and inequality to a significant extent. The debt-to-GDP ratio was reduced from around 47.6% in 1995 to around 22% in 2008[4], and our credit ratings improved from sub-investment grade in 1994 to investment grade in 2008[5]. This outcome was the result of a deliberate and considered economic policy framework that was meticulously implemented under functioning state administrations led by Presidents Mandela and Mbeki.

19 Under President Zuma, the erosion of the discipline of prudent decision-making and value-for-money spending, combined with the misdirection of funds, not only

[3] Source: Stats SA. http://www.statssa.gov.za/?p=9181
[4] Source: National Treasury. http://www.treasury.gov.za/documents/national%20budget/2020/TimeSeries/Excel/Table%2010%20-%20Total%20debt%20of%20government.xlsx
[5] Between 1995 and 2008 SA had a 4 notch (level) increase in its credit rating (Fitch and Standard&Poors), and a 5 notch decline since then. http://www.worldgovernmentbonds.com/credit-rating/south-africa/

reversed all these gains, moving us back into sub-investment grade, but also took some key economic indicators to a level far lower than that which we inherited in 1994. I cite a more objective source to corroborate my view, a concept note by the World Bank titled - "An Incomplete Transition: A World Bank Systematic Country Diagnostic for the Republic of South Africa", which describes the cycle of decline in the country[6], and attach a slide from a presentation made last year to Treasury by World Bank Staff (Annexure **IM2**).

20 The high-level corruption after 2009 has critically damaged our economy and country, with the commensurate devastating impact on the lives of our people, not least on our school education and health systems. We now have (pre-COVID-19) a public service (in all the three spheres of government) that cannot deliver even the most basic services in most parts of our country.

21 I also believe that the experience I have in overseeing the design, drafting and processing of the basic fiscal and financial laws that serve as the foundation for our democracy, and which give effect to many of the provisions in Chapter 13 of the Constitution, allows me to better appreciate how the good intentions around 1994 were undermined by events after 2009, and perhaps what we could have been done differently. These laws include financial good governance laws like the Public Finance Management Act, 1999 ("the PFMA"), the Municipal Finance Management Act, 2003 ("the MFMA"), as well as the intergovernmental fiscal system legislation like the Financial and Fiscal Commission Act, 1997, the Intergovernmental Fiscal Relations Act, 1997 and the tax and financial sector

[6] Available online at https://static.pmg.org.za/180814WBGReport.pdf

regulatory laws of our country, including the recent Financial Sector Regulation Act 9 of 2017 and the Financial Intelligence Centre Amendment Act 1 of 2017.

22 Against this backdrop, I turn to the specifics of how the Guptas tried to remove barriers to their project to take control of state funds and entities, with reference to the peculiar and inter-linked events relating to the closure of their bank accounts and the delay in the passage of the FIC Amendment Act.

THE CAMPAIGN TO STOP THE FICA BILL

Background

23 To understand the context to the closure of the Gupta banking accounts, it is necessary to understand the background to the passing of the Financial Intelligence Centre Amendment (FICA) Act. This process became closely intertwined with the Gupta fightback over the closure of their personal and business accounts, as well as their attempt to purchase their own bank. I attach a **Timeline Matrix** to my submission, which will enable the commission to contextualise the many events/activities within each process and the links between these processes - Annexure **IM3.**

24 On 27 October 2015, after lengthy governmental processes of many years (since 2011 and before), the Minister of Finance, Mr Nhlanhla Nene, tabled in Parliament two far-reaching bills to regulate the financial sector: The Financial Sector Regulation Bill (FSR Bill) and the Financial Intelligence Centre Amendment Bill (FICA Bill). Mr Nene's speech in the National Assembly when introducing these Bills, spelt out the objectives of the two bills - Annexure **IM4.**

25 The FSR Bill introduced a new and radical framework of very tough regulatory amendments for banks, and the rest of the financial sector, as part of the so-called Twin Peaks regulatory reforms, to make financial institutions safer, healthier, and for them to serve customers better, following the lessons learnt from the 2008 global financial crisis and in line with the response of most G20 member and other countries. Cabinet had approved this major regulatory framework in 2011, outlined in the policy document "A SAFER FINANCIAL SECTOR TO SERVE SOUTH AFRICA BETTER."[7]

26 The FICA Bill sought to strengthen customer due diligence measures by introducing measures on beneficial ownership and politically-exposed persons (PEPs), and enabled a more flexible risk-based approach to verify customers. It allowed for a better sharing of information to improve co-ordination and crime-fighting capabilities. Overall, as Minister Nene emphasised when introducing the Bill, it was "an important bill, to ensure that South Africa continues to meet international standards related to the combating of financial crimes like fraud, money laundering, terrorist financing and corruption".

27 The FICA Bill also sought to remedy a constitutional defect after the Constitutional Court had ruled on section 45(1B) of the Financial Intelligence Centre (FIC) Act in *Estate Agency Affairs Board v Auction Alliance*[8], which it declared to be unconstitutional, but suspended the constitutional invalidity for a period of two years to allow Parliament to remedy the defect. In the interim, the

[7] http://www.treasury.gov.za/documents/national%20budget/2011/A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf

[8] 2014 (3) SA 106 (CC)

Court read-in a temporary provision that set out the circumstances under which warrantless searches could take place. This was to expire on 26 February 2016.

28 The new democratic government under Presidents Mandela and Mbeki moved with speed to put in place a comprehensive anti-corruption framework, starting with the Prevention of Organised Crime Act, 1998 (POCA), which is aimed at combating organised crime, money laundering, racketeering and criminal gang activities. The FIC Act was enacted in 2001, and designed to work in concert with the POCA. The FIC Act also works in concert with the Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA), and the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (POCDATARA), which is geared primarily toward the prevention and combating of terrorist and related activities.

29 The fight against corruption has to be fought globally if it is to succeed in any country. This is widely recognised internationally, with the 2004 UN Convention Against Corruption noting:

> *"Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international co-operation to prevent and control it essential[9]"*

30 The first democratic administration recognised this fact in 1994, and the then Ministers of Justice and Finance, Mr Dullah Omar[10] and Mr Trevor Manuel

[9] Page 5, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

[10] Minister of Justice Omar report to the NCOP 5 May 1998: 'The cancer of violence, corruption and poverty are difficult to eradicate. It is not a single event – it is a long and difficult process" https://static.pmg.org.za/docs/1998/980504omar.htm

respectively, initiated processes to join the various international anti-corruption and anti-money laundering initiatives. As a result, we were accepted as members of the global anti-money laundering standard-setting and monitoring body called the Financial Action Task Force (FATF) in 2003, and we were proudly one of the founder countries to ratify United Nations Convention Against Corruption (UNCAC) in 2004. We also became a signatory to the OECD's Anti-Bribery Convention[11] in 2007. I attach Annexure **IM5**, which sets out in more detail how the UNCAC and FATF set a new framework of preventive and transnational measures to deal with corruption, including the introduction of the politically-exposed person (PEP) concept. It also provides more detail on the FATF definition of PEP, and the process to deal with deficiencies identified in our anti-money laundering system in 2009.

31 President Zuma[12] also committed SA in 2010 to tougher anti-money laundering and due diligence of politically exposed persons, when he endorsed the Seoul Anti-Corruption Action Plan at the G20 meeting of Heads of States in that year, which notes:

> *"To prevent corrupt officials from accessing the global financial system and from laundering their proceeds of corruption, we call upon the G20 to … continue to identify and engage those jurisdictions with ….. deficiencies; and update and implement the FATF standards calling for transparency of cross-border wires, beneficial ownership, customer due diligence,* ***and due diligence for "politically exposed persons".*** (my emphasis)

[11] www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf
[12] http://www.g20.utoronto.ca/2010/g20seoul-anticorruption.html

All the above international conventions or initiatives commit member countries to undergo some form of monitoring and review. The anti-money laundering systems of all FATF members is peer-reviewed by members via its Mutual Evaluations approximately once every 6-10 years. South African's first two mutual evaluations were in 2003 and 2009, and we are currently in the midst of our third evaluation. The 2009 Mutual Evaluation Report (MER) found that we needed to remedy a few deficiencies which required amending the Financial Intelligence Centre Act (FIC Act), to fully comply with evolving FATF recommendations. Since we had not remedied all the deficiencies by 2014, South Africa was under strong pressure to publish and enact the FICA Bill into law in order to meet our FATF commitments, as noted in the 29 August 2014 letter of the FATF President to the Minister of Finance - Annexure **IM6**. Annexure **IM7** sets out in more detail the deficiencies identified by FATF in its 2009 MER.

32 The banking sector is regulated more intrusively and intensively than the rest of the financial sector and most other sectors in the economy (possibly second only to the nuclear and airline sectors). For prudential and financial stability reasons, banks are required by the Banks Act to follow Basel 3 capital[13] and liquidity requirements, where they have to hold capital that is readily available, to reduce the prospect of bank failures. The FSR Act also requires banks to be regulated for market conduct and to treat their customers fairly. Indeed, following the 2008 global financial crisis, the major banks are today classified by regulators as SIFIs (Systemically-Important Financial Institutions), as they pose a risk to the entire

[13] An international regulatory framework for the banking sector.

economy of a country, and even globally in some cases. There is a so-called doom loop between sovereign and banking risks.

33 Banks also have to comply with anti-corruption and anti-money laundering legislation, and are required to know their customers and do customer due diligence. They have to adhere to at least ten financial sector laws in South Africa, all of which except one, are administered by the Minister of Finance, and are supervised by five financial sector regulators (Prudential Authority and the Financial Surveillance department of the SA Reserve Bank, Financial Sector Conduct Authority (FSCA), FIC and the National Credit Regulator).

34 For South African banks operating in other countries, and requiring access to the US dollar and other foreign currency markets, they are also expected to fully comply with the anti-corruption, anti-money laundering and other financial sector regulatory requirements of those jurisdictions, over and above that of South Africa. This is not a theoretical threat, as Standard Bank was fined $12.6 million by UK regulators[14] in 2014 for lax anti-money laundering controls. Such actions have become more common after the 2008 global financial crisis, particularly since 2012, when the USA Justice Department imposed at that time a record $1.92 billion in fines against UK bank, HSBC[15], for allowing itself to be used to launder drug money flowing out of Mexico and other banking lapses. This was followed on 30 June 2014 by an even higher fine, when the USA Justice Department announced a $8.9 billion fine and other sanctions against French bank, BNP Paribas[16], for violating sanctions imposed by USA authorities. Such

[14] https://www.gibsondunn.com/serious-fraud-office-v-standard-bank-plc-deferred-prosecution-agreement/
[15] https://www.reuters.com/article/us-hsbc-probe-idUSBRE8BA05M20121211
[16] https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial

high fines, if imposed on a SA bank, would pose a significant financial stability risk to SA, hence the need to ensure that our anti-money laundering regulatory system meets the highest of standards, which overseas regulators and banks can also place reliance on.

Two Cabinet approvals for the FICA Bill take one year

35 We submitted the first Cabinet memorandum to Cabinet on or after 3 October 2014, requesting Cabinet to approve the Bill for publication for public comment, and if no substantial changes were made as a result of the public comments, for introduction in Parliament. We pointed out that the FATF had placed us on its targeted follow-up process, and that we had to report to the next FATF Plenary on progress on our compliance progress. To the surprise of National Treasury management, the FIC Amendment Bill was met with great resistance from Cabinet when we first took it to the ESEID[17] (Economic Sectors, Investment, Employment and Infrastructure Development) Cabinet Committee on 15 October 2014, and it took us six months to secure the first approval to merely publish the bill for public comment, a process which should ordinarily have taken two weeks. The key objection related to the PEPs clause in the FICA Bill.

36 When a Cabinet committee raises a concern or objection to a Bill, we are normally given the week after, between the committee meeting, and the following week, before the full Cabinet meeting, to resolve such concerns or objections. This enables the full Cabinet meeting to reconsider the Bill for approval, often subject to further amendments. The Cabinet meeting of 22 October 2014

[17] https://www.gov.za/faq/guide-government/what-are-government-clusters-and-which-are-they

confirmed the decision of the ESEID Cabinet committee the previous week, to send us back to the drawing board, thereby unduly delaying the Bill, even though they knew this meant we would miss a critical FATF deadline.

37 The request to publish and introduce the Bill was rejected again at a second Cabinet meeting on 10 December 2014, with a set of new concerns related to sovereignty and abuse of personal information, but the main objection still related to the rationale for the PEPs' clause, which if it was to be included, should be applicable to both the public and private sectors. This meant that at the two FATF Plenary meetings in October 2014 and February 2015, we had to plead for more time to process the FICA Bill – Annexure **IM8**.

38 Cabinet only provided its first approval to publish the FICA Bill for public comment on 15 April 2015. This after we decided that for our third attempt to secure Cabinet approval, we would split the approval process into two, and only seek Cabinet approval to publish the Bill for public comment. We would request a second approval to introduce the Bill in Parliament, after we had taken public comments into account and revised the Bill. We also replaced the PEP concept with a broader PIP (prominent influential person) concept. A PIP is defined to include a PEP, but also includes private sector persons like the Chair of a Board of Directors, the CEO and CFO, of a company that provides goods or services to an organ of state and whose annual transactional value exceeds a threshold amount determined by the Minister of Finance (this was the principal difference between this draft and the previous draft of the Bill).

39 The press release after this Cabinet meeting (issued on 17 April 2015) noted that:

> "*7.2. Cabinet approved the publication of the draft Financial Intelligence Centre Amendment Bill, 2014 for public comment. The Amendment Bill proposes amendments to the Financial Intelligence Centre Act (Act No. 38 of 2001). This is to address threats to the stability of our financial system posed by money laundering and terrorism financing by ensuring compliance with international measures and standards, within the South African legislative framework.*"[18]

40 This statement was followed by a more detailed press release by the National Treasury when it released the Bill for public comment on its website[19] on 21 April 2015 – Annexure **IM**9. After receiving the public comments on the Bill by 31 May 2015, we revised the Bill and had to submit it for a socio-economic impact assessment, which certificate we received in September. We then submitted the Bill to Cabinet again on or around 7 September 2015, to seek its second and final approval, to table in Parliament. This time the approval was granted without any delay, on 23 September 2015, allowing the Minister to table the Bill in Parliament on 27 October 2015.

41 In summary, it took us over a year to secure Cabinet approval to introduce the Bill in Parliament, from the time we first submitted the Bill to Cabinet for its consideration. We also had to split the Cabinet approval process for the Bill into two. The Bill was first submitted to the ESEID Cabinet Committee on or around

[18] https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-15-april-2015
[19] http://www.treasury.gov.za/public%20comments/FIC2015/

3 October 2014 and rejected by it and the subsequent Cabinet meeting of 22 October 2014, and then rejected again at the 10 December 2014 Cabinet meeting, and finally only approved by Cabinet on 15 April 2015, that we could publish the Bill for public comment. Cabinet then approved the Bill for introduction in Parliament on 23 September 2015, which Minister Nene did on 27 October 2015.

42 It is important to note that JCPS Cluster Ministers would have attended all Cabinet meetings where the Bill was considered, and most of the Cabinet committee meetings. I am not aware of any questions that were raised on the constitutionality of the PEP/PIP clause or of the warrantless search clauses at any of these Cabinet meetings, nor was there any objection to the removal of chapter 2 on the Counter-Money Laundering Advisory Council. There was also no record of any discussion on the role of the FIC, nor on its reporting to a JCPS Cluster Minister rather than the Minister of Finance. All these points were only raised later by JCPS Cluster Ministers almost two years later, in January 2017, for the hearings convened by Parliament after President Zuma referred the Bill back to Parliament, as discussed later.

Concept of politically exposed persons (PEPs)

43 A politically exposed person (PEP) is an international concept with the same meaning as the term "persons with prominent public functions" from Article 52 from the United Nations Convention Against Corruption (UNCAC). Annexure **IM5** provides more detail.

44 Politically exposed persons (PEPs) are individuals who are entrusted with a prominent public position and therefore assessed by UNCAC and FATF to be more susceptible to acquiring money through illegal means, which also means that they are statistically more likely to launder money. FATF recommendation (no 12) requires financial institutions to actively monitor such customers through a risk-based approach, including identifying their sources of wealth, regular monitoring, and introducing senior management approval for establishing or continuing customer relationships.

45 FATF Recommendations differentiate between domestic and foreign PEPs. The FATF Guide on PEPs defines DOMESTIC PEPs as "individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials."[20]

46 The original FICA Bill submitted to Cabinet defined a domestic PEP in accordance with the FATF guideline definition, to include an individual who holds the position of President, Deputy President, Minister, Deputy Minister, Premier or member of a provincial Executive Committee, executive mayor, leader of a political party, member of the Defence Force above the rank of major-general, DG and CFO of a national or provincial department, municipal manager, chair and CEO of public and municipal entities, and other categories of persons. In accordance with FATF guidelines, the FICA Bill requirements on customer due

[20] https://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf

diligence on banks and other accountable institutions also applies to immediate family members (current and ex-spouses/partners, children, parents) and known close associates of a PEP or more accurately, a PIP.

47 Enhanced due-diligence measures apply automatically to all foreign PEPs, but not all domestic PEPs, only those who are assessed to be higher risk by their bank. Hence in relation to domestic PEPs, financial and other institutions are only required to take additional risk mitigation measures if they decide, on an individual basis, and via their objective risk profiling systems, that there are indications that a domestic PEP is assessed to be of higher financial crime risk. This means that financial institutions generally do not apply any more stringent identification requirements for the greater majority of clients who are domestic PEPs as they would for any other non-PEP client who is assessed to have a normal risk profile.

48 The FATF Guide also points out that *"These requirements are preventive (not criminal) in nature, and should not be interpreted as stigmatising PEPs as being involved in criminal activity. Refusing a business relationship with a PEP simply based on the determination that the client is a PEP is contrary to the letter and spirit of Recommendation 12".*

49 Many Ministers had objected to the definition of politically exposed persons (PEP) in the original FICA Bill, because they felt that it discriminated against politicians, as they believed it only applied to them, and not to the private sector. We struggled to explain to Ministers that the concept was applied by banks only

as a risk-mitigation tool to conduct enhanced due diligence investigations for higher risk customers including some (but not all) PEPs.

50 Many Ministers did not seem to realise that the concept was already being implemented by most major banks in SA, who did so for sound business risk reasons, and did not need legislation (like the FICA Bill) to do so. It was often the very small banks that did not do much business in US dollars or often in the foreign currency market (and hence were not reliant on correspondent banking relationships with foreign banks) that needed to be compelled to implement the PEPs concept. As we saw later with the Gupta businesses when the SA Reserve Bank fined them, the small Johannesburg branch of the Bank of Baroda proved to be negligent in applying general anti-money laundering measures when they took on high-risk PEPs as customers, and it is such banks that need to be compelled to do so by law.

51 We as the National Treasury and FIC teams working on the Bill were initially not surprised by the resistance to the concept of PEPs because we expected that Ministers, even good and honest Ministers, would not be familiar with this concept. Their initial reaction was not dissimilar to politicians in other countries, when they were first confronted with the PEPs concept. We initially accepted that this was driven more by a lack of understanding on how banks were expected to operate, not just in South Africa, but in most G20 and other countries.

FICA Bill approved by Parliament

52 After the Minister of Finance tabled the FICA Bill in Parliament on 27 October 2015, it was approved relatively quickly, with the final Parliamentary vote by the

National Council of Provinces (NCOP) on 25 May 2016. The Standing Committee on Finance (SCOF) in the National Assembly, which was chaired by MP Yunus Carrim, adopted the FICA Bill on 26 April 2016 after meeting at least 12 times on the Bill. It was only at this last meeting that Chairperson Carrim referred to a letter that he had received from the affected employees of the Gupta companies, who were concerned about losing their jobs because the major banks had closed the accounts of their employer. The worker representatives said they were seeking the intervention of Parliament. There was a brief discussion towards the end of this meeting, after which the Chair of SCOF said that he would write a letter to express solidarity with the plight of the employees.

53 The National Assembly then passed the Bill on 18 May 2016. By early June 2016, after the National Council of Provinces also passed the Bill, Parliament sent the Bill to the Presidency, for President Zuma to consider signing it into law.

54 What remained for the implementation of the FICA Bill was for President Zuma to assent to the Bill and thereafter be published in the Government Gazette. We faced being publicly shamed by the FATF, which in turn would have exposed the country to significantly higher correspondent banking costs for the economy to trade internationally as a result of other countries having less confidence in the strength or SA's anti-money laundering regulatory framework. We therefore had every expectation that President Zuma would sign the Bill into law, as soon as possible.

55 As we do with most of our Bills, our head of legislation, Adv Empie van Schoor, followed up with the Presidency's legal unit on the status of the Bill, including

whether the Presidency required any more information. She was in regular contact in July and August 2016 via email and text messages with the Presidency's legal unit. It became apparent that even the Presidency staff were unsure as to why President Zuma was not signing the Bill given its urgency, as they had submitted it to the office of the President shortly after receiving it from Parliament.

56 In June 2016, we attended the FATF Plenary and informed members that we were waiting for the President to sign the Bill into law. The FATF Plenary then gave us until December 2016 to have the Bill gazetted into law, with the related regulations that were required for commencement. The intention was that the Bill would then be analysed in advance of the February 2017 FATF Plenary to enable us to exit the targeted follow-up process.

57 President Zuma waited until 28 November 2016 to respond on the Bill, when he decided to return the Bill to Parliament for its reconsideration over concerns he had about the constitutionality of one clause. I show below how I believe that the delay was deliberate and that the Gupta family intervened after their bank accounts were closed, to delay and stop the Bill from being enacted into law.

THE GUPTAS SHOW THEIR HAND

Background on Gupta family activities late 2015 and early 2016

58 Throughout the process of seeking approval of the FICA Bill in Cabinet, and to the passing of the Bill in Parliament up to when it was passed on 25 May 2016, I did not see any evidence of Gupta-associates interfering to stop the FICA Bill.

The only Gupta-related matter that emerged in Parliament was at the last SCOF meeting on 26 April 2016 (which I outline above) when the Chair referred to a letter he had received from affected workers of the Gupta companies.

59 This period just before and after the tabling of the FICA Bill, and its passage in Parliament in late 2015 and early 2016, was very turbulent politically, with the media reporting (at that time or later, especially as it reported on the Gupta Leak emails) on the many dubious activities and transactions related to the Gupta family that occurred during this period. These events provide the context to understand the environment during that period. It is for the Commission to determine their relevance to my evidence. These are that:

59.1 Mr Jonas was approached by one of the Gupta brothers on 23 October 2015, to replace Minister Nene as Minister of Finance;

59.2 Mr Nene was dismissed as Minister of Finance on 9 December 2015 and Mr Gordhan appointed to replace Mr Des van Rooyen a few days later on 13 December 2015;

59.3 Mr Zwane and the Eskom Board were "engaging" with the Gupta family during the period November 2015-April 2016, to enable Tegeta to buy Optimum Coal mine, with Mr Zwane flying to Switzerland[21] to meet with Glencore (the owner), and the Eskom Board hastily arranged to make a "prepayment" to Tegeta.[22];

---

21 https://citizen.co.za/news/south-africa/state-capture/2092302/how-bigwig-officials-bullied-glencore-to-sell-optimum-mine/

22 https://youtu.be/Q1vQSM_OTPk
https://youtu.be/6pa9Nuwf6XU

59.4 Many top officials in Government and state-owned entities who are alleged to have assisted in processing transactions and payments to the Gupta businesses, were reported to have flown to Dubai on unofficial trips that December 2015-January 2016, often with their air flights and accommodation paid for. They included Ministers van Rooyen and Zwane, as well as Mr Siyabonga Gama (Transnet), Mr Anoj Singh and Mr Matshela Koko (Eskom), Mr Daniel Mantsha (Denel), together with Gupta associates Mr Salim Essa, Mr Duduzane Zuma, Mr Fana Hlongwane, and the sons of Free State Premier Magashule;[23] There were also formal denials[24] by some who were in Dubai at the time;

59.5 Gupta brothers and associates met with Lord Bell, the chairman of Bell Pottinger, and his team in January 2016, who flew to South Africa from the United Kingdom; and

59.6 Deputy Minister Mcebisi Jonas, made public on 16 March 2016, that he had been approached[25] by the Gupta family on 23 October 2015. Mr Jonas had alerted me of this approach and the "business" plans of the Gupta family a few days after Mr Nene was fired.

60 The reappointment of Mr Gordhan as Minister of Finance was, I believe, a big and unexpected shock to the Gupta plans, as many of their plans to do more business with state-owned entities were disrupted after Mr van Rooyen was

---

[23] See https://www.timeslive.co.za/politics/2017-08-21-guptaemails-the-mystery-of-the-great-dubai-gathering/ and https://www.outa.co.za/projects/state-capture/gupta-associates/oberio-guests

[24] https://www.timeslive.co.za/politics/2017-08-03-moyane-refuses-to-explain-dubai-trip/

[25] http://www.treasury.gov.za/comm_media/press/2016/2016031601 - Statement by Deputy Minister Jonas.pdf

removed from the Finance Ministry after four days. They no longer had the pliant Minister of Finance they needed to facilitate their "business" plans. I can only speculate that the Dubai gathering was a direct result of the crisis for the Gupta businesses caused by the failure to impose Mr van Rooyen as Minister of Finance and his replacement by Mr Gordhan, and the closure of their accounts by ABSA Bank.

61 Indeed, almost immediately after Mr Gordhan was re-appointed as Minister of Finance, I had to personally engage with applications from SAA[26] and Denel[27], as I happened to be Acting Director-General on two separate occasions for a few days in December 2015 and April 2016, whilst Mr Fuzile was away. The SAA Board wanted to amend a swap transaction with Airbus in December 2016 that Mr Nene had approved, and the new Denel board wanted approval for its newly established Denel Asia joint venture with VR Laser, whose sole owner was Mr Salim Essa. I was also familiar with the pressure faced by Treasury around the nuclear deal, which I had first become aware of in August 2012 when I was approached by an official from the Department of Energy to advise her on a tax incentive related to the deal.

Not surprisingly, soon after Mr Gordhan's appointment as Minister of Finance in December 2015, there followed continual and systematic political attacks against him and the National Treasury during 2016, led by his Cabinet colleagues known to be closely associated with the Gupta family or their relationship with President

[26] http://www.treasury.gov.za/comm_media/press/2015/2015122101 - Media Statement Swap Deal.pdf

[27] http://www.treasury.gov.za/comm_media/press/2016/2016041301%20-%20Denel%20Statement.pdf

Zuma (e.g. Ms Bathabile Dlamini, Ms Nomvula Mokonyane, Mr Mike Masutha, Mr David Mahlobo and Mr Nkosinathi Nhleko). Indeed, Mr Nhleko even made a presentation[28] to the media on 2 March 2016 to announce that the South African Police Service were investigating the SARS unit. Even officials of public entities attacked Mr Gordhan, without any consequences from their Minister or from President Zuma – for example, Mr Mantsha (then chairperson of Denel) and Mr Moyane[29], the then Commissioner of SARS, who even reported to Minister Gordhan. I believe that they did so because they followed the lead from President Zuma, who consistently attacked or undermined his Minister of Finance. One of the first such instances of the public undermining of Mr Gordhan after his reappointment as Minister of Finance occurred at the launch of the Presidential Press Corp, where just two days before the Budget on 22 February 2016, President Zuma expressed regret that he had yielded to the "havoc" caused by financial markets after appointing Mr Des van Rooyen as Minister of Finance, saying he was the most qualified person to be appointed as Finance Minister.[30] He did so even as he noted that the coming Budget was *"...being presented under difficult conditions"* and that the *"...situation is a bit unstable"*. Mr Gordhan's affidavit to the Commission dated 11 October 2018 outlines many of the attacks from his Cabinet colleagues, state-entities, the Hawks and the NDPP. Such were the attacks that the Presidency[31] itself was forced on several occasions, including on 27 May 2016 when it issued a statement to condemn *"... the toxic narrative that is being promoted in the media that insinuates that*

[28] https://www.gov.za/speeches/ministers-presentation-investigation-so-called-rouge-unit-2-mar-2016-0000
[29] https://www.gov.za/speeches/revenue-service-sars-leadership-media-reports-2-dec-2016-0000
[30] https://mg.co.za/article/2016-02-22-van-rooyen-was-most-qualified-for-finance-minister-job-zuma/
[31] https://www.gov.za/speeches/presidency-condemns-toxic-narrative-27-may-2016-0000

President Jacob Zuma is engaged in a certain "war" with the Minister of Finance". There were continual rumours that Minister Gordhan was about to be fired, which also led to the Presidency[32] denying such rumours. It issued yet another statement to the media on 21 August 2016 rejecting "rumours and gossip[33]" to state that *"The Presidency and the National Treasury are working well together….".* These attacks on Mr Gordhan and Treasury were widely covered in the media, as indicated in the varous footnotes, and included as an Annexure (see Annexure **IM10**). It was clear that Minister Gordhan and Treasury were under siege during 2016, and the open attacks above attest to how dysfunctional national government had become.

62 Though not known to anybody at the National Treasury or the public at that point, the media subsequently reported around 5 September 2017[34] that Bell Pottinger and Oakbay Investments had concluded a £100,000-a-month contract in January 2016, from emails uncovered from the Gupta-leaks cache. The article noted:

> '*According to leaked documents, Duduzane said the campaign should be "along the lines of economic emancipation of whatever" with a "narrative that grabs the attention of the grassroots population who must identify with it, connect with it and feel united by it".'*

63 The role of the Gupta family and their close relationship with President Zuma and their business activities was by early 2016 a big concern even within the ANC

---

[32] https://www.gov.za/speeches/presidency-rejects-cabinet-rumours-and-gossip-15-may-2016-0000

[33] https://www.businesslive.co.za/bd/companies/2016-08-22-presidency-dismisses-sunday-times-report-on-saa-as-gossip/

[34] Guardian article later revealed titled "Deal that undid Bell Pottinger: inside story of the South Africa scandal", https://www.theguardian.com/media/2017/sep/05/bell-pottingersouth-africa-pr-firm

and the ruling alliance partners like the SACP and COSATU. Indeed, COSATU[35] had raised questions as far back as 2011. Mr Solly Mapaila, the Deputy General Secretary of the SACP, confirmed to the media on 31 January 2016 that he had raised the role of the Gupta family at the ANC NEC Lekgotla, describing the family as the "elephant in the room". He was quoted in a Times media article as saying:

> *"We felt we needed to raise it in a meeting because people have been speaking about this thing hush-hush, gossiping about it, and sometimes it has been raised in order to attack the president. And because of that, people who wanted to raise the issue could not raise it because they would be [seen as] attacking the president," he said.*
>
> *"We have heard of the role of the Guptas and we wanted to tell [NEC members] that they do not account to the Guptas. They account to the liberation movement, headed by the ANC and its government, and not to individual families," said Mapaila.*'[36]

64 Indeed, the influence of the Gupta family and their suspicious business activities with government entities were not just making domestic news in early 2016, but internationally as well. A week before the statement released by Deputy Finance Minister Jonas, the highly respected Financial Times ran a major article "South Africa: The power of the family business" dated 8 March 2016, it noted:

---

[35] https://www.politicsweb.co.za/opinion/cosatu-cec-on-guptas-labour-laws--other-matters

[36] https://www.timeslive.co.za/sunday-times/news/2016-01-31-zumas-allies-in-revolt-against-guptas-audio/

"The claim is that under Mr Zuma's watch, predatory networks of patronage and cronyism are effectively looting the state, with the phrase "state capture" now part of the South African lexicon"[37]

Closure of Gupta bank accounts

65 Around the 1st April 2016, Oakbay confirmed that KPMG[38] had terminated their auditing relationship with all the Gupta-owned businesses. This confirmation followed the leaking of a KPMG email from its then SA CEO to all its staff, indicating that they had "with heavy hearts" decided to terminate all their services to the Gupta business Group because of "association risk". A few days later, on 4 April 2016, media[39] reported that ABSA (Barclays) and Sasfin had also terminated their services to the Gupta-owned businesses.

66 The CEO of the Gupta-owned Oakbay Mr Nazeem Howa informed the media[40] around 6 April 2016 that FNB[41] had also terminated their account. By 8 April 2016, Mr Howa confirmed (in letters to the Presidency, Ministers, ANC and others, as outlined below), that Standard Bank and Nedbank had also decided to join ABSA, FNB and Sasfin in closing their business accounts, and that no bank had provided them with reasons, claiming it was all part of a political campaign against the Gupta-owned businesses.

---

37 *https://www.ft.com/content/abd6e034-e519-11e5-a09b-1f8b0d268c39*

38 Oakbay confirms KPMG closure: https://www.biznews.com/sa-investing/2016/04/01/kpmg-cuts-all-ties-with-guptas-belated-attempt-to-end-reputational-damage

39 https://www.biznews.com/sa-investing/2016/04/05/two-more-big-sa-businesses-join-kpmg-sever-all-links-with-gupta-companies

40 https://youtu.be/9rlDiUJ6W2M

41 https://citizen.co.za/news/south-africa/1064589/fnb-cancels-guptas-business-accounts/

67 It is informative to also consider the Stock Exchange News Service (SENS) statements made at the time by the JSE-listed company Oakbay Resources and Energy Ltd. The JSE offers SENS as a service to its listed companies to make public any market-moving information. The first SENS announcement that Oakbay made on any termination of services by banks or other companies in 2015-16 was on 5 April 2016, through an update regarding the change in its auditor and sponsor, relating to KPMG and SASFIN. This announcement also indicated the general reasons by the two companies: for KPMG it was association risk, and for SASFIN, it was an alignment in its strategic objectives. This announcement was followed by two further SENS announcements on 8 April 2016 on resignations and appointments to their boards and an update on their banking relations. A further announcement on 13 April 2016 related to the Tegeta purchase of Optimum Mine and on 21 April 2016 on the appointment of SizweNtsalubaGobodo Inc as their auditors – Annexure **IM11** on SENS announcements.

68 The update announcement of 8 April 2016 on the board of their company and its subsidiaries, stated that Mr Atul Gupta, Mr Varun Gupta and Mr Duduzane Zuma had resigned from their various boards. It was noted that this decision followed "a sustained political attack on the company, and the concern that the jobs and livelihoods of nearly one thousand employees would be at immediate risk as a result of the outgoing directors' association with the company." This was followed by a SENS announcement the following day, 5 April 2016, on the termination of services by KPMG and Sasfin.

69 The update on their banking relationships also on 8 April 2016 dealt with the closure by FNB, and also dealt with the ABSA termination for the first time, and indicating it was in December 2015:

> *"...the Company confirms that Absa Bank Limited terminated its banking services to the Group in December 2015, while as of yesterday, the Group's remaining local banking service provider has given notice regarding the termination of their banking services on June 6, 2016."*[42]

70 Interestingly, it also stated that a major Asian Bank (probably Bank of Baroda) continues to service it and that the terminations would not impact on the operations of the Group:

> *"Despite the cessation of the provision of services by the major local banks, the Group continues to be serviced by a major Asian bank with a presence in South Africa, which bank has requested that the Company not communicate their name in this update. Consequently, the terminations will not impact the operations of the Group and the Company is confident that the remaining banking relationship is sufficient to fully service the operational requirements of the Group."*[43]

71 It later transpired in the evidence of ABSA in court and to this Commission, that it had informed the Gupta businesses of their intention to terminate their services on 18 December 2015, and that the accounts were then closed by 16 February

---

[42] https://www.politicsweb.co.za/terms-and-conditions/atul-varun-gupta-and-duduzane-zuma-resign--oakbay-
[43] https://www.politicsweb.co.za/rss-news/atul-varun-gupta-and-duduzane-zuma-resign--oakbay-

2016.[44] Oakbay had not made any SENS announcement at the time of the closure of their ABSA accounts, until the 8 April 2016 announcement.

72 It should be noted banks are not allowed to provide reasons for the terminations to the client if they relate to suspicious transactions in terms of the FIC Act. Most banks will also not make such terminations public, as they are legally precluded from commenting publicly on bank-client relationships, unless by consent. Neither did the banks inform the Treasury or financial sector regulators, probably because of client confidentiality, and also because they are not obligated to do so in terms of our laws.

73 I have not seen any evidence on how information on any termination by any bank was leaked to the media, from some of the media reports and the statements of the banks submitted to the Commission for the November 2018 hearings, it appears to me that none of the banks issued any formal public statement on terminating services to the Gupta family. One of the banks (FNB) did confirm their termination to the media, but after it appears to me to be in response to the disclosure to the media by Mr Howa and Oakbay. The initial news of these account closures appears to have been first from their audit company rather than a bank, when the internal KPMG email to its staff was leaked to the media. Oakbay then appears to have confirmed this to the media on 1 April 2016 rather than through a formal announcement from Oakbay or any other Gupta business.[45]

---

[44] . Affidavit filed by Yasmin Masithela of ABSA In the case Minister of Finance and v Oakbay Investments (Pty) Ltd and Others 2018 (3) SA 515 (GP) on 22 December 2016. A similar affidavit was filed by ABSA to Commission by Yasmin Masithela, dated 13 September 2018.

[45] https://www.enca.com/south-africa/fnb-closes-gupta-business-accounts

74 It also seems to me that none of the banks provided the real and specific reasons for their termination of services to Gupta businesses. Even today, as a Treasury official, I do not know the underlying reasons why each of the various financial institutions closed the Gupta accounts, beyond the evidence that the banks have submitted to the Commission, or that Oakbay made public or submitted to Mr Gordhan in late July 2016. To the extent that banks have provided reasons in the public domain, they are restricted to very general reasons like reputational or anti-corruption risks. The FIC Certificate of 72 suspicious (Annexure **IM12)** transactions submitted by Mr Gordhan in his founding affidavit to the High Court in the matter with Oakbay in October 2016 suggested that banks may have been concerned with anti-money laundering risks associated with the Gupta family as possible reasons for some banks closing their accounts.

75 All major banks have sophisticated risk-assessment models and are required by the FIC Act (even preceding the FICA Bill) to report suspicious transactions as well as all cash transactions above a certain amount (R25 000 in 2016) to the FIC. They are referred to as suspicious transaction reports (STRs) and cash threshold reports (CTRs). This is primarily to mitigate against money laundering. At a basic level, once a client is "flagged" internally for any reason by a bank's risk model, based on various automatic monitoring "triggers" that monitor their transactional behaviour against their business purpose, they are placed on "watch", which includes ongoing interaction between the bank and its client to understand the "flagged" anomalies. I do not believe that a bank will generally simply close accounts of any high-income customer on a whim, and not without seeking further information from the client to understand the anomalies in their transactional behaviour. A decision to close such client accounts is likely to be a

last resort measure when the client risk to the bank is deemed irreconcilably high, due to concerns related to financial crime, reputational or credit risk, and transactions that they have submitted as an STR to the FIC. Indeed, the bigger problem is when the relevant authorities do not act, or are seen not to act, upon the many STRs submitted to them, even when a bank strongly suspects they relate to serious crimes – legally-compliant banks will be likely to close such accounts as continuing to service such clients exposes them to severe consequences, including large fines and sanctions by overseas regulators and their criminal justice authorities.

76 Instead of formally challenging the banks legally or through direct representation on their decisions to close their accounts, the Guptas focused instead on lobbying the ANC, COSATU and Government to intervene on their behalf. They probably realised to their great consternation that their banks may have been monitoring their transactions to comply with anti-corruption laws, and possibly flagged them as suspicious with the FIC.

77 I believe that is why they began to focus on stopping the FICA Bill, shifting the FIC reporting to another Minister who was more loyal to the Gupta family (e.g. to the Minister of Intelligence), and to buying their own bank. It is also interesting that contrary to their SENS announcement (which I have only become aware of recently, when preparing this statement) that their operations would not be affected by the terminations, and that the Bank of Baroda would be able to fully service their operations, they wrote on the same day to the Minister of Finance and others to intervene because they would have to close their businesses and thousands of their workers would be losing their jobs.

The Guptas approach the Minister of Finance and Government

78 Mr Nazeem Howa, CEO of Oakbay Investments, wrote a letter to Minister of Finance Pravin Gordhan dated 8 April 2016, stating in his very first line that he was providing "advance warning" to the Minister that Oakbay and their related companies would soon be incurring significant job losses, because of "*..the unexplained decision of a number of banks, and of our auditors, to cease working with us, and of the continued press coverage of unsubstantiated and false allegations against the Gupta family*….". I annex the letter as Annexure **IM13**.

79 He confirmed that four of the major banks and Sasfin had closed their accounts, and had not provided any reasons: "*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*". According to Mr Howa, this *"unexplained decision of a number of banks"* was part of a "political campaign against Oakbay", even though "*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*".

80 Mr Howa projected the Gupta businesses as innocent victims of corporate bullying and anti-competitiveness, as they were challenging dominant businesses, alleging that the action of the banks "*is the result of an anti-competitive and politically-motivated campaign designed to marginalise*" their business. He claimed that Oakbay was "*a disruptor in new sectors, challenging*

the dominant businesses and global players in South Africa" and that they wanted to "*draw a line under the corporate bullying and anti-competitive practices we have faced from the banks*".

81 We regarded the tone of the letter from Mr Howa to Minister Gordhan as subtly threatening, an "advance warning" to Minister Gordhan that the Gupta-businesses held him personally responsible for the closure of their bank accounts. Given their close relationship with President Zuma, we saw their letter as implying that the closure of their businesses and loss of jobs would not only be regarded as the fault of the Minister, but if he did not intervene, President Zuma would act against him.

82 What Mr Howa did not reveal in his letter that they still had a banking account with at least one of the banks (as we do not know who anybody's banker is). As was noted in their SENS announcement and in media reports then and after, they were banking with the Johannesburg branch of the Bank of Baroda, and still continued to do business via this bank. I do not remember being aware of his letter on the day he dated it, even though I followed some of the media reports at the time on the termination of services to the Gupta businesses by KPMG and some banks. Neither was I aware of the Oakbay SENS filing in 2016 or 2017, so did not notice how their letter contradicted their SENS announcement. But we held the Gupta family in great suspicion since the firing of Mr Nene and the experience of Mr Jonas, even as we still dealt with them as professionally as we could.

83 It was Mr Howa's persistence over that week in approaching the Minister's office for a meeting, and their sudden high-profile media campaign, that attracted our attention. We also realised from Mr Howa's media interviews that he had also written letters to President Zuma, and Ministers Zwane and Oliphant around the same date.[46] But we did not know until around January 2017 (from Oakbay's filing notice affidavit by Ms Ronica Ragavan[47]) when we saw the actual letters written to the Presidency and the other Ministers, that they were identical, except for the last paragraph - whilst the letter to Minister Gordhan and President Zuma has the same last paragraph, with no reference to the office of the Minister of Finance, the last paragraph in the letters to Ministers Zwane and Oliphant has the additional sentence *"We are seeking your help as Minister of Finance with the responsibility to govern the financial sector to end the deadly stranglehold the banks have placed on our businesses".* (see Annexure **IM14**).

84 Interestingly, in her affidavit, Ms Ragavan, indicated that "similar letters and correspondence, all of which are generic in nature and not specifically directed to any one person in which Mr Howa asked for assistance…" and listed a total of 10 persons or organisations. These included (aside from the above), political parties (ANC, DA), trade unions, the Reserve Bank, and many regulators or ombuds. This is how we became aware that similar letters were also sent on the same date to the Secretary-General of the ANC, Mr Gwede Mantashe and I suspect, to COSATU. I have my doubts that Mr Howa really persisted in meeting most of those he wrote to as he did with the office of the Minister of Finance, who he also specificially mentioned in in his last paragraph in some of the letters he

[46] Annexures SB7-11 from Ian Sinton affidavit dated August 2017, submitted to the Commission.
[47] Paragraph 49, Filing Notice by Ms Ronica Ragavan, in the matter Minister of Finance and Oakbay Investments (Pty) Ltd and others, dated 20 January, 2017.

sent to others. Aside from the meetings with COSATU and the ANC which I note below, I am not aware of any public information on whether he met with President Zuma or any other Minister, before (and after) the Cabinet meeting of 13 April 2016 that I refer to below. I suspect there must have been such meetings.

85 The basic narrative propagated by Oakbay in their letters and media interviews was that the banks (and auditors) (i.e. the representatives of "white monopoly capital"), were victimising and isolating an emerging black disruptor entrepreneur like themselves, the Gupta family and its businesses. This strategy was more explicitly outlined in their extraordinary PowerPoint presentation in Oakbay's meeting with the ANC on 18 April 2016. I outline the key messages in their presentation below in my statement.

86 What we did not realise at the time was that Mr Howa's letter was the launch of a high profile political media campaign on that very day, as he went public on the closure of the accounts in both domestic and international media. He appeared on the highly-regarded CNN Quest Means Business programme where he was interviewed by its presenter, Mr Richard Quest. He was also interviewed on a few domestic media stations. In these interviews, he attacked the banks for closing their accounts, announced the resignation of their directors (i.e. the Gupta family and Mr Duduzane Zuma) and mentioned the letters he had written to President Zuma and three Ministers.

87 In his interview with CNN, Mr Howa provided even more detail:

"I did indeed write letters this morning to the Presidency, to the Minister of Finance who governs it, who governs the banking sector to the Minister of

Labour to warn of an imminent possibility of job losses. And to the Minister of Mining because I think we supply a strategic supply of coal to ESKOM, the power supplier. And that would be at risk if we were to go out of business. But our appeal really was on behalf of our staff because you know they've put heart and soul into our business and it really is not fair that an attack on us and our shareholder should affect our rank and file staff."

88 He also indicated to CNN that they only have one per cent of their turnover coming from government business, which cannot be "equated to state capture". He stated that they were "5% of to the total coal supply of the country". He stated that he believed the closure was not about the Gupta family, but about the President, and they were just been caught up in the political war about who would be future president after President Zuma:

"Well, you know, I think it's not about the Gupta family. I think it's about the President. And I think we've just been caught up in a political war around the future of the presidency. That's my own reading of it."

(Annexure **IM15** is a transcript of Mr Howa's CNN interview. The interview itself is available via the footnoted article below[48]).

89 His interview on Radio 702 and other media[49] on that day also focused on the closure of their accounts, and he confirmed that he had written his letters to Government, though some media also reported on the letters as if they had been

[48] https://businesstech.co.za/news/banking/119659/watch-gupta-company-ceo-on-cnn/
[49] https://mg.co.za/article/2016-04-08-guptas-become-too-hot-to-handle/ https://www.polity.org.za/article/guptas-quit-as-company-cant-pay-staff-without-banks-letter-2016-04-08 https://www.sowetanlive.co.za/news/2016-04-08-leaked-letter-oakbay-calls-on-president-zuma-and-cabinet-ministers-for-help/

leaked. He generally defended the integrity of the Gupta family and dismissed the "..continued press coverage of unsubstantiated and false allegations against the Gupta family", and accused the banks of corporate bullying and anti-competitive behaviour (as stated in his letter). He challenged Mr Solly Mapaila and others to produce any evidence against the Gupta family. Mr Howa continued to play the victim card, and indicated that they would be forced to close business and retrench their staff of over 4 500. It should be noted that throughout the next few months, the number of workers that Mr Howa referred to as possibly losing their jobs varied from 4 000, 4 500, 7 500 or 10 000 (after the Optimum deal) and later in court papers, the number was 16 000.

90 When Minister Gordhan went to Washington DC a week or two later to attend the IMF/World Bank meetings, he was also interviewed[50] in the same CNN programme by Richard Quest on 18 April 2016. Quest started with a question on the state of the economy, following a credit ratings downgrade after the dismissal of Minister Nene. He noted that President Zuma had faced a vote to impeach him in Parliament on 5 April 2016. Minister Gordhan was asked about the closure of the Gupta accounts, and confirmed he had received a "warning letter" from Oakbay, and explained that, like any customer of a bank, such matters are confidential and Government could not intervene in a bank-client relationship.

91 A few days later, but clearly wrongly dated 17 April 2016, Mr Gordhan received a second letter from Mr Howa, responding to the above interview with Mr Gordan "apologising" to him for any misinterpretation of his first letter. Mr Howa wrote

[50] https://edition.cnn.com/videos/tv/2016/04/18/exp-gordhanimf.cnn

that his only intention was "*to hear from you about any possible assistance you are able to offer*," stating that he was doing so because of Minister Gordhan's "*strong relationship to the captains of industry*", an insinuation, in my view, that Minister Gordhan was linked to "white monopoly capital" captains of industry. In the letter, Mr Howa accused the banks of continuing to take an "*intransigent" stance, especially because the shareholder (i.e. the Gupta family) had resigned from "all executive and non-executive roles*" in the group of companies to deal with concerns related to "association risk". I annex the letter as Annexure **IM16**.

Cabinet rushes to support the Guptas

92 Mr Howa succeeded incredibly well without the help of Minister Gordhan, as a mere 5 days after his letter on 13 April 2016, Cabinet decided to investigate why banks had closed the Gupta bank accounts. Incredibly, Cabinet did so without seeking the advice of Minister Gordhan, as the responsible Minister for regulating the banking sector. It did so when Mr Gordhan was not at the meeting, as he was out of the country attending the IMF/World Bank meetings in Washington D.C. Cabinet decided that the investigation would be done by the Ministers of Finance, Mineral Resources and Labour (Mr Gordhan, Mr Mosebenzi Zwane and Ms Mildred Oliphant respectively), coincidentally the very Ministers that Mr Howa had chosen to write letters to on 8 April 2016.[51] I will refer to this team of Ministers as the Ministerial Task Team, since it was not formally an Inter-Ministerial Committee, as Mr Gordhan later learned from the Secretary of Cabinet, DG Lubisi.

[51] Sinton statement to Commission, para 16.

93 The post-Cabinet media briefing for the 13 April 2016 Cabinet meeting was not held that week by Friday, 15 April 2016, as is the norm, but more than a week later on Thursday, 21 April 2016. This post-Cabinet statement, titled **"Statement on the Cabinet Meeting of 13 April 2016"** stated:

> *"5.2. Cabinet noted the actions by the four banks that gave notice to close the bank account of a company. Whilst Cabinet appreciate the terms and conditions of the banks, the acts may deter future potential investors who may want to do business in South Africa. Cabinet has endorsed that the Ministers of Finance, Labour and Mineral Resources should open a constructive engagement with the banks to find a lasting solution to this matter."*[52]

94 Minister Gordhan, Deputy Minister Jonas, the DG and I, together with other Treasury officials, were completely blindsided by this announcement because Mr Gordhan was not aware it was discussed at Cabinet whilst he was away. It was not on the Cabinet agenda circulated beforehand, and nobody had alerted or told him (or any of us) about this decision in the eight days after the Cabinet meeting. Though the media statement did not refer to any "investigation" (which he and I only became aware of late the following day or on Monday 25 April 2016), even the decision to "open a constructive engagement with the banks" was unprecedented. I am not aware of any other instance since 1994 where Cabinet decided to intervene in a bank-client relationship. Because Treasury is the responsible department for regulating banks (and part of my job), we were

[52] https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-13-april-2016

keenly aware of the long-established jurisprudence on bank-client confidentiality.[53] We suspected that the decision of Cabinet was not in accordance with the law.

95 We were also surprised by the speed at which Cabinet took this decision to support the Guptas, as it did so at the first possible Cabinet meeting (13 April 2016) after news broke on 1 April 2016 that the Gupta banking and auditing relationships had been terminated. We also did not anticipate this decision because there was no prior Cabinet memorandum circulated for the Cabinet meeting (normally done two weeks before), nor discussed at the ESEID Cabinet committee meeting the week before. Neither was it on the agenda of the Cabinet meeting.

96 We were not aware of the actual Cabinet decision taken at its 13 April 2016 meeting on that Thursday, 21 April 2016, or for most of the next day. Cabinet minutes are generally distributed to Ministries the Friday afternoon or Monday before the following Wednesday Cabinet meeting, together with the agenda. I am not able to confirm the exact date and time when the Cabinet minutes were provided to the Ministry of Finance, but believe it was either late Friday 22 April 2017 or early Monday 25 April 2017. We therefore only had the media statement on that Thursday and Friday morning, and tried to analyse it as much as possible, to try and understand it fully. Since this decision was covered under item 5 in the media statement headed "Cabinet's position on key issues in the environment" rather than the item "Key Cabinet Decisions" – this suggested that this matter

[53] *Bredenkamp v Standard Bank of SA Ltd 2010(4) SA 468(SCA)*

was probably raised under "general" at the Cabinet meeting, and was another indicator that there was likely no Cabinet memorandum to support this decision, not even one distributed at the meeting.

97 But, I think we were more surprised by this Cabinet decision because it was effectively dismissing the statement of Deputy Minister Mcebisi Jonas just 28 days before. In contrast to this rush to assist the Gupta family with their banking accounts, there was no rush for Cabinet to issue any media statement to support or even merely acknowledge the statement on the Gupta family by Mr Jonas. Every member of Cabinet present at that meeting of 13 April 2016 would have been fully aware of the very serious allegations made by Mr Jonas against the Gupta family.

98 The only immediate public response that I am aware of that President Zuma made to the 16 March 2016 statement by Mr Jonas, was his response to an oral question in the National Assembly from MP Mmusi Maimane the following day on 17 March 2016. President Zuma[54] stated that he appointed Mr Jonas as Deputy Minister, and Mr Maimane must ask Mr Jonas or the Guptas if Mr Jonas says he was offered the job of Minister of Finance. He responded again on or around 12 March 2016 to a further parliamentary question (No 729 of 2016) from MP Mr David Maynier, on whether he was aware of the details of such meeting and would he make a statement on this matter. President Zuma replied as follows:

[54] https://www.facebook.com/watch/?v=10154077271749617

"I am unaware of such a meeting taking place except for the public statement that was recently made by the Deputy Minister of Finance." – Annexure **IM17.**[55]

99 It was also odd to the Treasury that the post-Cabinet media statement suggested that investors would be discouraged because banks had terminated their services to the Gupta-owned businesses. We thought the opposite was in fact true, that no credible investors would want to invest in a country if its banks were ignoring money-laundering and corruption allegations, and the fact that the banks were seen to be enforcing anti-corruption laws would actually be a big positive signal for investors. Indeed, the Cabinet decision to investigate the banks would only serve to confirm the negative perception amongst many South Africans, international investors and trading partners, that President Zuma and many members of his Cabinet were so beholden to the Gupta family, that they were prepared to openly interfere in relationships between banks and the Gupta family.

100 So far-reaching was this decision that the SA Reserve Bank Governor Kganyago expressed his concern to the Minister of Finance, in a letter dated 26 April 2016, *"regarding Cabinet's proposed approach and decision on the matter pertaining to the relationship between banks and their individual customers"*. The Governor noted that *"…banks are required amongst others to adhere to the highest standards of compliance to laws which govern their relationship with customers"*, pointing out that in a given period banks do routinely close down a substantial

55 www.thepresidency.gov.za/parliamentary-qa/president-jacob-zuma's-replies-parliamentary-questions-written-reply%2C-national-0

number of accounts or have their conditions altered in order to maintain financial integrity and soundness. The Governor noted that contrary to the view that the closing of accounts may deter foreign investors, the involvement of Ministers to engage with banks *"...could introduce heightened levels of uncertainty and pose a risk to South Africa's financial stability."* – Annexure **IM18.**

Mr Gordhan's immediate response to the Cabinet decision

101 On hearing of the decision of Cabinet after the media briefing that Thursday morning 21 April 2016, Minister Gordhan wrote to the Secretary of Cabinet and Director-General in the Presidency, Dr Cassius Lubisi, requesting clarity on the Cabinet decision. Minister Gordhan also requested Treasury to seek an urgent legal opinion on whether a Minister of Finance, or any other Cabinet member, can approach a bank to discuss a client's affairs. He needed a formal external legal opinion to confirm the internal Treasury view that Cabinet did not have the power to intervene, and also that it would in fact be illegal for Cabinet to do so.

102 The following day, I became aware that the Ministry received an email from Mr Zwane's office at 11:48am that Friday, 22 April 2016, inviting Mr Gordhan to the first task team meeting, which would be banks. I attach the invite from Mr Zwane's office to Mr Gordan's office. The letter from Minister Zwane was dated two days before the date of the email, 20 April 2016. Minister Zwane's letter referred to the "*decision taken by Cabinet... to appoint an Inter-Ministerial Committee ("IMC") to consider the impact of certain allegedly unilateral actions taken by specific financial institutions against certain of its clients, which actions may have the potential to negatively affect the economy of the Republic of South Africa, with particular focus to be given to the impact of these actions on the*

already distressed mining and financial services sectors. Minister Zwane was unilaterally assuming that the three Ministers would be constituting an "IMC", and that he would be the chairperson (see Annexure **IM19**).

103 I remember that on the same day, 22 April 2016, Minister Gordhan received a reply to his letter from DG Lubisi, which clarified that no inter-ministerial committee had been established, but rather a ministerial task team, and that three ministers were appointed (finance, labour and mineral resources) and that no Minister was designated as chair or convenor.

104 Upon receiving the letter from the DG in the Presidency, Minister Gordhan responded to the invitation of Minister Zwane on the same day in a letter dated 22 April 2016, correcting the basic fact that Cabinet had not established an Inter-Ministerial Committee, and no Minister was designated as a convenor of the task team. More importantly, for the three Ministers to first meet as *"...it will be advisable for the three Ministers to first consult on the framework for any discussion with financial institutions. I prefer this takes place on the margins of the Cabinet meeting of the 26th April 2016."* Mr Gordhan noted that "*Whilst I appreciate the urgency of the matter for some, I must emphasise that the legal and regulatory environment has both global (BASEL III, Financial Action Task Force) and local (SA Reserve Bank, Financial Services Board, Financial Intelligence Centre, National Consumer Commission) regulators and regulations.*". Also, that he was *"currently seeking legal advice on what could be done".* Refer to Annexure **IM20**[56].

[56] Annexures to letters are available in statement of Mr Gordhan to Commission dated 11 October 2018.

105 Minister Zwane responded on 24 April 2016, ignoring the regulatory imperatives, as well as the request by Minister Gordhan for a legal opinion to guide the Ministers, and went ahead with the meeting on 25 April 2016, which was scheduled from 09:00 to 17:00, in Pretoria. In addition to inviting Ministers Gordhan and Oliphant, he also invited the then Minister of Communications Faith Muthambi (who was seen to be close to President Zuma and the Gupta family, and later from media reports[57] on Gupta Leak emails). Minister Zwane stated in his letter:

> "*...the discussions arranged for 25 April 2016 will continue and I urge you to consider attending as the outcomes thereof will be relevant to us as South Africans who wish to see this country prosper.*" He also stated in his letter that *"the President mandated us to consider the inclusion of any additional Minister, whose participation may be deemed relevant"*, suggesting he had invited Minister Muthambi, even though he did not consult Mr Gordhan beforehand, - Annexure **IM21.**

106 From the affidavits submitted by the banks to the Commission, it is clear that Minister Zwane had no intention of consulting Mr Gordhan beforehand on his meeting with banks, having sent his back-dated letter of 20 April 2016 to Mr Gordhan on 22 April at 11:48 am, a few minutes AFTER his advisor (Ms Zarina Kellerman) had already invited ABSA Bank via her email of Thursday, 22 April 2016 at 11:44 am. Mr Zwane also assumed that he was the Chairperson, and decided to invite Minister Faith Muthambi to be part of the task team.

---

[57] https://www.outa.co.za/projects/state-capture/faith-muthambi-treason

107 His sense of urgency was in stark contrast to the lack of urgency or concern he showed in his own portfolio for the plight of mineworkers, when, just 4 months earlier, the black-empowered mining company EXXARO had been forced to retrench 1 500 workers after Eskom failed to renew their coal contract with Arnot power station, in favour of Gupta-owned company Tegeta[58] — this certainly qualified as a distressed mining company that Mr Zwane referred to in his wrongly-dated letter of 20 April 2016. Indeed, the lack of involvement of Minister Zwane in the EXXARO matter was in my view very deliberate, as it appeared to me that he wanted to ensure that the coal contract for Eskom's Arnot power station was transferred to the Guptas' Tegeta company, which had just purchased Optimum Mine[59]. I am aware that the Commission has heard evidence relating to the purchase of this mine by Tegeta, and prepayment made to it by Eskom to enable it to buy Optimum mine from Glencore. In effect, Eskom[60] was taking away an existing contract with a black-empowered company in favour of a Gupta-owned company, at what analysts said was at a higher coal price, and which resulted in great suffering for the over 1 500 workers who lost their jobs at Arnot mine. I am not aware of Eskom or Cabinet intervening to assist the workers, or even engage with their trade union, nor why Cabinet did not issue any public statement.

108 It also appeared entirely irrational to me that the Minister of Mineral Resources would be prioritising matters falling in another Minister's portfolio, and do so by neglecting his own portfolio, to the detriment of the economy as a whole. This

[58] https://youtu.be/NFKpQwubGDM
[59] https://www.timeslive.co.za/politics/2018-02-14-lynne-brown-helped-guptas-get-coal-deal/
[60] https://www.news24.com/fin24/companies/mining/eskom-overlooked-exxaro-to-benefit-tegeta-inquiry-hears-20180215

can be seen in his failure to resolve significant uncertainties related to mining legislation like the Minerals and Petroleum Resources Development Act.

109 The sequence of events leading to this Cabinet decision suggests to me that the decision to "engage" the banks was a highly orchestrated attempt by the then President and Mr Zwane to protect the looting activities of the Gupta family, as:

109.1 The matter had not been discussed at any of the Cabinet committee meetings the previous week;

109.2 The decision was then taken at a Cabinet meeting when Minister Gordhan was overseas on duty, and the Presidency would have been fully aware beforehand that he would be absent from the Cabinet meeting;

109.3 There was no Cabinet memorandum, as is the standard practice, to support the decision;

109.4 The powers of the Minister of Finance were undermined, as the Minister of Mineral Resources was asked to intervene in a sector that fell under the executive authority of the Minister of Finance;

109.5 The Minister of Finance was never asked for any advice beforehand or after, and certainly not on the legal basis upon which banks could close customer accounts; and

109.6 There was no written legal opinion that we in National Treasury were aware of (or subsequently saw) to guide or advise Cabinet before they made such a far-reaching, and unprecedented, decision.

Actual Cabinet Decision differs significantly from Media Statement

110 I do not remember the exact day when Minister Gordhan's office received the agenda and other documentation for the Cabinet meeting to be held on Tuesday, 26 April 2016 (as Wednesday, 27th April 2016 was a public holiday). His office would have received it by that Monday, 25 April 2016, either on that day or the Friday afternoon before. I was anxiously waiting for the Ministry to alert me on the minutes of the 13 April 2016 Cabinet meeting, so I could see the actual wording of the Cabinet decision on the Gupta account closures. I also needed to advise the Minister for his preparations for the Cabinet meeting the next day. On seeing the minutes, I was surprised to see how significantly the actual wording differed from the post-cabinet media statement.

111 We realised that the actual decision in the Cabinet minute recorded that this was to be an investigation of the banks, and not merely to open a "constructive engagement" with them. We were well aware, just from our experience, that Cabinet did not have the power to investigate any regulatory or criminal transgression, and it would be illegal for it to do so. It was also to be an investigation against only one side in the dispute, and not only against the banks but also other "financial" sector companies like auditing companies for closing of the accounts of the Gupta-owned businesses, apparently from a client confidentiality perspective. There was to be no investigation against the Gupta family. The three Ministers were to also report to Cabinet on the impact of this action. There was no role outlined for the regulators or officials – this issue was so important that it was the Ministers themselves who had to do the investigation

112 We also noted that the Cabinet decision clearly did not reflect the more neutral constructive engagement the media statement referred to, and that these words were not even part of the minuted decision. Cabinet was only investigating one side of this dispute, the banks (and financial sector companies) that terminated their services to the Gupta-owned businesses. The Gupta businesses were seen as the victim, with no investigation to be conducted against them.

113 The minuted decision only referred to client confidentiality as the reason for the investigation, and made no reference to any impact on investment or investors, nor any concern about workers losing their jobs, nor any concerns related to collusion. It was also more open-ended, requiring the task team to make a briefing to Cabinet on the implications of the decision by banks to close the Gupta business accounts. It will be important for the Commission to request the minute of the actual Cabinet decision taken at the 13 April 2016 meeting, and to compare whether it was an investigation or constructive engagement, whether it refers to any concern on future investment, confidentiality or collusion. It will be noted later in my evidence how both the President and Minister Zwane later switched interchangeably between these different reasons as the rationale for the investigation or constructive engagement.

114 Treasury received the urgent legal opinion from Advocates Gauntlett SC and Pelser on that same day, 25 April 2016, in time for Mr Gordhan to consider it for the Cabinet meeting the following day. The opinion confirmed that *"save to the extent that this is authorised in law, no Cabinet member (or Cabinet collectively) has any power to intervene in the banker-client relationship. As a matter of public law any such intervention is unlawful and may be ignored by a private entity*

without seeking legal recourse. As a matter of private law any such intervention constitutes a delict, which may result in a claim for damages or other legal remedy (like an interdict).'[61] It noted that the Banks Act does not contain any provision which contemplates that any oversight responsibility or power that the Minister of Finance may have under the Act is somehow to be exercised together with the Minister of Labour and/or the Minister of Mineral Resources.[62] (see Annexure **IM22**).

115 The legal opinion also dealt with the exposure of SA banks to fines by foreign authorities, noting *"Should Government wrongfully interfere with the exercise of banks' powers and duties, Government may incur delictual liability for any penalty imposed on banks which is causally connected to Government's conduct.'*[63]

116 The legal opinion concludes that *"the contemplated meeting is not authorised by law…"*. The legal opinion more than confirmed the Treasury's view that that there was no basis for a Minister, or a member of Cabinet, nor Cabinet, to intervene in the private contractual relationship between a bank and its clients.

117 Minister Gordhan alerted Cabinet to the legal opinion at the Cabinet meeting of 26 April 2016, as he later confirmed in his follow-up letter to President Zuma on 4 May 2016 when formally submitting the opinion to the Presidency – Annexure **IM23**. Minister Gordhan requested in his letter that the Presidency and Treasury legal advisors meet with the senior counsel to advise on how to proceed within

---

61 Paragraph 15 of opinion.
62 Paragraph 31 of opinion.
63 Paragraph 24 of opinion.

the regulatory laws governing the banking sector. Minister Gordhan sent a similar letter on the same date, containing the legal opinion and the regulatory provisions applying to banks, to Ministers Zwane and Oliphant. All these letters were hand-delivered.

118 To my knowledge, President Zuma did not respond to Minister Gordhan's letter, so there was no follow-up on the request for the relevant legal advisors to meet the senior counsel. Mr Zwane responded in a letter dated 9 May 2016, where he complained that the legal opinion obtained on 25 April 2016 was hand delivered to him only on 5 May 2016. He noted the contents of Mr Gordhan's letter but did not engage on the content of the legal opinion, indicating that it is "best dealt with in the appropriate forum" and so he decided to "make no other comments at this time". I am not aware if Mr Zwane ever followed up in whatever appropriate forum he was referring to. Neither he nor Ministers Oliphant and Muthambi seemed to be concerned that the decision by Cabinet to "investigate" the banks may be a serious overreach of Cabinet's powers, and worse, for the benefit of specific private interests and not the public interest (see Annexure **IM24)**.

Oakbay approaches the ANC and COSATU

119 Following their letters of 8 April 2016 to many organisatons including the ANC and trade unions (as confirmed by Oakbay's Ms Ragavan, as noted above), the Gupta family (directly or via Oakbay) succeeded in securing meetings with both the ANC and COSATU leaderships around the same time as the Cabinet meeting of 13 April 2016.

120 COSATU was probably the first member of the tripartite alliance to respond positively and publicly to the Gupta request, on 11 April 2016, via comments in the media by its spokesperson Mr Sizwe Pamla[64]. He condemned KPMG and three of the banks for closing the Gupta business accounts. On 23 April 2016, COSATU President, Mr Sdumo Dlamini, confirmed in a COSATU memorial lecture that their leadership had met with the Gupta family, according to News24[65] which quoted him as saying:

> *"Our mission behind meeting the Guptas last week was about the jobs that were at stake if they [the Guptas] decided to leave the country," said Dlamini.*

The Cosatu president reiterated the labour union's stance against untoward influence of the state by private capital. "If we find that they are doing the same, we will crush them," said Dlamini.

He accused banks that had cut ties with the Gupta family of double standards, citing an instance of construction companies which had been found guilty of colluding in 2010 projects.

"When these companies were penalised at the insistence of the Competition Commission the banks continued doing business [with] them and found nothing wrong with that. What we see them [the banks] doing to the Guptas is selective punishment," he said.

---

[64] https://www.enca.com/south-africa/cosatu-slams-banks-shunning-gupta-family-businesses
[65] http://www.news24.com/SouthAfrica/News/we-met-the-guptas-and-theyre-coming-back-cosatu-20160423

Mr Pamla also appeared on various media programmes, including on ANN7[66] on 19 May 2016 on a panel with well-known Gupta associate, Mr Tshepo Kgadima, where he strongly attacked both the banks and SA Reserve Bank, even raising questions on the integrity and the ownership structure of the Reserve Bank.

121 Mr Howa met with the Office of the Secretary-General of the ANC on 18 April 2016. I became aware of the meeting after Mr Enoch Godongwana contacted me soon after this meeting. He also gave me a copy of their PowerPoint presentation, which is attached to this statement as Annexure **IM25** as noted above. The presentation indicates that the date of the meeting, which was five days after the Cabinet meeting, on 18 April 2016. I will not deal with the meeting of Oakbay with the ANC (as I was not there!), and am aware that Mr Gwede Mantashe has provided evidence as to why the Office of the Secretary-General met with Oakbay and later some of the banks. I will instead deal with what Mr Howa says in his slides, which I believe is important documentary evidence for the consideration of the Commission.

122 Mr Howa's presentation is largely a narrative built around a conspiracy theory on why the banks and KPMG had terminated their relationship with the Gupta companies, not once referring to the many allegations of corruption against the Gupta family and their companies. He accused the banks of informing Oakbay of their account closures with little prior notice or reason, suggesting that they were instead motivated by "*a conspiracy between major parts of the status quo*

---

66 ANN7 video https://youtu.be/GwznubA7fVM

to isolate Oakbay". It appears to me that Mr Howa was very economical with the truth when making this point, as he was a key cog in the Gupta business syndicate, and would likely have been aware of how the Gupta companies and family conducted their business, and would surely have at least suspected the reasons for the closure of their accounts. In any case, he certainly knew two months later on 19 June 2016, when he appeared on Carte Blanche programme on MNET, and read a letter from Standard Bank to Oakbay, which stated that their concern was that *"...a reasonably diligent (and vigilant) person would suspect that such dealings could directly or indirectly make us a party to or accessory to contraventions of that law",* in reference to both domestic, UK and USA anti-corruption laws.

123 Howa's PowerPoint slides described the banks' decisions as "anti-competitive, immoral and unethical", saying that there was a "deafening silence from civil society (except ANC/Alliance structures)". He obliquely invokes the "white monopoly capital" conspiracy theory by asking: *"How will our economy transform when anyone challenging that 97% is taken out through the withdrawal of essential services"*. He also perpetuates the Project Spider Web conspiracy theory saying: "*perhaps the Spider Web Theorists have been right all along. The 'elite' don't just have a lot of money, they own just about every major bank and corporation on the JSE and beyond*". In a slide titled "Conspiracy or co-incidental?", he makes reference to Johann Rupert, by posing the question: "*Is there a relationship between what is happening to Oakbay and Regime change? Central role of Johan Rupert?*" Finally, he asks the politically charged question: "*How do we have political power, but no influence over the economy?"*

124 The Oakbay meeting with the ANC was also reported on in a Business Day article dated 6 May 2016, by journalist Carol Paton, headlined "Oakbay 'conspiracy theory' claims SA's banks are controlled by Ruperts". According to the article:

> "*Oakbay Investments, the Gupta-owned company that has had its banking services terminated, has circulated a bizarre conspiracy theory in which it claims that South African banks are under the control of the Rupert family. The company also suggests that Project Spider Web, which claimed a conspiracy between Treasury officials, foreign governments and white business, has "been right all along". Some of the arguments it punts have also recently turned up in press statements by the African National Congress (ANC) Women's League and ANC Youth League. It is also believed to have been presented to the ANC. Business Day earlier reported that the presentation had been given to the ANC top six. However, ANC secretary-general Gwede Mantashe said that it was not the top six who had received the presentation. Project Spider Web, which claimed to be "an intelligence dossier" was circulated last August and was the precursor to various political attacks on the Treasury, including the shock dismissal of then Finance Minister Nhlanhla Nene."*[67]

125 As noted in the evidence to the Commission by Mr Mantashe and the 4 major banks, they were subsequently invited around 18/19 April 2016 by the ANC Secretary-General's office, to discuss the closure of the Oakbay accounts with them. The ABSA and Nedbank CEOs met with the ANC on 20 April 2016, and

[67] sa-monitor.com/oakbay-conspiracy-theory-claims-sas-banks-controlled-ruperts-bdlive-6-may-2016/

the Standard Bank CEO on 21 April 2016, and the meeting with the FirstRand CEO was called off. From their affidavits, all the banks only agreed to attend on condition they did not discuss the affairs of any client, and focused on a general discussion on the anti-money laundering and anti-corruption laws and other laws that applied to banks, and the processes they follow before closing any client accounts. Standard Bank recorded their discussion with the ANC in a detailed letter to the ANC after the meeting (Annexure **IM26**). A copy of their letter was provided to the Treasury around that time. Treasury was not involved or consulted on these meetings.

126 These behind-the-scenes lobby efforts were bulwarked by public events, such as lengthy political "analysis" and attacks against the banks and "white monopoly capital" on ANN7[68] and in the New Age, the Gupta media platforms. Alleged Oakbay employees and members of the ANC Youth League marched to ABSA, FNB and Standard Bank, around 26 or 27 April 2016.[69] An open letter to four bank CEOs from Oakbay workers, calling on banks to save their jobs by re-opening the banking accounts of their Gupta-owned company employers was emailed from an Oakbay email address to Minister Gordhan on 20 April 2016. At the time, political commentators raised questions about how these marches were organised, as media were not able to directly interview such employees on the march, to get their perspective. Media articles around 31 May 2016 reported that Oakbay instituted disciplinary action against at least 15 employees who were critical of a letter in which management pleaded with the banks to reopen its

[68] ANN7 interview with Nazeem Howa on Oakbay bank accounts https://youtu.be/Qq3mDOdiH2w
[69] https://citizen.co.za/business/business-news/1090524/oakbay-workers-march-banks-to-save-their-jobs/

accounts. According to the reports, the company also took action against those employees who chased ANC Youth League President Collen Maine from their offices.[70] (See Annexure **IM27).**

127 I must confess that even today, I remain perplexed that the Gupta family could at that stage still be so influential within the ruling party and trade unions, and could so easily secure meetings with the ANC and COSATU leaderships, and to do so at such short notice, even after the statement on the Gupta family by Deputy Minister Mr Jonas (a month before) and what Mr Solly Mapaila said at an ANC NEC meeting (three months before). I was also aware that leaders like Mr Mantashe and Mr Godongwana played important roles in countering the influence of the Gupta family at that time, and know they were very concerned about their proximity to the ANC President. The Gupta family enjoyed the strong support of the ANC formations like the ANCYL[71], ANCWL[72] and MKMV[73], who all got actively involved in attacking Mr Jonas and the banks in March-April 2016. The ANCYL called on Mr Jonas to be disciplined for issuing his statement of 16 March 2016. The ANCWL came out strongly to attack the banks and support Oakbay on 15 April 2016. The MKMV issued a statement on 30 March 2016 accusing those in the ANC who were critical of the Guptas as being in bed with white capitalists.

128 The Gupta family and their associates were very skilful in painting the closure of their accounts as a narrative of collusion, unfair conduct and discrimination, and

[70] https://www.news24.com/SouthAfrica/News/gupta-employees-get-disciplinary-notices-20160531
[71] https://www.timeslive.co.za/news/south-africa/2016-03-18-ancyl-wants-mcebisi-jonas-out/
[72] https://www.polity.org.za/article/anc-womens-league-slams-big-banks-comes-out-in-support-of-gupta-owned-oakbay-2016-04-15
[73] https://www.politicsweb.co.za/news-and-analysis/anc-leader-who-spoke-out-against-zuma-in-bed-with-

winning the political support of specific constituencies. Their media campaign engaged with broader political and economic debates in the country, casting their banking problems as resistance to economic transformation – their media painted them as the champions for real black transformation – a good example is one of the TNA Business Briefings[74] on 22 June 2016, where many Gupta associates posed as objective participants at a business breakfast, including the leaders of the BLF and the PPF. Indeed, the leaders of these organisations conducted vicious campaigns against all those who stood in the way of the Gupta family, and very loud praise-singers of the Gupta appointees to state-owned entities – they appeared regularly on their ANN7 channel to do so. Another such organisation was Transform RSA and its President Mr Adil Nchabeleng[75]. I cannot comprehend why such organisations would have supported the Gupta family so robustly, but suspect that they were funded to do so by the Gupta family (in spite of denials[76]). I leave it to the Commission to assess whether this was the case or not.

129 What is significant about the Gupta strategy is the amount of energy and resources that they put into rallying political support behind their campaign against the major commercial banks and the National Treasury, yet they never launched a legal challenge against the banks to test the various allegations they were making against them. It is important to bear in mind what was later revealed

[74] SABC's TNA Business Briefing in Sandton on "Transformation of the South Africa Economy". Panel of Ben Ngubane (Eskom), Mncane Mthunzi (BMF); Nazeem Howa (Oakbay); Mohale Ralebitso (BBC) and Tokyo Sexwale (former Minister).
https://youtu.be/kNRqhhOaJmE
[75] https://blackopinion.co.za/2016/11/07/open-letter-brian-molefe/
[76] Manyi's PPF: We are not funded by the Guptas
https://www.news24.com/fin24/Economy/manyis-ppf-we-are-not-funded-by-the-guptas-20170320

through the Gupta Leaks emails, that Bell Pottinger had been hired by Oakbay Investments in January 2016. I believe as a very experienced former journalist, Mr Howa would likely have been working very closely with Bell Pottinger on what was clearly a Gupta fightback campaign against the banks for closing their accounts, and as shown later, also on the Zwane cabinet memo that was presented to Cabinet at its meetings on 22 June 2016 and 6 July 2016 – I leave this to the Commission to confirm.

130 Mr Howa's Oakbay presentation was cleverly designed to distort selected facts using conspiracy theories and play on divisions in our society, similar to what we have been seeing in the politics of the USA under President Trump, and the UK over the Brexit vote. There are many half-truths and false assumptions made in the Oakbay presentation, which they skilfully exploited. There is no doubt that wealth in South Africa was concentrated in a few white families in 1994, and that such families continue to be wealthy today, together with other and newer post-1994 wealthy families, and that we continue to be a highly unequal society. Whilst such billionaires are still influential in some big businesses in South Africa, the form of capitalism has also changed over time, and these billionaire families no longer own and control JSE-listed companies as they may have once done before South Africa opened up to outside investment. Hence, no family owns any of the major banks, which like other major JSE-listed companies, are today dominated by foreign and domestic institutional investors like pension funds, collective investment funds etc. I refer the Commission to a factsheet that Treasury presented to Parliament and released for public comment in October 2017, on ownership trends on the JSE, to provide such perspective, and to deal with the underlying and deliberate distortions in the Oakbay presentation –

Annexure **IM28**. A more detailed research paper is also available on the National Treasury website[77].

131 I was approached much later to brief the ANC Secretary-General and Deputy Secretary-General on the FICA Bill, as the delay in signing attracted the news, which I did a few days after I was approached, on 23 September 2016. I was happy to be invited, as I was always ready to brief anyone (from any political party or organisation) who was interested in the Bill, and to win their support for it. My presentation focused on explaining the anti-money laundering system in SA, our commitments as a FATF member, the concept of PIPs and its origin, and why it was important to have the law enacted as soon as possible. I regarded the meeting as very helpful and constructive.

Minister Gordhan finally meets Oakbay CEO

132 It is clear from the above that the Guptas were able to put heavy pressure via Cabinet and within the ANC and COSATU, lobbying very hard and strategically, behind the scenes. Mr Gordhan had resisted meeting him, taking into account the legal opinion he had secured. The CEO of Oakbay subsidiary, SAHARA, also wrote to Mr Gordhan to intervene on 28 June 2016. - Annexure **IM29**.

133 Minister Gordhan finally met with Mr Howa on 24 May 2016 at the National Treasury, a meeting that I also attended. Also present was Mr Lungisa Fuzile, former Treasury Director-General, and a few other Treasury officials including our legal head Ms Rebecca Tee. Mr Gordhan's and Mr Fuzile's statements to

---

77 http://www.treasury.gov.za/comm_media/press/2017/2017100301%20Ownership%20monitor%20-%20Sept%202017.pd8

this Commission provide sufficient detail, and I will not deal with that meeting in any detail. I recall Mr Gordhan making the point to Mr Howa (whose father was a great freedom fighter spearheading the non-racial sports movement, and whose role I admired in my youth) that we did not fight in the struggle to have state capture, and that Mr Howa should not pretend that everything was okay with his company and its owners; that there was much the Gupta family had to account for, including the statement by Deputy Minister Jonas on the approach made to him by the Gupta family.

134 Mr Howa did not make a formal presentation, and did not attempt to make the same conspiracy-type points in his presentation to the ANC. Mr Fuzile told Mr Howa to provide hard facts and evidence, and not simply repeat what was already in the media. Howa then stated that they had 20 letters of correspondence with ABSA, which he stated gave them two months' notice to close their accounts, after a meeting with them on 18 December 2015.

135 Howa claimed that ABSA did not want to meet them thereafter. He claimed that early in April 2016, Norton Rose contacted them to say that FNB was closing their account, but that FNB had refused to meet them. In the last week of that month, Nedbank closed their account/s followed by Standard Bank.

136 Howa then spoke about how their auditors and a number of businesses (such as Equestra and Barloworld) had cut off all links with them. Potential auditors were refusing to enter into business with them, including one that had agreed (via a handshake) to be their auditor but shortly after, walked away.

137 We did not engage on all the above impromptu information that he revealed, as we did not place much reliance on his statements until he provided some evidence or documentation. Mr Fuzile pointed out to him that the banking sector is highly regulated, and asked him what he expected of the Minister and Treasury, given that by law we cannot approach the banks on any matter related to any of their clients.

138 Mr Howa stated they employed 7 500 people and it would not be right for them to lose their jobs. Mr Gordhan responded by saying that he too was concerned about workers losing their jobs. Mr Fuzile asked them why they were not taking this matter to court, if they felt they were not treated fairly by the banks. He pointed out that it may be in the public interest for them to put out all their facts and evidence in the public domain. Mr Howa indicated that they had discussed this with their lawyers, and was aware of the Bredenkamp case, and they did not think it was feasible for them to do so at that stage. Mr Fuzile stated that if they had nothing to hide, they would do so, and such cases could be in the public interest.

139 Mr Howa indicated that all they were expecting is to get advice from the Minister. Minister Gordhan repeated that Oakbay should approach the courts if they had nothing to hide, as this was the only way they could get the relief they were seeking.

140 In my view, Mr Howa was clearly not very transparent with us, continuing to act as if there were no serious allegations around the Gupta family and Oakbay, stating that he was only appointed the CEO of Oakbay a few months before, and

the Guptas had resigned as directors. He claimed that their business used to only be reliant on the state for one per cent of its income, but was now five per cent (after the Optimum deal), and that Eskom had saved R2 billion compared to their previous coal contracts. He claimed that the Optimum deal was done by him in SA, and not in Switzerland. He claimed that he as an ex-unionist, his main concern was the 7 500 jobs that were at risk.

141 His key point was that their businesses were now the victims of the banks and auditors. Mr Gordhan told him that he was playing victim when he knew full well what had happened to Deputy Minister Jonas. Towards the end of the meeting, Mr Fuzile challenged Mr Howa for not demonstrating good faith when engaging with the Minister, pointing out "*that the recent attacks on the integrity of the National Treasury [were] neither helpful nor were they in the national interest*" (paragraph 188 in Lungisa Fuzile's statement to the Commission, dated 15 Feb 2019). Mr Fuzile said further that he was aware that Mr Howa had referenced the "Operation Spiderweb" intelligence "report" in their meeting with the ANC officials. He told Mr Howa that we would not meet with him if they continued to make such false allegations that Treasury officials were apartheid spies. Mr Gordhan also reprimanded Mr Howa for defaming Treasury. I also pointed out how the Treasury was under attack from the Gupta family. Mr Howa denied that he had attacked the Treasury and apologised if that was our perception. The PowerPoint presentation to the ANC speaks for itself, as to how "honest" Mr Howa really was with us.

142 Minister Gordhan ended the meeting by requesting Mr Howa to provide us with the information he claimed to have, such as his attempts to engage with their

banks. Minister Gordhan told him we would be sending him our input on the regulatory environment applying to banks.

143 There was further correspondence of letters between Mr Gordhan and Mr Howa, with both writing to each other after the meeting, on the same day, 24 May 2016, to record their understanding of the meeting and to follow-up. Mr Gordhan confirmed what we had discussed, that banks operate in a highly regulated environment, that here are legal impediments to the Minister of Finance (or any third party) to discussing bank-client matters, and that Oakbay had not exhausted all its legal remedies. He ended by reminding Mr Howa of the further relevant information he had agreed to send us, and that the recent attacks on the integrity of the National Treasury were neither helpful nor in the national interest (see Annexure **IM30**).

144 Mr Howa's letter on the same date (before he received the Minister's letter) stated that following "detailed discussion with several legal advisors, we are of the strong view that given the contractual rights the banks have, any legal approach may indeed be still-born." He also confirmed that the their "shareholder has resigned from all executive and non-executive roles in our group", in a reference to the role of the Gupta family and possibly Mr Duduzane Zuma. He still expected Minister Gordhan to "open the way" to "create a business environment which will promote job creation and growth", and that the closure of their accounts would create "a negative perception around foreign direct investment". (see Annexure **IM31**).

145 Soon after the meeting with Mr Howa, Mr Gordhan sought a second legal opinion from Adv Gauntlett and Pelser (see Annexure **IM32**). This legal opinion was provided to the Minister on 29 May 2016, and opinion confirmed that:

145.1 *"Banks are not legally obliged to provide Oakbay with reasons for closing Oakbay's accounts.*

145.2 *It would not be permissible for the Minister to approach the banks to request reasons for the closure of the accounts, and the banks would not be obliged to comply with the request by the Minister – even if Oakbay were to waive its right to confidentiality.*

145.3 *The regulatory system does not provide a mechanism through which the Minister may intervene at the instance of Oakbay."*

146 There were a few more letters between Mr Gordhan and Mr Howa, with Mr Howa failing to deliver on his promise to provide us with the information ("the full file of all the correspondence with the banks" as he later referred to it in one of his letters) promised at the meeting with Mr Gordhan. Mr Gordhan's founding affidavit in his application against Oakbay Investments on 14 October 2016 covers this in detail, so I will only make a few brief points.

147 Mr Gordhan's letter dated 14 July 2016 noted that Oakbay's reluctance to approach the courts may leave "*the distinct impression that Oakbay management is not doing all in its power to protect its staff from losing their jobs and further that Oakbay is concealing the real facts from being made public. You may also create the impression that you are trying to find a political solution to what is essentially a legal compliance matter.*" Mr Gordhan also noted the

information Mr Howa did make public in an interview with Carte Blanche screened on 19 June 2016 where he indicated a reason that was furnished, related to the various anti-corruption legislation. (See Annexure **IM33**).

148 Mr Howa emailed Minister Gordhan again on 19 July 2016, attaching a letter from Impala Platinum informing one of the Gupta companies (Westdawn Investments (Pty) Ltd) that they were no longer prepared to do business with them. Mr Howa persisted again for a meeting as "we had promised each other to try to find solutions which avoids job losses" (see Annexure **IM34**).

149 It was only in his letter of 25 July 2016 (in response to a further request from Mr Gordhan dated 14 July 2016) that he finally provided one letter from each of the four major banks (Annexure **IM35**) they had received:

149.1 Barclays (ABSA) notifying TNA Media in a letter dated 18 December 2015 of their intention to close their account by 16 February 2016;

149.2 First National Bank informing them via a letter dated 1 April 2016 from Norton Rose Fulbright informing them that their accounts would be terminated on 31 May 2016;

149.3 Nedbank informing them in a letter dated 7 April 2016 that their accounts would be terminated within 30 days (i.e. by 7 May 2016), and indicated it was due to their "…view that any continued relationship with Oakbay Investments (Pty) Ltd may create material business risks that could pose significant reputational risk to Nedbank…"; and

149.4 Standard Bank informed them in a letter dated 13 April 2026 that their accounts would be closed on 6 June 2016. (Note: An earlier letter dated 6 April 2016 from Standard Bank serving notice of termination was not included, but its existence was confirmed later by Ms Ronica Ragavan's in her filing notice[78].)

150 These four letters did not provide reasons or alert the Gupta businesses on any suspicious transaction records that they may have submitted to the relevant authorities, probably because this is forbidden in terms of the FIC Act. Most banks provided no reasons in these letters, except for Nedbank, which provided a very general reason related to reputational risk. Mr Howa had previously referred to another letter from Standard Bank in his Carte Blanche interview, which indicated compliance with general anti-corruption legislation. But Mr Howa was still not providing us with "the full file of all the correspondence with the banks" which he had promised, even in his last letter dated 9 September 2016. He continued promising he was *"very happy to share with"* us his correspondence, which *"makes for interesting reading"*, but would do so when he met the Minister again, where he would be *"…happy to … show you my file and inform you of my various meetings and telephone calls"*.

151 This engagement with Mr Howa had reached a dead-end, and Mr Gordhan sought further legal advice, and as noted further below, launched the 14 October 2016 declaratory order court application.

---

78 Ms Ronica Ragavan's filing notice affidavit dated 20 January 2017 in the matter Minister of Finance vs Oakbay Investments (Pty) Ltd and others.

MR ZWANE BATS FOR THE GUPTAS

Mr Zwane continues with haste on his 'investigation'

152 Mr Zwane moved with remarkable haste after the 21 April 2016 post-Cabinet media briefing, to proceed with his "engagement" with the banks. From the affidavits supplied by the four major banks to the Commission, it appears that Mr Zwane's advisor, Adv Zarina Kellerman, emailed the offices of the CEOs of ABSA and FirstRand Bank, on 22 April 2016 at 11:44am and 1:57pm respectively, inviting them to a meeting on 25 April 2016 with the IMC to *"look into certain allegations made against certain financial institutions"*. Since Adv Kellerman was not able to respond to their queries on the meeting, ABSA and FirstRand both declined attending the 25 April 2016 meeting.

153 Banks were puzzled by this process, and why they were contacted by Mr Zwane's office, and wanted more details from the regulators and Treasury. Some asked whether Minister Gordhan would be present at their meeting with the Ministerial Task Team. They queried why none of the regulators were involved. I was aware of some their concerns at the time, as they contacted the regulators or me directly, but only became aware of all their correspondence with the Ministerial Task Team much later in the year, when the banks filed their affidavits in the Oakbay declaratory court application that I deal with later in this statement.

154 We see from the evidence of the banks that Adv Kellerman then sent a new invitation letter again to ABSA and FirstRand on 4 May 2016, but now also to Standard Band and Nedbank, requesting them to attend a meeting of the "IMC"

the following day. The meetings appear to be set for 30 mins each, as Nedbank invitation was for 12:00, FirstRand at 12:30 and ABSA at 13:00. Both ABSA and FirstRand again declined to attend the meeting. Standard Bank attended the meeting on 5 May 2016 and Nedbank the following day 6 May 2016.

155 According to the statement of Mr Ian Sinton from Standard Bank dated 13 August 2018 submitted to the Commission, Mr Zwane sought to secure a favourable outcome for the Guptas by using political and executive power. He states further that Mr Zwane accused Standard Bank of colluding with 'white monopoly capital', and Mr Zwane's 'reminder' to Standard Bank that it was operating in terms of a banking license granted by Government. These were similar to the allegations made in the PowerPoint slides submitted to the ANC by Oakbay CEO Mr Howa. As noted and attached as an Annexure in Mr Sinton's statement, Standard Bank sent a letter to Mr Zwane and Ms Oliphant after their meeting, to formally record their response to the questions that they were asked, as they had also done after their meeting with the ANC a few weeks earlier.[79]

156 To the best of my knowledge, no report of the two meetings with banks, or any other meetings of the "IMC", nor the questions that were to be asked of banks, were provided to Mr Gordhan or Treasury by Mr Zwane or his secretariat. No list of all the meetings that took place, nor of the minutes of each such meeting, nor the documents submitted, were ever provided to Mr Gordhan. Nor did Mr Zwane, nor any of the members of his Task Team or his secretariat, ever consult with the Minister of Finance or National Treasury to analyse the interviews with the

[79] See https://www.timeslive.co.za/news/south-africa/2018-09-17-state-capture-inquiry-what-was-mzwanele-manyi-doing-at-a-standard-bank-meeting/

banks, or on the relevant laws. I would have known had Mr Zwane provided any documents to Minister Gordhan or sought to consult him, as Minister Gordhan would have requested me to comment, as the responsible official in the National Treasury.

157 It is clear from the correspondence submitted by the banks to the Commission, that Mr Zwane showed no regard, or understanding, of our anti-money laundering legislation and the compliance responsibilities of the banks in the area of financial crime. It is shocking that he even went as far as threatening to have the government remove one of the bank's licence, which in my view would constitute an act of economic sabotage given the consequences not only of a bank failure, but would have had dire consequences on the economy as a whole given that all four banks are classified as SIFIs (systemically important financial institutions) following the 2008 global financial crisis – so the failure of even one of these four banks would spread to the entire banking system, and adversely impact the economy as a whole. Fortunately, no bank seemed to have been intimidated by this threat, as they would have been keenly aware of the legal limits of Mr Zwane's power, and that only the banking regulator at the Reserve Bank could possibly withdraw their banking license. No responsible bank regulator would do so, as it would spark the systemic crisis I refer to above.

158 Curiously, at this meeting between Mr Zwane and Standard Bank, Mr Mzwanele Manyi was also present. According to Mr Sinton, in paragraph 26 of his affidavit, Mr Manyi said he was there in his capacity as a Ministerial advisor. I do not know if he was present at the meeting with Nedbank, but according to their affidavit, when they queried the names of the officials who attended their meeting with Mr

Zwane, Adv Kellerman indicated that Mr Mzwanele Manyi and Mr Sandile Nene had attended and referred to both of them as advisors to Minister Muthambi (refer to email dated 9 May 2016 in the affidavit of Mr Brown). (Mr Brown notes that contrary to the email response of Adv Kellerman, Mr Manyi and both the Ministers of Labour and Communications did not attend to the best of his knowledge). But the key point to note is that Mr Manyi's presence at IMC meetings was on the basis that he was an advisor to the Minister of Communications, but he later claimed that he had attended as a "part-time" advisor to Mr Zwane.[80] He was also a regular ANN7 political commentator where he was notable for his defence of the Gupta family and their activities. He was also actively involved with the BBC and PPF in wanting to delay the FICA Bill, as I outline below. Mr Manyi was certainly not an "independent" participant to assess the banks closing the account of the Gupta businesses – he was in fact both a player and a referee.

159 Needless to say, given our experience with the advisors of Mr van Rooyen when he came to the National Treasury, I was sceptical about the role of the advisors of Ministers Zwane and Muthambi, and suspected that they may have been placed there by the Gupta family, including to participate in the task team.

Zwane Task Team report to Cabinet June-July 2016

160 Mr Zwane attempted to present the report of his Task Team at the 22 June 2016 Cabinet meeting (as I was informed by Mr Gordhan). This surprised Mr Gordhan who was present at this meeting, as it was not on the Cabinet agenda, and again, no Cabinet memorandum was circulated beforehand via the normal two-week

[80] Confirmed in statement by Mr Sinton to the Commission, 13 August 2018, para 26.

Cabinet process. Instead, Mr Zwane distributed his report at the Cabinet meeting, once again bypassing the normal Cabinet process. Mr Gordhan therefore saw the memorandum for the first time at that Cabinet meeting, despite being a member of the Ministerial task team.

161 President Zuma was apparently not present at the meeting when Mr Zwane's report was discussed. Cabinet rejected his report, which was officially withdrawn for further refinement and consultation. Mr Zwane was directed to rework the memorandum, and to ensure agreement of all three Ministers in the Task Team first, and then to brief the Deputy President and President, before submitting to Cabinet again. There was no reference to this matter in the post-Cabinet statement published on 23 June 2016.

162 Minister Zwane ignored this Cabinet decision and proceeded to again present his memorandum at the very next Cabinet meeting on 6 July 2016, where President Zuma was present. He did so without engaging Minister Gordhan (who did not even see the report), or inviting him to any briefing with the Deputy President and President before submitting. Minister Gordhan was also not present at this Cabinet meeting. It is also noteworthy that again, this Cabinet memorandum did not go through the normal two-week process of consultation, as the Ministry did not receive the memorandum before that Cabinet meeting. I suspect it must have been circulated at the meeting only. It did not feature on the previous week's ESEID Cabinet committee either, which both Mr Gordhan and Mr Jonas apparently did not attend. I believe this matter was also not listed on the agenda circulated for the Cabinet meeting of 6 July 2016. In fact, it can be concluded that all three times that Cabinet discussed this particular matter, the

standard two-week Cabinet process was not followed, was not listed on the agenda circulated before each Cabinet meeting, and where there was a memorandum or document, it was only circulated at the Cabinet meeting itself. To this day, neither Mr Gordhan nor the Treasury has seen this memorandum. Treasury only became aware later from the Cabinet minute that there was a Cabinet memorandum circulated at the meeting, referenced as Cabinet memorandum 1 of 2016, dated 29 June 2016, file number IMC/01, Department of Mineral Resources.

163 We learned later that Cabinet approved almost all the far-reaching recommendations proposed in this Cabinet memorandum. For some reason, these recommendations were not made public at the post-Cabinet press statement released on 8 July 2016, which merely stated:

> *"Cabinet received a report from the Ministers of Mineral Resources, Labour and Finance following their constructive engagement with stakeholders in the banking industry. The outcome of this report will be communicated in due course."*[81]

164 I do not know why the media statement suggested that no Cabinet decision was made after considering the "report". Neither was the "outcome" of the report ever communicated to the public via a future Cabinet communication. This was similar to the nuclear deal decision on 9 December 2015, hours before Mr Nene was fired. That decision was also concealed from the public and kept a secret. There was no formal Cabinet press statement ever made on this Cabinet decision as

[81] https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-6-july-2016

far as I am aware – indeed, as I indicate below, President Zuma seems to have even denied there was any Cabinet decision taken, stating in reply to a parliamentary question that the Ministerial team merely reported back to Cabinet on the "constructive engagement" that they were requested to "open".

165 I recommend that the Commission requests the Cabinet memorandum (Cabinet Memorandum 1 of 2016, dated 29 June 2016: Department of Mineral Resources) be declassified and made available to the Commission, together with the withdrawn memorandum circulated at the 22 June 2016, as well as the Cabinet minutes of the 6 July 2016 and 22 June 2016 meetings. I believe that these minutes and memoranda will prove quite decisively to what extent Cabinet was manipulated to do the bidding of the Gupta family, as I suspect that at least a few members of the Cabinet probably expressed their reservations with supporting the Gupta family and their businesses. However, it is my view that President Zuma and Mr Zwane wanted to record a certain outcome from Cabinet, as recommended by Mr Zwane's report or memorandum, so they deliberately preferred an ambiguity in the Cabinet outcome, which they could use to act against those not doing the bidding of the Gupta family – it is a good example of plausible deniability when such matters were exposed in the media.

166 I recall that we expected Mr Zwane to make damning findings against the major banks who had closed the Gupta accounts, given the way he ran the task team and his role in supporting the Gupta family. However, we were still shocked when we learnt how far the Cabinet decision actually went to support the Gupta family, as it apparently even called for a judicial commission of inquiry against the Treasury and SA Reserve Bank.

167 We learned that Cabinet approved that the three Ministers intervene to further assist the workers affected by the action of the banks, which now increased to 16 000 (from 7 500 and 4 500) workers, and requested the Minister of Finance to ensure the transformation of the banking sector, and to review many aspects of the financial sector reform process, including:

167.1 *Establishing a banking tribunal system to assist aggrieved customers or expand the banking Ombud;*

167.2 *Reviewing the FICA Bill to strengthen reporting and addressing the concerns related to unreasonable practices against "Politically Exposed Persons" (PEPs);*

167.3 *Consider the existing provisions for clearing banks with a view to allowing more banks to participate;*

167.4 *Investigating possible collusion by banks in closing accounts of companies and individuals;*

167.5 *Fast tracking of the process to transform the Postbank into a state bank; and*

167.6 *Requesting the JCPS Cluster to review the separation of the function of financial intelligence from civilian intelligence.*

168 Despite Mr Zwane's memorandum apparently recommending that a judicial inquiry be established against the Treasury, SA Reserve Bank and banks that closed the Gupta accounts, Cabinet did not adopt this specific proposal, for technical reasons. Mr Zwane seemed to suggest later in his 1 September media

statement (outlined below) that though Cabinet supported such an inquiry, it could not make such a decision because the power to appoint a judicial inquiry resides solely with the President and not Cabinet.

169 The above decisions by Cabinet did not make any sense to me from a policy or supervisory perspective, and this mattered to me, given that I was the ultimate responsible official in Treasury who would have to process and prepare the legislation and implementation plans for these decisions, for the consideration of the Director-General, Minister, Cabinet and Parliament for approval. There was already an Ombud system in place for the financial sector for more than a decade. The memorandum also required us to investigate the decisions that banks took to close certain client accounts (a power Government did not have) and to review the bank licensing process, to make it easier for others to also get a bank licence. It required us to amend the PIP-related clauses yet again.

170 The Cabinet decision effectively required the Minister of Finance to reverse some of the major reforms in the very bills (FSR and FICA Bills) that were with Parliament and no longer in the domain of the executive, having been introduced in Parliament in October 2015. The FICA Bill was before President Zuma for his assent, and any review of the PIPs concept would have required a further amendment to the FIC Act. The FSR Bill could have been amended, but this was up to Parliament to approve, and the most Treasury could have done was to propose amendments to the SCOF for its consideration.

171 Cabinet was effectively prepared to weaken the more intensive regulatory framework that we had adopted after 2011 in line with international practices in

order to (as we learned later) enable the Guptas or their associates to buy their own bank (Ubank or Habib Bank), and to do so by circumventing the rigorous process that every other applicant had to comply with. I deal with the attempt by the Guptas to buy their own bank in a later section of this affidavit. It was not clear to me how Cabinet could decide to amend the law so radically, without any research or technical report to support such changes (actually reversals) in policy. It would also mean that we would be moving in a different direction to that of the G20 and other countries, and doing so at a time when we were facing punitive sanctions at FATF. It just did not make any sense to me.

172 Ominously, Cabinet also approved Mr Zwane's proposal that the JCPS cluster should review 'the separation of the function of financial intelligence from civilian intelligence', which we interpreted to confirm the rumours we were constantly hearing that the FIC should be moved away from the Minister of Finance to a more pliant JCPS cluster Minister, where they could control any suspicious transaction record reports (e.g. on the Gupta-related transactions). There were many rumours to this effect around some of the intelligence officials in the JCPS cluster, who continually questioned why the FIC was reporting to the Minister of Finance, but neither the Minister of Finance nor Treasury were ever formally approached.

Mr Zwane goes public on "IMC" investigation

173 There was no Cabinet meeting for eight weeks after the 6 July 2016 meeting, until 31 August 2016, probably because of the local government elections that took place on 3 August 2016. So, since the post-Cabinet media statement

provided no details on the actual decision of Cabinet, it appears Mr Zwane[82] became impatient to make it public. On 1 September 2016, he issued his own statement the day after the next Cabinet meeting of 31 August 2016, not even waiting for the post-cabinet meeting that was to be held the next day (Annexure **IM36)**. He stated that Cabinet had approved the far-reaching findings of his task team. This Cabinet meeting would normally have confirmed the minutes of the previous Cabinet meeting, so would likely have confirmed the decisions of the 6 July 2016 Cabinet meeting.

174 Minister Zwane's statement contained the following alarming announcements:

174.1 That a 'judicial enquiry' would be established to probe the four major banks, to "consider allegations that certain banks acted unilaterally and allegedly in collusion, when they closed bank accounts and /or terminated relationships with Oakbay Investments". He announced that since only the President could establish a judicial commission, and not Cabinet, this recommendation of the task team was not approved by Cabinet, but that it left it to President Zuma to make this decision.

174.2 That, in addition to investigating the banks, the judicial commission would investigate the Reserve Bank and Treasury. He claimed that this was to understand the "implications of legal action against any of these entities and the potential impact that would have on the volatility of the Rand as well as the measures that could be put in place to protect the economy."

[82] https://www.news24.com/fin24/economy/full-statement-call-to-probe-banks-20160920

174.3 That the Judicial Commission would "re-consider South Africa's clearing bank provisions to allow for new banking licences to be issued and in so doing, to create a free market economy." He said that was because "evidence was also presented that these institutions (SARB and Treasury) may have placed undue pressure on banks that sought to assist the company (Oakbay) by subjecting them to unwarranted auditing processes. He stated that it is unclear why the Reserve Bank will not issue new banking licences to other banks and this would need to be given careful attention by the Judicial Commission as it did not fall within the purview of his task team, which he continued to call an IMC. He did not say who presented such evidence to the task team, as we were only aware of the two banks that had accepted his "invitation".

174.4 He also called for the establishment of a state bank, and noted that current banks "are owned by private shareholders and report to National Treasury who in turn do not need to act on information provided to it."

175 Minister Zwane's statement was replete with factual inaccuracies (e.g. contrary to what his statement stated, private shareholders do not report to the National Treasury) and demonstrated his complete lack of understanding of how banks are regulated, and how banks report and to whom (Treasury or SARB), how our anti-money laundering and anti-corruption legislation work, as well as the independence of the SARB, the role of the Treasury and the functioning of the financial regulatory system. His statement also displayed a lack of knowledge of all Cabinet decisions before he became the Minister, including the 2014 and 2015

Cabinet decisions on the FICA Bill, and the decisions made by Cabinet on the FSR Bill in 2013 and 2014 and on the twin peaks regulatory system since 2011. He did not indicate that the two bills were currently before Parliament (FSR Bill and FICA Bill), and no longer with the executive. He clearly was not aware of the major reforms that Cabinet approved in 2011 (under President Zuma) following the 2008 global financial crisis, where the regulatory system over banks became so much more intrusive and intensive. I am not sure if he knew, or cared, that his actions could cause financial and economic instability, and that it was in the public interest to strengthen our anti-money laundering system and to avoid sanctions from overseas regulators if we did not update our system.

176 Mr Gordhan took no part in the entire task team process, after giving advice to Minister Zwane that it was not legal for government to interfere in bank-client relationships. Indeed, he did not even get minutes or reports after task team meetings, nor receive any other documentation beyond a few invitations to meetings – Mr Zwane clearly was not unhappy that he did not attend – he did not try at all to get Mr Gordhan to attend, or to refer his non-attendance to President Zuma. Yet the 1 September 2016 media statement claimed that the task team (including Mr Gordhan) had agreed to the recommendations proposed in Mr Zwane's Cabinet memorandum, and whose recommendations he claimed were approved by Cabinet, including that a judicial inquiry be established into the closure of the bank accounts of several Gupta companies by the major commercial banks in South Africa.

177 Mr Zwane's statement was unexpectedly slapped down within 24 hours by the Presidency, which issued a statement on 2 September 2016 distancing itself and

Cabinet from Zwane's statement. The Presidency described the contents of Zwane's statement as "unfortunate", "inconvenient" and cause for "confusion", and reiterated to "domestic and international investors", Government's unwavering commitment to the letter and spirit of the country's Constitution as well as [to] the sound fiscal and economic fundamentals that underpin our economy – Annexure **IM37**[83].

178 However, the Presidency did not comment on what exactly Cabinet had decided on the report of the task team, as reflected in the Cabinet minute for the 6 July 2016 meeting. Mr Zwane[84] is reported to say that the task team report was also discussed at the 31 August 2016 Cabinet meeting and would likely have confirmed the 6 July 2016 Cabinet minute if normal practice for such meetings was followed. The Cabinet minute of the 31 August 2016 meeting does not reflect any change or correction to this decision. The Presidency therefore did not deny the content of Mr Zwane's statements on what recommendations of the task team Cabinet had in fact approved. Neither did the statement indicate that Cabinet had decided to request the State Security Agency to investigate the appearance in the media of Mr Zwane's cabinet memo earlier on that day, and to report to Cabinet on this security breach.

179 The post-Cabinet media conference on the same day as the statement of the Presidency on 2 September 2016 provided no further detail in its media statement on any decisions related to the report of the Ministerial Task Team. Indeed, to this day, I am not aware that the decisions of Cabinet on the Task

[83] www.thepresidency.gov.za/content/statement-minister-mineral-resources-not-government-position
[84] https://youtu.be/b7fb9Ys9oYI Minister Zwane interviewed on SABC News on 1 or 2 Sept 2016

Team report at the 6 July 2016 meeting were ever made public, or rescinded or corrected, and neither has there been any monitoring as to why it was not implemented if it was approved.

To and fro following Mr Zwane's Press Statement

180 In the days following the 2 September 2016 statement by the Presidency, Minister Zwane and President Zuma made many statements that even cast doubt on what decision Cabinet actually made, and even whether it made any decision at all, and why Minister Zwane contradicted President Zuma on making his statement on behalf of the Ministerial task team or not. Eventually, on 23 November 2016, President Zuma effectively confirmed in Parliament that Mr Zwane's 1 September 2016 media statement was in fact the Cabinet decision. So, in effect, the Presidency's statement of 2 September 2016 was merely saying that Mr Zwane had no mandate to speak for Cabinet, but was silent on the veracity of his statement. Indeed, I am aware that there is a formal decision, recorded in a usual Cabinet minute, that confirms that Mr Zwane's 1 September 2016 correctly reflected what Cabinet had in fact decided, as Cabinet approved 4 of the 5 recommendations of his report or memorandum. But there were a lot of statements in between these dates, as I outline below.

181 Mr Zwane's spokesperson Mr Martin Madlala was the first to respond to the two statements of 1 and 2 September 2016, admitting in a radio interview on the evening of 2 September 2016 that it was misleading to say Minister Zwane's statement comes from Cabinet, but claimed instead that it came from the task team. He did not point out that Mr Gordhan had not been part of such task team decision, so he probably meant it was the decision of Minister Zwane and

perhaps with Minister Oliphant. I am not aware of Minister Oliphant making a single public statement on her own role on the task team, or comment on any of its meetings or reports.

182 Mr Madlala went on to say in his interview with Radio 702 that the judicial inquiry into the banks was proposed because the Inter-ministerial Committee (IMC) felt the matter was important to investigate further. He is quoted in the interview as saying "The judicial commission will have some extended powers to investigate that the IMC (inter-ministerial committee) doesn't have necessarily. And to extend the investigation will produce some additional results that will be beneficial to the country."[85]

183 The following day, ANC spokesperson, Mr Zizi Kodwa, issued a statement condemning the ill-discipline of Mr Zwane, calling his behaviour *"outrageous, appalling and shocking"*. It went on *"This type of ill-discipline has brought the name of government into disrepute. We call on President Zuma to discipline Minister Zwane because [it is] this kind of reckless and careless statement that sends wrong signals about our cabinet".* He called on President Jacob Zuma to discipline Mr Zwane. - *"The action must be a lesson that no one again must make this public statement unmandated which has got a negative impact both on the economy and the perceptions of national leadership."*[86] COSATU also called on President Zuma to discipline Mr Zwane.[87]

[85] www.702.co.za/articles/16325/it-was-imc-and-not-cabinet-pushing-for-banking-inquiry-zwane-s-spokesperson
[86] https://www.news24.com/news24/southafrica/news/zwane-statement-reckless-anc-20160903
[87] https://ewn.co.za/2016/09/03/ANC-calls-on-Jacob-Zuma-to-reprimand-Mosebenzi-Zwane

184 Yet Mr Zwane continued to defend his actions when he was forced to respond in Parliament to an oral question (no 205) on 7 September 2016 from MP David Maynier, on whether he would be resigning. I find it difficult to comprehend Mr Zwane's reasoning in his verbal response, which video is available for viewing (refer to the footnote), but media articles quote him as follows:

> *"But there is a separation of powers and this matter – whether I resign or not – the matter belongs to Cabinet. As a result, the honorouble Maynier cannot ask me whether I'll resign or not."*[88]

185 He went on to state that Cabinet was dealing with the matter between the banks and the Gupta family, and referred to such closures of bank accounts as abuse by the banks. He stated *"Since that incident (the closure of the Guptas' bank accounts), many have come forward saying they've 'suffered' at the hand of banks. Many South Africans have been subjected to this kind of abuse."*

186 The first public response from President Zuma himself that I am aware of after the Presidency's 2 September 2016 statement was on 20 September 2016, in response to a parliamentary question from Hon David Maynier on (NW1806). He stated:

> *" The statement issued by the Minister of Mineral Resources, Mr Mosebenzi Zwane on 1 September 2016, on the work of the task team established to consider the implications of the decisions of certain banks and audit firms to close down the accounts and withdraw audit services from the company*

[88] https://mg.co.za/article/2016-09-07-mosebenzi-zwane-to-parliament-i-wont-resign-as-mineral-resources-minister/

named Oakbay Investments, was issued in his personal capacity and not on behalf of the task team or Cabinet."

I reassured the public, the banking sector as well as domestic and international investors of Government's unwavering commitment to the letter and spirit of the country's Constitution as well as in the sound fiscal and economic fundamentals that underpin our economy.

I also informed parliament on 13 September that I was engaging Minister Zwane regarding his statement."

I found it interesting that President Zuma saw the need to assure investors about Government's "unwavering commitment" to both the Constitution and sound fiscal and economic policy, given that President Zuma would have known how far-reaching the actual Cabinet decision was, yet as the head of the national executive he allowed Cabinet to adopt a resolution that was blatantly unlawful and unconstitutional, and would have undermined sound fiscal and economic management and bank regulation in the country..

187 Yet the very next day 21 September 2016, Mr Zwane responded in a written reply to another parliamentary question by MP David Maynier (no 1892), contradicting President Zuma and effectively not only speaking again on behalf of Cabinet, but pointing out that it had adopted 4 of the 5 proposals of the "IMC", and that he had issued his statement on behalf of the task team. He not only confirmed that Cabinet had taken "resolutions" on this matter at its 6 July 2016 and 31 August 2016 meetings, but went even further to state:

> *" The IMC made 5 recommendations to Cabinet, 4 of the recommendations were approved by Cabinet and 1 was referred to the President for further consideration as it was not within the purview of Cabinet to take a decision on the matter."*

188 He also stated that he was *"not speaking in his personal capacity but in his capacity as Chairperson of the IMC".* (See Annexure **IM38**). Interestingly, he also pointed out that *"On 13 April 2016, Cabinet established an IMC to consider allegations that certain banks and other financial institutions acted unilaterally and allegedly in collusion, when they closed bank accounts and/or terminated contractual relationships with Oakbay Investments."* In effect, he was saying that this process was not the "*constructive engagement*" conveyed in the post-Cabinet media statement of 21 April 2016, but "to consider allegations" against banks of acting "unilaterally" and in "collusion". It should be noted that the actual Cabinet minute does not use words like "collusion", or for that matter "unilaterally".

189 President Zuma responded again in public on 23 November 2016, to a parliamentary question from MP Bantu Holomisa. Mr Holomisa asked whether President Zuma "*has applied his mind to the proposal of the Inter-Ministerial Committee and what his decision was in this regard".* President Zuma responded by stating that Cabinet had appointed the three Ministers "*to open a constructive engagement with the banks on the matter of the closure of bank accounts."* Interestingly, he did not use the word "investigation". He went on to say that *"The team reported back to Cabinet. No other mandate was given to this team of Ministers. As we have stated before, the statement released by Minister Zwane*

does not represent the views of government and Cabinet. I reprimanded the Minister for the remarks and he apologised". This part of his response was also provided to Parliament in writing. If anything, this response suggests that perhaps there was no Cabinet decision taken, and that all Cabinet had done was get a report from the Ministerial Task Team. -Annexure **IM39**[89].

190 When pressed further by Mr Holomisa through a follow-up oral question, on the status of the five recommendations that Minister Zwane had referred to in his 21 September 2016 parliamentary reply, President Zuma effectively contradicted his initial written reply, as he confirmed (by not refuting) that four of the five recommendations of the Zwane task team were approved by Cabinet, and that the remaining recommendation on a judicial commission of inquiry was under consideration by President Zuma. In effect, President Zuma was suggesting that Mr Zwane's 1 September 2016 statement was a Cabinet decision, without explicitly saying so.

191 In response to another follow-up question from another MP, President Zuma's response was now more threatening, stating that when *"... a number of banks act in the same way simultaneously... this adversely affects the image of SA as an investment destination as investors would be afraid to invest if banks can act "willy nilly" in a manner that suggests collusion, and the country expects Government to intervene and "deal" with the banks".* I refer the Commission to his response, as provided as an Annexure in Mr Sinton's affidavit.

[89] https://pmg.org.za/files/RNW1892-160927.docx

192 I would like to point out that neither Mr Zwane nor President Zuma, when they responded to parliamentary questions on this matter, contemplated the possibility that the Gupta family may have been transgressing anti-corruption and anti-money laundering laws, and that they needed to be investigated. It seems that President Zuma and Minister Zwane did not want to acknowledge the need for banks to comply with anti-money laundering laws of the country, and were suggesting that this was instead a form of "collusion".

193 It was clear to me as the responsible official in Treasury dealing with our anti-money laundering legislation that President Zuma and Mr Zwane were determined to weaken our anti-corruption and anti-money laundering legislation, as well as our financial regulatory framework, all of which Cabinet had previously approved. All this to serve the interests of the Gupta family and their businesses.

Role of Bell Pottinger and leaking of Zwane memorandum

194 The intrigue around the Zwane memorandum started even before his 1 September 2016 statement. The very day before or so, media reports emerged on 31 August 2016 that Mr Zwane had recommended to Cabinet that the Banks Act be reviewed to amend the process to approve bank licensing (e.g. article in Business Day[90]). More detail emerged in the media on or around 22 September 2016, when Fin24 published an article headed "EXCLUSIVE: Gupta PR firm knew about bank probe weeks before Zwane dropped bomb" by Matthew le Cordeur.[91] The article indicated that Bell Pottinger was in possession of a

[90] https://youtu.be/KSlnF1IGITE

[91] Available online at https://www.news24.com/fin24/Economy/exclusive-gupta-pr-firm-knew-about-bank-probe-weeks-before-zwane-dropped-bomb-20160922

document with the findings of the Zwane task team on 15 July 2016. A photo of the page was published in the Fin 24 article - Annexure **IM40.** This appears to me to be a page from the Cabinet memorandum that Mr Zwane may have circulated to Cabinet on 6 July 2016. So, Bell Pottinger may have had a copy of the actual Cabinet memorandum nine days after the Cabinet had approved its recommendations, or had the pages with the recommendations. The article indicated that Bell Pottinger had sent the picture of the page of a confidential document to Fin24 to prove that they had a scoop for them.

195 The Cabinet meeting of 31 August 2016 had noted the leaking of Mr Zwane's cabinet memo, and requested an investigation by the State Security Agency (SSA). I am not aware of the outcome of the investigation, and whether the SSA ever reported back to Cabinet on the source of the leak. I do not know if this refers to the Bell Pottinger leaking of the memorandum, as reported by Fin24 on 22 September 2016.

196 I believe that this Commission may be able to uncover valuable evidence if it were to request Mr Zwane, Ms Oliphant and the secretary of the task team, Ms Kellerman, as well as Mr Manyi and other officials who attended the task team meetings, to indicate whether Bell Pottinger or Mr Howa were involved in the drafting of the report of the task team and all its reports (including the Cabinet memorandum of 22 June and 6 July 2016), and any meetings and correspondence with Bell Pottinger. They should also provide the minutes of all meetings of the task team, including with the banks and all others they may have interviewed or met with, including the Gupta businesses or family. In particular,

who made the various recommendations including the decision to launch a judicial inquiry against the Treasury, Reserve Bank and banks.

Mr Gordhan exposes suspicious Gupta activities

197 Before and after the Cabinet meeting of 6 July 2016 that adopted Mr Zwane's 'findings', the Treasury leadership was under siege, with constant rumours that Mr Gordhan was about to be fired. We faced continual and growing pressure from President Zuma, the JCPS Cluster Ministers, Minister Zwane and other Ministers, who were all working to actively undermine and weaken the Treasury, probably because we were (rightly) seen to be a barrier to the nefarious plans of the Gupta family. The HAWKS targeted Mr Gordhan, even after he responded to their 27 questions on 18 May 2016, requesting him to present himself at their offices on 25 August 2016 to submit a warning statement to them.

198 Key state-owned entities were 'brave' enough to openly attack Mr Gordhan and Treasury in public statements (e.g. DENEL, see Annexure **IM41**). The Office of the Chief Procurement Officer encountered significant resistance in 2016 from the SABC, TRANSNET, SASSA and ESKOM after requesting information related to preliminary investigations it wanted to conduct into certain tenders and transactions. Many Ministers responsible for these entities also used bureaucratic arguments to prevent the Treasury from receiving such information, contrary to the PFMA. When Eskom delayed for over 5 months in sending information on coal contracts, Treasury was forced to issue a media statement dated 29 August 2016 to respond to misleading statements, noting:

"media reports of Tegeta "warning" and threatening to interdict the department should it release a report into its investigation of Eskom's coal contracts[92]*.*

National Treasury has also noted with concern the statement issued by Eskom on Sunday 28 August 2016 suggesting that it has been co-operating with the process of reviews of the coal contracts. The National Treasury would like to categorically state that, its efforts have met resistance". [93]

199 After the Cabinet decision at the 6 July 2016 meeting, and the continuing correspondence with Mr Howa, Minister Gordhan sought further legal advice in early August 2016 to seek a declaratory order on the limits of his power to intervene in decisions taken by banks on the closure of the Gupta accounts. It was the sole responsibility of the Minister of Finance to protect the integrity of our financial regulatory system, given the significant financial and economic implications if our anti-money laundering system did not meet basic international standards.

200 Mr Gordhan wrote to all the regulators on 28 July 2016, requesting that they advise him, within the framework of their legal powers, on whether or not registered banks have reported to them on issues related to Mr Howa's public statements on the Oakbay group of companies. The Minister stated that he was considering seeking a definitive court ruling on whether the Minister of Finance has the power to intervene in their case - Annexure **IM42.**

---

[92]www.treasury.gov.za/comm_media/press/2016/2016082901%20%20Statement%20on%20Eskom%20Contracts.pdf

[93]http://www.treasury.gov.za/comm_media/press/2016/2016082901%20-%20Statement%20on%20Eskom%20Contracts.pdf

201 Mr Murray Michell responded on 1 August 2016 that given Minister Gordhan's "intention to approach a court for a definitive ruling on certain questions of law, … I have decided to issue a certificate under section 39 of the Act, relating to possible reports that may have been made in relation to the entities mentioned in your letter - Annexure **IM43**. All these documents formed part of the documentation for the court action that Mr Gordhan later launched.

202 The hostile climate against National Treasury got even more hostile, when on 11 October 2016, the then NDPP, Adv Shaun Abrahams, announced that the NPA was issuing a formal summons[94] to Minister Gordhan (together with Mr Ivan Pillay and Mr Oupa Magashula) related to the payment of a pension to Mr Pillay. This development compounded our already tenuous fiscal position (we were fighting an investment downgrade). After a high-profile press conference to announce the pending summons for criminal charges, Adv Abrahams, in a stunning reversal, withdrew[95] the summons on 31 October 2016. I will not deal with this matter in my statement.

203 On or around 14 October 2016, Mr Gordhan served papers to launch the court application[96] seeking 'declaratory relief to confirm the limitations of his powers (and of that of any other member of Cabinet) to intervene in decisions taken by commercial banks to close the accounts of Gupta-related companies'.

---

[94] https://www.reuters.com/article/us-safrica-gordhan-idUSKCN12B0QV

[95] https://www.biznews.com/leadership/2016/10/31/shaun-abrahams-gordhan

[96] http://www.treasury.gov.za/comm_media/press/2016/2016101601 - Notice of Motion and Founding Affidavit.pdf

204 As detailed in Minister Gordhan's statement to this Commission, the declaratory relief application included a certificate issued by the Financial Intelligence Centre certifying that it had received 72 Suspicious Transaction Reports, totalling R6.8 billion, from the various banks relating to suspicious account activity and transactions conducted using the Gupta bank accounts that had been closed. The list of 72 suspicious transactions was the first official and public report from any government agency that indicated that there were possibly questionable or unusual transactions related to the Gupta banking accounts. This, despite the fact that the FIC itself did not provide any detail on the Suspicious Transaction Reports (STRs) listed, and in effect was only confirming that some banks had reported transactions that they had considered to be suspicious or unusual, and for the FIC to consider for further investigation. The certificate was, undoubtedly, the first hard and official evidence confirming that there was a clear basis for the relevant authorities to investigate these transactions related to the Gupta family and their businesses.

205 Coincidentally, the former Public Protector Thuli Madonsela announced her intention to release her 'State of Capture' report on 14 October 2016, which would be her last day in office. The publication of the report was delayed due to objections by President Zuma and Minister Des van Rooyen; however, the report was finally made public on 2 November 2016.

206 Minister Gordhan's application attracted even greater hostility towards him and the National Treasury from those associated with the Gupta family. I believe this was because of the realisation that the court challenge could prompt a discovery process forcing the Guptas to provide evidence to explain their ongoing pressure

on Minister Gordhan to intervene on their behalf against the banks. A few months later, around midnight of 31 March 2017, just after the case was heard, Minister Gordhan was dismissed (together with former Deputy Minister of Finance Mcebisi Jonas).

207 I will not deal with the details of the declaratory relief application, but believe that the founding affidavit by Minister Gordhan sets out the background that I have touched on in this section of my statement. However, the affidavits submitted by Oakbay's Ronica Ragavan, and the banks, are instructive. Mr Howa did not file any substantive affidavit himself, as (probably coincidentally), he resigned from Oakbay about three days after Mr Gordhan filed his application, citing health issues and on medical advice[97]. Ms Ragavan acted in his place as CEO in the days after his resignation.

FICA BILL ATTACKED AND REFERRED BACK TO PARLIAMENT

FICA Bill: Intervention by the Black Business Council and allies

208 Whilst Oakbay and the Zwane initiative were in process, we were still awaiting the response of President Zuma to enact the FICA Bill into law. As noted above, we had heard nothing from the Presidency since the Bill was submitted to his office by Parliament at the end of May or early June 2016. We first heard from media reports in early September 2016 that President Zuma was considering objections to the FICA Bill received from the Progressive Professionals Forum (PPF) and the Black Business Council (BBC). These organisations had neither

[97] https://techcentral.co.za/gupta-boss-nazeem-howa-quits/69277/

contacted the Minister of Finance nor National Treasury before submitting their objection to President Zuma, nor did they participate in any of the parliamentary or governmental consultation processes on the FICA Bill. A Bloomberg article dated 5 September 2016 reported:

> *"South African President Jacob Zuma is considering an objection to changes to the country's laws that will compel banks to more closely scrutinise their customers and their transactions. The challenge to the Financial Intelligence Centre Amendment Bill is being brought by the Progressive Professionals Forum, which "petitioned the president not to sign the bill, saying it has constitutional defects", Zuma's spokesman, Bongani Ngqulunga, said by phone on Monday. "He is considering those objections, whether they have merit or not. There is nothing unusual about the process."* [98]

209 On the same day, the Business Report published the following:

> *"The PPF is concerned the bill violates the human rights of people who are employed by the government, or family of state employees, because this makes them a prominent or influential person that immediately renders them a "suspect", PPF Secretary General Siphile Buthelezi, said by phone. "We are not saying the whole bill is not welcomed,"*[99] he said.

[98] https://www.iol.co.za/business-report/economy/zuma-weighs-objection-to-law-on-bank-transactions-2064475

[99] https://www.iol.co.za/business-report/economy/zuma-weighs-objection-to-law-on-bank-transactions-2064475

210 Two weeks later, we learned from media reports of a meeting between President Zuma and the BBC held on 9 September 2016.[100] According to the article, the BBC met with President Zuma to show him support after the poor showing of the ANC in the local government elections on 3 August 2016. However, they also talked of lobbying President Zuma to not sign the FICA Bill into law. This they did before and after this meeting.

211 Mr Mzwanele Manyi led the charge against the Bill for both organisations. He was the chair of the PPF and a member of the executive of the BBC at the time. He was also a regular analyst on ANN7, together with Mr Tshepo Kgadima and other supposed "political commentators". Mr Manyi was known to be a strong defender of the Gupta family, and also had, via his Decolonisation Foundation, continually laying charges during August-October 2016 with the Hawks, or complaints to the current Public Protector, against former Ministers of Finance and officials of the Treasury, like Mr Trevor Manuel[101], Mr Gordhan[102] and Mr Kenneth Brown[103].

212 It is important to note that not once did President Zuma query or express any concerns with the Bill to the Minister of Finance or seek further information from him. President Zuma did not provide Treasury with the submissions objecting to the Bill to seek our response to such objections. Adv Van Schoor inquired from the Presidency's state law advisor whether the Presidency had received any

---

100 https://www.vocfm.co.za/black-business-pleads-with-zuma-to-stay/

101 https://businesstech.co.za/news/trending/140849/hawks-take-aim-former-finance-minister-over-r1-billion-contract-report/

102 https://sandtonchronicle.co.za/Inn/206386/manyi-opens-case-against-manuel-nene-and-gordhan

103 http://www.treasury.gov.za/comm_media/press/2016/20161006 MEDIA STATEMENT ALLEGATIONS AGAINST CPO.pdf

submissions to President Zuma on the Bill, and whether we could be furnished with copies if there were any. Whilst the Presidency's state law advisor informally confirmed that some submissions had been received, they were unable to provide them to Treasury, which I found odd, as they would normally have done so. It was also surprising because I expected that any objection or input into any Bill would and should be made available to the public, given the constitutional principle of transparency. The Presidency's state law advisors appeared embarrassed that they could not provide us with these submissions. We had always worked well with them, and continue to do so today.

213 Given the above reports around the FICA Bill, and the unexplained delay in signing and communicating with us about any concerns, the Director-General of the National Treasury, Lungisa Fuzile, wrote to the Director-General of the Presidency in a letter dated 22 September 2016, annexed as Annexure **IM44**, expressing his concern regarding the delay, and pointing out that the Bill needed to be signed into law as soon as possible, as we still needed to prepare to have necessary regulations in place, all by the February 2017 FATF Plenary. Although he did not say it explicitly in his letter, we were also concerned that even if President Zuma had signed the Bill in September 2016, we still needed at least two months to consult the public and then revise and finalise the necessary regulations, even if they were ready for publication on the day the President enacted the law. Hence, we were unlikely to have the necessary provisions and regulations in force by the FATF meeting in February 2017, even if President Zuma had signed the Bill into law in September 2016.

214 The delay in signing the FICA Bill into law was by now widely reported on. For example, the City Press ran an editorial on 25 September 2016 posing the question "What is the real objection to FICA bill?" It noted that the main reasons appeared to be the BBC and PPF objections. It went on *"but these concerns, which the President is taking his own time to consider, appear spurious and mysterious*", and noted that the objection was "*to a specific group of people being singled out to have their accounts monitored. If there is nothing illegal happening in those accounts, what is the problem?"* The editorial also dismissed the argument that the Bill transferred "*...judicial authority from law enforcement agencies and the independent judiciary into the hands of banking and financial institutions*". The editorial correctly noted "*But the banks only have a duty to report suspicious transactions and to satisfy themselves before authorising such transactions*", and that the "*...outcry about superpowers for the banks is overstated, as they will continue to do what they are doing anyway, except to pay more attention to a defined group of individuals. We are either committed to the fight against corruption or not.*" (City Press editorial 25 September 2016) [104]

215 In early November 2016, the media reported that the Council for the Advancement of the South African Constitution (CASAC) had served legal notice around 19 September 2016 for President Zuma to finalise his response to the FICA Bill within 30 days in terms of his powers in the Constitution. When the 30-day period expired on 31 October 2016, CASAC approached the Constitutional Court for an order declaring that President Zuma had failed to perform his constitutional obligations and ordering him to either assent to and sign the Bill,

[104] https://www.news24.com/citypress/voices/editorial-what-is-the-real-objection-to-fica-bill-20160925

or, alternatively, to refer the Bill back to the National Assembly for reconsideration.[105]

216 President Zuma was also asked to respond, via a Parliamentary question from MP David Maynier, to which he responded around 8 November 2016, stating that he was considering objections received from the BBC and PPF, Annexure **IM45**. The Presidency did not make such letters of objection available to the Treasury or to Parliament or to the public. I am also not aware of any formal legal opinion that the Presidency may have secured to assess the objections.

Meeting between National Treasury and the BBC

217 I became aware sometime in November 2016 that Mr Sello Rasethaba of the BBC had approached the South African Reserve Bank (SARB) about their objection to the FICA Bill and he was referred by the SARB to my office. Mr Rasethaba and I were then in telephonic contact, resulting in an urgent and formal meeting on 15 November 2016 between the BBC leadership and Treasury (together with SARB and FIC) in Johannesburg.

218 The BBC was represented at the meeting by its then President Ms Danisa Baloyi, its Secretary-General Mr George Sebulela, Mr Sello Rasethaba and Mr Tshepo Kgadima (who arrived late, after I had made our presentation). Representatives from the Association of Black Securities and Investment Professionals (ABSIP) and the Banking Association SA (BASA) were also present. Even though ABSIP was a member of the BBC, it differed significantly from the BBC position (as

[105] https://mybroadband.co.za/forum/threads/zuma-faces-court-action-if-he-sits-on-banks-bill.843950/

noted later in Parliament on 25 January 2017). Government officials that were present included Deputy Governor Kuben Naidoo who was responsible for banking supervision at the SARB, Pieter Smit of the FIC, and Treasury officials Olano Makhubela, Dondo Mogajane, Raymond Masoga and myself.

219 The big concern they raised was on the concept of PIP, and its potential abuse by banks. We explained the rationale for the PIP concept, the FATF recommendations and processes, as well as the legislative framework in place to deal with any abuses by banks against customers. Mr Kgadima arrogantly stated with absolute certainty that the PIP clause in the Bill was unconstitutional. When I queried how he, like me, was not a legal practitioner, could say what he was saying, and whether they had a formal legal opinion to back up his opinion, they indicated they would send us a legal opinion. We also pointed out that the BBC or PPF could not override a Bill passed by Parliament, and queried why they had also not submitted comments to the SCOF when it invited public comments.

220 It should be noted that they did not send us any such legal opinion, and we only saw their "legal opinion" when they submitted a "legal" opinion to a parliamentary hearing in January 2017, done by a non-legal political analyst.

221 They also resorted to making unsubstantiated allegations of racial discrimination by the banks against black people and businesses, using their own personal experiences with their banks. Whilst we pointed out that this had little to do with the PIP concept, we invited them to provide concrete examples so we could see how such allegations could be taken up by the regulators, even though we had

to be mindful of bank secrecy limitations. We did not accept their point that only black people would be PEPs or PIPs. We pointed out that the key point to note was that the FICA Bill had been passed by Parliament, they provided no explanation for why they thought they could bypass the democratic process in Parliament and go directly to the President, and could provide no evidence or legal opinion to justify their views.

222 The most disturbing point for me during this meeting was when Mr Tshepo Kgadima confidently declared that President Zuma had decided to send the FICA Bill back to Parliament.[106] I was surprised that someone who was not in Government or the Presidency could claim to know what President Zuma would be doing, when we in Government did not. It indicated that Mr Kgadima, as a close confidant of the Gupta family (he was a regular "political" commentator on ANN7, defending the Gupta family), had such influence over President Zuma to delay the FICA Bill. I was also concerned that Mr Kgadima enjoyed the confidence of the then BBC leadership. He was not on their executive and was posing as their expert on a legal issue, as the BBC indicated that Mr Kgadima was the author of their written opinion (which they would forward to us).

223 It should be noted that neither of these organisations nor any of their members, made any submission to Parliament during the hearings for the FICA Bill in Parliament, or when the Treasury had requested public comments in 2015 before the tabling of the Bill. They did not approach Treasury or Parliament (for example, the Speaker or the Chair of SCOF), to raise their concerns. During the

[106] It was already known that Mr Kgadima had a chequered past with serious allegations made against him: https://ewn.co.za/2014/11/27/Tshepo-Kgadima-dropped-as-Petro-SA-chair

parliamentary hearings in 2015 and 2016, there were no constitutional issues raised, and no challenge against the clauses related to PIPs or warrantless searches.

President Zuma refers the Bill back to Parliament

224 Almost two weeks later, President Zuma did exactly what Mr Kgadima had told us President Zuma would be doing when we met with the BBC. President Zuma submitted a letter dated 28 November 2016 to the Speaker of the National Assembly in Parliament, referring the FICA Bill back to Parliament in terms of section 79(1) of the Constitution - Annexure **IM46**.

225 President Zuma did not alert Minister Pravin Gordhan beforehand, or seek his opinion, and did not send a copy of his letter to the Minister after sending his letter to the Speaker of Parliament. We had to obtain a copy of the letter from Parliament itself, after learning of the decision of President Zuma.

226 President Zuma's reason for referring the FICA Bill back to Parliament related to only one clause - clause 32(b) of the Bill which amended section 45B (1C) of the FIC Act dealing with warrantless searches. Contrary to the BBC's and PPF's objections, President Zuma did not raise, as his primary objection, the PIP clauses. The Presidency also did not provide Parliament or the Treasury, with any of the letters of objection it received on the Bill, or indicated on what basis President Zuma believed any clause was possibly unconstitutional.

227 The Speaker referred the letter of President Zuma to the Standing Committee on Finance (SCOF). The SCOF briefly discussed the letter of President Zuma on

7 December 2016, one of its last meetings for the year. The Senior Parliamentary legal officer advised the Committee as to what was legally expected of Parliament when the President referred a bill back to the National Assembly. The key point made by the Senior Parliamentary Legal Advisor was that the President could refer a Bill back to Parliament only on the basis of the constitutionality of any clause of concern and nothing else. After the presentation by the Parliamentary Legal Advisor, I briefed the SCOF on the challenges we faced with the coming FATF Plenary meeting in February 2017.

228 I also pointed out that the FICA Bill had been approved by Cabinet twice, once for public comment and secondly for tabling. The substance of the contested clause was essentially the same from the original bill submitted to Cabinet as far as I could recall, and it did not get amended in any material way (if at all) during the parliamentary process at SCOF nor in the NCOP. This provision had been reviewed and the Bill certified by the State Law Advisor before it went to Cabinet, and was not raised as a concern by Cabinet, nor when it was considered by Parliament. Please refer to the Parliamentary Monitoring Group record[107].

229 Early in 2017, Parliament's SCOF convened hearings on the FICA Bill in January 2017, and made minor amendments to the clause queried by President Zuma. The revised Bill was adopted by the National Assembly on 28 February 2017.[108]

230 Although we had a legal opinion from Adv Gauntlett SC, as well as the parliamentary legal opinion, both of which advised that the clause was not

[107] https://pmg.org.za/committee-meeting/23875/
[108] Public hearings were scheduled for 25 January 2017, and the committee met on this Bill again on 1, 15 and 21 February 2017.

unconstitutional, Treasury took the concerns raised by President Zuma in good faith, and tweaked the wording to accommodate such concerns. A revised FICA Bill with only one clause, to amend section 45B in the FIC Act via clause 32, was then adopted by the National Assembly on 28 February 2017 and sent to President Zuma for his assent.

231 Needless to say, we were now in hot water at FATF. The FATF Secretariat's follow-up report for the coming February 2017 Plenary meeting noted that the FATF President had cancelled a high-level visit for June 2016 "on the expectation that the FIC Amendment Bill would be enacted shortly". Considering that this expectation was not met, the Secretariat of FATF prepared a draft public statement for the consideration of the FATF Plenary, where FATF would state that it "*is deeply concerned by South Africa's continued failure to remedy the serious deficiencies identified in its second mutual evaluation report adopted in February 2009. The deficiencies relate especially to customer due diligence and record-keeping obligations of financial institutions…*", annexure **IM47**.

232 Fortunately, the SA delegation was able to persuade the February 2017 FATF Plenary to afford us a bit more time, given that SCOF had already adopted a revised Bill by then, and that the Bill was about to be voted on by the National Assembly, before going back to the President. We expressed our hope that by the next FATF Plenary in June 2017, the Bill would be enacted.

SECURITY CLUSTER INTERVENES TO AMEND FICA BILL

Security Cluster submits objections to SCOF – JANUARY 2017

233 Days before the 25 January 2017 meeting of the SCOF, the JCPS cluster suddenly, and surprisingly, formally submitted its own submission to the SCOF for its 25 January 2017 hearing, via a letter dated 23 January 2017 in the name of the Minister of Defence and Military Veterans, Nosiviwe Noluthando Mapisa-Nqakula, in her capacity as the Chair of the JCPS Committee - Annexure **IM48**.

234 The crux of their submission was that "the Bill would be inconsistent with the Constitution if signed into law in its current form".

235 Minister Gordhan and all of us from the Treasury, SARB and FIC working on the Bill, were surprised by this submission, as none of JCPS cluster Ministers had raised their newfound concern with Cabinet, nor with the responsible Minister, Mr Gordhan, nor even alert him to their letter, or intention to submit such letter to SCOF, and acted totally contrary to the way members of Cabinet ordinarily work and are expected to work. We obtained the submission from the SCOF.

236 This was an unprecedented step for any Minister, let alone the entire cluster of the Cabinet, to object to the legislature against a Bill that was previously approved by Cabinet and passed by Parliament. I am not aware of this having happened before or since, and to do so without going back to Cabinet first. This was a Bill that had been adopted by Cabinet after a series of meetings over almost a full year. Most of the JCPS cluster Ministers had attended most, if not all, the Cabinet or its committee meetings in 2014-15, and were certainly not

passive participants on the Bill. They did not take their newfound concern to Cabinet, and were now acting unilaterally to effectively reverse a Cabinet decision of which they were part.

237 At no stage at the many Cabinet or its committee meetings where the FICA Bill was considered, did any Minister object to the constitutionality of the Bill, or raise concerns regarding warrantless searches and the phasing out of the Counter-Money Laundering Advisory Council, which had not changed much during the Parliamentary process. Indeed, the only constitutional matter that had emerged on the drafting of the Bill was the clause on warrantless searches, which was guided by the judgment of the Constitutional Court in the *Auction Alliance* case. There were no constitutional objections to the PEPs or PIPs clause as I explain above. The Bill submitted to President Zuma for assent in May 2016 did not substantially differ from the original bill first submitted to Cabinet in 2014 for the clauses related to the Counter-Money Laundering Advisory Council, unlike the PEPs/PIPs clauses.

238 The JCPS Cluster letter did not have a formal written legal opinion to support its view, but instead their letter took the form of both an informal "legal" opinion although it was more of a political opinion in my view. Their letter purported to provide more detail on the concerns of President Zuma, by stating: "*The President is further concerned of the impact…would have on the rights of persons identified as foreign prominent public officials, domestic prominent influential person and family members and known associates of the abovementioned persons".* So, they were now also raising the constitutionality of the PIPs clause, despite the fact that this concept was extensively discussed,

and amended, by Cabinet. They claimed that all these clauses are discriminatory and therefore unconstitutional. They called for removing these clauses and concepts. It was also odd to me that they appeared to know more of President Zuma's concerns than the Treasury, and I wondered whether President Zuma had in fact discussed his concerns with the JCPS Ministers, when he did not do so with the responsible Minister, the Minister of Finance.

239 A further point raised in their submission is that the Constitution and national legislation give the security cluster the sole jurisdiction over all intelligence. In my non-legal view, they effectively questioned the very basis of the original FIC Act of 2001. After 16 years of the operation of the Act, they were of the view (without raising this at Cabinet in a formal memorandum) that the approach to financial intelligence was unconstitutional all these years. I believe that they wanted to take the FIC away from the executive authority of the Minister of Finance so that they in the JCPS security cluster could take control over it. Indeed the "I" in the FIC was deliberately misunderstood to be part of state-security type intelligence, rather than recognising other objectives like preventing the abuse of the banking system and maintaining the integrity of the payment system.

240 Minister Masutha emphasized his approach on the role of intelligence in the economy very directly when he told the ANC finance study group meeting on 24 January 2017 where I was present, that the security cluster was even more important that the economic cluster, as there would be no economy if the security (i.e. JCPS) cluster was not present to protect the economy. I provide more detail on the study group meeting below.

241 Indeed, this approach was also seen in the approach of the security cluster to the Border Management Authority, where the JCPS cluster was intent on fragmenting SARS and breaking up its customs and excise function, wanting to do so without any feasibility study to support their case. This had first been confirmed by the Cabinet meeting of 6 July 2016, which approved that the JCPS cluster reviews the separation of financial intelligence from civilian intelligence, following on the recommendation by Mr Zwane from his Ministerial task team investigating the closure of the Gupta banking accounts. I believe that this decision was aimed at transferring the FIC from the executive authority of the Minister of Finance to the Minister of Justice or Intelligence, to ensure that in the future, FIC information on STRs and Cash Threshold Reports (CTRs) from banks could be under their sole and full control, and to stifle any potential investigations against the Guptas and favoured politicians.

242 Their submission was also replete with "facts" that were actually false, and a simple check could easily have shown them to be not true, and every JCPS (and other) Minister would know they were not true. As an example, (in point 46), they claim that the JCPS security cluster was not consulted on the Bill, stating "*It is hence apparent that there was no consultation with institutions or persons listed as members of the Council, especially members of the Security Cluster who are seized with the detection, investigation and prosecution of money laundering and terror financing offences*". It can be verified that the JCPS cluster committee of Ministers was also invited to the Joint ESEID, JCPS and International Cooperation, Trade and Security (ICTS) Cabinet Committee on 3 December 2014, and JCPS Ministers were present at all four Cabinet meetings when the Bill was considered during 2014-15, as outlined earlier in this statement. In

addition, the National Intelligence Co-ordination Committee (NICOC) Principals were briefed on 26 September 2014, the JCPS DG cluster on 7 October 2014 before the Bill served at Cabinet.

ANC Finance Study Group intervenes to stop the Security Cluster

243 Given the letter from the JCPS cluster Ministers, which showed that there were now open differences on the FICA Bill within Cabinet, the Chairperson of SCOF, Mr Yunus Carrim, decided to convene a study group meeting of ANC SCOF members on 24 January 2017, to resolve the differences between Cabinet Ministers before the public hearing of SCOF the following day.

244 The study group is closed to the public and is a dedicated meeting of ANC MPs who are members of SCOF, where the Minister or Deputy Minister are often invited, together with any invited guests or presenters (e.g. from the department). In this instance, the JCPS cluster Ministers were invited, together with Deputy Minister Jonas and myself.

245 Ministers Mahlobo and Masutha led the JCPS cluster delegation at the ANC Study Group meeting held on 24 January 2017, accompanied by the Secretary of Defence, Dr Sam Galube, and the advisor to the Minister of Justice, Mr Prince Maluleke. Deputy Minister Jonas was present for the start of the meeting, but could not stay to the end as this meeting started quite late because of delays in the flights of the JCPS Cluster Ministers. Mr Jonas was present to hear the two Ministers make their initial presentations.

246 Mr Mahlobo admitted that he and Minister Masutha had raised issues on the Bill at Cabinet and its committee meetings in 2014 and 2015, but not on its constitutionality, as they had focused on the PEPs and PIPs issue and other issues, and not on the inspection's clause. He claimed that this was therefore a new issue for the JCPS cluster, ignoring the fact that all the Cabinet memoranda in 2014-15 had covered this clause and referred to the Constitutional Court judgment in the *Auction Alliance* case, so he could hardly claim that they were unaware of the issues related to this clause. Mr Mahlobo also made some startling allegations, not covered in their written submission. He claimed, without providing any evidence, that banks were going into clients' bank accounts illegally and covertly. He also claimed, again without providing any evidence, that the FIC was collecting information covertly, and they (i.e. he or his department or JCPS cluster) have a list on who it was that collected such information. Again, they provided no evidence, nor did they alert the Minister of Finance of such alleged abuse of power.

247 Minister Masutha then addressed the meeting, saying that they had a legal opinion, and that this matter had only come to their attention the previous week. The essence of their submission was with respect to the Constitution and on the rule of law. He admitted that they may have been "sleeping" at the time when Cabinet was considering this bill, and that they did not realize the Bill phased out the Counter-Money Laundering Advisory Council in the FIC Act. They now had four key objections to the Bill. The first was on chapter 13 (Finance) vs Chapter 11 (Security) of the Constitution on the delineation of powers. He stated that there was also the problem of the judiciary vs legislative powers and the allocation of powers and functions to financial institutions vs security institutions.

Chapter 13 of the Constitution dealt with powers and functions to financial institutions, and chapter 11 to security institutions.

248 His second key problem related to the checks and balances required by the Constitution in terms of cooperative governance relations. He wrongly claimed that the Counter Money Laundering Advisory Council had not met since 2002, and claimed it opened the Minister of Finance to a "mandamus" order, whatever he meant by this. He claimed that the bill kills the only mechanism that enabled cooperation between the financial and JCPS security clusters, and removing the Council would end the requirement to co-operate. He said something like: "*You as an economic group can think that the economy takes priority and you are more important (than the security cluster), but there will be no economy without the security cluster.*"

249 The third problem that he articulated was that the Bill effectively turned inspectors into policemen by allowing for warrantless searches.

250 Minister Masutha's comments at the meeting, like the submission, were simply incorrect, and deliberately so in my view, to mislead. It was not correct to say that there had been no meeting of the council since 2002, or that the Bill empowered inspectors or banks to play the role of the police. It was very clear that the Minister of Justice had not really applied his mind to the Constitutional Court judgment that informed the drafting of the clause on warrantless searches by inspectors.

251 The ANC SCOF MPs present at the study group meeting were not impressed by the two Ministers, and told Minister Masutha that he was out of order, and pointed out to him that issues related to finance vs security was a matter for Cabinet and

not the portfolio committee. It was pointed out that if the banks or the FIC had acted illegally, they should have taken appropriate action, yet they had not. They also pointed out that the committee had had thorough discussions on the warrantless searches clause, and rejected Minister Masutha's objections. The Chair challenged Minister Masutha to answer two questions:

251.1 How is it that the Constitutional Court did not rule that the power is unconstitutional, but in fact guided how the clause should be crafted?

251.2 Is government going to remove this power of warrantless searches from all other legislation aside from the FIC Act?

252 The ANC Finance Study Group emphasized that they did not agree with the points on constitutionality that Minister Masutha had raised. They told him that they had properly applied their minds to the issues that he was raising when they considered the bill. They in fact pointed out that this submission made by the JCPS cluster was embarrassing, and requested it be withdrawn and not serve on the agenda the following day.

253 There was mention of a meeting that the JCPS cluster Ministers claimed was organized with the Minister of Finance for that Thursday, where they indicated that they would be raising the issues in their memo. Neither Mr Jonas or I were aware of that meeting, and neither had they formally provided their memo to us (which we obtained via Parliament). It was Mr Carrim who ended up arranging the meeting two days later, on Thursday 26 January 2017, on the sidelines of the ANC Lekgotla.

Parliamentary SCOF Hearing and Revision of FICA Bill clause

254 The SCOF meeting the following day on 25 January 2017 was (as is the norm) open to the public and was very well attended, having more people than at any of its 2016 hearings for the FICA Bill. The BBC and PPF were present, as were many NGOs like CASAC and Corruption Watch who had also made submissions, as were we as the relevant officials from Treasury and the FIC. The JCPS Cluster Ministers did not attend, but some of their officials did, and their submission was not discussed as it had been withdrawn. However, the withdrawal of their memo was not conveyed to the parliamentary staff, who had already printed copies that were available to MPs and members of the public. Those present at the start of the meeting were able to secure copies of their memo, including journalists.

255 There were at least two teams of SCs who presented, including Adv Gauntlett for Treasury, Adv Semenya and Adv Steven Budlender for the Speaker of Parliament, the Senior Parliamentary Advisor, counsel for the FIC, and legal advisors to some of the NGOs, including Adv Michelle le Roux. The PMG record provides a good summary of the discussion that day, which focused on the constitutionality of the disputed section 32 of the Financial Intelligence Centre Amendment Bill [B33B-2015] due to President Zuma's concerns about the constitutionality of warrantless searches by inspectors.

256 I will not deal with this hearing, but would recommend following the discussion as reported on the PMG website, and which I attach as a footnote.[109] The

[109] https://pmg.org.za/committee-meeting/23875/

meeting heard the submissions by the various legal counsel who had advised National Treasury, Parliament and the FIC, and heard the objections by the BBC and PPF, as well as those who supported the Bill strongly, like Corruption Watch, CASAC, Banking Association SA, as well as a member of the BBC, Association of Black Securities and Investment Professionals (ABSIP), which differed with the BBC and supported the Bill. Interestingly, both the BBC and PPF raised their concern on the unconstitutionality of the FICA Bill, but did not provide a proper legal opinion (its opinion was found to be more of a political opinion at the next[110] hearing on 1 February 2017). It raised its concern on the implications of the Bill on ordinary hardworking black business people, and its President Ms Baloyi indicated that some of the accounts of its members had also been closed by banks. Mr Manyi, representing the PPF, supported the BBC's submission, but stated that his objection was that the Bill was dealing with Chapter 11 (Constitution) issues of the security cluster, and that the investigative function was to be given to private sector banks. He also objected that the PPF and the BBC were being insulted and referred to as supporters of a criminal syndicate by a Member of Parliament. He also stated that those who fund or donate to the ANC would be implicated by the FIC as PEPs.

257 It was the behind-the-scenes ANC meetings that assisted in resolving the political objections from the JCPS cluster, and the important role played by the ANC Study Group in dealing with their objection both the day before, and then after, at the follow-up ANC meeting convened by Mr Carrim (and not the JCPS cluster of Ministers) the following day on 26 January 2017 on the sidelines of the

[110] https://pmg.org.za/committee-meeting/23907/

ANC Lekgotla at St George Hotel. The meeting was held during the lunch break, and was attended by the JCPS Ministers (Defence, Justice, Intelligence), Secretary of Defence (and other officials), the Minister and Deputy Minister of Finance, MPs Yunus Carrim, Pule Mabe, DG Fuzile and myself, and a few other officials who I do not remember. We did not have the time to discuss any substantive issues, but focused on matters of process. The Minister of Defence who chaired the JCPS cluster stated the objection of the cluster was that inspectors had wide-ranging powers, and that she had spoken to the Minister of Finance whom she said had said we should meet to discuss their proposed amendments. They also agreed that legally, they could not raise all the other issues they wanted to raise (as they now accepted that Parliament could only amend the clauses mentioned in the referral letter of President Zuma in his letter to the Speaker of Parliament). They agreed that the Bill should not be further delayed, that our legal teams should meet to sort out the wording for the warrantless searches' clause.

258 Minister Mahlobo still raised what he said were substantive issues on the powers of banks and that he was aware of abusive practices by banks (which he had raised in the Study Group meeting), but indicated that it was not for the current amendments, and that the two clusters should work jointly to resolve these issues through future amendments. Minister Masutha claimed they had 5 legal opinions, and we needed to work through the issues to prevent legal action on the signing of the Bill. To this day, I have not seen a single one of those opinions.

259 The officials were then directed to finalise the wording of the inspection clause, which I led. This was the wording that was then presented to SCOF, for its

consideration at its 1 February 2017 meeting. As we ended this meeting, Mr Fuzile noted his concern that the JCPS cluster appeared to be led on this Bill by ANN7 and Mr Manyi on behalf of the Gupta family. Incredibly, the JCPS cluster Ministers did not respond to his statement, nor told him that he was out of order.

260 We then met as officials on Friday, 27 January 2017, where we reached agreement around the Gauntlett opinion which proposed small amendments for changing the wording in the clause, to submit to SCOF for its consideration. We presented this proposal to the SCOF meeting of 1 February 2017, discussed it again on 15 February 2017 and it was finally adopted by SCOF on 21 February 2017. The National Assembly passed the Bill on 28 February 2017 and submitted it almost immediately for assent by the President.

261 After firing Mr Gordhan on 30 March 2017, President Zuma signed the Bill into law on 26 April 2017 as FIC Amendment Act 1 of 2017. We were surprised that President Zuma did not delay further on the signing. I believe he probably did so since Mr Gigaba was now the Minister of Finance.

262 To summarise, it took two-and-a-half years for the FICA Bill to be signed into law, from the first time we submitted to Cabinet around 3 October 2014 to 26 April 2017. We were lucky after such a long process after tabling, that we were able to get off the FATF targeted follow-up list at its meeting of November 2017 in Buenos Aires.

263 However, the drama around the Bill was not over even after President Zuma finally signed the Bill into law on 26 April 2017. The provisions of this new Act still required the Minister of Finance to gazette their commencement date. As I

will show below, before he could proceed with the gazetting, Mr Masutha and Adv Abrahams approached Minister Gigaba to stop him from bringing the Act into operation.

Enter Advocate Shaun Abrahams at FATF Plenary

264 Adv Shaun Abrahams started showing a sudden interest in the FIC, FATF and the FICA Bill in December 2016, when he registered his objection to a one-year extension of the contract of the FIC Director, after he was consulted via email as a member of the Counter-Money Laundering Advisory Council. He stated that he did so because the Council was not functioning. He then attended a formal meeting of the Council that was convened in January 2017, chaired by Deputy Minister Jonas, where he repeated his objection. (Please refer to Annexure **IM49**).

265 We took Adv Abrahams' objections in good faith, as we generally welcome critical comments more than praise, as it provides a good feedback mechanism, and were happy to have him actively involved in the anti-money laundering process. As the official responsible for assisting the Ministry to convene meetings of the Counter-Money Laundering Advisory Council for the Ministry, I was not aware of Adv Abrahams (or any member of the JCPS Cluster) ever calling for meetings of the Counter-Money Laundering Advisory Council previously, including after Adv Abrahams was appointed as NDPP in 2015. Neither was I aware of Adv Abrahams showing any interest in FATF or the FICA Bill before 2017. I am not aware of any engagement he may have had with National Treasury over the FICA Bill before then. He may have had some exposure to the FICA Bill as a member of the JCPS DG Cluster, when we briefed its meeting on 7 October

2014. I also do not remember receiving any written submissions on the FICA Bill from any Minister, DG or head of any agency like the NPA, SARS or Hawks in the JCPS cluster, from the time it was first circulated at Cabinet and whilst in Parliament. But better late than never, if the JCPS Cluster was now showing more interest in the FICA Bill.

266 At this January 2017 meeting of the Council, we discussed the upcoming FATF Plenary in February 2017, where we faced a tough hurdle after the further delay in enacting the Bill, due to President Zuma referring the Bill back to Parliament. By now, the FATF was exasperated by SA continuing to fail to address the 2009 deficiencies, and on our promises that the FICA Bill would have taken effect by February 2017. We had reported great progress at the June 2016 FATF Plenary, given that the Bill had been passed by both Houses of Parliament, and were only awaiting the assent of the President.

267 The referral of the Bill by President Zuma back to Parliament on 28 November 2016 now put SA in real danger of being named and shamed for continuing to delay on enacting the Bill. The FATF Secretariat had circulated a draft public statement to all member countries and jurisdictions, for consideration at the Plenary. The draft statement expressed the FATF Plenary's deep concern by *"South Africa's continued failure to remedy the serious deficiencies identified in its second mutual evaluation report adopted in February 2009. The deficiencies relate especially to customer due diligence and record-keeping obligations of financial institutions…".*

268 Adv Abrahams indicated at this Council meeting that he would be personally attending the coming FATF Plenary to support us, together with the NPA's regular representative, Adv Malini Govender. Treasury and FIC were pleased that the NPA was stepping up its involvement to support us at the coming FATF Plenary.

269 After landing in Paris, I accompanied Adv Abrahams to a courtesy visit to the SA Ambassador in Paris the night before we were to defend SA at FATF. We were working together to defend SA at FATF. But I was then surprised when Adv Abrahams expressed his opposition to the PEPs concept in the FIC Amendment Bill, soon after we started chatting to the Ambassador. He explained that he felt that the Bill was unfairly targeting politicians by introducing the concept of PEPs, which he also claimed was unconstitutional. I could not believe that a member of our delegation to FATF was now raising such a fundamental objection, knowing that it was an international FATF standard we were expected to implement. He had never expressed this view to the Treasury before, and even if he had, there was not much we could do about it, as it was a FATF standard.

270 I was also surprised because I had expected that as a crime-fighter, he would have instead welcomed this new power to deal with corruption. I responded to his comment immediately, saying that we had very clear legal opinions from top constitutional senior counsel (as was just discussed exhaustively with the SCOF in Parliament on 25 January 2017) on the constitutionality of the FICA Bill.

271 The following day, Mr Pieter Smit and I represented SA, and successfully managed to postpone the sanction and secure a further extension from FATF,

given the progress we had made at SCOF on the FICA Bill. Our delegation was in a celebratory mood after securing this further extension.

272 Advocate Abrahams and I then met for about an hour after the meeting, outside the conference room. I wanted to talk to him about the Public Protector's recently released State of Capture report and the reports that Treasury had on suspicious Eskom coal contracts, but Adv Abrahams indicated to me that he had not read the Public Protector's Report, and that Adv Govender was going to brief him the following week on the report. I offered to arrange a meeting for Treasury to brief him on the reports we had. Instead of welcoming evidence of possible corruption at Eskom, Adv Abrahams was more interested in speaking about Minister Pravin Gordhan and that he thought he still had a case to answer, and why he thought the Minister did not like him. I told him I was not interested in discussing his issues with Mr Gordhan. After much effort to get him to focus on corruption and state capture, he promised to follow up with Treasury after he was briefed on the State of Capture report.

273 By the time I left Paris that night, I had a sense that Adv Abrahams was not really interested in supporting the FICA Bill nor in complying with FATF standards. And that he had no real interest in following up on the many allegations of serious corruption at our state-owned entities. I began to realise that perhaps he was only beginning to show an interest in the FICA Bill after Mr Gordhan had made public the FIC Certificate outlining the 72 Gupta suspicious transactions when he sought a declaratory order at the Gauteng High Court after the closure of Oakbay's bank accounts.

Minister Masutha and Adv Abrahams Try and Stop the FICA Act taking effect

274 Soon after, Mr Gordhan was fired as Minister of Finance, and after President Zuma had signed the FICA Bill into law on 26 April 2017, I was requested to attend a meeting on the FIC Act on 29 May 2017 between Minister Gigaba and Minister Masutha. Minister Gigaba had been briefed on the FICA Bill process on the very first Monday, 3 April 2017, after his appointment and again on 9 May 2017.

275 I understood this meeting was requested by Minister Masutha, and the meeting was held at the Treasury offices. Minister Gigaba was supported at the meeting by his own staff, as well as Adv Empie van Schoor and I from Treasury, and Mr Pieter Smit from the FIC. Minister Masutha was accompanied by Adv Abrahams only. I wondered why he had not brought his Director-General or another official from his department, since it is the department and not the NPA that is responsible for policy and legislation.

276 The Minister of Justice started by stating that his concern about the lack of progress on illicit financial flows. He claimed he had raised this with the previous Minister of Finance Mr Gordhan at both the August 2016 and January 2017 Cabinet lekgotlas. He repeated his concerns with the FIC Amendment Act, including:

276.1 the constitutionality of the PIPs provision;

276.2 the role of the banks and his belief that their prerogative in drawing up lists of PEPs could undermine individual rights; and

276.3 the need for greater co-ordination within the JCPS cluster given that the FIC would now be playing a law enforcement role.

277 He did not explain why he thought the FIC would be playing a law enforcement role, given that the FIC Amendment Act did not give them this power. He suggested that the new Act failed to deal with illicit financial flows and the billions leaving our shores as a result of financial crime activity. He elaborated on the need for better collaboration between the JCPS cluster and the economic clusters, and that this should be done by reviving the Counter Money-Laundering Advisory Council through an amendment to the FIC Act. They therefore wanted to delay the commencement of the FIC Amendment Act until it was amended to restore the Counter-Money Laundering Advisory Council.

278 It was surprising that he was now trying to stop or delay implementation of the new FIC Amendment Act. This was despite the agreement at the meeting held on the sidelines of the ANC Lekgotla on 31 January 2017 (outlined earlier), which he had attended, and where it was agreed that the issues raised by the JCPS cluster should be dealt with through a different process including going to Cabinet first.

279 I was also skeptical about the new interest that the JCPS cluster was now showing about illicit financial flows, as they had showed no real interest in participating actively in the many public hearings on illicit flows convened by Parliament's three parliamentary portfolio committees (SCOF, Trade and Industry, Mineral Resources) in 2015, 2016, and 2017. Both the NPA and SAPS

(Hawks) attended the 2017 hearing for the first time, and were not able to show how they were dealing with illicit flows[111].

280 We explained that the phasing out of the Counter-Money Laundering Advisory Council was because it was no longer a functional structure, as it involved both public and private sector players in one forum, so confidential enforcement matters could not be discussed between the security and financial clusters. It was pointed out that, in fact, we wanted to establish a separate and dedicated consultation forum only for government departments and agencies, and a second but separate consultation forum with the private sector.

281 Adv Abrahams followed by stating that in some countries the head of their financial intelligence units (equivalent FIC body) has a direct link to their President on critical issues, and everything must go through Cabinet. He stated that we should be sending only very senior people to FATF. He requested the Minister to appoint a chairperson for the advisory council so that it could commence its work.

282 Both Ministers Masutha and Gigaba corrected Adv Abrahams to not confuse administrative and policy issues, pointing out to him that such administrative

[111] The Parliamentary Monitoring Group (PMG) report on this meeting notes:
"The Hawks Head of the Commercial Crimes Unit of the South African Police Service (SAPS) was not able to present on its requested brief. The Committees expressed disappointment that SAPS was unable to answer the questions on IFFs cases referred to SAPS for further investigation…. They asked SAPS to give the current status of specific investigations captured in the Minister of Finance affidavit; if it had received any complaints about cash in transit from SA to Dubai and if it had names of people that were taking money from SA to Dubai. SAPS was asked what made it difficult monitor IFFs and cash in transit at airports and what had been the role of SAPS in stopping this. Members asked SAPS to give updates on the case against the Gupta family, state its relationship with FIC in the enforcement of laws dealing with financial crime, as it seemed SAPS was ill equipped to enforce such laws".
The National Prosecuting Agency (NPA) was also not able to report on specific cases, and instead focused on "identified systemic weaknesses".

issues don't go through Cabinet. Where an administrative process or structure fails, the matter should be escalated to the responsible Ministers. Mr Masutha indicated that if the level of representation at FATF was an issue, it is for the Ministers to resolve (i.e. not Cabinet).

283 At some point in the meeting, I raised the problem of a lack of enforcement on suspicious transactions, like the 72 listed in the FIC Certificate in relation to the Gupta family, and suspicious transactions related to state-owned entities like Eskom, which were also illicit flows, and said that I was still waiting for Adv Abrahams to contact the Treasury after our discussion in Paris.

284 Minister Masutha responded that the matter of the 72 transactions, the statutory role of the FIC, the role of banks in designating PEPs and of banks closing accounts were before the courts, which I took to mean that therefore we could not discuss whether these transactions were being investigated. His response confirmed to me that he had no appetite to deal with the many illegal transactions related to the Gupta family, including the "illicit flows" by state-owned entities to Gupta-associated companies in Hong Kong and Dubai.

285 Minister Gigaba became impatient with their unconvincing request to delay the commencement of the Act, and responded by saying the issues they were raising were not difficult at all. He stated that the National Treasury would consult them on the draft gazette before its publication. I suggested that the Ministers leave us as officials, to resolve some of the technical issues related to the draft gazette.

286 Once the two Ministers left the room, we continued the meeting as officials. Treasury officials Olano Makhubela and Raymond Masoga joined Adv Empie

van Schoor, Pieter Smit and myself, and Adv Abrahams, who was on his own. I started off the meeting by saying to Adv Abrahams that with respect, the legal issues raised by his Minister were not valid, and had been rejected in Parliament, and the Bill was now enacted into law. I also asked him why they wanted to delay the commencement of the Act. I asked him why he had not come back to Treasury and followed up on our discussion on the corruption at Eskom and state capture, as he agreed in our discussion on the sidelines of the FATF Plenary meeting in Paris in February.

287 I raised my points quite strongly, because I was by now frustrated by the persistent attempts to stop, initially the Bill, and now the Amendment Act, in contrast to the lack of focus on the obvious grand scale corruption that was happening. Adv Abrahams was initially defensive, telling us that they were busy with investigating a number of cases. At some point he became irritated at my questions and he stood up, telling me that he did not like my attitude. I asked him to sit down and stop being dramatic, and focus on the job our Ministers had left us to do. He continued telling me he does not like my attitude, and walked out of the meeting, forgetting his bag, prompting one of our staff to run after him to give it to him.

288. Following his walk-out, he sent me a sms text message with his email address to send the draft gazette, which we duly did. In response to his text, I expressed my hope for an apology for his behaviour at the meeting. My text read as follows: -*"I also await any follow-up on any enforcement issues, as you indicated at the meeting on Monday. Whilst I was hoping you would have apologized in your sms that led to an abrupt ending of the meeting, rest assured we always act*

professionally at the Treasury and hope we both ensure there always mutual respect when relating to each other. I am happy to talk on any issues of concern and look forward to working with you to take matters forward." He responded by saying *"There will be no apology forthcoming from me. Your understanding of professionalism leaves me speechless and your arrogance has no bounds. This is regrettable. Fortunately, you are only a DDG. Don't forget that!". (Please refer to Annexure **IM50**).*

289 I did not respond to his sms, and waited for his comments to the draft commencement notice. Neither he nor the Minister of Justice sent us any comments, and so Minister Gigaba notified Minister Masutha in a letter dated 9 June 2017 of his intention to proceed with gazetting the commencement notice later that week, given the need to strengthen our anti-money laundering system, and to avoid any further negative steps from FATF. He noted that the agreement in the meeting of 29 May 2017 was not to unduly delay the implementation of the FIC Amendement Act, and the need to create better consultation and co-ordination mechanisms within government (via an interdepartmental AML/CFT committee) on the one hand, and a second consultation mechanism with private sector institutions. He also indicated that he had requested the Acting Director-General to convene the first interdepartmental committee without delay. (See Annexure **IM51**).

290 The commencement notice for the FIC Amendment Act was then published on 13 June 2017 in Government Gazette No 40916 Notice No 563, with some provisions taking immediate effect, some later on 2 October 2017 and thereafter. The Treasury and FIC also published a document outlining the new approach to

combat money laundering and terrorism financing, as well as a roadmap on implementation. These documents are available on our website, which I note in the footnote[112].

FATF finally takes South Africa off its targeted list

291 SA was finally taken off FATF's targeted follow-up list at its 1-3 November 2017 Plenary in Argentina, after the FIC Amendment Act came into operation, with some provisions coming into effect on 13 June 2017, and other provisions coming into effect on 2 October 2017.

292 The FATF Secretariat noted in its report (Mutual Evaluation of SA: 14th follow-up note) that: *"South Africa has made clear and substantial progress by issuing subsidiary legislation to consolidate the changes made in the FIC Amendment Bill and to address the remaining deficiencies. The Secretariat analysed these measures to determine whether removing South Africa from the targeted follow-up process is justified, and is of the view that this is a borderline case. On that basis, delegations are asked to independently review the analysis and consider the progress made to determine whether South Africa has reached a level of compliance for old R.5 that is substantially equivalent to largely compliant, or should otherwise be removed from the targeted follow-up process taking into account that it has already started preparing for its 4th round mutual evaluation which begins imminently (the TC annex is due in May 2019)."* Annexure **IM52**.

[112] http://www.treasury.gov.za/legislation/regulations/FICA/

293 Fortunately, though we were still deemed to be 'borderline' by the Secretariat, the Plenary was more generous and removed SA from the targeted follow-up process, three years from the time we first submitted the Bill to Cabinet. We had been needlessly delayed by President Zuma, the security cluster and other deployees of the Gupta family, who decided to stop or delay the FICA Bill.

294 It should be noted that later in the year, Mr Gigaba appeared to get cold feet, and I suspect he must have been put under further pressure from some of the JCPS Ministers, as without discussion with any of the Treasury or FIC officials involved with the FIC Act, he requested the department to amend the definition of prominent persons in 2018 to also include all businesses, when he noted in a memorandum on coming legislation:

> *"We should invoke FIC Amendments to include the advisory council, as well as the inclusion of private business not doing business with government".*
> (11 Sept 2017 memo on 2018 legislative programme) - Annexure **IM53**.

295 The cost of the long delay in enacting and the commencement of the FICA Bill not only meant that our anti-money laundering system remained weak, but also that our capability lags behind most G20 and other FATF countries. Indeed, we are currently going through our third Mutual Evaluation process. I have no doubt that after this Review, we will have to take much stronger steps to meet the minimum FATF standards we have committed to. It is in our own interests to do so.

GUPTA ASSOCIATES TRY TO BUY A BANK

296 It was reported in the media around 23 June 2016 that the CEO of Oakbay Investments, Mr Howa, had approached the General Secretary of the National Union of Mineworkers (NUM) to buy a majority share in a bank called Ubank owned by Teba Fund Trust, which is administered by the NUM and the then Chamber of Mines (now called the Mineral Council South Africa). The then General-Secretary of the NUM, David Sipunzi, confirmed this to the media:

> *"We have been approached unofficially about selling UBank to Oakbay. (Oakbay Investments CEO) Nazeem (Howa) called me and I told him what our stance is and the official channels he should follow," Sipunzi told the Star.*
>
> *"Our stance is that UBank is not for sale. We'll take all the necessary means to finance the recapitalisation; selling would be the last resort." (Business Day Article June 2016)* - Annexure **IM54**.

297 The NUM General Secretary also confirmed in the NUM statement that Oakbay had donated R1 million to the NUM to cover the costs of its central committee meeting at the time.

298 Since both the NUM and the Chamber of Mines refused to sell their shares to Oakbay, there was no formal application to purchase Ubank from Oakbay for approval to the Reserve Bank.

299 A few months later, around September or October 2016, I became aware that Vardospan, a company linked to Gupta-associate Mr Salim Essa, submitted an application to the Registrar of Banks to acquire Habib Overseas Bank Limited (Habib), after concluding a Share Purchase Agreement with the controlling shareholder Pitcairns Finance S.A. - Annexure **IM55**.

300 Vardospan was a newly incorporated company that had been established in 2016 and was jointly-owned by Pearl Capital Group Holdings (Pty) Limited (Pearl Capital) with an interest of 33.33 per cent and CINQ Holdings (Pty) Limited (CINQ) with an interest of 66.67 per cent. Pearl Capital was wholly-owned by Mr Hamza Farooqui while CINQ was wholly-owned by Mr Salim Essa. Additionally, both Mr Salim Essa and Mr Hamza Farooqui were the sole directors of their respective companies. Since they were applying for a controlling 100 per cent of the shareholding in Habib, Mr Essa's CINQ would have indirectly been the major shareholder in Habib Bank.

301 While Mr Farooqui denied any link to the Gupta family in media reports, Mr Essa was well-known as a central player in the Gupta business scheme.

302 Both Pearl Capital and CINQ themselves were only established in 2016 and had at that time not been involved in any banking or other business, other than their investment in Vardospan. Vardospan had indicated to the Registrar of Banks that both Pearl Capital and CINQ did not have any financial statements or management accounts and nothing could be ascertained about the companies' financial track-record.

303 According to the Vardospan's application, the subscription price that was to be paid by the shareholders of Vardospan was approximately R327.3 million, with a further capital injection of R150 million into Habib bank. As at December 2016, Habib Bank's total assets and liabilities amounted to about R1.13bn and R1bn respectively. The bank posted a profit of about R79 million for the same period.

304 Owning a bank requires the significant shareholders to be both fit and proper, and confirm that the source of their funds are legitimate. Banks, unlike other businesses, often need capital injections from their shareholders. Therefore, anyone owning a significant share, deemed to be more than 15% of shares in a bank, in terms of our law, must have actual capital on hand that is not borrowed or otherwise encumbered, to buy such a significant share. You cannot borrow from one bank to buy the shares of another bank, if the share is significant. For all these reasons, any ownership of equity above 15% required (and still requires) the approval of the Registrar of Banks (now the Prudential Authority), and above 75%, also of the Minister of Finance. I outline the actual legislative powers below[113].

305 The application was made in terms of section 37(2)(a)(iv) of the Banks Act 94 of 1990 (the Banks Act), read with section 37(2)(c) of the Banks Act. In terms of section 37(2), the then Registrar of Banks (now Prudential Authority) is required to first approve the application, and if it involves the acquisition of more than 49 per cent of shares in a bank or its controlling company, the consent of the Minister of Finance is also required.

[113] Section 37 (2) (a) Banks Act 94 of 1990

306 The legal requirements in terms of which the Minister must assess this application are set out in section 37 4 (a) and (b) which states that:

> *"Permission in terms of subsection (2) for the acquisition of shares or the voting rights in respect of the issued shares in a bank or controlling company shall not be granted unless the Registrar or the Minister, as the case may be, is satisfied that the proposed acquisition of shares or the voting rights in respect of the issued shares –*
>
> *(a) will not be contrary to the public interest; and*
>
> *(b) will not be contrary to the interests of the bank concerned or its depositors or of the controlling company concerned, as the case may be."*

307 In January 2017, the Minister received a letter from the Registrar of Banks on Vardospan's application to acquire a 100 per cent shareholding in Habib Bank. A slightly revised letter (with minor corrections to the above referenced letter) was received on 6 February 2017. This request to the Minister was in terms of section 37 of the Banks Act.

308 During the same month, the Competition Commission announced that it had unconditionally approved a merger between Vardospan and Habib Bank.

309 The Registrar recommended to the Minister to decline the proposed transaction by Vardospan to acquire Habib Bank. The Registrar's recommendation was made on the basis of a number of reasons that were set out in the correspondence to the Minister.

310 A meeting between Treasury officials and the Bank Supervision Department of the SA Reserve Bank to discuss the application by Vardospan was held on 8 February 2017 at the National Treasury offices.

311 Subsequent to the aforementioned meeting, Treasury wrote to the Registrar on 9 February 2017. The letter sought further clarity on a number of issues pertaining to the Registrar's submission. The Registrar responded to Treasury's letter (dated 9 February 2017) on 6 March 2017 and further on 29 March 2017.

312 While the South African Reserve Bank and the National Treasury were still busy with the processing of the application, Vardospan approached the High Court in March 2017, on an urgent basis, to force the SARB to make a decision on whether the group were authorised to make the purchase.

313 It appeared that like Mr Zwane, Vardospan assumed that they were entitled to get a quick approval, and saw no need to provide critical information on Vardospan, like its financial statements, to enable the Registrar of Banks to properly assess their financial capacity and integrity, including whether they were fit and proper and that the sources of their funding were legitimate, as is the norm for all bank applications and acquisitions.

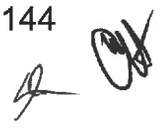
314 The DG of National Treasury filed an affidavit to respond to the Vardospan application, as did the SARB. The Pretoria High Court struck down this urgent court application on the grounds that it lacked urgency.

315 Further correspondences were exchanged between the National Treasury and the Registrar of Banks until 29 March 2017 when the application was formally considered closed.

316 On 30 March 2017, Minister Gordhan was fired as Minister of Finance by President Zuma.

317 I would like to point out to the Commission that the attempt to buy Ubank coincided with the time when Mr Zwane first submitted a memorandum to Cabinet on 22 June 2016 to weaken the banking licensing requirements, which Cabinet adopted at its next meeting on 6 July 2016. The Vardospan application was submitted to the Reserve Bank a day before Minister Zwane's 1 September 2016 media announcement, where he announced that the SARB and Treasury should be investigated because the bank licensing process was too burdensome. I leave it to the Commission to investigate whether this was just mere coincidence or not, and whether Mr Zwane wanted to weaken our financial regulatory laws and have a judicial inquiry against the SA Reserve Bank and National Treasury to enable Gupta associates to buy a small bank so that they could continue with their suspicious transactions.

318 I suspect that by then, the Gupta family knew that they could control such a bank to NOT file suspicious transaction reports and cash threshold reports with the FIC and any other agencies that they did not control. This was already the case with the Bank of Baroda, which though they did not own it, clearly looked the other way for the many years they were the bankers for the Gupta family. The Prudential Authority of the SA Reserve Bank fined the Bank of Baroda



R400 000 as an administrative sanction for non-compliance with certain provisions of the Financial Intelligence Centre Act in August 2019, related to a five-year on-site inspection of the bank commencing in 2014.

319 This fine against the Bank of Baroda pales into insignificance when compared to the fines imposed by overseas authorities. It merely reflects the need to tighten our sanctions mechanism, so that it acts earlier, and leads to significantly higher fines and other sanctions. I believe that there is much that the Bank of Baroda has to answer for, in their role in facilitating corrupt transactions for the Gupta family and their businesses, including the possible plundering of mining rehabilitation funds which Treasury was particularly concerned about. The bank tried to break its ties with the Gupta businesses in 2017, and finally exited South Africa in 2018, probably due to pressure from the authorities in India.

320 Buying a small and privately-held bank (that is not listed on any stock exchange) was a good solution for the Gupta-businesses. Their only problem was to get the approval of the Registrar of Banks at the SA Reserve Bank and Minister of Finance. They had failed to seize control of the Ministry of Finance, so needed Mr Zwane and this task team to do so, by getting Cabinet to adopt their recommendations.

321 I would like to end this section by stating that neither the National Treasury nor the SA Reserve Bank (as confirmed to me) is aware of any formal application after the 2008 global financial crisis by any BEE consortium, Indian billionaire or Gupta-linked associates, to purchase a controlling share of Nedbank, aside

from the application by HSBC[114] to purchase the controlling share of Old Mutual in 2010. I am also not aware of any informal application to this effect.

CONCLUSION

322 The evidence that I have put forward to the Commission demonstrates how whole institutions and legal processes were demobilised in order to achieve the scale of corruption that took place during the years under review by this Commission.

323 In this regard, my evidence has focused on the following examples:

323.1 The attempts by President Zuma and Gupta associates to undermine and weaken South Africa's anti-corruption and anti-money laundering system by unduly delaying and trying to stop the enactment of a core piece of legislation called the Financial Intelligence Centre Amendment (FICA) Bill.

323.2 How President Zuma manipulated the Cabinet system (by informalising the way it makes decisions) to intervene to protect the interests of a private family (the Gupta family) after banks closed their accounts because of the associated financial crime risk.

323.3 How President Zuma and Minister Zwane used a task team of Ministers to launch targeted attacks on the SA Reserve Bank, the National

[114] https://www.ft.com/content/aebaef12-d7bd-11df-b478-00144feabdc0

Treasury, FIC and banks that terminated their services to the Gupta family.

323.4 How the Guptas, after failing to undermine the country's financial crime legislative framework, tried to purchase a bank, in order to continue and control their illicit activities, including laundering the proceeds of their corruption and moving funds offshore.

324 It is important to keep in mind that banks are amongst the most heavily regulated sectors in our economy, often driven by international standards that we choose to comply with because it is in the best interests of the country to do so. Given the nature of banks, there is a "doom-loop" between banking and sovereign risks, which poses systemic risk to the entire economy, and hence the need for very intrusive and intensive prudential supervision over banks. The Treasury and regulators are very tough on ensuring banks comply with all financial sector laws at all stages, including how banks treat their customers, and how they conduct their business. In supervising banks, it is particularly important that supervisory actions do not compromise financial stability in the economy, hence the need to work closely with all regulators, including those that do not report to the Minister of Finance, like the Competition Commission and the National Credit Regulator, which deal with market conduct transgressions related to competition or the credit market (e.g. the current investigation by the Competition Commission[115] on poor forex market practices).

[115] http://www.treasury.gov.za/comm_media/press/2017/2017021701 - Media Statement Competition Commission finding on Banks.pdf

325 I hope I have been able to also put into perspective the attacks on the National Treasury, which need to be differentiated from the normal and on-going robust debates around the work of the Treasury. Former Ministers Nene, Gordhan and DG Fuzile have dealt in their evidence on the role of the Treasury. Given the nature of our work, Treasury officials in fact welcome such continual debates around policy-related and budgeting issues, as they provide important feedback around the many decisions that Treasury has to make everyday. We argued from 1994 when reforming the budget process that it is not a mere bean-counting exercise, but a deep policy-making and priority-setting process involving difficult trade-offs, and even more so for a developing country with the Apartheid legacy that we inherited. There is a healthy tension between the National Treasury and most organs of state, particularly where they are dependent on funding for commitments from the fiscus.

326 Outside government, in the political arena, including within the ruling party and its tripartite alliance, there are those who continually critique the role of the Treasury from a political and ideological perspective. These debates are also legitimate and necessary in a vibrant and noisy democracy like ours, and Treasury is happy to engage with such debates. However, we must also be wary of opportunistic voices driven by criminal objectives like defrauding the public sector, who also know that they also need to operate in the political domain if they are to succeed in their nefarious activities – they knew that Treasury was (and still is) a barrier to their plans, and used their political influence to launch public attacks on the Treasury and Minister of Finance, and wanted to weaken it and have a pliant Minister of Finance and Treasury. They funded their many agents (both in government, and many organisations and

their leaders outside) to do their bidding, and influenced political decisions taken by Government. It is vital to our democracy that we have better disclosures in future on all political funding, not just for registered political parties, but all organised political players. We need to know as a society how the many paid agents and lobbyists, as well as PEPs, are funded.

327 It will be important to identify those who directed corruption and state capture, and are the primary beneficiaries of its proceeds, by following the money that ended up with high-profile PEPs and Gupta associates. I believe that our institutions like the FIC, SARS, HAWKS and NPA can bring them to justice quickly, if they work closely together, using as a basis the many suspicious transactions that I believe banks would have reported to them. They need to act against those who cannot explain these suspicious transactions or source of income and wealth.

328 From the evidence of this Commission, and other Commissions on SARS and PIC, there is a clear pattern that some of the really big decisions under President Zuma (e.g. the nuclear deal, appointment of the Commissioner of SARS[116] in 2014), were taken outside of Cabinet, and only brought to Cabinet (if at all) to legitimise such decisions. We must prioritise measures to protect the integrity of the Cabinet and the process by which it makes decisions, given it is the highest (and most important) executive in our land. We must put in place the highest order of accountability for members of Cabinet, including a fiduciary-type responsibility that is of an even higher standard than King-type corporate

[116] Page 35 of the report of the Commission of Inquiry into Tax Administration and Governance by SARS ("Nugent Commission"

governance practices. Similar measures must apply to all accounting officers and authorities, throughout government.

329 President Ramaphosa has identified the need to build a capable state and reverse the effects of corruption, as he announced in his two SONA addresses after the 2019 national elections. He prioritised the need to take "critical actions .... to build a capable state and place our economy on the path to recovery"[117], and "[build] an ethical State in which there is no place for corruption, patronage, rent-seeking and plundering of public money[118]". We must take decisive steps to restore the capability and integrity of the state and government, if we want to ensure that the state can and does play the role that our people expect, be it to deal with a pandemic like COVID-19 or to rid our schools of pit latrine toilets.

330 Fortunately, Chapters 13 and 14 of the 2011 National Development Plan contain recommendations that can and should be very seriously considered for immediate implementation, but must be complemented with stronger mechanisms to improve governance and accountability of all institutions. I attach as an annexure some thoughts on measures to restore the capability of the state, and to fight corruption, as well as the many questions I believe we need to get answers to if we are to learn the lessons from our recent history (Annexure **IM1**).

331 The current COVID-19 crisis has reinforced to all of us just how important and critical the role of Government and the state is in any country, and even more so in a developing country like ours where many live in poverty with high levels

[117] February 2020 State of the Nation Address by President Ramaphosa
[118] June 2019 State of the Nation Address by President Ramaphosa, following the 2019 national elections

of inequality. We must strengthen our governmental system and the developmental state to do what our people rightly expect the state to do, to rid our country of poverty, inequality and unemployment and materially improve the life of all those who live in our country.

DEPONENT

I certify that the Deponent acknowledged that he knows and understands the contents of this affidavit, that he has no objection to the making of 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 SANDTON on this 1ST day **of FEBRUARY** 2021 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.

COMMISSIONER OF OATHS

Mohamed Azhar Hoosen
The Central, 96 Rivonia Road
Sandton, Johannesburg, 2196
Commissioner of Oaths
Ex-Officio / Practising Attorney R.S.A.

SSA-02-209

STATE SECURITY AGENCY

EXHIBIT YY 6

LLOYD MHLANGA

SSA-02-210

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
Tel: (010) 214 to 0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

INDEX: EXHIBIT YY 6

#	Description	SSA Bundle	Bundle Page	Exhibit Pages
1.	Affidavit of Lloyd Mhlanga	02	211 to 250	01 to 40
2.	Annexure “LM1”	02	251 to 253	41 to 43
3.	Annexure “LM2”	02	254 to 255	44 to 45
4.	Annexure “LM3”	02	256 to 268	46 to 58
5.	Annexure “LM4”	02	269 to 278	59 to 68
6.	Annexure “LM5”	02	279 to 281	69 to 71
7.	Annexure “LM6”	02	282	72
8.	Annexure “LM7”	02	283 to 284	73 to 74
9.	Annexure “LM8”	02	285 to 295	75 to 85
10.	Annexure “LM9”	02	296 to 299	86 to 89

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

Security Agency ("**SSA**") situated at the Musanda Complex, Joe Nhlanhla Drive Pretoria, which position I accepted with effect from 1 November 2018 and held until I was permanently appointed on 13 March 2019 by Presidential Note, annexed marked "**LM 1**".

2. On 24 May 2019, I was suspended from this position under the circumstances dealt with below. My appointment was hereafter terminated with effect from 30 June 2019, allegedly on the basis that my contract had expired, without any disciplinary proceedings having been instituted against me dealt with by me below.

3. I have obtained the consent of the Director General ("**DG**") of the SSA, Mr Loyisa Jafta to

depose to this affidavit and have been directed to co-operate fully with the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("**the Commission**"). I annex a copy of the aforementioned letter of consent dated 16 November 2020 hereto marked "**LM 2**".

4. The facts deposed to by me in this affidavit are within my personal knowledge, unless otherwise stated or indicated by the context and are, to the best of my knowledge and belief, both true and correct.

A. THE PURPOSE OF THIS AFFIDAVIT

5. I have been requested by the Commission to provide an affidavit dealing with:

5.1. my appointment as the acting Director of the Domestic Branch of the SSA to conduct an internal investigation into:

5.1.1. the misuse of the funds allocated to the SSA for covert projects and operations;

5.1.2. the politicisation of the projects and special operations conducted by the SSA beyond the mandate of the SSA and contrary to the Constitution and the applicable Security legislation; and

5.1.3. possible criminal conduct on the part of operatives within the SSA and the executive.

5.2. my referral of the criminal offences suspected to have been committed to the Directorate of Priority Crimes Investigation ("**the DPCI**") by way of affidavits dated 10 April 2019 and 16 April 2019, annexed hereto marked "**LM 3**" and "**LM 4**" respectively;

5.3. the removal of the investigation from the SSA on 24 April 2019 by Advocate Mahlodi Sam Muofhe, then a Special Advisor to the former Minister of State Security, Ms Dipou Letsatsi-Duba, shortly after my referral of the investigations to the DPCI;

5.4. my notice of suspension on 30 April 2019 some 6 days after the investigation had been removed from the SSA and I had refused to hand over the supporting documentation to Adv. Muofhe and to withdraw the matter from the DPCI;

5.5. my suspension on 24 May 2019, on the eve of President Cyril Ramaphosa's inauguration; and

5.6. the subsequent termination of my appointment at the SSA with effect from 30 June 2019, allegedly on the basis that my contract had expired.

B. MY EMPLOYMENT HISTORY

6. My employment history is as follows:

6.1. From May 1995-2005, I was the Divisional Head: Counter-Espionage ("**CE**") at the SSA.

6.2. I was suspended during 2005 but, after an inquiry during which no wrongdoing was found on my part, I was transferred to the South African Police Services ("**SAPS**") Crime Intelligence ("**CI**") division from 2006-2008, where I held the position of Deputy Divisional Commissioner: Operational Support.

6.3. During September 2009, I was appointed as Special Advisor to the then Minister of State Security, Dr Siyabonga Cwele.

6.4. In 2010, I was appointed as the Acting Head: Operations of the Domestic Branch of the SSA. During this time, I was involved in the investigation into the SSA's covert Principal Agent Network (PAN) programme, which had been commissioned by Minister Cwele.

6.5. During May 2011, I was removed from the SSA and redeployed back to the Ministry, after having been involved in an open source investigation into the undue influence of the Gupta brothers over the former President, Mr Jacob Zuma. This was after Minister Cwele

had questioned me about whether we were running an operation into the relationship between the Guptas and President Zuma. Although I indicated that, at that stage, only an environmental scanning of their relationship was being conducted, the Minister did not believe me and thought we had a full-blown investigation running into the Guptas. The Minister expressed his displeasure about this investigation, as he believed that by necessary implication, we were investigating President Zuma.

6.6. Within a few months of having this conversation, I heard in the Minister's budget vote in Parliament during May 2011 that I was being sent back to the Ministry; I had not

been told about this before by Minister Cwele.

6.7. I remained at the Ministry until 2014, during which period I provided advice on the General Intelligence Amendment Bill and the Protection of State Information Bill.

6.8. On 25 May 2014, President Zuma appointed Mr David Mahlobo as Minister of State Security, a position he held until 2017. I was asked to stay on as an Advisor to the Ministry in order to assist Minister Mahlobo during the transition period. In August 2014, I was told by the Head of Human Resources that my services were no longer required; I was not told this personally by the Minister.

6.9. In April 2017, Ms Lindiwe Sisulu, the then Minister of International Relations and Cooperation of South Africa ("**DIRCO**"), asked me to join her at DIRCO, which I did.

6.10. On 1 November 2018, I was asked by Ms Letsatsi-Duba, who had been appointed as the Minister of State Security on 27 February 2018, to return to the SSA as the acting Director: Domestic Branch, in order to assist with the internal investigations that were being conducted into the allegations of corruption and malfeasance at SSA, as well as to enhance corporate governance.

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.

During the course of this investigation, we interacted with General Anwa Dramat, the then Head of the DPCI, and Mr Willie Hofmeyr, the then Head of the Special Investigations Unit ("**SIU**"). During November 2011 and shortly after Mr Njenje had requested the SIU to conduct a further investigation, he resigned, apparently as a result of the breakdown in the relationship between him, Minister Cwele and President Zuma.

10. After the departure of Mr Njenje, the PAN investigation lost impetus. I suspect that President Zuma may have had a hand in this as the PAN investigation implicated, amongst others, Mr Arthur Fraser, who President Zuma returned to the SSA as the Director General ("**DG**") during 2016,

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.

E. THE INTERNAL INVESTIGATIONS CONDUCTED BY THE TEAM ASSEMBLED BY ME

15. I was engaged to strengthen and enhance the internal investigations which were being conducted by SSA into the malfeasance discovered in its covert special operations and counter-intelligence units. These investigations spanned:

15.1. the PAN investigation into the financial irregularities at SSA prior to 2009 involving, amongst others, the then Director General (DG), Mr Manala Manzini, his deputy and Director of National Operations, Mr Arthur Fraser, and the former manager of the

Covert Support Unit, the late Philani ("**PAN 1**");

15.2. Project Veza into the financial irregularities and illicit nature of the covert projects and operations conducted by the Chief Directorate of Special Operations ("**CDSO**") under the then Deputy DG: Counter-Intelligence, Mr Thulani Dlomo between 2012 and 2016; and

15.3. the further investigation into the burgeoning budget of the SSA from R42 million in the 2016/2017 financial year to more than R 300 million during the 2017/2018 financial year, after Mr Fraser returned to the SSA as the

DG and centralised operational control under his office from 2016 to 2018 ("**PAN 2**").

16. On accepting the transfer, I set about expanding and enhancing the capability of the investigation team. At that stage, the investigation team was a three-man show, comprising of an advocate and two people from the CI Counter-Intelligence division. I accordingly enhanced the team to include persons who could bring specialised skills and experience to bear upon the investigation.

17. By then, the PAN 1 investigation had all but fizzled out:

17.1. The PAN 1 Investigation Report had not been investigated and pursued by law enforcement agencies;

17.2. the IGI report prepared by Ms Jay Govender had not been acted upon by the Inspector General, Ms Faith Radebe; and

17.3. the IGI's presentation on its findings to the Joint Standing Committee on Intelligence ("**JSCI**") had not yielded any proper oversight.

18. Following upon our investigations, I compiled two reports in terms of Chapter 2 and Section 34 (1) of the Prevention and Combatting of Corrupt Activities Act, 12 of 2004 and in terms of Treasury Regulation 12.5.1, issued in terms of the Public Finance Management Act 1 of 1999, for submission to Brigadier Zama Basi, the then Head

of the DPCI, with the assistance of the investigation team:

18.1. The first report, dated 10 April 2019, dealt with our findings with regard to our investigations into Project Veza and PAN 2, annexed hereto marked "**LM 3**";

18.2. The second report, dated 16 April 2019, dealt with our findings with regard to our investigation into PAN 1, annexed hereto marked "**LM 4**".

19. I point out that as the documentary support for our findings had not at this stage been de-classified, it was not provided to the DPCI together with my reports. However, I am advised that on 10 June 2019 Mr Jafta supported the submissions made by

me and provided the documentary support thereof electronically to the DPCI in terms of the Intelligence Services Act 65 of 2002. Mr Jafta also affirmed the seriousness of the allegations and suspicions reported by me. A copy of Mr Jafta's affidavit in this regard is annexed marked "**LM 5**".

20. Save to affirm the content of my reports and my submissions, I do not intend to deal further with our investigations and findings as I am advised that these will be dealt with fully by an SSA member on behalf of the investigation team. I believe that this is appropriate as the investigations continued after I left the SSA and a more comprehensive picture can thus be presented by those who have been actively seized with the ongoing investigations.

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.

44. It is worth mentioning that on 13 August 2019, Advocate Muofhe was appointed to my position at SSA, Mr Fraser, who was seriously implicated in our investigations, has been appointed as the National Commissioner of Correctional Services and Ambassadors Kodjoe, who was the DG of the SSA from 2013 to 2016 and was also implicated in our investigation, was appointed as the Secretary for South African Defence Force ("**SANDF**") on 23 July 2020.

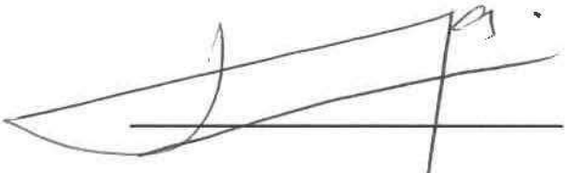
45. I, who was brought back to the SSA to assist with the investigation and have done nothing other than performing the job I was appointed to do, have been left unemployed. It is with untold regret that I believe that my removal from the SSA was to stifle

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 LM1

"LM1"

PRESIDENT'S ACT NO. 78

In terms of section 8(1) of the Intelligence Services Act, 2002 (Act No. 65 of 2002), I hereby concur with the decision of the Minister of State Security to appoint Mr L Mhlanga as the Director Domestic Branch of the State Security Agency.

Given under my Hand at PRETORIA on this 13th day of MARCH Two Thousand and Nineteen.

PRESIDENT

MINISTRY
INTERNATIONAL RELATIONS AND COOPERATION
REPUBLIC OF SOUTH AFRICA

Private Bag X152, Pretoria, 0001 • 460 Soutpansberg Road, Rietondale, PRETORIA • Tel: (012) 351 1000
17th Floor, Room 1703, 120 Plein Street, CAPE TOWN, 8000 • Tel (021) 464 3700 Fax: (021) 465 6548

11 November 2018

Ms D Letsatsi-Duba, MP
Minister of State Security
Private Bag x 51278
WATERFRONT
8002

Fax: (021) 461 4644

Dear Colleague

TRANSFER OF MR L MHLANGA

Your letter in the above regard, dated 8 November 2018 refers.

Mr Mhlanga has been instructed to conclude some assignments that he is engaged with at the Department of International Relations and Cooperation, one of which deals with the recall of Heads of Mission seconded from the Department of State Security.

I would therefore be grateful for a formal response from you to my letter of 9 November 2018, requesting the urgent recall of all Heads of Mission from the Department of State Security.

Yours sincerely

L N Sisulu, MP
Minister of International Relations and Cooperation

ANNEXURE LM2

"LM2"

CONFIDENTIAL

state security

State Security Agency
REPUBLIC OF SOUTH AFRICA

SSA/DG01/4/3 Office of the Director-General

16 November 2020

Mr L Mhlanga

Cooperation by members / former members of the State Security Agency with the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (Zondo Commission)

1. As you are aware, on 23 January 2018 the President of the Republic of South Africa appointed the abovementioned Commission of Inquiry to investigate allegations of state capture, corruption and fraud in the Public Sector.

2. In terms of paragraph 3 of the Commission's Terms of Reference *"All organs of State will be required to cooperate fully with the Commission"*. This includes the SSA and its members.

3. Consequently, if called upon to do so you are hereby directed to provide your full cooperation with the Commission insofar as providing it with any information it requires in the fulfilment of its mandate. This includes any information obtained by you in the course of carrying out your official duties, or by virtue of your being or having been a member of the Agency. No member or former member of the Agency shall be entitled to withhold information from the Commission based on grounds such as classification, the need-to-know principle, or the oath of secrecy undertaken by them.

4. Furthermore, kindly note that members / former members are to first seek permission, from the office of the Director General, before handing over any classified documents to the Commission.

5. Thank you.

Mr L Jafta
Acting Director-General

Sikhungo Setekuphepha Kwembuso Setheo sa Tshireletso sa Mmuso Ikoro yezoKuPhepha kweLizwe | Staatsveiligheidsagentskap Setheo sa Tshireletso sa Puso IsiPhiko Lwezokuphepha Kwezwe | i-Arhente yoKhuselo kaRhulumente Xiyenge xa Vuhlayiseki bya Mfumo | Zhendedzi ya Vhutsireledzi ha Muvhuso Basensedi Ba Tshireletso Pusong

CONFIDENTIAL

ANNEXURE LM3

"LM3"

Affidavit of Lloyd Mhlanga Identity number: xxxxxxxxxxxx

I the undersigned, Lloyd Mhlanga ID number xxxxxxxxx, in my capacity as Director: Domestic Branch of the State Security Agency (herein after referred to the SSA) situated at Pretoria, state under oath as follows:

1.

I am duly authorised as a Senior Manager to depose to the contents of this statement.

2.

This affidavit is deposed to in terms of Chapter 2 and Section 34 (1) of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 and in terms of Treasury Regulation 12.5.1 issued in terms of the Public Finance Management Act 1 of 1999.

3.

Knowledge of suspicion

Flowing from the budget vote speech of Honourable Minister Letsatsi-Duba in 2018, where she committed to stem the rot within SSA, ensure that corporate governance is enhanced as well as to confront allegations of corruption and misconduct; I launched an internal investigation with the purpose of strengthening integrity management mechanisms within the SSA in pursuance of restoring the SSA and its systems.

4.

In addition, the Office of the Inspector-General of Intelligence (OIGI) has informed the SSA of its investigations into irregularities uncovered relating to specifically the Chief Directorate Special Operations (CDSO) – the covert operational structure within the SSA - which has been the primary ground on which most of the suspected offences have played out.

5.

Further to these developments, the Report of the High level Panel on the SSA, confirmed suspicions with their findings of "instances of serious criminal behaviour which had taken place under the guise of conducting covert work and that this behaviour may have involved theft, forgery and uttering, fraud, corruption, and even bordered on organised crime and transgressions of the Prevention of Organised Crime Act 121 of 1998 (POCA)". The Panel noted that the nature of the accusations and the evidence collected during the various investigations painted a disturbing picture. Allegations of malfeasance, procedural transgressions and criminal behaviour were placed before the Panel.

6.

Suspected offences

In the ensuing investigations, information patterns emerged that indicated apparent corrupt networks operational within the SSA, which have been recurring over a period of years (2012 – 2018) resulting in serious economic losses to the State through illegal financial flows and the activities of entrenched corrupt networks. It is suspected that the individuals implicated,

most of whom are public officials, have committed the crimes of corruption (as defined in the Prevention and Combating of Corrupt Activities Act 12 of 2004); theft; fraud; forgery; treason and serious commercial offences against the State.

7.

The uncovered networks appear to employ a similar modus operandi indicating an illicit value chain involving three distinct yet interrelated tiers of operation – initiators, facilitators and primary/secondary beneficiaries which include but are not limited to political and executive heads as well as senior government officials. It is suspected that there has been planned, continuous and repeated participation or involvement in these offences during the period 2012-2018. These range from suspicions of individual members who had failed to adhere to proper procurement processes; signed fraudulent contracts or made payments to persons without contracts having been signed; the employment of family members and close associates outside of formal processes; procurement of assets without adherence to formal procedures; abuse of assets; missing funds; and missing assets.

8.

Illegal vehicles (false or front business entities) and illegal operations were created as tools for siphoning funds as well as for establishing parallel intelligence capacities that, if not abated, will continue to pose a risk to national security and the constitutionally established State. The implicated members (or former members who remain public officials) used their positions of authority to ensure that they or their family members or close associates directly benefitted from these unauthorised contracts with the front companies and/or illegal operations.

9.

In certain instances, these structures within the SSA were used to further political ends and attempted to interfere with the outcome of the ANC National Elective Conference in December 2017 which is in contravention of the SSA mandate and constitutional prescripts relating to the civilian intelligence structures.

Actual/Potential losses

10.

Sustained patterns of financial irregularities resulted in an approximate amount of R1.5 billion being fleeced from state coffers. The funds, taken under the guise of covert operations, emanated from the Treasury allocated budget as well as retained funds as regulated in terms of the Secret Services Act, 56 of 1978. These funds were expended both domestically and abroad.

11.

The SSA stands to incur further financial losses as legal action is brought against the Agency by some of the purported intelligence operatives previously involved in parallel intelligence work. Some of the plaintiffs are related to implicated SSA members who are believed to be

inciting these actions which include threatening to expose SSA's covert operations publically in the event that settlements are not reached. It should be noted that these individuals are not employees nor registered sources of the Agency.

Implicated individuals

12.

The SSA is responsible for the securing of the State against any potential threats to its sovereignty and Constitution. There is a concern that the activities of the individuals mentioned below has constituted a threat to the economic interest and good governance interests of the State and to the lives of the people residing within it.

13.

The details in respect of the implicated individuals are as follows:

13.1.

Ambassador Silence Thulani Dlomo: ID Number:
Telephone Numbers:

During the period 2012 – 2016, Mr Thulani Dlomo was appointed as General Manager and Deputy Director (DB03). He is suspected of having being central to networks that stole funds and defrauded the SSA. Mr Dlomo is implicated in committing the SSA to contracts with companies without the necessary authorisation and with business entities that are suspected of being fake or created specifically for the purpose of defrauding the SSA and for which he may have received personal gratification. He is also suspected of creating parallel intelligence machinery by outsourcing the SSA CI mandate through these companies which procured the services of individuals who were promised permanent employment within the SSA. Large sums of cash were withdrawn and misappropriated. The target also outsourced VIP protection services to security companies which provided fictitious invoices to the Agency which were paid for, parallel to a VIP protection service of the SAPS and PSS established within the SSA. It was found that the member has committed theft resulting in the loss of assets belonging to the SSA. These assets include vehicles and firearms.

13.2.

Mr Arthur Fraser (Former Director-General of the SSA; now National Commissioner of Correctional Services) ID:
Telephone Numbers:

Mr Fraser was the Director-General from October 2016 – March 2018. During his tenure he took over certain Special Operations projects and centralised them within his office, thereby acting beyond the scope of his mandate as Director-General. While claims were made that certain projects were terminated, investigations indicate that funds continued to be withdrawn for the same projects. This resulted in the exponential increase of operational expenditure in the Director-General's office from approximately R42 593 961, 09 in 2016/2017 financial year

to R303 992 341, 76 in the 2017/2018 financial year. In addition, Mr Fraser in collaboration with former Minister Mahlobo and later Minister Bongo, authorised the establishment of a parallel intelligence network relating to influencing civil society; creating intelligence products and social engineering. In this way, Mr Fraser resuscitated the networks previously established under his leadership as Deputy Director-General Operations (under NIA) as well as assert his control over new networks that had been established during his absence from the SSA. This continued even after his departure from the SSA in early 2018 indicating the entrenchment of his network. He procured state of the art intelligence equipment worth millions, some of which remains unaccounted for.

14.3.

Mr. David Mahlobo (Former State Security Minister)

Mr Mahlobo, the Former Minister of State Security is implicated in directly initiating and participating in intelligence operations in breach of constitutional and legal prescripts. Some witnesses have indicated that they were required to provide cash amounts (approximately R4 500 000.00 per month) to Mr Mahlobo for the alleged handling of sources for which there is no proof of payments. These payments were facilitated through the former Head of Ministerial Services, Jay as well as former SSA member employed in the Office of the Ministry, Vukhani. He is further alleged to have authorised expenditure from the retained funds of the SSA for covert operational expenses at the cost of IT and logistical infrastructure required by the SSA regardless of consistent irregular and wasteful expenditure by CDSO from 2014 - 2016. This perpetuated the irregular expenditure and theft of state funds. Furthermore, during his tenure (2014 - 2017) as State Security Minister, the Operational Expenditure for the DG's office escalated due to 'presidential covert projects' believed to be imposed by him and later continued by Mr Fraser and former minister Bongo.

14.4.

Adv. Bongani Bongo (Former State Security Minister)

In 2017, Minister BONGO was appointed as the new Minister of the SSA albeit for five months. During this period there are suspicions that the purportedly "closed down" CDSO projects continued to operate under the former DG Fraser's office. As a result Operational Expenditure driven by covert operations escalated from **R42 593 961.09** in the FY 2016/2017 to **R303 992 341.76** in the 2017/2018 FY. In addition, he continued to receive cash amounts (approximately R4 500 000.00 per month), similar to his predecessor for the alleged disbursements to agents. One such operation included deployment to the ANC Elective Conference of December 2017 where operations conducted by the CDSO structures attempted to neutralise support for the CR17 campaign. He is suspected of conducting unconstitutional or anti-constitutional activities that potentially undermine the democratic rule within South Africa; Acting beyond the scope of the mandate of the SSA; Embezzlement of funds (possible fraud); and Irregular Expenditure in contravention of the Public Finance Management Act (PFMA).

14.5.

Frank

Telephone Numbers:

Frank is an SSA member who was appointed as the Project Manager in the majority of the fictitious projects that were created by Mr Thulani Dlomo and compiled the majority of the submissions used to approve the said projects. He took temporary advances/cash amounting to millions of rand, approximately R160 000 000, 00 over a period of two (2) years and failed to sufficiently account for how the funds were expended. It is suspected that he owns offshore investments, including an immovable property in a foreign country. In addition, he is suspected of playing a pivotal role in the illegal extension of contracts outsourcing intelligence work to service providers, including a foreign company registered in a foreign country. He used companies belonging to his uncle and wife in those fictitious projects to defraud the SSA. He is further suspected of having contravened the Firearms Control Act and facilitating extraneous paramilitary training.

14.6.

Susan
Telephone Numbers:

Susan was employed as an HR Consultant prior to transferring to the Chief Directorate Special Operations as a Staff Officer in the SSA, the member was appointed to acting as Manager for Presidential Protection Service (PSS) in 2013. She was involved in withdrawing temporary advances/cash worth R4 500 000, 00 per month over a period of six (6) months for projects whose objectives she alleges she did not have knowledge of. The monies were not properly accounted for but were allegedly given to Former Minister Mahlobo. She was also involved in acts that resulted in the SSA losing some firearms which have still not been accounted for in contravention of the Firearms Control Act. She was also involved in an attempt to compromise the personal security of Mr Cyril Ramaphosa when he was still the Deputy President and immediately prior to the Nasrec Conference. In this regard, she was also implicated in actively being involved in offering an amount of R20 000 000, 00 to compromise the security of Mr Ramaphosa through the withdrawal of the protective services rendered.

14.7.

Saki
Telephone Numbers:

Saki is employed as an Analyst in the SSA, the member became involved in the remuneration of sources, by so doing acting outside of her scope of employment. She was complicit in the commission of fraud by falsely registering people as sources merely to legitimise their monthly payments. There is further indication that this conduct constituted a pattern of racketeering activity. Some sources were made to sign blank receipts which facilitated possible defrauding of the SSA. She further used photocopied signatures to justify

the claims for cash withdrawn. It is suspected that some of these signatures may be forged. She is suspected to have embezzled large sums of cash from SSA.

14.8.

Jack
Telephone Numbers:

Jack was appointed Head of the Covert Support Unit (CSU) by Mr Arthur Fraser in August 2017. He was an active participant in entangling the SSA into untenable lease agreements not only outside his delegated powers of authority but to the detriment of the SSA and wider State. He is also suspected of defrauding the SSA, in the process of facilitating payments with non-SSA members and service providers. While he is a qualified and senior Auditor by profession, Jack facilitated the withdrawal of monies without the requisite documentation. He also received cash amounts of over R2 000 000.00 from Helen who is suspected of grand theft, fraud committed against the Agency. Jack also withdrew funds and subsequently settled for an amount of R6 000 000. 00 which was purportedly expended on a project. However, on subsequent enquiry, he returned R3 000 000.00 of the money indicating possible fraudulent settlement processes. Jack also played an active role in attempts to subvert the internal investigation by withholding and preventing access to documentation pivotal to prove the gross fraud perpetrated by members of CDSO.

14.9.

Helen
Telephone Numbers:

Helen served as Office Manager in the office of the former DGs Ambassador Kudjoe and Mr Arthur Fraser. While she is not an operative and only cleared at a Confidential level, she withdrew temporary advances/cash worth R505 948 928, 68; EUR 6 083 280, 00; USD 9 800 569, 00 between 2013 and 2018 allegedly for covert projects that were run from the office of the DG. This includes amounts in foreign currency (320 000 euros) for a domestic project. The settlement of the advances taken, do not comply with necessary financial and accounting prescripts and it is therefore suspected that she was complicit in defrauding the SSA. These projects indicate collusion with former Ministers Mahlobo and Bongo in running operations to pursue political agendas and interfere with the independence of the judiciary and influence civil society. She was found in a sting operation conducted by Internal Security (Access Control) stealing classified documents and is currently on suspension.

14.10.

Kelly
Telephone Numbers:

Kelly perjured herself regarding her involvement in the channelling of SSA funds through her company to pay so called "co-workers" involved in the parallel intelligence structures. The member's corrupt relationship with Mr Thulani Dlomo is indicated by the utilisation of her residential address as the Agency's domicilium address in one of the illegal contracts entered into by Mr Dlomo on behalf of the Agency. These illegal contracts compromised the SSA where the CI mandate of the Agency was outsourced to private companies potentially impacting national security. In addition, these relationships have resulted in a loss of funds
and potential further losses due to legal action taken against the Agency by so called "co-workers" who were wrongfully promised permanent employment within the SSA. Kelly, the sole director of Remix one of the companies illegally contracted by Mr. Thulani Dlomo, is seen as an integral facilitator to the illicit financial flows as the company made payments for expenses incurred by Kelp. The latter company is linked to Ms Mandisa Mokwena who has fleeced the SSA of millions of rand through her suspect relationship with Mr Dlomo and her involvement in illegally carrying out the Agency's CI mandate.

14.11

Ms Mandisa Mokwena:

Telephone Numbers: Home:

Ms Mokwena has through her company Kelp conducted operations purportedly on behalf of the SSA which entailed a parallel counter-intelligence machinery. In this regard, she was enabled by SSA members including Mr Thulani Dlomo, Mathew, Darryl, Felicity and Kelly. Ms Mokwena utilised Kelly's company Remix, which entered into an illegal contract with SSA, to access and disburse funds from the Agency. Remix made payments of expenses incurred by Kelp; Ms Mokwena received R1 800 000.00 per month over years which was withdrawn through Temporary Advances (TAs) by Felicity, Lilly and Mirriam respectively. Some of the TAs were taken under Project names different to the one she claims she was contracted for. Ms Mokwena while claiming to have a contract with SSA has failed to produce proof to that effect. Furthermore, she has claimed in sworn affidavits that she submitted products directly to the former President Zuma and the CDSO. However, it cannot be ascertained how the said products benefitted the Agency neither can they be traced.

Stemming from the cessation of money flows from SSA, Ms Mokwena's network of co-workers including herself have pursued civil claims against the Agency which have had further financial impact on the Agency. Ms Mokwena is also suspected of perjuring herself in affidavits where glaring disparities between the information stated by the involved parties regarding both the purpose and commencement of the project can be discerned. It is also suspected that assets were bought with SSA funds.

14.12.

Lilly
Telephone Numbers:

Lilly was employed as a Divisional Head for the Business Finance and Asset Management division within the CDSO. Lilly is suspected of having facilitated payments of over R20million to Shadow (see below) - a close associate of Mr Thulani Dlomo – and who is not a member of the SSA and has no legitimate connection to the SSA. Receipts relating to these transactions have furthermore been tampered with, adding to suspicions of irregular and fraudulent activities. She is furthermore suspected of having taken cash from the SSA without properly accounting for the expenditure. There is further indication that this conduct constituted a pattern of racketeering activity. Lilly was also key in facilitating cash payments to Ms Mandisa Mokwena of Kelp Resources through Kelly prior to the utilisation of Remix as a conduit. Lilly is also suspected of playing a key role in the elaborate safe-house fraud where SSA funds were channelled to fictitious companies in collaboration with Felicity.

14.13.

Felicity
Telephone Numbers:

Felicity is suspected of receiving gratuities in respect of awarding of contracts for the maintenance of safe houses used by the SSA. She is suspected of having forged documentation in order to skew supply chain management processes in favour of certain preferred suppliers. She is suspected further of having facilitated payments in favour of Kelly as listed above. There is further indication that this conduct constituted a pattern of racketeering activity. The member became involved in the remuneration of sources, by so doing acting outside of her scope of employment. She was complicit in the commission of fraud by falsely registering people as sources merely to legitimise their monthly payments. There is further indication that this conduct constituted a pattern of racketeering activity. Some sources were made to sign blank receipts, which is in contravention of SSA policies and directives governing source remuneration. She further used photocopied signatures to justify the claims for cash withdrawn.

14.14.

Darryl
Telephone Numbers:

Darryl was appointed the General Manager of Chief Directorate Special Operations and during his tenure he facilitated the fraud and corruption allowing for the pattern of racketeering to continue. He drew Temporary Advances (cash) from Agency funds for the purported purpose of operational activities, however, there is no indication that these funds were used for their intended purpose. Furthermore, he approved TAs withdrawn by individuals including Lilly for projects that were found to be unconstitutional in that they encroached on the independence of the Judiciary. In this regard, he and Frank facilitated the monthly withdrawal of R4 500 000.00 in cash allegedly for delivery to former Minister Mahlobo. He on more than one occasion also approved TAs worth millions withdrawn for a project run by Ms Mokwena despite that the attached submissions related to a different project.

14.15.

Mathew
Telephone Numbers:

Mathew was appointed as the Chief Financial Officer. He played a key role in the deactivation of the "funds availability check" mechanism in the financial system despite numerous instructions from the then DG Kudjoe and the Budget Management Committee for him to reactivate it. In this regard, he is suspected of facilitating illegal activities by failing to implement internal control measures which perpetuated the escalation of unauthorised expenditure, irregular expenditure, fruitless and wasteful expenditure, as well as fraud resulting in Contravention of Section 38 (1) (a)(i) (iii), 38(1) (c) (ii) and Section 50 of the PFMA. Furthermore, Mathew approved the withdrawal of cash by members of CDSO regardless of the red flags and the blatant non-compliance with budgetary requirements. This in turn obliterated the financial audit trail thus facilitating illicit financial flows. In addition, he is suspected of having violated National Treasury Regulations, Ministerial Payment Directives and the PFMA.

14.16.

Raymond
Telephone Numbers:

Raymond was appointed as the Chief Audit Executive (CAE), and later as Acting Chief Financial Officer from 01 April 2017 to 18 May 2018. Despite her numerous Internal audit reports where she raised concerns around CDSO overspending as well as highlighting the risk of fraud, unauthorised expenditure and financial mismanagement during her tenure as CAE; the practices continued during her tenure as Acting CFO particularly within DG Fraser's office notwithstanding that CDSO had been closed. In this regard, there was exponential increase of operational expenditure in the Director-General's office from approximately R42 593 961, 09 in 2016/2017 financial year to R303 992 341, 76 in the 2017/2018 financial year some of which is linked to Helen. She is therefore, suspected of facilitating illegal activities by failing to implement internal control measures which facilitated the escalation of unauthorized, irregular, fruitless and wasteful expenditure, as well as fraud resulting in Contravention of Section 38 (1) (a)(i) (iii), 38(1) (c) (ii) and Section 50 of the PFMA. In addition, she is suspected of having violated National Treasury Regulations, Ministerial Payment Directives as well as the terms and conditions of the EXCON Agreement between the South African Reserve Bank and SSA in relation to handling of foreign currency.

14.17.

Shadow

Shadow, a former member of the SAPS, is not a member of the SSA. However, it is suspected that there is a corrupt relationship between him and Mr Dlomo whereby Shadow receives some gratification for the services that he provided. Furthermore, he is implicated as a conduit through which funds were moved between the SSA and Mr Thulani Dlomo as well as unknown recipients. Shadow also received large sums of cash from Lilly and Frank for projects that were illegally established and did not fall within the mandate of SSA Domestic Branch. He is further suspected of providing extraneous paramilitary training to members of the parallel intelligence structure created by Mr. Dlomo. He was also one of the individuals arrested in a foreign country where he was involved in providing training to security personnel of a political party, on military tactics. It was also suspected that their activities could interfere with the country's election results as details including vulnerability assessments of the country's electoral officers were found in their hotel rooms.

Documentary support

15.

The SSA investigation team is in the process of unearthing documentary evidence. However, due to the documentation being classified, it cannot be attached at this stage.

Further investigations

16.

Further investigations by the SSA are continuing and more individuals implicated are being uncovered. These investigations include amongst others lifestyle audits of individuals already implicated.

Witnesses

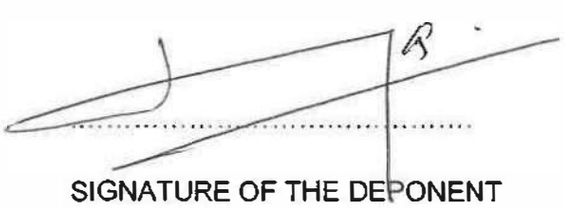
17.

Demi, the Project Manager who is leading the investigation may be contacted for more information relating to the outlined suspicions and witnesses.

18.

The gross financial irregularities and practices unearthed within the SSA have severely impacted on the SSA's ability to deliver services in its pursuance of its mandate to ensure that all people are and feel safe within South Africa. In the context of the current economic challenges faced by the country, it is pivotal that the proceeds of theft of SSA assets and funds be recovered.

To the best of my knowledge and belief the contents of this statement is true and correct. I have read this statement before signing it. I am familiar with and understand the contents of this statement. I have no objection to taking the prescribed oath. I do consider the oath as binding on my conscience.



SIGNATURE OF THE DEPONENT

I certify that the above statement was taken down by me, after putting the following questions to the deponent:

1. Are you familiar with the contents of the statement and do you understand the statement? Whereupon the deponent replied....YES.

2. Have you got any objection against the prescribed oath? Whereupon the deponent replied....No.

3. Do you consider the prescribed oath as binding on your conscience? Whereupon the deponent replied....YES

After the deponent had answered the abovementioned questions verbally to me, the statement was attested to in my presence and the deponent signed it in my presence at **Pretoria** on this 10 day of **April 2019**.

BRIG. TA BASI

SIGNATURE OF COMMISSIONER OF OATHS

ZAMA ANDREAS BASI

DIRECTORATE FOR PRIORITY CRIME INVESTIGATION; 421 PRETORIUS STREET; PRETORIA.

DESIGNATION: BRIGADIER; SA POLICE SERVICE.

ANNEXURE LM4

AA

"LM 4"

Affidavit of Lloyd Mhlanga Identity number: xxxxxxxxxxxx

I the undersigned, Lloyd Mhlanga ID number xxxxxxx, in my capacity as Acting Director: Domestic Branch of the State Security Agency (herein after referred to the SSA) situated at Pretoria, state under oath as follows:

Between 2009 and 2011, I held the position of acting Deputy Director-General: Operations, National Intelligence Agency (known as NIA, before changing to SSA). For the purpose of convenience reference to SSA in this statement shall also imply reference to NIA, as SSA was known before 2012.

1.

The facts herein contained are, unless otherwise stated or as appears from the context, within my personal knowledge and are to the best of my belief true and correct. I am duly authorised as a Senior Manager to depose to the contents of this statement regarding the Principal Agent Network (PAN). During the period under which the PAN programme existed, Mr Manala MANZI NI was the Director-General of NIA while Mr Arthur FRASER was the Deputy Director-General: Operations, NIA. Philani was the Manager and Head of the Covert Support Unit (CSU).

2.

This affidavit is deposed to in terms of Chapter 2 and Section 34 (1) of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 and in terms of Treasury Regulation 12.5.1 issued in terms of the Public Finance Management Act 1 of 1999, which further stipulate that reporting of any financial losses or damages suffered through criminal acts to the South African Police Service (SAPS).

3.

Knowledge of suspicion

3.1.

In September 2009, the then Minister of State Security (Dr S CWELE MP) ordered an investigation into alleged irregularities in the SSA's covert Principal Agent Network programme (PAN programme). His concern related to the SSA's CSU's overspending of its own allocated budget and subsequent use of SSA's rollover budget funds and budget savings.

3.2.

Flowing from the above, a preliminary inquiry was instituted by the Internal Audit Division of the SSA to look into the above issue. Subsequent to that and during February to September 2010, in my capacity as the then Acting Deputy Director-General: Operations, I appointed teams to investigate any alleged acts of maladministration within the CSU structure of the SSA for the period 2007 until 2010. The specific teams were composed and mandated to investigate the validity of lease agreements entered into by the CSU, verifying the existence

of members of the PAN programme, and conduct an operational audit of the PAN projects to determine which should be continued and which should be closed down.

Over and above the terms of reference the teams were tasked to identify maladministration within the CSU; breaches of legislation, policies, directives and regulations; and conduct an investigation into the procurement and purchase of assets.

3.3.

From time to time the teams provided me with preliminary reports regarding progress of their investigations. During the course of the investigation the different teams identified numerous incidents of breach of the SSA regulatory framework, as well as the irregular authorisation and utilisation of funds. The result of the investigation was that there was sufficient indication to institute internal disciplinary and criminal investigations against certain identified members of the SSA.

3.4.

During or around October 2010, I appointed a multidisciplinary team to consolidate and finalise the proceedings of the various investigation teams and to finalise all the outstanding investigations. The above team was made up of members from the various investigation teams with additional members co-opted as and when a specific skill was required.

3.5.

I am aware that the Joint Standing Committee on Intelligence (JSCI), Office of the Inspector General of Intelligence (OIGI) and Auditor General of South Africa were briefed on the findings of the report; and the matter was referred to the OIGI for further investigation in June 2013 by then Minister of State security DR S. CWELE. The OIGI, I am aware, has produced two reports on the issue. I am not aware of any reasons why no further action was taken as I had left the SSA at the time.

3.6.

The report on the findings of the internal investigation identified acts of criminality pertaining to activities of the SSA's Cover Support Unit, which include transgressions in terms of the provisions of the Prevention and Combating of Corrupt Activities Act, no 12 of 2004 (PRECCA).

Suspected offences: Findings of investigation team

3.7.

Without going into detail on the contents of the report, clear breaches with regard to SSA's regulatory framework were also identified in relation to the management of the CSU and the

PAN programme, which included but not limited to the irregular conducting of covert operations; Irregularity in the deployment and employment of members in the covert PAN programme; irregularities in the reporting of information collected by the covert PAN programme; fraud and corruption relating to the leasing of safe houses; contracts entered into in the absence of authority and with potential fundamental risks; defeating the ends of justice by attempting to obstruct and subvert the investigation conducted by the auditors through the unlawful interception and thereby contravening Regulation of Interception of Communications Act 70 of 2002 (RICA); and absence of authority to appoint former members. It is also evident that the suspects acted individually and/or in concert amounting to possible statutory offences in terms of Prevention of Organised Crime Act 121 of 1998 (POCA).

Actual/Potential losses

3.8.

Sustained patterns of financial irregularities resulted in an estimated amount of R138.7 million being fleeced from state coffers. This amount is a very conservative figure due to much of the assets and infrastructure procured during the period of the PAN programme remain unaccounted for. For example 293 vehicles were purchased, however most of these have not been recovered. The SSA was further prejudiced as a result of residual action emanating from the legal action taken against the agency for irregular contracts that could not be honoured due to the closure of the programme as well as the absorbing of PAN personnel into the SSA.

4.

Implicated individuals: The details in respect of the implicated individuals and suspected criminal activities they are linked to as well as exposition of the network are as follows:

4.1.

Philani

Grant : Possible Corruption, Fraud (R36Mil) and suspected Tax evasion

Grant was the sole director of Cherry. Cherry is a shelf company that was registered in 2003 and was bought by Grant in January 2005, while he was still a covert member of the SSA. Grant resigned from the SSA on 31 March 2006 and became the sole director of Cherry, which held the following ABSA bank account num bers xxx

Umango with registration xxx- with a First National Bank account number xxxxxxx- was registered in 2008 with Nate as its director. In turn, Umango was the letting agent in respect of all the properties leased from Cherry.

Possible illegal activity relating to the letting of safe houses to the amount of approximately 36 million rand is to be investigated. Preliminary investigation uncovered that Philani arranged with Grant to front for the CSU in the acquisition of safe houses.

Nate was interviewed by the investigation team and indicated that he was approached by Grant to register Umango Letting in order to act as a letting agent for properties that belong to Grant's company Cherry. Thereafter, Grant brought him in contact with Philani who was looking for properties to lease.

Nate indicated that in regard to the pre-paid leases an amount of R36 million was paid over to Umango through Boma a cover company of the CSU that was registered in 2007 with registration number xxx; under the directorship of Philani. The amount was paid in a single transaction in March 2008 to Grant. Nate was not prepared to provide further information, to make a statement or to have further contact with the investigators.

Nate was also questioned with regard to the VAT that was apparently paid in respect of the R36 million paid over to Umango. Nate indicated that Umango indeed paid the VAT over to SARS and furnished the investigators with the VAT Registration number. On enquiry with SARS the VAT Registration number was found to be non-existent. The investigators went back to Nate with the new information and he argued that the VAT was incorrect because Umango was converted from a Close Corporation to a private company. This explanation was not satisfactory as according to SARS VAT is payable on the 25th day of every month, therefore the VAT should have been linked to the registration number of the Close Corporation. This raises strong suspicions that the VAT that was charged by Umango was never paid over to SARS as required by the legislation.

The investigators thereafter interviewed Grant and he indicated that he was approached by Philani to render assistance with the obtaining of properties to lease to Boma and that he in fact approached Nate to register Umango. He mentioned that Nate was never made aware that Umango will be utilized for intelligence purposes. He confirmed that the leased properties in question are owned by Cherry which is his company. He further confirmed that he received payment for the pre-paid lease agreements from Umango but did not disclose the amount. He was not prepared to provide any statement or further assistance. During an interview with Mary, she also indicated that she has knowledge of an amount of R36 000 000-00 that was paid over to Grant.

Houses on sale in the Pretoria area were seemingly identified. Philani and Grant then evidently created lease agreements for the properties. A submission was generated in some cases and approved by Philani, for the CSU to enter into the

rental agreements, pre-paid to the landlord for up to 10 years in some cases. These properties were then leased back to the CSU. From the information gathered the CSU paid rentals upfront and effectively assisted Grant with the purchase of the leased properties. Ms

Mary, the CSU's financial Officer made a confession regarding this modus operandi to the investigation team.

Cherry will have unencumbered ownership of the properties that were acquired using State funds. The relationship between the above individuals and entities needs to be determined as there is suspicion that they may have been involved in a corrupt relationship in relation to the above contracts.

4.2.

Mary and Philani: Fraud and theft

Mary was the CSU's financial officer. During the preliminary internal investigations she admitted to the investigation team of having drawn an amount of R1.2 million from the CSU coffers to purchase two properties in Pretorius Park, Pretoria East.

Mary then gave the said money to her husband Will and her brother Wayne (who was also PAN Programme member) to purchase the said properties.

She then leased the said property back to the CSU. A fraudulent and fictitious lease agreement in the name of a housing rental company was created which was used to conceal her identity when contracting with the SSA.

In a further instance, Philani created a fraudulent and fictitious lease agreement and invoice in the name of a housing rental company for an amount of approximately 5.6 million rand. While this requires further investigation, it is however clear that both Philani and Mary were party to fraud in both instances.

4.3

Arthur FRASER, Philani and Manala MANZINI : Corruption in respect of irregular awarding of contract to a company to provide services to PAN program.

Pybus, was registered on 27 March 2008 with an ABSA account number xxxxxxx. Mr Jail was the sole director member of the company. Jail, w as a former member of SSA and Head of Counter Intelligence in Western Cape Provincial Office until his resignation in March 2008.

FRASER identified Pybus as the only service provider to deal with security related installations in all covert facilities of the PANs. A submission authorising funding for Pybus to commence work was recommended by FRASER and approved on 18/02/2008 by former Director General, MANZINI. While the approved submission only related to security installations by Pybus, it was utilised for variety of services amongst others construction,

guarding services, provision of cell phones etc. It is noteworthy that Pybus did not exist at the time FRASER and MANZINI signed approval for the funds. They in essence authorised the

CSU to pay a fictitious company. Pybus was only registered more than a month later on the 27 March 2008. Jail resigned from NIA on 31/03/2008. . Jail received payment (R11 million) for work, while he was still a member of NIA, from the CSU. Furthermore, while there was no written contract between the CSU Cover Company and Pybus, verbal instructions were issued to Pybus by Mr FRASER and Philani. Further losses by the SSA stemmed from a R10 million lawsuit filed by Pybus against the SSA (CSU) resulting in a settlement to an amount of R6.65 million.

The decision to award work to Pybus was irregular and the relationship between Pybus, FRASER and Jail requires further investigation. The above conduct individually and/or acting in concert amounts to possible statutory offences in terms of PRECCA.

4.4

Arthur FRASER and Manala MANZINI: Secure Remote Communication/Server: Contravention of the Intelligence Services Act

A Server with a pre-programmed e-mail link to all PAN's laptops was installed at Mr FRASER's private residence, instead of in a prescribed secure official facility. FRASER appeared to have been the sole recipient of information gathered. The communication system was installed at xxxxxxxxxx, Observatory, JHB and managed by Isa, represented by a former Cammo (a private company, operating as an Organ of State, established in 2002 as part of the National Communications Branch of the civilian intelligence) consultant, Nada. Consequently the information being sent in by the PANS was not disseminated or integrated into the SSA's information/document management system (DMS). FRASER was not only intercepting this information but also withholding it unlawfully from the SSA.

The PANs in the field were not provided with feedback or re-tasking (according to the PANs themselves). This in effect resulted in the PANs and their projects being left without the necessary guidance, focus and monitoring. All raw information was provided to FRASER in an encrypted electronic format.

In a specific instance relating to a project on the threat posed by Right-wing extremism, a total of between 700-800 reports were found not to have been captured on the DMS system over a period of 2 years. Neither were they forwarded to analysis structures of the SSA. An assessment of the withheld information indicates the resultant understating of the extreme right-wing threat by SSA analysts as crucial intelligence which could have provided a more accurate and comprehensive picture, was not accessed. This hampered on the Agency's ability to forewarn the client, thus impacting on national security. The information only came to light in March 2010 after the project had been taken away from the Manager: Operational Coordination (Garth) and substantially changed the information picture,). The information was generated by agents within the PAN system.

The above conduct was not only in breach of secure communication policies but also a blatant breach of our National Security Regulations and in effect amounted to running a parallel intelligence organisation.

4.5

Project NGO/ Community Peace Programme (CPP): (Corruption (R14, 9mil), Fraud, Nepotism and possible money laundering in terms of POCA)

The CPP project was initiated by FRASER. FRASER's mother, Ms C.F. Fraser, was on the board of directors together with Mr Yusuf PATEL the other director and a Ms JENNEKER. The idea was to establish an ear on the ground initially in the Coloured communities of the Cape flats. Internal investigations discovered that this concept was not initiated by the SSA (FRASER) but was rather inherited from the SAPS. From a SAPS' perspectives, this was a form of a community policing initiative wherein neighbourhoods were divided into blocks; each block to elect a representative which would report on activities in that particular community on a weekly basis. The CPP therefore took over the above project and funded it despite absence of any evidence of intelligence relevance and value. The project was also spread to areas such as Paarl. The investigation team visited Mbekweni Township in Paarl to verify the existence of the Mbekweni Community Peace Centre, which was formally opened in 2004. The objective of the centre was, inter alia, resolution of disputes, conflicts and problems that do not require police actions.

This was one of the projects that were funded by the SSA CSU through the Community Peace Foundation project headed by Yusuf PATEL. The Centre was closed down in 2006 due to financial constraints. However funds received from SSA to CPP were not managed. According to Mr Patel, 50% of funding received from SSA went to school feeding schemes and other social upliftment projects.

It is estimated that CSU funded this programme for a total of R10 million in a period of about a year. The CPP is sued SSA for R14.9 million for services not rendered.

4.6

Arthur FRASER: Movable Assets (Ugli (Pty) LTD: Financial mismanagement, Corruption (R24Mil)

A number of vehicles were purchased by the CSU for all the members of the PANs and some ostensibly to be used in operations of the PANs. These vehicles included three surveillance command vehicles that were imported at a cost of R18 million. Some of the vehicles were kept at warehouses of Ugli (Reg number: xxxxxxxx) Internal investigations reveals that the warehouse is linked to Bart (Identity number: xxxxxxxxx), the brother of Arthur FRASER who is director of the company and Kyle FRASER, Arthur's son was a manager in the company, responsible for the warehouse. The CSU leased the warehouse from Ugli for R400 000 per month for a period of five years. This translates into an amount of R24 million over 5 years which was paid to Ugli. The investigation team recommended that further investigations be conducted as there are serious suspicions of corruption and clear indications of nepotism relating to the above transaction.

5.

Terrence aka Mr Y, Acting General Manager for Special Operations, SSA can be contacted for more information relating to the outlined suspicions and witnesses.

6.

The gross financial irregularities and practices unearthed within the SSA have severely impacted on the SSA's ability to deliver services in pursuance of its mandate to ensure that all people are and feel safe within South Africa. In the context of the current economic challenges faced by the country, it is pivotal that the proceeds of theft of SSA assets and funds be recovered.

7.

It is therefore requested that the SAPS make further investigations into these suspicions.

8.

I have read this statement before signing it. I am familiar with and understand the contents of this statement. I have no objection to taking the prescribed oath. I do consider the oath as binding on my conscience.

.....

SIGNATURE OF THE DEPONENT

I certify that the above statement was taken down by me, after putting the following questions to the deponent:

1. Are you familiar with the contents of the statement and do you understand the statement? Whereupon the deponent replied....YES
2. Have you got any objection against the prescribed oath? Whereupon the deponent replied....NO....
3. Do you consider the prescribed oath as binding on your conscience? Whereupon the deponent replied....YES

TA.

After the deponent had answered the abovementioned questions verbally to me, the statement was attested to in my presence and the deponent signed it in my presence at Pretoria on this 16th day of April 2019.

BRIG. ZA BASI

SIGNATURE OF COMMISSIONER OF OATHS

ZAMA ANDREAS BASI

DIRECTORATE FOR PRIORITY CRIME INVESTIGATION;

421 PRETORIUS STREET; PRETORIA.

DESIGNATION: BRIGADIER: SA POLICE SERVICE.

ANNEXURE LM5

A3
"LM 5"

Affidavit of Mr Loyiso Mhlobo Thando Jafta

I the undersigned, Mr Loyiso Mhlobo Thando Jafta (Identity number: xxxxxxxxx), in my capacity as the Acting Director General of the State Security Agency (herein after referred to the SSA) situated at Pretoria, state under oath as follows:

1.

I am duly authorised to depose to the contents of this statement. I have read the affidavits deposed to by Mr Mhlanga, the Director: Domestic Branch on 10 and 16 April 2019 relating to Project Veza and the Principal Agent Network (PAN) and support the submissions made insofar as it relates to financial mismanagement or irregularities uncovered.

2.

The purpose of this affidavit is to provide documentary support in response to the request dated 23 May 2019 from the Directorate Priority Criminal Investigations (DPCI) under heading "Request for information relating to the Principal Agent Network and Project Veza: State Security Agency" under case number DPCIH/0 Enquiry 8/04/2019.

3.

In terms of the Intelligence Services Act (Act 65 of 2002), I am duly authorised to release the following documents:

- Annexure A (Project Veza- Demi)
- Annexure B (Principal Agent Network – Terrence aka Mr Y)
- Annexure C (Instructions to xxxxx: Delegation of Power- Minister Letsatsi-Duba and Louisa)
- Annexure D (Office of the Chief Financial Officer)

The above documents are submitted electronically.

4.

It is my view that the allegations and suspicions as reported by Mr Mhlanga are very serious in nature.

5.

To the best of my knowledge and belief the contents of this statement is true and correct. I have read this statement before signing it. I am familiar with and understand the contents of this statement. I have no objection to taking the prescribed oath. I do consider the oath as binding on my conscience.

.....

SIGNATURE OF THE DEPONENT

A3

I certify that the above statement was taken down by me, after putting the following questions to the deponent:

1. Are you familiar with the contents of the statement and do you understand the statement? Whereupon the deponent replied..YES
2. Have you got any objection against the prescribed oath? Whereupon the deponent replied..NO
3. Do you consider the prescribed oath as binding on your conscience? Whereupon the deponent replied..YES

After the deponent had answered the abovementioned questions verbally to me, the statement was attested to in my presence and the deponent signed it in my presence at Pretoria on this 10 day of June 2019.

COMMISSIONER OF OATHS (EX OFFICIO)
LABOUR RELATIONS CONSULTANT
MUSENDA COMPLEX, DELMAS RD,
RIETVLEI, PRETORIA

10/6/19

NKOKOTANE MALALA ..... DATE .....

SIGNATURE OF COMMISSIONER OF OATHS

ANNEXURE LM6

"LM6"

Confidential

The Honourable President

Mr CM Ramaphosa

The Presidency, Republic of South Africa

Private Bag x 1000

Pretoria

0001

Concerns regarding malicious case opened again Mr L Mhlanga

1. I am writing this letter as I feel aggrieved by actions of a member in the Office of the Minister of State Security.

2. I was approached on a number of occasions by Minister DB Letsatsi-Duba to re-join the State Security Agency (SSA) and I finally agreed to the offer in November 2018 pending full agreement with Minister L Sisulu of the Department of International Relations and Corporation (DIRCO).

3. Both HR Departments of SSA and DIRCO were informed accordingly about my transfer to SSA. An agreement was reached between SSA and DIRCO that my salary would be paid by DIRCO and that the SSA would add (pay) the difference since the job levels were not the same. For November to December 2018 and January to April 2019, DIRCO paid my salary.

4. It transpired that SSA inexplicably paid me a monthly salary for February 2019, March 2019 and April 2019. Similarly the DIRCO paid me a salary for the same period. When I realised that my salary had ballooned I contacted the SSA General Manager Human Resources, Louisa to enquire about the anomaly and immediately requested the SSA should reverse the payment as I still received and would continue to receive a salary from DIRCO until such time that the terms of my employment were concluded by Minister Sisulu and Minister Letsatsi-Duba. The Acting General Manager Human Resources assured me that the salary run - inclusive of any over and under payments - would normalise once all paperwork was concluded between the SSA and DIRCO. I was further advised that I should hold on to whatever salary that was paid extra and repay such to DIRCO upon conclusion of my transfer to SSA.

Confidential

5. The Honourable President would recall that he was asked to sign a Presidential Minute on 13 March 2019 confirming my appointment. The Presidential Minute was preceded, on 24 January 2019, by a challenge advanced by xxx xxxxx on my acting appointment in SSA - given that I was at that time, attached to DIRCO as a contract employee. When Minister Letsatsi-Duba informed me of the challenge made on my acting appointment, I spent a month doing work unofficially for the SSA as requested by Minister Letsatsi-Duba. Only after receiving the Presidential Minute the relevant officials within the SSA activate my transfer from the DIRCO (contract employment) to SSA (permanent employment). The aforesaid process was not concluded to date.

6. In the meantime and unbeknown to me, a case of fraud was lodged with the Hawks for alleged "double-dipping" stemming from double salary payments made to me by SSA and DIRCO. I learnt that Adv. Sam Moufhe, the Special Advisor to the Minister of State Security was responsible for opening a case of fraud in April 2019. At no point did he afford me an opportunity to explain my side of the story nor did he consult relevant SSA and DIRCO officials or any of my superiors to formally provide an explanation on processes that ensue when a transfer happens from one department (contract employment) to another (permanent employment).

7. I give credit to the Minister of State Security as she called me to ask for an explanation on the matter pertaining to the double salary payments. Fortunate enough, the Acting General Manager Human Resources, Louisa was around on the day that I met with the Minister and he gracefully explained the circumstances around the matter and further explained the ensuing processes that would unfold to rectify the salary anomaly. The Minister expressed satisfaction upon hearing the explanation offered by the Acting General Manager Human Resources.

8. Subsequent to learning about the case filed against me, I informed the Acting Director General (DG): SSA, Mr L Jafta about what had transpired since the moment I noticed the salary anomaly. By his own admission, the Acting DG: SSA confirmed that what I reported to him on that day was new to him. It turns out that the Acting DG: SSA was economical with the truth. He not only knew about the irregular salary payment but was party to the case being lodged with the HAWKS. I place it on record that I refunded DIRCO the full amount due, on 03 May 2019 when SSA officials confirmed the amount I had to pay back. I am fully cognisant that the said irregular salary transactions would have been uncovered at any point during the 2019/2020 Financial Year as these payments have a bearing on my tax obligation and on the respective departments, namely

SSA and DIRCO. There was no ill-intention on my part to hide the double salary payments.

9. In the recent past the dignity and good names of some senior members in SSA were destroyed by the likes of former Directors General of the SSA with unconscionable and corrupt tendencies. Numerous members can attest to how false charges were trumped-up against them and in the end were left destroyed and later dumped in the abyss of despair. I cannot turn a blind eye to tendencies that perpetuate underhanded corruption and maladministration.

10. I am a law-abiding citizen and an ethical Senior Intelligence Official who can ill-afford a stain on my service record. I find it disingenuous that all manner of antics are engineered to undermine my responsibilities as a Senior Official of the SSA. Such antics serve to intimidate and subvert the cumulative efforts of an Investigation Team working to uncover corrupt activities that transpired in the SSA.

11. It is my belief that during 25 January 2019 to 13 March 2019, I did what was asked of me diligently, including supervising and directing what the Honourable President, the Minister of State Security and the Presidential Review Panel required. In addition I took on the responsibility to investigate the rot that had set in with the Agency for the past 10 years.

12. On 11 December 2018, I established a Project Team to probe alleged corruption and gross maladministration in the SSA, in particular within Chief Directorate Special Operations (CDSO) that manifested between 2013 and 2018 and this was consequently confirmed by the Presidential Review Panel Report.

13. The Project has to date uncovered evidence of fraud, money-laundering, theft and incidents of outsourcing the mandate of the Agency; Contravention of SSA policies; Contravention of the Intelligence Services Act; Contravention of the Public Finance Management Act; the infiltration of the Agency by organised crime networks linked to Contravention of the Prevention of Organised Crime Act 121 of 1999.

14. While internal investigations by the Team are ongoing, I fulfilled my obligation as prescribed by the Prevention and Combatting of Corrupt Activities Act by

reporting the cases relating to the Principal Agent Network (PAN) as well as the afore-mentioned investigation to which I deposed to affidavits. These affidavits were in agreement and in line with a report I presented on 23 January 2019 to the Minister of State Security, Adv. Moufhe and the Acting DG: SSA. Further endorsement of the project was when the Investigation Team made a presentation to the Acting DG: SSA and Adv. Moufhe on 24 January 2019.

15. To date there have been discernible efforts to undermine the investigation including the following:

15.1 On 24 April 2019: - Adv. Moufhe communicated an instruction to me, purportedly by the Minister of State Security and the Acting DG: SSA to hand over all evidence obtained by the Project Team. Later on the same day members of the Investigation Team met with Adv. Moufhe where Adv. Moufhe reiterated the same instruction and additionally said that the A1 Statements submitted to the Directorate for Priority Crime Investigation (HAWKS) should be withdrawn. The said instruction was not acceded to and remained pending a meeting with the Acting DG:SSA on the following day (25 April 2019). At the meeting on 25 April 2019, the Acting DG: SSA reaffirmed his support for the project.

15.2 On 30 April 2019:- Adv. Moufhe opened a case of alleged fraud against me and instructed the HAWKS to close the PAN and VEZA investigations. In his affidavit, Adv. Moufhe cites the Acting DG: SSA as the witness and source of the information of the alleged "double dipping". Further witnesses cited by Adv. Moufhe include the Minister of State Security and the Acting Head Ministerial Services, xxxxxxx. The HAWKS requested a written instruction thereof but to date this remains pending.

15.3 On 01 May 2019:- The Project Sponsor, Ilse was withdrawn, with immediate effect, from the Project and from his acting position as Deputy Director General Counterintelligence.

15.4 On 02 May 2019 the Project Manager and one other Project Team member were called to a meeting with the Acting DG: SSA wherein the Acting DG: SSA proposed the relocation of the Project to his Office and the imminent appointment of a retired Judge to lead the investigation.

16. The above have given me an impression that there are concerted efforts to subvert the investigation and undermine the President's Project of Renewal and Accountability.

Confidential

17. Through my efforts and the exceptional work of the Investigation Team, the matter is with the HAWKS and the National Prosecuting Authority (NPA). Be pleased to know that both the HAWKS and the NPA have expressed confidence on the strength of the case and are ready to proceed with prosecution.

18. I do not think malicious actions such as those of the ilk Adv. Moufhe serve to stem the rot bemoaned by the President. These actions smack of subterfuge and will take our country nowhere. I am convinced that the SSA cannot afford further instability and as such the Agency's Senior Management team must work in unison towards a common goal.

19. I am still awaiting the outcome of a complaint I communicated to the Minister, about the Minute the Honourable President was requested to sign. Implementation of the Presidential Minute clearly places me, my family and SSA colleagues at a disadvantage as it means I resigned at DIRCO to take up a post at SSA for a period of three (03) months. I have had no joy despite numerous pleas to have an explanation, on why the three (03) months' employment terms were not negotiated with me. To date no one has come forward to take responsibility for the latter.

20. I am available to discuss this and any other matter if required.

Warmest regards

Gen. L Mhlanga (Retired)

Date: 15/05/19

Cc. Honourable Minister DB Letsatsi-Duba, (MP)

Cc. Adv. Nokukakhanya Jele (Legal Advisor to the President)

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 xxxxxxxxxxx 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*D07:1000000000010154

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

SCORPIO

Fired for misconduct, rehired by Presidential Minute: The curious case of Land Affairs DG Mdu Shabane

By Jessica Bezuidenhout • 12 September 2019

Caption

Sacked for serious misconduct in 2017, Rural Development and Land Reform director- general Mdu Shabane is back at work courtesy of Presidential Minute No 37 of 2019, one that not only caused taxpayers to cough up for his defeat in court, but also binds government to ditch a Labour Court ruling that had gone against him.

A collective decision involving President Cyril Ramaphosa and two Cabinet ministers paved the way for sacked land affairs DG Petrus Mdu Shabane to return to office last week.

He resumed his duties at the Department of Rural Development and Land Affairs on 2 September 2019 following a controversial settlement deal that was triggered by a Presidential Minute issued on 26 February 2019.

This resulted in a deal signed between Shabane and former land affairs minster Maite Nkoane-Mashabane and former public service and administration minister Ayanda Dlodlo weeks later.

Astonishingly, the agreement, now effected, provides that all decisions relating to his December 2016 suspension, the guilty findings of a disciplinary hearing in July 2017 and the sanction of dismissal be "set aside" as "unlawful" and "invalid".

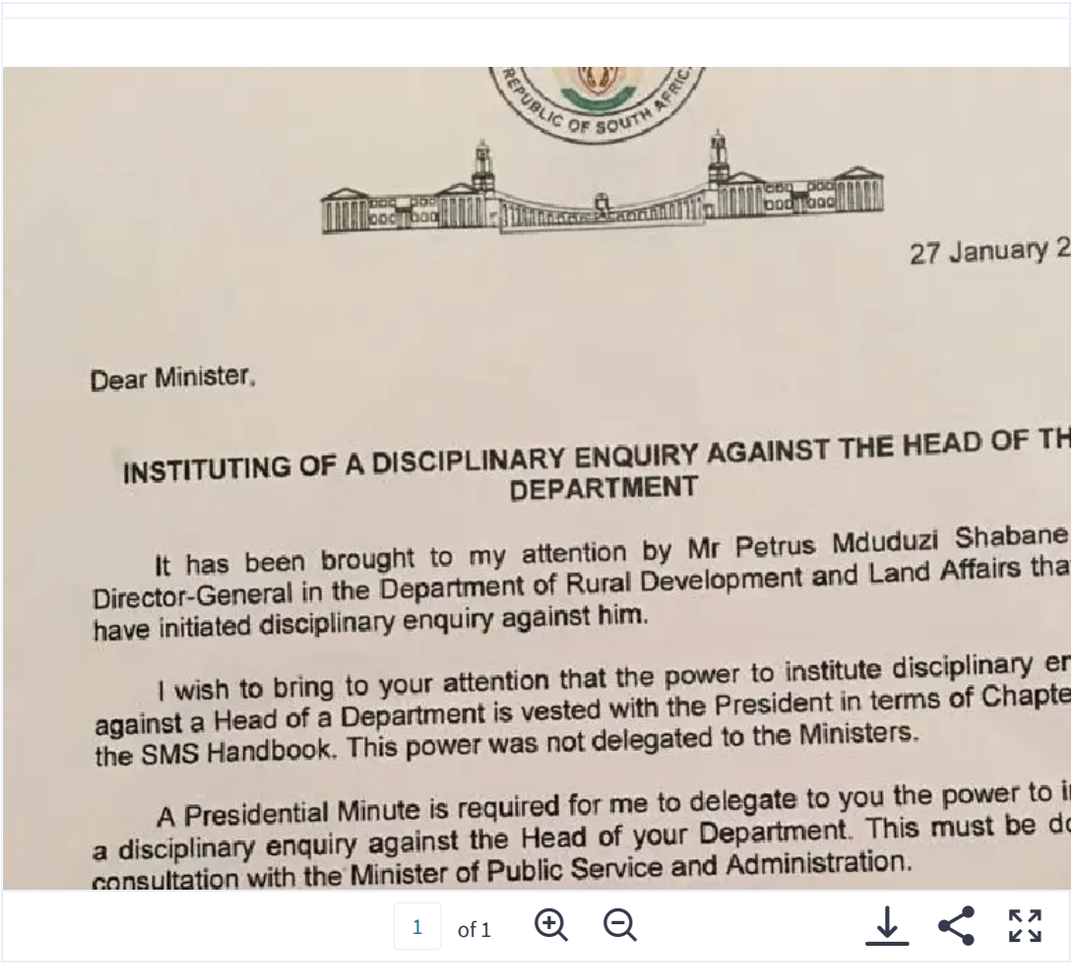
In short, this is because the case against him was allegedly unlawfully initiated by the then-land affairs minister Gugile Nkwinti, and not the President.

This is where it gets curious, because Shabane had actually lost at the Labour Court when he unsuccessfully tried to argue that the minister lacked the authority to discipline him.

He arrived back at work last week in the comfort of knowing that government has committed to paying his legal fees for his defeat at the court while his appeal before the Labour Appeal Court remains pending.

In issuing the Presidential Minute directing the two ministers to settle the dispute, Ramaphosa became the second sitting president to intervene in Shabane's suspension after former president Jacob Zuma, who provided a letter used in Shabane's labour case in 2017.

JZletterNkwinti (https://www.scribd.com/document/425509848/JZletterNkwinti#from_embed)



REPUBLIC OF SOUTH AFRIC

27 January 2

Dear Minister,

INSTITUTING OF A DISCIPLINARY ENQUIRY AGAINST THE HEAD OF TH DEPARTMENT

It has been brought to my attention by Mr Petrus Mduduzi Shabane Director-General in the Department of Rural Development and Land Affairs tha have initiated disciplinary enquiry against him.

I wish to bring to your attention that the power to institute disciplinary er against a Head of a Department is vested with the President in terms of Chapte the SMS Handbook. This power was not delegated to the Ministers.

A Presidential Minute is required for me to delegate to you the power to i a disciplinary enquiry against the Head of your Department. This must be d consultation with the Minister of Public Service and Administration.

1 of 1

The case against Shabane was not petty. It emanated from an investigation by the Special Investigating Unit (SIU) and involved breaches of the Public Finance Management Act in a contract to digitise deeds records, and hundreds of millions of rand in wasteful expenditure.

The department had signed a deal with Gijima AST in 2009 and then entered into additional ones, allegedly outside of due process, thereby escalating the overall costs.

Significantly, the department had made an over-payment of R50-million to Gijima, one on which Shabane had allegedly agreed to waive millions of rand in interest and allowed for the company to offset the over-payment against payment from the department.

The contract was later cancelled as a result of court action.

Shabane was found guilty of misconduct charges.

Shabane never participated in the disciplinary hearing – he had walked out – so no version of his is available and while he is back at work now, the jury is out on whether he still had a case to answer.

He initially went to the High Court to interdict the proceedings and the matter was struck from the roll due to a lack of urgency. Then he headed to the Labour Court, where he lost. Although he was granted leave to take his case to the Labour Appeal Court, the ruling noted that he had little prospect of success.

In a strongly-worded judgment, Labour Court Judge GN Moshoana stated that Shabane's case was that of alleged unfair dismissal clothed as an unlawful decision and that it ought to have been referred to arbitration instead.

And, if it was accepted that the Labour Court had jurisdiction over the matter, a proper reading of

section 12 of the Public Service Act indeed gives a minister the power to discipline and ultimately fire a DG.

The Zuma factor

A "worrying" issue, noted in the ruling, was how Shabane, upon having been suspended by Nkwinti, had run to Zuma to complain.

This prompted Zuma to write a letter in which he warned Nkwinti that he didn't have the power to tackle Shabane and needed a Presidential Minute to do so.

On this little side-show, the Labour Court was particularly harsh as the president was not party to the court case and importantly, Zuma's view on whether the president was the only one who could fire a DG was not supported in law, it found.

DG Mdu Shabane and (A)DDG Rural Enterprise and Industrial Development Leonna Archary receiving the Chinise delegation on 4 February 2015. Photo: Twitter/Department of Rural Development and Land Reform

"It defies logic for a minister not to have powers to discipline a head that serves in a department under his or her control," Judge Moshoane said.

"In terms of the Constitution, the President appoints ministers, assigns powers and functions to them. It is clearly not in line with the accountability principle for a minister responsible for a particular portfolio to keep a blind eye on non-compliance simply because the president is the only person to act.

"Any construction to exclude and limit the powers of the responsible minister is absurd," the ruling went on to state.

In Shabane's case, the then-president only became aware of the alleged non-compliance or misconduct when Shabane himself wrote to Zuma to complain about Nkwinti.

Shabane had told Zuma that Nkwinti had had ulterior motives for removing him and conceded in his letter that there may have been "mistakes" under his leadership, for which he should be held accountable.

But the judge noted there was no indication before the court that Zuma had in fact acted on that

concession by Shabane.

It could easily be inferred that Shabane had used Zuma as a shield to avoid being disciplined.

Judge Moshoana also provided an extensive explanation for why he deviated from a different High Court judgment; that involving former Home Affairs DG Mkuseli Apleni, who had successfully challenged his suspension two years ago.

He held that, in Apleni's case, the court had not considered all the relevant sections of the Public Service Act in ruling that only the President could discipline a DG.

While the debate around who may or may not fire a DG ought to have been settled in court – a perfect platform being Shabane's appeal case – Ramaphosa's Presidential Minute and the subsequent settlement deal now squashes that opportunity.

In doing so, there appears to have been a disregard for a valid ruling by the Labour Court in a manner that could arguably be viewed as those party to it having usurped the power of the court in this case.

The Presidency failed to acknowledge receipt of questions from *Daily Maverick* and did not respond to several emails and WhatsApp messages, and neither did Land Affairs. Shabane said he preferred for his employer, government, to respond.

Public Service and Administration Minister Senzo Mchunu, during a brief interview, told *Daily Maverick* that part of the rationale for the unusual settlement had been informed by legal opinion suggesting a diminished prospect of success and the outcome of the Apleni case.

He said delays in resolving the crucial issue of whether there was any merit to the allegations against Shabane may have had something to do with the May 2019 national elections.

This is because the settlement provided for the relevant minister to reconsider the case against him and reinstitute charges, if warranted.

"There may have been some level of disengagement on the issue during the switch-over from the fifth to the sixth administration," Mchunu said.

Shabane's current boss at Land Affairs, minister Thoko Didiza, is empowered to review the case and to determine what ought to happen next, Mchunu said.

But whether Didiza, now delegated by a Presidential Minute, can indeed still have Shabane charged is questionable in view of the time lapse and potential legal concerns around fair process.

The settlement was signed four months ago and it is unclear whether there was a deadline from that date within which Shabane had to be re-charged or cleared.

Amid the lingering rot of State Capture and promises of change by the New Dawn, did Shabane's file simply just slip through the cracks for four months?

Shabane is not a middle-management state employee, he is the accounting officer and it can be reasonably assumed that a new minister will have arrived in office in May with the urgent task of getting down to business.

That task usually involves the DG and if, as is the case here, the DG was on suspension following a serious case of misconduct, a guilty finding and a dismissal in a hearing presided over by a senior

advocate, it can reasonably be assumed that his file would have been drawn as a priority – even if just to clear Shabane of wrongdoing. **DM**

Send tip-offs to jessica@dailymaverick.co.za (mailto:jessica@dailymaverick.co.za)

Gugile Nkwinti (https://www.dailymaverick.co.za/article_tag/gugile-nkwinti/)

Senzo Mchunu (https://www.dailymaverick.co.za/article_tag/senzo-mchunu/)

Jessica Bezuidenhout

Top Reads This Hour

EDITORIAL

Corruption Sans Frontières: Supreme Court of Appeal teaches Malema an important lesson about lying & corruption

(https://www.dailymaverick.co.za/article/2021-06-24-corruption-sans-frontieres-supreme-court-of-appeal-teaches-malema-an-important-lesson-about-lying-corruption/?utm_source=top_reads_widget)

DAYS OF ZONDO

Empty suit: Serial Cabinet minister Malusi Gigaba says it was just a coincidence State Capture happened on his watch

(https://www.dailymaverick.co.za/article/2021-06-23-empty-suit-serial-cabinet-minister-malusi-gigaba-says-it-was-just-a-coincidence-state-capture-happened-on-his-watch/?utm_source=top_reads_widget)

ACE VS ANC

DAILY MAVERICK

he ANC and the ANC is him

OUR BURNING PLANET NEWSFLASH

Karpowership deal sinking fast as Environment Department says ‘no deal’

By Tony Carnie

(https://www.dailymaverick.co.za/article/2021-06-24-karpowership-deal-sinking-fast-as-environment-department-says-no-deal/?utm_source=homepagify)

authority-over-vaccines-in-sinister-bullying-tactic/?utm_source=top_reads_widget)

QUICK SEARCH ACE MAGASHULE (HTTPS://WWW.DAILYMAVERICK.CO.ZA/ARTICLE_TAG/ACE-MAGASHULE/)
COVID-19 (HTTPS://WWW.DAILYMAVERICK.CO.ZA/ARTICLE_TAG/COVID-19/)
DR ZWELI MKHIZE (HTTPS://WWW.DAILYMAVERICK.CO.ZA/ARTICLE_TAG/DR-ZWELI-MKHIZE/)
STATE SECURITY AGENCY (HTTPS://WWW.DAILYMAVERICK.CO.ZA/ARTICLE_TAG/STATE-SECURITY-AGENCY/)
ZONDO COMMISSION (HTTPS://WWW.DAILYMAVERICK.CO.ZA/ARTICLE_TAG/ZONDO-COMMISSION/)
JACOB ZUMA (HTTPS://WWW.DAILYMAVERICK.CO.ZA/ARTICLE_TAG/JACOB-ZUMA/)

UNACCOUNTABLE #26

Vossloh: The German railway giant that derailed Prasa

(https://www.dailymaverick.co.za/article/2021-06-23-vossloh-the-german-railway-giant-that-derailed-prasa/?utm_source=top_reads_widget)

CORRUPTION SANS FRONTIÈRES

Peter Hain lambasts UK inaction against British Gupta-linked companies

(https://www.dailymaverick.co.za/article/2021-06-24-peter-hain-lambasts-uk-inaction-against-british-gupta-linked-companies/?utm_source=homepagify)

Natasha Marrian 10 mins ago

ACE VS ANC

Ace rally held

(https://www.dailymaverick.co.za/article/2021-06-24-ace-rally-held-outside-court-as-worst-ever-covid-19-wave-grips-city-city-of-johannesburg-says-no-permission-given/?utm_source=homepagify)

Ferial Haffajee and Bheki Simelane 27 mins ago

outside court as worst-ever Covid-19 wave grips

(https://www.dailymaverick.co.za/section/newsdeck/?utm_source=homepagify)

NEWSDECK

News and reports from around the world

Last updated: 3 hours ago

OPINIONISTA

Danes' glory sets stage for knockout phase

(https://www.dailymaverick.co.za/opinionista/2021-06-24-danes-glory-sets-stage-for-knockout-phase/?utm_source=homepagify)

Richard Calland • 22 mins ago

(https://www.dailymaverick.co.za/opinionista/2021-06-24-danes-glory-sets-stage-for-knockout-phase/?utm_source=homepagify)

Odds are good that you were not the fastest swimmer. An egg's outer layer often requires several sperms to wear it out. In all likelihood you were the result of one of the slower, lazier swimmers in the race.

THE FRENCH REJECTION

Government pushes for probe after claims of ill-treatment at Paris airport by SA opera star Pretty Yende

Sandisiwe Shoba • 56 mins ago

(https://www.dailymaverick.co.za/article/2021-06-24-government-pushes-for-probe-after-claims-of-ill-treatment-at-paris-airport-by-sa-opera-star-pretty-yende/?utm_source=homepagify)

SAPS IN CRISIS

Fired cop Jeremy

(https://www.dailymaverick.co.za/article/2021-06-24-fired-cop-jeremy-veareys-protection-detail-withdrawn-in-a-move-he-says-will-further-endanger-his-life/?utm_source=homepagify)

Caryn Dolley

51 mins ago

Vearey's protection detail

(https://www.dailymaverick.co.za/article/2021-06-24-corruption-sans-frontieres-supreme-court-of-appeal-teaches-malema-an-important-lesson-about-lying-corruption/?utm_source=homepagify)

EDITORIAL

Corruption Sans Frontières: Supreme Court of

Daily Maverick

15 hours ago

(https://www.dailymaverick.co.za/article/2021-06-24-eff-targeting-our-health-regulatory-authority-over-vaccines-in-sinister-bullying-tactic/?utm_source=homepagify)

COVID-19

EFF targeting our health regulatory authority

Adele Kirsta

5 hours ago

(https://www.dailymaverick.co.za/article/2021-06-23-empty-suit-serial-cabinet-minister-malusi-gigaba-says-it-was-just-a-coincidence-state-capture-happened-on-his-watch/?utm_source=homepagify)

DAYS OF ZONDO

Empty suit: Serial Cabinet minister Malusi

Marianne Thamm

16 hours ago

Deputy President Cyril Ramaphosa has publicly backed Finance MInister Pravin Gordhan. File picture: Siyabulela Duda

Gordhan has Ramaphosa's backing

By Siyabonga Mkhwanazi And Craig Dodds Aug 26, 2016

Johannesburg - The uproar around the impending arrest of Finance Minister Pravin Gordhan has escalated into verbal sparring, with President Jacob Zuma and his deputy Cyril Ramaphosa sending conflicting messages.

This was as the ramifications of the political saga continued to rattle the government, the ANC and its partners in the tripartite alliance, as well as business.

As the Hawks' pursuit of Gordhan and other former Sars officials for their role in the "rogue unit" threatened to blow up in his face, Zuma went on the defensive on Thursday.

In a flurry of media statements from the Presidency echoing those in the days after the firing of Nhlanhla Nene as finance minister last year, Zuma said he had no power to halt investigations.

He said the presidential committee on state-owned enterprises announced on Monday was the product of recommendations from a review of parastatals adopted by the cabinet.

MORE ON THIS

- Activists slam Hawks over 'baseless charges'
- South Africa backs Pravin's Hawks rebuff
- Hawks saga: Zuma says he can't intervene
- Read Gordhan's full statement on Hawks saga

Gordhan had significantly raised the stakes in the stand-off by effectively challenging the Hawks to come and get him if they dared, for their use of a purported investigation into Sars to instruct him to report to their offices.

While Zuma on Thursday said he had "full support and confidence" in Gordhan, he insisted he did not have the powers to stop any investigation against him.

However, Zuma's denial, while strictly correct in law, was received with scepticism and criticism. This was as evidence mounted that the Sars saga was turning into a public relations disaster for him.

A few hours later, however, Ramaphosa, in an apparent proxy war with Zuma, contradicted him when he publicly backed Gordhan.

Ramaphosa, who was speaking at the funeral of former minister and diplomat Makhenkesi Stofile in the Eastern Cape, said Gordhan's integrity was unquestionable.

"The minister of finance is today facing what could be an arrest. It should concern us. When the government works well, it should not be a government that wages a war against itself," warned Ramaphosa.

Gordhan and his deputy Mcebisi Jonas were part of a team of ministers attending Stofile's funeral in the Eastern Cape.

"I am here to pledge my total support to the minister of finance," said Ramaphosa, who has been working closely with the finance minister in unlocking growth in the economy.

Former foreign affairs director-general Sipho Pityana was particularly scathing of Zuma, saying that if the president had been in the Eastern Cape for Stofile's funeral, he would have pleaded with him to resign. He then asked the mourners to use Stofile's funeral to rid the ANC of the ills of corruption and nepotism.

"May his (Stofile's) wish for the movement to go back to its former glory during his last few days not be in vain," said Pit-yana, who pointed out that he was disappointed that Zuma was not at the funeral to listen to him make all these pleas.

This came as public sentiment overwhelmingly swung behind Gordhan and the other Sars officials, with jurists, lawyers, opposition parties and academics adding their voices to the call for Zuma to block the Hawks from locking up Gordhan.

Following an open letter to Zuma from Business Leadership SA on Wednesday begging him to

call off the Hawks for the sake of the economy, advocate George Bizos, retired judge Johann Kriegler and the Helen Suzman Foundation came out in support of former Sars deputy commissioner Ivan Pillay and former group executive: strategy and risk Peter Richer, agreeing with Gordhan that the charges were baseless.

“Not only are the charges baseless, but the manner in which they have been pursued is clearly calculated to besmirch the names of the individuals, and has predictably already seriously impaired our national economy,” said the Helen Suzman Foundation and Freedom Under Law in a joint statement.

Former finance minister Trevor Manuel has been backing Gordhan. Opposition parties in Parliament have also backed Gordhan, saying he was standing up to Zuma for trying to capture the National Treasury.

Political Bureau

25 Aug 2016

Ramaphosa supports Gordhan, warns against state at 'war with itself'

City Press

Lubabalo Ngcukana

Cyril Ramaphosa. Picture: Denzil Maregele

It was worrying to have a state that seemed to be at war with itself, Deputy President Cyril Ramaphosa has said in reference to Finance Minister Pravin Gordhan's possible arrest by the Hawks.

Ramaphosa, delivering a eulogy at the official funeral service of the late Reverend Makhenkesi Stofile in Alice in the Eastern Cape today, criticised government entities that were taking each other on.

He said one of the things Stofile – a former premier of the Eastern Cape and former sports minister – was concerned about was what he perceived to be continued battles that happened in government where one wing of government seems to act against another.

"And right now we are facing more or less a similar situation where the minister of finance is today almost facing what could be arrest. This is something that should concern us. It should concern us because when a government works well it should be a government that does not wage war with itself," Ramaphosa said.

The deputy president told the thousands who had gathered at Fort Hare University's Sports Complex – including the under-fire Gordhan who sat silently in the front row close to Stofile's casket – that he was confident in Gordhan.

"I would like to, as I stand here, pledge my total confidence in the minister of finance. I am confident in the way that he is doing his work," he said.

He added that whatever the agencies of government need to do, it should be done in a way that does not jeopardise government and the economy and does not demonstrate to the electorate a government that is at war with itself.

Ramaphosa's comments come after the Hawks summoned Gordhan for further questions regarding what is known as the "rogue unit" he allegedly established while he was a commissioner at Sars.

Meanwhile, Ramaphosa put the cat amongst the pigeons when he said in addition to the "collective responsibility" taken by the ruling party's leadership for the poor performance in the August 3 local government elections, he also took individual and personal

responsibility.

Many observers would be interested to see if the rest of the ANC leadership would follow suit, especially President Jacob Zuma who has been mum since the disastrous polls which saw the ANC losing key metros such as Tshwane, Nelson Mandela Bay and Johannesburg.

After its NEC meeting, the ANC leadership issued a statement taking responsibility collectively for what had happened. But Ramaphosa said the leadership should go beyond that and take individual and personal responsibility.

“Even for myself, as deputy president of the ANC, I am prepared to say I do take personal and individual responsibility. This is a moment for us not to only feel the pulse of our movement, but to listen to what our members are saying. Right now we need an ANC membership that will rise above factionalism and rise above petty jealousies that continue to affect our movement. We need to work tirelessly to achieve unity,” he said.

Some of those who attended the funeral included, former presidential spokesperson Mac Maharaj, former finance minister Trevor Manuel, former president Kgalema Motlanthe, Stofile’s successor as ambassador to Germany Stone Sizani, and a host of former ministers and current ministers.

Also in attendance were ANC party leaders led by secretary-general Gwede Mantashe, treasurer-general Zweli Mkhize and national chairperson Baleka Mbete.

22 June 2021

State Security Minister Dlodlo wants to smoke out information peddlers among spooks

news24
Qaanitah Hunter

Minister of State Security Ayanda Dlodlo PHOTO: GCIS

- **Minister of State Security Ayanda Dlodlo wants to see the end of information peddlers wreaking havoc in the State Security Agency.**
- **This is part of her bid to strengthen and professionalise the intelligence agency.**
- **Dlodlo said she wants the SSA to be the chief risk advisor for government.**

When word surfaced that the State Security Agency (SSA) paid off some of the country's top judges, that was the work of information peddlers.

This is according to Minister of State Security Ayanda Dlodlo who is determined to put an end to the phenomenon that has wreaked havoc in the country's intelligence services and has caused the SSA to become entangled in politics.

"I would not say that no judge was bought, but the information that was placed at that point was not credible information," she said in an interview with News24.

South Africa has been awash in examples of its intelligence services falling victim to information peddlers, and now Dlodlo said she is committed to ridding the organisation of relying in a bid to reform and professionalise the SSA. Former public protector Thuli Madonsela, former deputy chief justice Dikgang Mosenke, and EFF leader Julius Malema are just among the names besmirched by false intelligence of information peddlers.

"We have a plethora of examples in South Africa where peddlers have run amok," Dlodlo said following revelations to the state capture commission of how the SSA was used to target political players.

READ | SSA referred 5 corruption cases to the police, Zizi Kodwa tells Parliament

She said foremost in dealing with this is that the SSA needs to stop entertaining people who come forward with untested information.

She said: "Peddlers you find everywhere. Everyone wants a piece of the cake. Some people want to be seen as being in the know. Other people do it for financial reasons. Other people do it for sheer mischief. Other people do it to sow divisions between state and entities. There is a variety of reasons why peddlers exist. As long as there is an audience for peddlers, peddlers will always exist."

The matter was raised in the department's budget vote speech delivered in Parliament by Dlodlo's deputy Zizi Kodwa. Dlodlo said putting an end to information peddling among the country's spooks would mean strengthening the analysis arm of intelligence that is able to verify the information brought by the collection arm. It also means filling vacancies in the agency by matching the right people for the jobs necessary.

Dlodlo said:

Sometimes the intelligence is not credible, the part of that is whether your collection arm (is) credible, your analysis arm vigilant and sharp to detect if that collection brings through credible information with integrity. At the analysis phase, that is where you package information.

Dlodlo's vision for the SSA is for the agency to become the chief risk advisor for the government. "For us to do that, our intelligence product has to be of good quality, it needs to be credible, it needs to be forward-looking, it needs to be on time and reliable," she said.

President's desk

A complete overhaul of the SSA in line with a high panel review report authored in 2018 by former minister Sydney Mufumadi is now sitting in the hands of President Cyril Ramaphosa.

A move to split the SSA into the old National Intelligence Agency and the South African Secret Service to deal with foreign and domestic intelligence, respectively, has been halted.

ALSO READ | State capture inquiry says it has 'further evidence' on SSA's alleged payments to Zuma, attempts to bribe judges

Dlodlo said that model did not consider changes in the intelligence landscape and make provision for changes like cybercrimes.

She said they are now exploring all options on this matter.

They are also in talks about appointing a permanent director general of intelligence with Dlodlo saying names had been mooted. Former acting Director-General Loyiso Jafta was replaced in March by Ambassador Gab Msimanga whose acting tenure was extended at the end of last month.

Dlodlo said Jafta remained a deputy Director-General in the SSA, and she was in the process of finding a placement for him, When asked about stability in the top echelons of

the SSA, Dlodlo said a lot of the tensions were exaggerated, and the relationship between her and the top spooks, bar two or three senior managers, was thriving.

July

The following judgments were amongst the judgments considered for possible publication during the past three months of the year. The full text of most of the judgments can be found at www.saflii.org.za.

Labour Court — Jurisdiction

The Labour Court confirmed, in *Singhala v Ernst & Young Inc & another* (J2046/2017 dated 12 September 2017), that the court lacked jurisdiction to entertain claims of unlawful dismissal.

The applicant public service employees approached the Labour Court in terms of s 158(1)*(h)* of the LRA 1995 to review a decision by the respondent MEC to implement the department's system relating to the payment of performance bonuses. The court found that the dispute concerned an unfair labour practice dispute relating to benefits and should be dealt with by the relevant bargaining council. A review under s 158(1)*(h)* was not appropriate, and the application was dismissed (*Public Servants Association of SA on behalf of Members v MEC for Agricultural & Rural Development, North West Province* JR634/2013 dated 12 October 2017).

Where the applicant had been employed by the State President and had been dismissed for misconduct by the Minister of Public Service & Administration, the applicant approached the Labour Court, in terms of s 158(1)*(h)* of the LRA 1995, claiming that his dismissal was unlawful because only the State President had the power to dismiss him. The court confirmed existing authorities that s 158(1)*(h)* is reserved for actions performed by the state as employer where the LRA does not provide a remedy. In this matter the minister had, on a proper interpretation of the Public Service Act (Proc 103 of 1994), the power to dismiss, and, even though the applicant disavowed a claim for unfair dismissal, his claim was in fact one for unfair dismissal. The court therefore lacked jurisdiction to adjudicate by judicial review in terms of s 158(1)*(h)* as the dispute had to be arbitrated in terms of s 191 (*Shabane v Nkwinti NO & another* J1947/2017 dated 18 January 2018).

Employee — Determination

The Labour Court found that no employer-employee relationship existed between the applicant who was offered a place to stay in exchange for maintaining the place and his landlord (*Kiyega v Commission for Conciliation, Mediation & Arbitration & others* C818/2016 dated 29 September 2017).

In *SA Broadcasting Corporation SOC Ltd v Commission for Conciliation, Mediation & Arbitration & others* (D510/2015 dated 31 October 2017) the Labour Court reviewed and set aside a CCMA commissioner's finding that the respondent had been appointed by the SABC as an employee and not an independent contractor. It considered the well-established approach to be adopted when determining whether a person is an employee and the terms of the contract concluded between the parties, and was satisfied that the respondent claimed that an employment relationship existed in order to procure employment benefits to which she was not entitled.

Employer — Section 200B of LRA 1995

Where a CCMA commissioner was required to determine whether the applicant employer, Assist Bakery, had contravened the provisions of s 198B(5) of the LRA 1995 by employing employees on fixed-term contracts for a period longer than three months, he mero motu invoked the provisions of s 200B to find that Pick n Pay, which had entered into empowerment scheme agreements with Assist Bakery, was a co-employer of the employees. On review, the Labour Court found that the invocation of s 200B was misguided — the section had to be invoked by a party to the dispute, in this case the employees, and they had to prove that the intention of the empowerment scheme was to defeat the purpose of the LRA or any other employment law, which they could not do. The commissioner had incorrectly interpreted the law, this constituted a material error of law and the award had to be set aside (*Assist Bakery 115 CC v Ngwenya NO & others* JR668/2016 and JR649/2016 dated 27 October 2017).

Dismissal — Assault

The Labour Court found that self-defence, once proven, constitutes a basis for exonerating an employee from charges of assault in the workplace. However, in this matter, the third respondent employee not only exceeded the bounds of self-defence when she continued to attack a customer, she in fact initiated the confrontation. The court reviewed and set aside the arbitration award and confirmed the dismissal of the employee (*JDG Trading (Pty) Ltd t/a Barnetts v Mthukwane NO & others* JR52/2015 dated 25 October 2017).

The fourth respondent employee, a manager at a Gautrain station, had been dismissed for assault. A CCMA commissioner found that the evidence disclosed that two members of the public, clearly under the influence of alcohol, had been vulgar, abusive and unruly; that the employee had been verbally abused when he attempted to control them; and that he had pushed one of the drunken men towards the exit in order to remove him from the station. Although this constituted assault, it was not a case of assault which warranted dismissal, especially where there was provocation. On review the Labour Court found that the award fell within the band of reasonableness. It found, however, that the remedy of reinstatement should have been accompanied by a final written warning.

Dismissal — Intimidation

In *Mnguni v Mbekwa NO & another* (JR1993/2013 dated 27 October 2017) the Labour Court upheld a SALGBC arbitrator's finding that the applicant employee had been guilty of intimidatory and aggressive behaviour, verbal abuse of a fellow employee and disruption of the operations of the employer. It also confirmed that dismissal was the appropriate sanction for the employee's gross misconduct.

Dismissal — Insubordination

In CCMA arbitration proceedings the commissioner found that the applicant employee had not been dismissed for insubordination but for wearing a union T-shirt and participating in union activities, and that the CCMA therefore had no jurisdiction. On review the Labour Court was satisfied that the true nature of the dispute between the parties was that the employee had been dismissed for insubordination when he refused to obey a reasonable and lawful instruction to wear protective clothing in breach of a workplace safety rule. The court accordingly reviewed and set aside the jurisdictional ruling and remitted the matter to the CCMA (*National Union of Metalworkers of SA on behalf of Jama v Transnet Engineering Uitenhage & others* PR166/2015 dated 15 December 2017).

Dismissal — Public Service Employee

During the applicant public service employee's pregnancy her doctor recommended bed rest for the remainder of her pregnancy. She applied for sick leave and submitted sick leave forms with medical certificates attached, which the department officials acknowledged. On her return to work her employment was terminated in terms of s 17(3)*(a)* of the Public Service Act (Proc 103 of 1994) because she was absent without permission for a period exceeding 30 days. In unfair dismissal proceedings, the PHSDSBC arbitrator accepted that the employee had not been dismissed. On review, the Labour Court found that the employee had not been absent without leave — the department officials knew of her medical condition and her whereabouts throughout her absence. She had therefore been unfairly dismissed and the department was ordered to reinstate her with retrospective effect (*Blel v Phalane NO & others* JR1782/2016 dated 19 October 2017).

In *Govan Mbeki Local Municipality v SA Local Government Bargaining Council & others* (JR465/2015 dated 31 January 2018) the Labour Court reviewed and set aside the SALGBC arbitrator's award, finding that he had failed to evaluate the evidence before him when finding that the

respondent employee's dismissal was unfair. The evidence clearly indicated that the employee, a member of the municipality's bid evaluation committee, had resigned from a company that he and his partner had formed in order to hide his interest in the company. The municipality had thereafter given orders to the company and the employee had, in contravention of the code of conduct, failed to disclose his association and interest in the company. Having found that the dismissal was substantively fair but procedurally unfair, the court determined that the employee be awarded three months' compensation.

Disciplinary Penalty

After finding that the applicant employee's dismissal was substantively unfair, the CCMA commissioner refused to order reinstatement, relying on the same charges he had found to be unproven when he ruled that the dismissal was unfair. On review, the Labour Court found that the commissioner did not have a choice not to order reinstatement, the primary remedy, where none of the provisions of s 193(2)*(a)-(d)* of the LRA 1995 were applicable. The arbitration award was reviewed and set aside and the court ordered that the employee be reinstated with limited restrospectivity (*Ziqubu v Commission for Conciliation, Mediation & Arbitration & others* JR667/2015 dated 25 October 2017).

Strike — Unprotected Strike

In *Association of Mineworkers & Construction Union & others v Australian Laboratory Services (Pty) Ltd* (JS315/2012 dated 1 November 2017) the Labour Court confirmed that the factors determining the fairness of a dismissal of employees for participating in an unprotected strike are not confined to those listed in item 6 of schedule 8 to the LRA 1995. In the matter before the court, where the employer doubted that the employees sincerely tendered to return to work after it had obtained a court order interdicting the strike and had issued three ultimatums, the court found that the employer had failed to explore ways to avoid dismissal and to invite representations before it dismissed the strikers. The court accordingly found the dismissal to be unfair. It awarded the employees compensation because the employer's financial position had deteriorated so drastically since the dismissal that there were no positions for the employees in its smaller organisation.

The respondent company had received an exemption from the provisions of an agreement providing for increased wages from the bargaining council. The employees were briefed on this, but nonetheless embarked on a strike lasting several days. After they ignored ultimatums to return to work, the employees were dismissed. The Labour Court rejected the employees' argument that they had been provoked into striking. The court found that the strike had been pre-planned and not spontaneous and that it was unprotected. The court was satisfied that dismissal was the appropriate sanction in the circumstances (*SA Clothing & Textile Workers Union & others v Filtafelt (Pty) Ltd* JS263/2015 dated 14 November 2017).

Unfair Discrimination

In *Sethole & others v Dr Kenneth Kaunda District Municipality* (JS576/2013 dated 21 September 2017) the Labour Court granted absolution from the instance where the applicant employees, who claimed that they had been paid less than other employees who performed similar work, failed to identify a ground of discrimination in their application.

Retrenchment

In *National Union of Mineworkers & others v WBHO Construction (Pty) Ltd* (J1687/2015 and JS620/2015 dated 13 December 2017), a dispute that mass retrenchments at the respondent company had been substantively and procedurally unfair, the Labour Court surveyed the well-established guidelines relating to bumping, selection criteria and alternatives to retrenchment and also considered the circumstances in which an application in terms of s 189A(13) is appropriate. On the facts of the matter, the court found that the retrenchments were fair.

Restraint of Trade Agreement

The Labour Court, in *ARB Electrical Wholesalers (Pty) Ltd v Bhodraj & another* (D683/2017 dated 13 October 2017), granted an urgent interdict restraining the respondent former employee from being employed by a competitor in breach of the restraint clause in his contract of employment. In *Miway Insurance Ltd & another v Cassim* (J2236/2017 dated 12 January 2018) the Labour Court granted a similar urgent interdict. It found that the restraint was reasonable and, although it prevented the employee from engaging in the same work as that he was engaged in at the applicant company, he had been paid one year's remuneration as compensation for the imposition of the restraint.

Review of Arbitration Awards of CCMA and Bargaining Councils

In *National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* (JA43/2014 dated 28 November 2017) the Labour Appeal Court found that a CCMA commissioner had not been able properly to determine the issue before him because key aspects of the employee's case were not put to the employer's witnesses in cross-examination and had not been canvassed in the evidence of those witnesses in chief. The court, accordingly, found that the Labour Court had correctly found that the award was not one that a reasonable commissioner could reach on the material before him and was justified in referring the matter back to the CCMA for a rehearing. It dismissed the appeal with costs.

In *Department of Correctional Services v Seggie NO & others* (D229/2015 and D302/2015 dated 20 December 2017) the applicant employee sought to review an arbitration award on the ground that the bargaining council arbitrator's ability to conduct the proceedings had been seriously compromised by his ill-health — he had suffered a stroke and had allowed his wife to assist him as a mouthpiece and scribe. The Labour Court found that an arbitrator whose proficiency and functionality are impaired is expected to excuse himself, especially in the face of a clear objection to the intervention and assistance of a third party. The arbitrator had committed misconduct with regard to the manner in which he conducted the proceedings, and the award was set aside.

Practice and Procedure

An application to review a SSSBC arbitration award upholding the dismissal of the applicant police officers for misconduct was filed three years and four months late. In an application for condonation the Labour Court rejected the officers' excuse that they had to await their pension payouts to fund the litigation, and dismissed the application (*Mngomezulu & others v Mulima NO & others* JR2744/2012 dated 7 November 2017). In *Mdluli v International Union for Conservation of Nature* (JS457/2016 dated 7 November 2017) the court granted condonation for the late filing of the applicant's statement of claim where it was clear that, although generally an employee cannot escape the consequences of poor legal advice, the applicant had acted responsibly but had been misled by her attorney. In *SA Transport & Allied Workers Union on behalf of Mbewe & others v Barloworld Logistics (EHL)* (JS691/2015 dated 28 November 2017), the court declined to grant condonation for the late filing of the applicants' statement of claim where the statement was filed 20 months late and the applicants failed to provide a proper explanation for the delay.

In *Umso Construction (Pty) Ltd v Lebepe & others* (PR28/2013 dated 29 November 2017) the Labour Court dismissed an application for the late filing of a rescission application on the grounds that the application was ill-founded and extremely late.

In *Association of Mineworkers & Construction Union v Chamber of Mines of SA & others* (JS611/2016 dated 5 December 2017) the Labour Court restated the principles applicable to exceptions and lis alibi pendens.

Statement on the Cabinet meeting of 9 December 2015

11 Dec 2015

1. Implementation of key government programmes

1.1. Cabinet welcomed the signing of 26 agreements to the value of R94 billion during the recent State Visit by Chinese President Xi Jinping. The signed agreements included R12 billion to build a car-manufacturing plant in South Africa, a US$500 million loan facility to Eskom for infrastructure development and a US$2.5 billion funding guarantee for Transnet from the China Development Bank.

As part of the 2nd Forum on China-Africa Cooperation (FOCAC), President Xi Jinping pledged US$60 billion for development in Africa. The adoption of a new Declaration and Plan of Action (2016-2018) at FOCAC consolidates the growing mutual partnership between Africa and China, which will unlock new trade and investment opportunities to help stimulate economic growth.

The economy further received an economic boost with South Africa's BMW Group announcing an investment of R6 billion at its plant in Rosslyn, Pretoria, which bears testament to the important partnership that exists between business and government, and the role that business is playing in the development of the economy.

1.2. On Tuesday, 8 December, President Zuma bestowed National Orders to South African

citizens and eminent foreign nationals who have contributed to the upliftment of humanity. The National Orders are a moment of great reflection, celebration and pride for our people. They celebrate human achievement, human sacrifice and human endeavours that make our country a better place. We salute the recipients of the 2015 National Orders.

1.3. Cabinet appeals to all South Africans to use water sparingly. This is in support of a number of measures taken to alleviate the water shortages, which have been exacerbated by the heatwave the country has experienced in the past weeks. Whilst the recent rainfalls in some parts of the country provided some relief, the country's water shortage remains a real challenge and requires all of us to use water sparingly and responsibly.

1.4. Cabinet expressed its appreciation to all South Africans for participating in this year's 16 Days of Activism for No Violence against Women and Children campaign, which ended yesterday. Recent research indicates high numbers of new HIV infections, particularly among young women and girls in Africa between 15 and 24 years of age. South Africans are encouraged to take forward their activism into everyday action as part of the #365 Days Campaign of No Violence Against Women and Children and the #CountMeIn campaign that unfolds throughout the year ahead.

Through the #365 Days Campaign and #CountMeIn, the country needs to continue mobilising members of society, especially men, to join hands with government in dealing with this scourge. It is the responsibility of the nation, both individually and collectively, to stop the spread of the virus by taking care of our own health and that of others.

1.5. Cabinet has appreciated the progress that has been made by the Council for Scientific and Industrial Research in developing a bio-manufacturing process for HIV antibodies. This brings the health industry a step closer to an economically viable preventative treatment. Whilst the country still struggles to find the cure for HIV and AIDS, South Africans are still expected to practice safe sex and observe the ABC (Abstain, Be faithful and Condomise) principles of preventing new infections.

1.6. Cabinet commends all learners, students, teachers, lecturers, schools and institutions of higher learning on concluding a successful academic year, despite the challenges experienced during the year. Cabinet also wishes those who agreed to postpone examinations rescheduled for 2016 well in their coming examinations.

1.7. The Department of Social Development, in collaboration with Department of Defense and National Youth Development Agency, will hold its 6th National Youth Camp. This is a youth leadership development programme that seeks to change behaviour, attitudes and empower

the youth about opportunities at their disposal. The camp also assists with mentoring and teaching young boys to grow into men who value and respect women.

1.8. A joint agreement signed between the Minister of Higher Education and Training Minister, Dr Blade Nzimande, and BRICS partners – Brazil, Russia, India and China – is aimed at developing a framework for future cooperation in education. The agreement covers general education, educational policy strategy, Technical and Vocational Education and Training (TVET) colleges and higher education. TVET colleges hold the potential to unlock economic opportunities for our young people, while addressing the challenges of unemployment, inequality and poverty affecting communities.

The agreement, which will improve the quality of teaching and teachers' education, also commits BRICS universities to support joint research projects, encourage collaborative programmes at postgraduate, doctoral and postdoctoral levels and the co-publishing of scientific results.

1.9. The Department of Science and Technology hosted the Science Forum South Africa under the theme "Igniting conversations about science". Over 45 countries participated in debates on the interface between science, technology and innovation and society, specifically in the context of development. The forum also served to strengthen South Africa's strategic international science, technology and innovation partnerships.

1.10. South Africa will be represented in the Council of International Maritime Organisation. This is a major step towards realising the country and the continent's potential in the maritime sector. The organisation is responsible for adopting decisions on global maritime affairs, ranging from the Oceans Economy, rescue initiatives and safety and security matters at sea. The participation in this body will support government's programme of unlocking the country's maritime potential through the Blue Oceans Economy Strategy and Operation Phakisa, which aims to create over one million jobs by 2033.

1.11. The South African National Defence Force commenced in the past week a process to upgrade Salisbury Island Naval Station in Durban into a fully functional naval base. The upgrading of facilities will improve defence capabilities and also contribute towards the ocean economy.

1.12. The Department of Health, in partnership with Soul City and Times Media, launched a dedicated health and lifestyle channel The Good Life Network on DStv channel 199. The channel offers diverse, entertaining and original home-grown content on nutrition, health and fitness, human rights, youth sexuality, HIV and TB, as well as consumer and gender rights. Cabinet calls

on South Africans to watch the channel.

2. Key Cabinet decisions

2.1. Cabinet approved the publication of the White Paper on the National Health Insurance (NHI) for South Africa, for public comment. The NHI is part of government's major health sector reforms. The policy proposes government's ability to offer medical services to all who visit its health facilities. It will be funded through a central fund that will also be made available to private medical practitioners who want to participate in the scheme. Once finalised, the policy will be phased in over the years and focus mainly on commencing in underserviced areas. The Minister of Health, Dr Aaron Motsoaledi, will today brief the media on the roll-out of the NHI.

2.2. Cabinet approved the National Integrated Early Childhood Development (ECD) Policy. The policy was developed in consultation with various stakeholders in the sector. It went through public consultation in February 2015. This integrated ECD policy will ensure all young children and their caregivers are able to access comprehensive quality ECD services from conception to Grade R. The policy extends the service to eight-year-old children with developmental difficulties. The policy further provides a monitoring and evaluation framework to ensure it is effectively implemented to all children irrespective of race, gender or religion.

2.3. Cabinet has approved the White Paper on the Rights of Persons with Disabilities and its Implementation Matrix. This is aligned to the disability-inclusive Sustainable Development Goals, adopted by the United Nations (UN) General Assembly (UNGA) in September 2015. The policy will accelerate transformation and redress regarding full inclusion, integration and equality for persons with disabilities.

2.4. Cabinet approved the publication of the National Sanitation Policy for public comment. The policy places the well-being of people at the centre of development by striking a balance between allocating financial resources to support investments in higher levels of service, providing services to underserved households, while also maintaining and refurbishing existing sanitation infrastructure.

2.5. Cabinet approved for the submission to Parliament of South Africa's 5th Periodic Report (2009-2014) on the Implementation of the Convention on the Elimination of all Forms of Discrimination against Women. The report provides an overview on the effectiveness of the range of laws, policies and programmes implemented and highlights the country's achievements on women's empowerment and gender equality. The report also recognises that there are persistent challenges and barriers to overcoming inequality and discrimination in the country.

2.6. Cabinet approved the publication of the Draft National Action Plan to Combat Racism, Racial

Discrimination, Xenophobia and Related Intolerance, for public comment. The plan is an integrated and systematic national strategy aimed at combating racism and building a truly non-racist and non-sexist democratic South Africa.

It provides a framework for sustained and coordinated measures to be undertaken by the country as a whole to deal with the legacy of racism and racial discrimination. This assists South Africa to meet its international, regional and national obligations, specifically the Durban Declaration and Programme of Action adopted by the UN at the World Conference against Racism in 2001.

2.7. Cabinet was briefed on progress made on the digital migration programme. It approved the commencement of the dual-illumination period for the digital broadcasting signal in South Africa on 1 February 2016. The migration from analogue to digital broadcasting services releases the much-needed radio frequency spectrum suitable for the provision of mobile broadband services. This will increase the competitiveness of the South African economy by revitalising the broadcasting industry, strengthening the electronics manufacturing industry, creating jobs, and developing more local and diverse broadcast content.

2.8. Cabinet was briefed on the findings of the 2014 South African Science, Technology and Innovation Indicators Report and the trends in the performance of the National System of Innovation (NSI), produced annually by the National Advisory Council on Innovation. The report uses critical indicators to assess the performance and contribution of the NSI to key national priorities articulated in the National Development Plan (NDP) and other policy documents which contribute to socio-economic development.

2.9. Cabinet approved the rationalisation of magisterial districts for Limpopo and Mpumalanga, and the designation of the Lephalale Magistrate's Court as a local seat of the Limpopo Division of the High Court, as an interim measure until a separate permanent local seat of the Division is built in the area.

The rationalisation of magisterial districts and areas of jurisdiction of the Divisions of the High Court is part of the policy reform aimed at redressing the legacy of spatial injustices of the past. It is also part of the broader transformation imperative to enhance access to justice, which is aligned to the Constitution of the Republic of South Africa of 1996.

2.10. Cabinet approved the report on progress regarding the implementation of the Cabinet directives in Limpopo in terms of Section 100 (1) (a) of the Constitution. Cabinet approved the withdrawal of Section 100 (1) (a) by 31 March 2016 in the following Limpopo provincial departments: Health; Transport; Public Works; Roads and Infrastructure and Treasury.

Cabinet also approved the conditional withdrawal of Section 100 (1) (a) in Education to pave the way for the Provincial Treasury to effectively implement Section 18 of the Public Finance Management Act, 1999 (Act 1 of 1999) in the Limpopo Department of Education, with support from national government.

Cabinet approved the following directives to the Premier and the MECs for Finance and of Education:

a) Capacitating the provincial departments by recruiting competent personnel;
b) Finalising the appointment of senior management positions; and
c) Dealing decisively with leadership failure and corruption.

2.11. Cabinet approved for South Africa to host the high level Anti-Drugs Dialogue Conference from 11 to 12 March 2016, which will be under the auspices of the African Union. This serves as a follow-up session of the Russia-Africa Anti-Drugs Dialogue, which aims to present a consolidated position regarding countering the world drug problem. This will be tabled at the UNGA Special Session in April 2016. The fight against illicit drugs is in line with the NDP and the Dialogue will provide a platform to further enhance the National Drug Master Plan (2013-2017).

2.12. Cabinet approved for the Department of Human Settlements to co-host the “Leading Change in the City: From Slums to Inclusive, Safe, Resilient and Sustainable Human Settlements” Conference with the UN Human Settlements Programme, in March 2016.

The conference supports both the international development agenda and the domestic development agenda by strengthening support for Goal 11 of the Sustainable Development Goals: Make cities and human settlements inclusive, safe, resilient and sustainable. The conference forms part of the discussion on the implementing of the post-2015 UN Development Agenda and the “New Urban Agenda” to be adopted by the UN in 2016.

2.13. Cabinet approved for the Agricultural Research Council to host the 3rd Global Conference on Agricultural Research for Development in April 2016. The conference will identify: international research and innovation priorities as well as needs in national innovation systems so as to achieve future development goals, in particular for family farmers and poor communities.

3. Bills

3.1. Cabinet approved the publication of the Marine Spatial Planning Bill of 2015 for public comment. The Bill provides a legal framework to unlock ocean economic potential by promoting

cooperative spatial planning. The Bill will assist the already existing Operation Phakisa institutional structures. It seeks to promote collaboration and responsible ocean governance arrangement.

4. Upcoming events

4.1. President Zuma will lead the country's Reconciliation Day celebration on 16 December in Port Elizabeth, Eastern Cape under the theme: "Bridging the divide: Building a common South African nationhood towards a national developmental state".

4.2. The Minister of Telecommunications and Postal Services, Dr Siyabonga Cwele, will lead the South African delegation at the UNGA on the World Summit on the Information Society (WSIS) from 15 to 16 December 2015, where South Africa's country position, contributing to the WSIS+10 Non-Paper will be presented.

5. Cabinet's position on key issues in the environment

5.1. South Africa successfully hosted the 7th Africities Summit of cities and local governments of Africa in Johannesburg from 29 November to 3 December 2015. Under the theme: "Shaping the future of Africa with the people: the contribution of African local authorities to agenda 2063 of the African Union", the summit, which attracted 15 000 mayors and 500 000 councilors, is one of the most concrete initiatives for building African unity. The summit focused on strengthening local government across the African continent, particularly financial management and establishing a secure revenue base, towards the attainment of Agenda 2063 – the Africa we want.
The summit supports the goals of the NDP in which cities and local government play an important role in our overall development.

5.2. Cabinet remains confident that as negotiations unfold at the 21st session of the Conference of the Parties (COP21) to the UN Framework Convention on Climate Change (UNFCCC), a fair and binding agreement will be reached.

Climate change is a global problem requiring a global solution, which can only be effectively addressed multilaterally, under the broad-based legitimacy of the UNFCCC and with all parties making a contribution. In South Africa, we can proudly say that we have put in place progressive, innovative and proactive policies, and plans to deal with an ever-changing climate. These policies are guided by the overarching principle of sustainable development, which is the cornerstone of Vision 2030 as contained in the NDP.

5.3. Being the last Cabinet meeting for 2015, Cabinet extends its best wishes to all South Africans for the upcoming festive season. In the spirit of the season and in keeping with the spirit of Ubuntu, Cabinet calls on all South Africans to assist needy individuals and families in their community. We are a nation that cares for one another, respects each other and supports those who are less fortunate. The coming New Year offers all of us the possibility to recommit ourselves to work for a better future for all.

6. Condolences

6.1. Cabinet extends its condolences and sympathies to the family and friends of Mohamed Ismail ("Issy") Dinat, who passed on Tuesday, 8 December. His selflessness and involvement in the Struggle contributed to our freedom.

7. Appointments

All appointments are subject to the verification of qualifications and the relevant clearance.

7.1. Water Research Commission:

a) Dr Nozibele Mjoli (Chairperson);
b) Prof Sibusiso Vil-Nkomo (Deputy Chairperson);
c) Prof Aldo Stroebel;
d) Ms Nompumelelo Msezane;
e) Dr Mosidi Makgae;
f) Ms Masaccha Khulekelwe Mbonambi;
g) Mr Mxolisi Adolphius Cassius Ndhlovu;
h) Dr Ntombifuthi Patience Nala; and
i) Representative from the Department of Science and Technology.

7.2. Amatola Water Board:

a) Ms NN Mnqeta (Chairperson);
b) Mr A Hadebe (Deputy Chairperson);
c) Mr EV Jooste;
d) Mr AP Le Roux;
e) Mr BE Hollingworth;
f) Mr C Mbande;
g) Ms TF Maenetja;
h) Ms M Nzimande; and
i) Prof L Louw.

7.3. Board of the Community Schemes Ombud Service:

a) Mr Vukile Charles Mehana, (re-appointment and Chairperson);
b) Ms Beauty Nomhle Dambuza;
c) Mr Bhekumusa Gorden Dlamini;
d) Taureen Dylan Holmes;
e) Rajesh Jock;
f) Oupa Moshongoane Moshebi; and
g) Nomazotsho Yvonne Memani (re-appointment).

7.4. Board of the National Development Agency:

a) Ms Judy Hermans (Chairperson);
b) Mr Zolile Thando Ngcakani (re-appointment and Deputy Chairperson);
c) Ms Suraya Bibi Khan (re-appointment);
d) Mr Abram Stefanus Hanekom;
e) Ms Sebenzile Matsebula;
f) Ms Mashila Matlala;
g) Mr Moses Mabokela Chikane (government representative);
h) Ms Bernice Makgoro Mannya (government representative);
i) Ms Thabitha Shange (government representative);
j) Ms Farzana Suliman Varachia (government representative).

7.5. Board of Legal Aid South Africa:

a) Prof Yousuf Abdoola Vawda;
b) Mr Nkosana Mabhuti Francois Mvundlela;
c) Ms Thulisile Mhlungu;
d) Ms Nonhlanhla Mgadza;
e) Ms Marcella Naidoo;
f) Mr Matome Leseilane; and
g) Ms Adila Chowan;
h) Ms Aneline Rhoda (alternate member); and
i) Mr Langelihle Ezrome Mtshali (alternate member).

7.6. Extension of the employment contract of Mr Thabane Wiseman Zulu as the Director-General (DG) at the Department of Energy.

7.7. Dr Mmaphaka Ephraim Tau as Deputy DG (DDG): Forestry and Natural Resources Management at the Department of Agriculture, Forestry and Fisheries.

7.8. Ms Kelebogile Sybil Sethibelo as DDG: Institutional Governance at the Department of Arts and Culture.

7.9. Mr Omega Shelembe as DDG: State-Owned Enterprises Oversight and Information Communication Technology Enterprise Development at the Department of Telecommunications and Postal Services (DTPS).

7.10. Mr Edward Xolisa Makaya as DDG: Africa at the Department of International Relations and Cooperation.

7.11. Ms Thulisile Glory Manzini as DDG: Administration at the DTPS.

In conclusion, Cabinet extends its gratitude to those South Africans who complied by submitting their tax returns resulting in a total of 5.94 million tax returns received for non-provisional taxpayers. This is 11.52 per cent higher than in 2014, and the compliance for taxpayers filing on time exceeded 90 per cent for the third consecutive year. This high level of compliance enables government to deliver services that improve the quality of life of all its citizens.

During this festive period, government is implementing various campaigns which require all South Africans and visitors to play their part in ensuring that the festive period is enjoyed in a safe and secure environment. Cabinet calls on all to work with the South African Police Service and to report any criminal activities in our homes and communities.

In order to accommodate the influx of cross-border travellers, all government departments at ports of entry will from 10 December 2015 to 14 January 2016 extend their operating hours. These include Health, Agriculture, Police, Home Affairs and South African Revenue Service). Details are available at www.dha.gov.za.

All road users are urged to adhere to the rules of the road, including adherence to speed limits; ensure vehicles are roadworthy; not drive under the influence and to wear safety belts. Pedestrians are urged to ensure that when using the roads they do not endanger their well-being or that of motorists. Law-enforcement agencies will be out in full force to deal with transgressors.

Enquiries:
Ms Nebo Legoabe
(Acting Cabinet Spokesperson)
Cell: 082 453 2874

Issued by: Government Communications
More from: Government Communication and Information System (GCIS)
More on: Cabinet statement

Government releases report on closure of Oakbay Investments banking accounts

2 Sep 2016

Statement of the Chairperson of the Inter-Ministerial Committee set up by Cabinet to consider the implications of the decisions of certain banks and audit firms to close the accounts of and/or withdraw auditing services from Oakbay Investments

On 13 April 2016, Cabinet established an Inter-Ministerial Committee (IMC) to consider allegations that certain banks and other financial institutions acted unilaterally and allegedly in collusion, when they closed bank accounts and/or terminated contractual relationships with Oakbay Investments. The IMC was chaired by me as the Minister of Mineral Resources.

The situation warranted close scrutiny by Government because of the impact that the actions would have, not only on job losses for 7500 South Africans but also the impact that it would have on investor confidence.

The IMC conducted a number of meetings with various banks, financial institutions and insurance companies as well as with representatives of Oakbay Investments. Although the Minister of Finance was a member of the constituted IMC, he did not participate in its meetings.

A Report of recommendations was tabled at Cabinet. After discussion of the Report,

Cabinet has now resolved as follows:

- To recommend to the President that given the nature of the allegations and the responses received, that the President consider establishing a Judicial Enquiry in terms of section 84(2)(f) of the Constitution.
- To consider the current mandates of the Banking Tribunal and the Banking Ombudsman. Evidence presented to the IMC indicated that all of the actions taken by the banks and financial institutions were as a result of innuendo and potentially reckless media statements, and as a South African company, Oakbay had very little recourse to the law. Looking into these mandates and strengthening them would go a long way in ensuring that should any other South African company find itself in a similar situation, it could enjoy equal protection of the law, through urgent and immediate processes being available to it as it required by the Constitution;
- To consider the current Financial Intelligence Centre Act and the Prevention of Combatting of Corrupt Activities Act regarding the relevant reporting structures set out therein as evidence presented to the IMC was unclear on whether the various banks and financial institutions as well as the Reserve Bank and Treasury complied with these and other pieces of legislation. The IMC was also briefly ceased with the implications of legal action against any of these entities and the potential impact that would have on the volatility of the Rand as well as the measures that could be put in place to protect the economy. This was not something that fell within the mandate of the IMC and should therefore be considered by the Judicial Enquiry;
- To re-consider South Africa's clearing bank provisions to allow for new banking licences to be issued and in so doing, to create a free market economy. The IMC was presented with evidence suggesting that the South African banking system is controlled by a handful of clearing banks which ensured that every other local or international bank participating in the South African banking sector would need to go through these clearing banks in order to have their transactions cleared, thereby creating an oligopoly. Evidence was also presented that these institutions may have placed undue pressure on banks that sought to assist the company by subjecting them to unwarranted auditing processes. It is unclear why the Reserve Bank will not issue new banking licences to other banks and this would need to be given careful attention by the Judicial Enquiry as it did not fall within the purview of the IMC.
- The establishment of a State Bank of South Africa with the possible corporatisation of the Post Bank being considered as an option. Evidence presented to the IMC suggested that all

of South Africa's economic power vests in the hands of very specific institutions, institutions that have shown that their ability to act unilaterally is within their mandate and is protected. These institutions are owned by private shareholders and report to National Treasury who in turn do not need to act on information provided to it.

It was further agreed that the IMC would monitor the process of finalising these matters and would report-back to Cabinet on their progress.

Enquiries:
Martin Madlala
Cell: 063 505 4199
E-mail: Martin.Madlala@dmr.gov.za

Issued by: Department of Mineral Resources
More from: Department of Mineral Resources
More on: Governance

Feedback

Sitemap

Get e-mail updates

Services for residents

Services for organisations

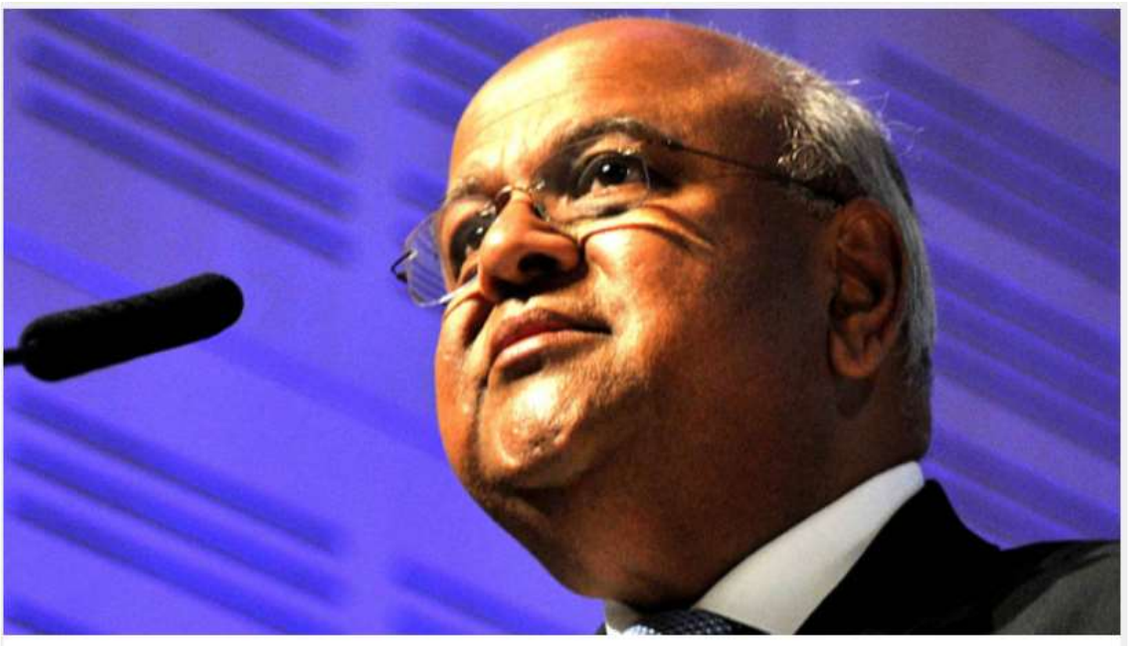
Services for foreign nationals

FAQs

Terms and conditions

RSS feeds

BUSINESS REPORTECONOMY



Cape Town-110624.Finance Minister Pravin Gordhan. The Climate Investment Funds (CIF) in Africa, the African Development Bank (AfDB) will host the 2011 CIF Partnership Forum in Cape Town, South Africa from 24-25 June 2011. AfDB Vice President, Bobby Pittman, is expected to give opening remarks and welcome over 400 delegates expected from recipient countries, other multilateral development banks, UN agencies, donor countries and other stakeholders. Picture Mxolisi Madela/

Door open for nuclear deal - Gordhan

By Marianne Merten Dec 15, 2015

Cape Town - Less than a day after his re-appointment as finance minister, Pravin Gordhan was already tightening the purse strings, saying the country would not spend money it doesn't have.

Despite this, Gordhan confirmed the door remains open to an ambitious nuclear build programme – estimated to cost up to R1 trillion – following last week's cabinet discussion of the issue. He said such a deal could take place if the country had the money.

While emphasising fiscal prudence, Gordhan also undertook to maintain pro-poor spending and growth-inducing incentives.

The decision to go nuclear was yesterday confirmed by Gordhan – "There will be a formal procurement process" – although Minister in the Presidency Jeff Radebe did not utter a word about this at the briefing following last Friday's cabinet meeting.

Meanwhile, Gordhan made it clear that he would take a firm line with the financially and governance troubled SAA. He reiterated former finance minister Nhlanhla Nene's

decision to halt a restructuring of a proposed Airbus leasing deal because it would leave the national airliner worse off.

Before Wednesday's public holiday there would have been a telephone conversation between Gordhan and SAA board chairwoman Dudu Myeni, who is close to President Jacob Zuma and has driven the restructuring, although further discussions are only likely take place early next year.

"We have been clear that one of the risks to our fiscal framework is the financial state

of state-owned companies. Let me emphasise that any support to these companies will be done in a fiscally sustainable manner," Gordhan told journalists yesterday at a briefing also attended by finance deputy minister Mcebisi Jonas, National Treasury director-general Lungisa Fuzile and Reserve Bank Governor Lesetja Kganyago.

SAA, the nuclear programme and efforts to contain government expenditure were touted as reasons for the abrupt substitution of Nene with little known ANC MP and former Merafong mayor David van Rooyen, who has now replaced Gordhan at the co-operative governance and traditional affairs portfolio.

The IFP and DA yesterday criticised that shift, both pointing out Van Rooyen's less than stellar financial and political track record in Merafong.

Monday's briefing promoted a view that market and bond losses of up to R300 billion are being recouped, while the rand had strengthened on the back of Gordhan's return as finance minister.

"I have received many representations to reconsider my decision. As a democratic government, we emphasise the importance of listening to the people and to respond to their views," said Zuma in his announcement of the second cabinet change in four days, late on Sunday night.

The announcement came after a turbulent five days which also saw public criticism of the initial decision to replace Nene from civil society, business and religious representatives, a "crisis" meeting with ANC alliance partners, the labour federation Cosatu and the SACP on Friday night, and a social media campaign #ZumaMustFall.

That campaign will come to Parliament early next year if DA leader Mmusi Maimane has his way. Yesterday, Maimane announced he had requested a motion of no confidence debate in the National Assembly after MPs return in late January.

"The people of South Africa have lost confidence in Jacob Zuma and hundreds of thousands have expressed their intention for Zuma to fall. Now Zuma can fall, in January 2016, when Parliament can take up the cause of enraged South Africans and can vote President Zuma out of office," Maimane said.

Freedom Front Plus leader Pieter Mulder similarly argued while Gordhan's appointment is welcomed to restore confidence in the economy, it did not restore confidence in Zuma.

However, while Cosatu, the SACP and even the ANC “noted” Van Rooyen’s appointment last week, Gordhan’s appointment as finance boss was “welcomed” by the ANC and SACP, although Cosatu expressed reservations as Gordhan was “not a friend of the working class”.

However, Cosatu said it respected “the president’s attempts and efforts to fix what people of this country were objecting to. We wish the new ministers well”.

Gordhan faces low economic growth and high unemployment in the wake of last week’s brutal reaction from financial markets.

“Our expenditure ceiling is sacrosanct. We can have extra expenditure only if we raise extra revenue,” he said, adding this could be by cost-cutting, increasing efficient expenditure across government and/or selective changes to tax policy.

“I want to be very clear: we will not cut pro-poor programmes, growth inducing programmes and investment. Instead we will seek to increase investment in the 2017 budget.”

DA MP and finance spokesman David Maynier yesterday cautiously welcomed the finance minister’s plans – and his unconditional backing of his director-general, who was also rumoured last week to face the boot. “To restore confidence and trust today the minister will have to demonstrate he has the political space to do what is required to save the economy and avoid ‘junk status’ in South Africa,” Maynier added.

Gordhan said: “My job is not to be happy. My job is to serve you (as South Africans) and to do so with enthusiasm.”

POLITICAL BUREAU & CAPE ARGUS
SHARE THIS ARTICLE:

FOR SUBSCRIBERS 14 Dec 2015

Cabinet not aware of secret nuclear dealings

fin24 Matthew le Cordeur

SHARE

A steam component of a nuclear reactor at the Atommash factory in Volgodonsk, 205km from the regional capital of Rostov-on-Don in southern Russia. (Photo: Matthew le Cordeur).

Cape Town – President Jacob Zuma's Cabinet has denied claims that it secretly approved the start of the nuclear procurement programme during its meeting just before Finance Minister Nhlanhla Nene was fired last Wednesday.

Business Day journalist Carol Paton, who has a reputation for excellent sources, wrote on Monday that "the decision was made at the last Cabinet meeting of the year on Wednesday, after which Nhlanhla Nene was fired as finance minister. The approval was not announced by Minister in the Presidency Jeff Radebe in his Cabinet briefing on Friday."

Acting Cabinet spokesperson Phumla Williams told Fin24 in a brief response on Monday that she was not aware of this. "(I) saw it in Business Day."

Nene stalled the 9 600 MW nuclear build programme, saying it was too expensive in the current economic climate. He had allocated R200m in his mini budget for the departments of energy and finance to investigate the costing of the programme. There were no indications of this having produced any results.

Paton said "several independent studies have found that the cost of new nuclear energy will be greater than energy produced by other technologies".

The nuclear process has been veiled in secrecy for over a year. As a result, non-governmental organisations (NGOs) Earthlife Africa Jhb and the Southern African Faith Communities Environment Institution approached courts to challenge government's plans to procure nuclear reactors.

Nomura emerging market analyst Peter Attard Montalto told Fin24 on Monday that if Cabinet had approved the programme, it was very serious.

"I believe this move is illegal under the Public Sector Finance Management Act. Major public procurement projects have to have National Treasury cost-benefit analysis and affordability sign off."

Montalto believed Treasury provided initial evidence to Cabinet that the project was unaffordable, which was the "wrong" answer for Zuma. "Hence Nene was ousted," he said.

Montalto said Finance Minister Pravin Gordhan had always objected to the nuclear deal due to the cost and the possibility of corruption.

"He was in the Cabinet meeting when it was approved (by a majority) and would not have been presented with funding/guaranteeing, as it was a done deal back at National Treasury. Maybe he even didn't object to it given it wasn't his area at cooperative governance?"

Ramaphosa: 'Totally unacceptable' for JZ to fire Gordhan

Marietjie Gericke, Netwerk24
SHARE 31 Mar 2017

Cyril Ramaphosa arrives at the Palonomi hospital in Bloemfontein. Photo: Netwerk24

Bloemfontein - Deputy President Cyril Ramaphosa says he is very unhappy about the firing of Finance Minister Pravin Gordhan and his deputy, when President Jacob Zuma reshuffled his Cabinet with a predetermined list without consulting him, Netwerk24 reported.

Ramaphosa was in Bloemfontein on Friday to launch the National Strategic Plan on HIV, TB and STIs.

The media bombarded him as he arrived late at Pelonomi Hospital for the launch of the multi-drug-resistant tuberculosis (MDR-TB) 9-month regimen.

“I am especially unhappy about the firing of Gordhan and his deputy, to which the financial markets will react negatively. I think it is totally unacceptable that he fired someone like Gordhan, who has served the country excellently, for his own gain and survival,” he said.

“I find it very difficult to believe that someone like Gordhan, who has served the country with everything he has and so much pride and total honour, planned to besmirch Zuma and his government overseas. The actions Zuma has against Gordhan is based solely on assumptions.”

'I will stay to serve the people'

Ramaphosa said he was reminded of the conspiracy against him in 2001 while in former president Thabo Mbeki’s government. It was at that stage that former president Nelson Mandela told him not to become anxious.

The deputy president said he had already expressed his dissatisfaction to Zuma. “I also told him I was going to express my unhappiness to the public at large.”

He added that the president has the right to reshuffle his Cabinet and exercise his own choices.

On the question of whether he will resign, Ramaphosa answered: “No. I will stay to serve the people. I know there are many of my colleagues and friends who are also unhappy.

“What just happened is an absolute upset – to get rid of a man with great capabilities, an intelligent man who served his country and his people well, in such an unsolicited and unexpected manner.”

EXHIBIT PP 2

LIZO
NJENJE

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
Tel: (010) 214 to 0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

INDEX: EXHIBIT PP 2

LN-01

LIZO NJENJE'S STATEMENT TO THE STATE CAPTURE COMMISSION LAWYERS MADE ON 29 OCTOBER, 2018.

1. My name is Lizo Njenje an African male born on 24 December, 1958. I am also known as Gibson, a name I inherited since joining the ANC in exile in 1977.
2. I underwent military training as a soldier and later an Intelligence officer under the aegis of the ANC military wing, Umkhonto we Sizwe (MK). I plied the intelligence tradecraft from 1979 till 1994 in the Department of Intelligence and Security (DIS) performing in various positions and responsibilities in the then Frontline States.
3. Although I played a major role in the CODESA process and in the negotiations which culminated in the new civilian intelligence dispensation, I opted not to join the new government intelligence structures in 1995 when the amalgamation of the various Services was effected. Instead, I went for business management training in pursuit of private interest and later worked for the private sector. Notwithstanding my seniority in the DIS, I decided to leave intelligence because I felt very tired of doing the same job.
4. In around 2002 I was headhunted by the South African Secret Service (SASS) and served as the Deputy Director General (DDG) : Operations. In 2003, I was transferred from SASS to the National Intelligence Agency (NIA) as DDG Operations.
5. Late in 2005 I resigned from NIA because of certain developments which had political implications. This was the period leading to the ANC Polokwane national elective conference in 2007.

LNJ

LN-02

6. Between 2006 and 2009, I went back to the private sector where, in the main, I continued with my interests in a number of companies, dealing in gold, coal and manganese.
7. In about mid July 2009, I was contacted by the then Minister of State Security, Dr. Siyabonga Cwele, who informed me that President Jacob Zuma (uBaba) was requesting me to join the SSA to become part of a new leadership to steer away the Organization from the challenges it was faced with. After several discussions with Cwele, I agreed to join the SSA as part of the Top 3 in the Agency. I was duly appointed the Head of Domestic Branch (effectively, NIA DG).
8. Ambassador Mo Shaik was appointed the Head of the Foreign Branch (formerly SASS), and Ambassador Jeff Maqetuka, to whom both Mo Shaik and I reported to, was what known as "Super DG".
9. As Head of the Domestic Branch my responsibilities mainly covered the Counter Intelligence function. The responsibility also empowered me to advise the Super DG, and/or the Minister, and/or the President at my discretion based on the gravity of the matter at hand.
10. From the outset, Cwele tasked me to investigate the activities of what was called the Principal Agent Network (PAN) Programme which had been directed the then DDG Operations, Mr. Arthur Frazer. This programme was supposed to be a deep cover collection structure with no formal links to NIA. In brief, the Minister suspected that the PAN Programme was establ;ished outside the legal and regulatory prescripts of the Agency.

I set up an investigation team which reported to me on a regular basis and I in trun, reported to the Minister. I also kept abreast my colleagues at Top 3 meetings on the developments of the

11.

12. investigation. While the investigation was on going, Arthur Frazer and several affected members were suspended. Frazer later resigned as a member of the Agency.

13. As a result of the amalgamation of the NIA and SASS into State Security Agency (SSA) in 2009, some restructuring and realignment was necessary and this became one focus area the Top 3 had to undertake almost on a daily basis. At the beginning Cwele gave us good support, but with time the enthusiasm waned and it took long for him to attend to our submissions for his approval. From there on, the relationship between the Minister and the Top 3 gradually began to suffer a strain.

14. As head of Domestic Branch, I found the challenge of the strained relationship to be a risk the running of the SSA. I then took it upon myself to reach out to the Minister trying to show to him that there was no mal-intent on the part of the Top 3 other than trying to get our job done. But the situation continued to deteriorate to the point where the Top 3 decided to approach the State President for his intervention.

At a Domestic Branch senior management strategy planning meeting in 2010, one of the Chief Directorates, as part of their report, were indicating that there is some work they were performing on the Gupta family. Indeed, there was nothing much to this more than open source analysis. I can also

add here that there were inquiries and information requests that NIA received from Foreign Intelligence Services with regards to a Gupta-owned uranium mine. Such requests are normal protocol between fraternal intelligence services.

15. I later heard that Minister Cwele was saying I was investigating the Gupta family because I have conflicting business interests with them.
16. In truth, the matter of the Gupta family and their relationship with President Zuma and his family, particularly Duduzane, was an open public talk and a worrisome one to State Security. At the Top 3 level, we decided to call a meeting with the President so we could canvass him on the matter of the Guptas as well as the deteriorating relationship with Minister Cwele.
17. In about 2010, I received a call from Mr. Archie Luhlabo, a long time friend and comrade. He asked to meet as a matter of urgency. He told me that he was at former President Kgalema Motlanthe's private residence in Sandton. It was a Sunday evening. When I got there, I found Archie in the company of Ms. Gugu Mtshali (then) and Mr.
18. Nogxina and he advised that I mediate between the parties. Adv. Nogxina was clearly informed about the issue.
19. Ms. Mtshali made contact with Mr. Ajay Gupta and he agreed to meet with me at Saxonwold. At the meeting with Mr. Gupta, I told

him about how I got involved in the matter and that I had also made contact with Adv. Nogxina. I was surpised to hear from Ajay that he knew of me and my job at SSA. From wanting to take 90% of ICT, I managed to get Ajay accept 50%. His claim was that ICT could only succeed against Kumba and Arcelo Mittal with the support of President Zuma which he had.

20. Still in 2010, I made a call to Ajay Gupta (whose contact details he had shared with me at the meeting with Gugu and Archie) and asked him for a meeting to which he agreed. We met at his Saxonwold residence. I wanted to make an assessment of the power which they seemed to wield over the President which was negatively affecting the government and the ruling. Basically, I told him that as SSA we were concerned about the negative publicity that the President was receiving as a result of their family relationship with him. I also told him that if indeed they were friends with the President, they would need to assist us in protecting the President against the negative perceptions that were doing the rounds. At this point, Ajay told me that, in fact, before he agreed to meet on the Sunday, he spoke to the President and latter told him that I am a "good man from old days". Ajay went on to agree with the approach that President's name and integrity must be protected. He further committed that he would talk to one of his brothers who was said to be very rude in dealing with people. He went on a long narration of his family background, religious beliefs, business ethics, business interests in SA and how they met Duduzile and Duduzane Zuma when President Zuma was a political polecat etc. He undertook that he would play his part. But then he wanted to know from me what I thought was

Minister Cwele in the Gupta family. I frankly told him that I did not know and asked him why the question. He responded that at an ANC fundraising event held at the Hilton Hotel in Durban not long before, Cwele forced himself onto the Gupta-bought table; that Cwele gave the impression he wanted to be in business with them and also wanted to be close to President Zuma. I told him I had no idea.

21. When the Top 3 met President Zuma in 2010 or early 2011, we raised our concerns with the President. In response, he gave us a lengthy explanation about the relationship with the Guptas. He gave us the background of his 2 children and how the Guptas assisted them to become independent. We shared our concerns with him and the damage caused by the relationship. Overall, it was our view as Top 3 that we were not convincing the President. He also made the point that there was nothing untoward in their relationship. On the matter of the deteriorating relationship between the Minister and the Top 3, President seemed helpless and annoyed. He finally told us "you guys are senior. You should find a solution". Meaning we as Top 3 must sit down with Minister Cwele and resolve the issues.
22. A lot of work into the PAN Programme investigations and by 2011 the team and I convened a meeting with the NPA, SIU and Hawks where prosecutions indicated their happiness with going ahead with the case. The documentation of the investigation was then handed over to the Hawks and the SIU. We were then ready to move with the prosecution process.
23. I got a call from Minister Cwele asking that we meet at OR Tambo International Airport. At the meeting he told me about his meeting with President Zuma where latter expressed strong opposition in us

taking Arthur Frazer to court. He said there were concerns of national security. I was gobsmacked and all my attempts to something sensible from Minister Cwele drew a blank. He finally said, it is the President's decision. I had the misfortune of having to go to my team of dedicated investigators and convey this decision by the President.

24. To ameliorate the failing diplomatic relations between Pretoria and Kigali, SSA Top 3 undertook a painstaking intelligence operation spanning between SA and the Caribbeans. A great deal of work was done resulting in the Caribbean states agreeing to host 2 top former Rwandan security officers living in SA and suspected of causing political instability in Rwanda. Towards the end of 2011, Minister summoned me to Cape Town. He told me he wanted me to brief President Zuma on the progress made with resettling the 2 Rwandans. But the meeting with the President seemed an illusion. After about 2 days, I told the Minister that I could not sit idle in Cape Town and left back to Pretoria.

    Cwele told me that he had recommended to the President that he appoints me as SA's ambassador to Kigali because of my "seniority" and understanding of the politics the Great Lakes and Central Africa. I told him that I was not interested. I phone my 2 colleagues and they were amused with this news.

25. A few days later Minster Cwele called me to his office in Pretoria to give him "feedback" on the "Kigali offer". I went to his office armed with my resignation letter. This was in November 2011.

26. I think it was at the Cabinet Lekgotla in 2011 when Adv. Sandile Nogxina informed me about a pending meeting between Minister Susan Shabangu and Ajay Gupta. He further told me that the DMR

LN-08

was having hard time dealing with the demands of the Guptas. I offered to accompany them if his Minister were to agree. She agreed. At the point of leaving the marquee where lunch was served for the Cabinet Lekgotla, Minister Shabangu went to inform the President about her meeting, but he knew about the meeting already and it was to be held at Mahlambandlopfu. We found Ajay there and he led us to the President's study where the meeting was held. The meeting was not good. Ajay Gupta was talking down to the Minister and very much overbearing. He was demanding that Minister Shabangu must fast track their application for mineral rights. I intervened and stopped him for his conduct.

Signed : (Lizo Njenje)

26 November 2018.

Ek sertifiseer dat die bovermelde verklaring voor my afgeneem is en dat die verklaarder erken dat hy/sy vertroud is met die inhoud van hierdie verklaring en dit begryp. Hierdie verklaring is voor my beëdig/bevestig en verklaarder se handtekening/merk/duimafdruk is in my teenwoordigheid daarop aangebring.

I certify that the above statement was taken by me and that the deponent has acknowledged that he/she knows and understands the contents of this statement. This statement was sworn to/affirmed before me and deponent's signature/mark/thumbprint was placed thereon in my presence.

te/at MIDRAND op/on 2019/08/20 om/at 13:37

(HANDTEKENING) KOMMISSARIS VAN EDE
(SIGNATURE) COMMISSIONER OF OATHS

VOLLE VOORNAME EN VAN IN DRUKSKRIF
FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS

CAR CRACE AND SMITS ARM

BESIGHEIDSADRES (STRAATADRES)
BUSINESS ADDRESS (STREET ADDRESS)

HALFWAY GARDENS

WO

RANG/RANK

SA POLISIEDIENS
SA POLICE SERVICE

SOUTH AFRICAN POLICE SERVICE
HEAD SUPPORT
MIDRAND
2019 -08- 20
SUID AFRIKAANSE POLISIEDIENS

EXHIBIT PP 3

MZUVUKILE MAQETUKA

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
Tel: (010) 214 to 0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

INDEX: EXHIBIT PP 3

#	Pages	Pages
1.	**Affidavit and Annexures of Mzuvukile Maqetuka**	**001 to 118**
	Affidavit of Mzuvukile Maqetuka	001 to 025
	Annexure "MM1"	026 to 086
	Annexure "MM2"	087 to 111
	Annexure "MM2A"	112 to 113.8
	Annexure "MM3"	114 to 118
2.	**Additional documents**	**119 to 162**
	MM4.1: Enclosing email and letter requesting declassification of document dated 03 July 2020	119 to 121
	MM4.2: Enclosing email and letter requesting declassification of document dated 03 July 2020 dated 07 July 2020	122 to 124
	MM5: Chapter 11 of the Final Constitution of the Republic of South Africa Act 108 of 1996	125 to 130
	MM6: The 'Shaik Document' titled Input into the Draft General Intelligence Laws Amendment Bill, 2011	131 to 134.4

PP3-MM-001

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

AFFIDAVIT

I, the undersigned,

MZUVUKILE MAQETUKA

do hereby state under oath that:

1. I am an adult male formerly employed as the Director-General of the State Security Agency ("*the SSA*"). I was appointed to that position by former President J.G. Zuma ("*the former President*") on 2 October 2009. I retired from the SSA in 2012.

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

3. On 13 December 2018, I signed a statement which I provided to the Commission ("*my first statement*"). Attached to my first statement are three annexures marked "**A**", "**B**" and "**C**" respectively. I confirm that the contents of my first statement and these annexures are true and correct. A copy thereof is attached as Annexure "**MM1**" hereto.

4. I have been requested to supplement my first statement to address additional matters that are of relevance to the terms of reference and investigations conducted by the Commission.

5. The broad topics which I have been requested to canvass are as follows:

5.1. The re-structuring of the State Security Agency (SSA) by Proclamation, as opposed to by legislation as required in terms of the Constitution of the Republic of South Africa, 1996 ("the Constitution");

5.2. The constitutional role of the President and the Minister of Intelligence in providing direction over the Intelligence Services;

5.3. The meaning of the term, "*national security*" as provided for in the Constitution and the obligation on the Intelligence Services to investigate state capture as a matter of national security;

5.4. The investigation conducted by the SSA into the influence of the Guptas and whether their alleged influence over the former President constituted a threat to national security;

5.5. The interference by Minister Cwele and the former President in the Gupta investigation;

5.6. Whether, had the SSA investigation into the Guptas not been stopped and/or interfered with, capture of the state by them could have been avoided?

5.7. The politicization of state security with reference to the General Mdluli and PAN 1 investigations;

5.8. The interference in the PAN1 investigation; and

5.9. The breakdown of my, Ambassador Riaez (commonly known as "*Moe*") Shaik's and Mr Gibson Njenje's relationship with Minister Cwele which ultimately led to our resignation.

MY BACKGROUND LEADING TO MY APPOINTMENT AS DIRECTOR-GENERAL OF THE SSA

6. I am a trained intelligence officer, having first received training in furtherance of the armed struggle waged by the African National Congress (ANC) in Mozambique during 1979. I left Maputo, Mozambique, for formal military training in Angola as a company commander. When my training there finished, I attended a six months specialised intelligence course in the German Democratic Republic during 1980.

7. After training in Germany in 1980, I went back to Mozambique and was attached to the Department of Intelligence and Security (DIS) of the ANC.

8. In 1982, I was deployed to Lesotho to head the DIS and to focus on building internal structures, mostly in the Eastern Cape and the Free State. I also served in a structure called the Political-Military Committee, which comprised of senior members of the political and military wing of the ANC, as well as the head of the South African Congress of Trade Unions. I was in Maseru when the infamous Maseru Massacre took place, during which more than thirty ANC and Umkhonto We Sizwe freedom fighters were killed. I left Lesotho after having been arrested and deported on several occasions by the Lesotho government.

9. From the years 1985 until 1989, I was deployed to Botswana in the same capacity as in Lesotho. I left Botswana under similar conditions as when I left Lesotho.

10. From Botswana, I went to Zambia where I worked at DIS headquarters until the year 1990, when I went to the United Kingdom to further my studies.

11. I completed my studies and returned to the Republic of South Africa in May 1994 to re-join DIS. I joined a team that was tasked with the amalgamation of the country's then existing six intelligence services into two intelligence services: the National Intelligence Agency (NIA), which dealt with domestic intelligence, and the South African Secret Service (SASS), which dealt with

foreign intelligence. At that time there were six Intelligence Services, namely the apartheid government's National Intelligence Service, the ANC's DIS, the PAC's Intelligence Service and the three Intelligence Services in the former homelands, Venda, Transkei and Bophutatswana. A decision was taken to incorporate all these intelligence agencies into a domestic and foreign branch of the Intelligence Service, to be called the National Intelligence Agency (NIA) and the South African Secret Service (SASS). To this end, a White Paper was prepared which set out the rationale for, and proposed manner in which, the aforementioned existing Intelligence Services could be integrated.

12. By December 1994, the Committees of the Heads of the six Intelligence Services listed above had still not finished their work, and were six months late in integrating their respective agencies. A decision was taken that senior management of each Intelligence Service would finish their work and that the new Heads of the NIA and the SASS would complete the integration.

13. In January 1995, the six organisations were integrated and persons to lead them were appointed retrospectively to June 1994, which was the date that had been set for their integration. In 1995, I was appointed Deputy Director-General of the NIA, in which capacity I served until 1997.

14. Hereafter, I served in various national government departments, including SASS, NICOC and Home Affairs until 2007, when I was appointed as the Republic of South Africa's Ambassador Plenipotentiary in the Democratic People's Republic of Algeria. I remained in this post until January or February 2010 when I was recalled to Pretoria for a consultation with the President, the Minister of State Security and the Director-General of DIRCO for discussions on the intention of the President to appoint me as DG of the new, to be created, State Security Agency (SSA).

MY APPOINTMENT AS HEAD OF THE STATE SECURITY AGENCY

15. Whilst I was serving in my post as Ambassador to Algeria, the former President issued Proclamation 59 of 11 September 2009 to integrate the domestic and foreign Intelligence Services.

16. Shortly hereafter, I received a call while in Algiers from the Director-General of the Department of Foreign Affairs, Dr Ayanda Ntsaluba. He told me that the former President had instructed him to arrange a consultation with me in Pretoria and that he may have to release me from my ambassadorial duties.

17. On return to Pretoria, I met with the Minister of Intelligence, Dr Siyabonga Cwele, who told me that the Civilian Intelligence Service was to be restructured. Minister Cwele said that he had been asked by the former President to get my views on his proposed plans to integrate the then existing Intelligence Services, the NIA and the SASS, into one service.

18. This in effect meant that the hitherto separate domestic and foreign Intelligence Services were to be amalgamated and centralised into a single Intelligence Service, together with their associated entities, including the National Communications Centre (NCC), the Office for Interception Centres (OIC), Electronic Communications Security (Pty) Ltd (COMSEC) and the South African National Academy of Intelligence (SANAI).

19. I had no objection accepting the position offered to me by the President. I was told that Ambassador Shaik and Mr Njenje, for whom I had great respect, would also be brought back to assist me, it being contemplated that Ambassador Shaik would lead the foreign branch of the Intelligence Services and Mr Njenje would be in charge of domestic Intelligence.

THE IMPLEMENTATION OF OUR MANDATE TO RESTRUCTURE THE INTELLIGENCE SERVICES

20. In order to implement our mandate to integrate the domestic and the foreign Intelligence Service and their related entities, we had to create a new structure and, thereafter, determine our designations.

21. It was decided that I would look at our designations in title, and Ambassador Shaik would look at the organisational structure. After much research, Ambassador Shaik, Mr Njenje and I elected to adopt the Canadian Model of Intelligence. This was accepted by the Minister.

22. In 1994, there had been a Director General (DG) for the foreign branch and a DG for the domestic branch of the Intelligence Services. There was, however, no thinking that could guide us on the designations of our positions in the new structure. Whereas in Canada, the Head of the Security Services is called a Director, with the deputy directors designated as Director Generals, we needed to create our own structure as the DG is the accounting officer in terms of the Public Service Act. It was, accordingly, decided that I would be appointed as the DG and accounting officer and that Ambassador Shaik would be appointed as the Director of the foreign branch and Mr Njenje would be appointed as the Director of the domestic branch of the SSA.

23. The Minister approved the structure proposed and our designations.

24. I dealt with the mechanism implemented to deal with the restructuring and the general management of the SSA in parts 4 and 5 of Annexure 'C' to my first statement and thus, do not repeat this here.

THE WHITE PAPER ON INTELLIGENCE

25. In the course of executing our mandate to amalgamate the two extant Intelligence Services, I perused several intelligence documents including, amongst others, the White Paper on Intelligence. The White Paper had been created to inform the intelligence provisions to be incorporated into the new

Constitution, which was to provide the basis and framework for our new democracy. A copy of the White Paper is attached as Annexure "**MM2**".

26. Section 1 of the White Paper sets out its objective, namely to serve as "*a framework for the understanding of the philosophy, mission and role on intelligence in a democratic South Africa*". This '*Philosophy on Intelligence'* is dealt with in Section 3, sub-paragraph 3.1, where it is explained that:

"Reshaping and transforming intelligence in South Africa is not only a matter of organisational restructuring. It should start with clarifying the philosophy, and redefining the mission, focus and priorities of intelligence in order to establish a new culture of intelligence."

27. When Ambassador Shaik and Mr Njenje and I were called and appointed, there was no clarification of the philosophy, mission or intelligence focus intended for the to be formed SSA, which could have guided us; we were left to devise, for ourselves, a new intelligence culture, which we believed to be in line with the fundamental principles of Intelligence outlined in the White Paper and in the Constitution.

THE LEGALITY OF THE RE-STRUCTURING OF THE SSA BY PROCLAMATION, AS OPPOSED TO BY LEGISLATION AS REQUIRED IN TERMS OF THE CONSTITUTION

28. Ambassador Shaik and I shared a concern about the amalgamation of the SSA through proclamation rather than national legislation, as required by section 209(1) of the Constitution of the Republic of South Africa Act 108 of 1996 ("*the Constitution*"). Indeed, I raised my concerns about the Proclamation with my colleagues, Ambassador Shaik and Mr Njenje, on the day of the announcement of our appointment during October 2009.

29. Soon after my appointment, I established an Executive Committee comprising senior management, including myself, the Director of the Domestic Branch, Mr Njenje, and the Director of the Foreign Branch, Ambassador Shaik. The

extended Executive Committee also included the Head of the National Communications Centre, the Deputy Directors of the domestic and foreign branches, the Deputy Director General of Corporate Services and the Principal of the Intelligence Academy. The institutions I refer to had all been amalgamated under the new structure.

30. During the beginning of 2010, the Executive Committee, in consultation with Legal Services, discussed the Proclamation and the then draft State Security Bill. Our aim was to bring to the attention of the Minister issues that could be corrected in both the Proclamation and the Bill, which we felt fell foul of the Constitution, as well as other matters which had been directed by the Minister which were in conflict with the Proclamation and the Bill. These concerns were embodied in a document submitted to the Minister on 28 April 2010 entitled, "*The State Security Agency Legislative Framework*". This document is marked, "*Confidential*", and will need to be declassified before I can provide a copy to the Commission. I am advised that steps will be taken to obtain such declassification.

31. I tried to explain to Minister Cwele that the proposed restructuring went against the philosophy outlined in the White Paper as aforementioned. In my view, what the former President proposed was to revert to the single, centralised national Intelligence Service that had existed during the apartheid era, which the framers of the Constitution had sought to prevent.

32. This is explained in Section 5, (unmarked) paragraph 6 of the White Paper, which states that:

"*The most significant departure from the old dispensation is that instead of one centralised national civilian intelligence organisation, there will be two. This arrangement will not only ensure that the new intelligence dispensation in South Africa corresponds with general international trends, but will promote greater focusing, effectiveness, professionalism, and expertise in the specialised fields of domestic and foreign intelligence.*"

33. I pointed out to the Minister that even the proposed name of the new Agency, "*The State Security Agency*," went against the philosophy of having a national security agency, as opposed to a state security agency (that had existed during the apartheid years). I tried to explain that the idea of Intelligence being a state instrument went completely against the founding principles on Intelligence enshrined in the Constitution. Ambassador Shaik, who was part of the Intelligence sub-committee that drafted the Intelligence provisions in the Constitution, testified about this and dealt with the anomaly posed by the Proclamation fully during his evidence before the Commission. I defer to Ambassador Shaik's expertise in this regard, and agree with the views expressed by him during his evidence.

34. These difficulties, however, were neither appreciated, nor attended to by the Minister. With respect, Minister Cwele was not sufficiently qualified to run the organisation; he could not even argue with me about the Constitutionality of the proposed restructuring, or any of the other issued addressed. I pointed this out in my letter of resignation which I addressed to the former President dated November 2011, a copy of which, excluding the annexures, which are marked "*confidential*", is annexed hereto as Annexure "**MM2A**".

35. I point out, however, that in reality, there was very little that we could do to remedy the situation as, by the time that Minister Cwele approached us to lead the new Intelligence Services, the Proclamation by the former President restructuring the Intelligence Services had already been gazetted.

THE CONSTITUTIONAL ROLE OF THE PRESIDENT AND THE MINISTER IN PROVIDING DIRECTION OVER THE INTELLIGENCE SERVICES

36. The President's Constitutional role is to guide the Intelligence Service. These functions and powers of the President were then delegated to the Minister by the President.

37. This delegation raises the broader philosophical question which has been raised by me and others consistently and that is whether there is any need for a Minister of Intelligence.

38. Before the appointment of a designated Minister of Intelligence, the President had retained his role to guide the Intelligence Services, only delegating the administration of the Intelligence services to an extant Minister, traditionally the Minister of Justice. I am of the view that the Constitution did not contemplate that the President would delegate his duties to guide the Intelligence Services to another Minister. I agree with Ambassador Shaik that there is and was no need for there to be a Minister of Intelligence. Furthermore, it is my view that the concept of having a Minister of Intelligence is in direct conflict with the basic principles of Intelligence set out in the White Paper.

39. Section 4 of the White Paper recognises that, as a basic principle of Intelligence, there should be "*the separation of intelligence from policy making*". The notion of having a Minister of Intelligence is in direct breach of this fundamental principle: How do you separate the Intelligence Service itself from the executive when the Minister of Intelligence is a member of the Executive? This raises further difficulties as, where the Minister of Intelligence is part of the Executive, this will inevitably lead to breaches of the Code of Conduct set out in the White Paper requiring his/her impartiality.

40. Section 4 requires, amongst other things:

- "*adherence to the principle of political neutrality,*
- *a commitment to the highest degree of integrity, objectivity and unbiased evaluation of information*"

and of importance:

- "*a commitment to the promotion of mutual trust between policy-makers and intelligence professionals.*"

41. As I discuss later in this affidavit, this fundamental trust between us, as the three senior intelligence officers of the SSA and the Minister, as the person to whom policymaking had been delegated by the President, did not exist. This, together with the Minister's interference in operational matters and his abuse of state resources led to the irretrievable breakdown in the relationship between us and the Minister and ultimately, all of our departure from the newly formed SSA.

THE PURPOSE BEHIND THE RESTRUCTURING

42. Under my leadership, we tried to get clarity on the rationale for the amalgamation of the then extant Intelligence Services.

43. I initially believed that there were genuine reasons why the former President wanted the three of us brought back to lead the new agency. Other people had also been brought back, like Mr Vusi Mavimbela, who was brought back from Egypt to be the Director-General in the office of the Presidency, and the Ambassador in Washington, Mr Welile Nhlapo, who was recalled by the former President to be his National Security Advisor.

44. It was my view that the reason for the restructuring of the Intelligence Service was that post Polokwane ANC elections, the faction in support of the former President ("*the Zuma faction*") wanted to assert their control and make their mark by effecting change to the existing Intelligence Services. I did not believe that they applied their mind to the rationale for doing so.

45. However, in retrospect, and having regard to the events that followed after our departure from the Intelligence Service - and in particular the parallel, covert intelligence operations conducted by Arthur Fraser - it may be that more sinister objectives were at play in the restructuring of the Intelligence Services.

46. It may thus be that, whilst the former President believed that we would all serve his broader agenda to perhaps, capture the Intelligence Services, when it was apparent that we were not as compliant as expected, we were replaced so that he could pursue his agenda unhindered.

47. Our experience when raising the national security risk posed by the activities of the Guptas and the parallel security structure established by Arthur Fraser in PAN 1, dealt with by me below, are testimony to this.

THE MEANING OF *"NATIONAL SECURITY"* AS PROVIDED FOR IN THE CONSTITUTION AND THE OBLIGATION TO INVESTIGATE STATE CAPTURE AS A MATTER OF NATIONAL SECURITY

48. National security, in context of the White Paper, is defined as "*the maintenance and promotion of peace, stability, development and progress*" and this should be the primary objective of any government.

49. An important Constitutional principle that governs national security is found in section 198 of the Constitution which stipulates that:

"*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*".

50. The catastrophic effect of state capture is, in itself, evidence that it is a matter of national security that it be prevented. State capture has not only led to both systematic and systemic corruption, but has also been the proximate cause of the collapse of state-owned enterprises, which were formed to provide essential services to the people of South Africa, huge rates of unemployment and the virtual collapse of the economy of the country.

51. It is easy, thus, in retrospect, to see how state capture constitutes a fundamental breach of national security, which it was incumbent on the SSA to prevent.

REASONS FOR INITIATING THE INVESTIGATION INTO 'THE GUPTAS'

52. Initially, the Gupta family were of interest to the SSA as they had been flagged by the Americans, who were concerned about the Gupta's interest in the Shiva

Uranium mine which the Americans believed was financed by Iran. This was dealt with in the evidence of Ambassador Shaik before the Commission.

53. Shortly hereafter, and sometime during 2011, there was a press report issued which dealt with the NEC meeting of the ANC at which Minister Fikile Mbalula informed the NEC that one of the Gupta brothers had told him about his ministerial appointment as Minister of Sport, before he had been informed thereof by the President ("*the Mbalula incident*").

54. Ambassador Shaik, Mr Njenje and I discussed the matter and had two fundamental concerns with the Mbalula incident: First, it constituted a fundamental breach of national security for a private person or family to be involved in and/or interfere with the discretion conferred on the former President to appoint Ministers to his Cabinet. Second, it had the effect of seriously tarnishing of the name and respect for the former President, and ultimately the nation.

55. This was further discussed during one of our routine Monday morning meetings, at which we all agreed that Mr Njenje, as Head of the Domestic branch, should investigate the matter further.

INTERFERENCE BY MINISTER CWELE AND THE FORMER PRESIDENT IN THE GUPTA INVESTIGATION

The Meeting with Minister Cwele about the Gupta investigation

56. We all believe that someone present at our Monday morning meeting informed the Minister that we had resolved to investigate the undue influence that the Gupta brothers wielded over the former President as, shortly thereafter, we were all summonsed to attend a meeting with him at his offices in Cape Town. I do not remember the date but, I think it was on a Wednesday.

57. At the start of the meeting, Minister Cwele arrived with his staff, Mr Kau Mavhungo who was the Head of Ministerial Service, together with Mr Dennis

Nkosi, who had returned from a posting in Ethiopia, Addis Ababa where he had been the head of the Committee for Intelligence and Security Services of Africa (CISSA), an African Union Security structure.

58. Minister Cwele stated that he had called us to the meeting because he had been told that Mr Njenje was conducting an investigation into the relationship between the Gupta family and the former President, which he believed to be irregular. He paused there and looked around at us to, I believe, gauge our reaction.

59. At that stage, I lifted my hand in order to get Minister Cwele's attention. When he granted me the opportunity to speak, I objected to the presence of Mr Mavhungo and told the Minister that we could not discuss operational matters in his presence. I am not sure, but I think Ambassador Shaik then also protested about the presence of Mr Nkosi. After much debate, it was finally agreed that Mr Mavhungo would leave the meeting, but Mr Dennis Nkosi could stay, with the proviso that he could not participate in the meeting and only take minutes for the Minister.

60. After the presence of the Minister's officials had been sorted out, Minister Cwele stated that he objected to the Gupta investigation because, in his view, it was not being pursued *bona fide,* but was rather being pursued by Mr Njenje in order to protect his own business interests, which were in conflict with those of the Guptas. I objected to this accusation against Mr Njenje, making it plain that the investigation had not been initiated by Mr Njenje, but that he had been tasked with the investigation by us, as it was a domestic investigation and he was the Head of the Domestic branch. I further challenged the Minister to substantiate his allegation about Mr Njenje's motives for pursuing the investigation, but he failed to do so. I told the Minister that if he could provide me with evidence in substantiation of his allegations against Mr Njenje, then Mr Njenje could be taken off the investigation. This, however, I explained, was not a reason to stop the investigation, which I insisted was a legitimate and perfectly justified, official SSA investigation.

61. Minister Cwele never responded to this and it was clear that we would not be able to resolve this issue with the Minister. I, therefore, told Minister Cwele that there were no purposes in debating the issue any further and that it was our intention to take the matter up with the former President directly.

62. I do not remember the Minister categorically and directly instructing us to stop the investigation. However, he made it quite clear by his attitude to the investigation that it should be stopped; he was not interested in the merits of the investigation and sought only to question Mr Njenje's motives for pursuing it.

63. I must reiterate, however, that had he given us a direct instruction to stop the investigation, we would have not accepted it, without confirmation from the former President. This was particularly so as the Minister was not supposed to interfere with operational issues, ought not properly to have summonsed us to justify the investigation we were conducting into the Guptas at all, and had no authority to stop the investigation.

The Subsequent Meeting with the Former President

64. The only thing with which I differ in Ambassador Shaik' testimony before the Commission is in regard to the place where he averred our subsequent meeting with the former President took place. Whereas Ambassador Shaik testified that this took place in Cape Town, I firmly believe that it took place the day after our meeting with Minister Cwele, on a Thursday, on the 18th Floor at the former President's offices in Plein St in Pretoria.

65. The reception from the former President was not very warm and it was clear at the outset of the meeting that he had already been briefed by Minister Cwele as to the purpose of the meeting. The former President sat quietly as we went through the detail of our preliminary report about the influence of the Guptas and our view that this relationship would tarnish his reputation and that of the country.

66. Although the meeting was a long one and lasted between one to two hours, the President said virtually nothing during our briefing. After the briefing, the former President was very defensive and explained at length his relationship with the Gupta family; he told us that they were his friends and that when his children could not get work, it was the Guptas who helped them. At the end of the meeting, the former President simply said, "*[t]hank you,*" and asked for a copy of the report we had referred to. I told the former President that I could not give him a copy as he was the subject of the report.

67. I wish to stress that at this stage, the report which had been compiled was merely a scoping report and not an Intelligence report. By this I mean that it had been based on open source intelligence and was simply the result of a desktop investigation. It had, however, been resolved at our Monday meeting that this be escalated to an in-depth Intelligence investigation.

68. Although the former President did not, like Minister Cwele, expressly instruct us to stop the investigation, his body language and demeanour during the meeting made it abundantly clear to us that this is what he intended.

69. After this meeting, we had difficulty trying to meet with the former President; in fact, I think that this meeting was the last time that I physically engaged with the former President. It soon became clear to us that the trust between us and the former President, which I have said was cardinal to the proper functioning of the Intelligence Services, had irreparably broke down; we all knew that this was primarily as a result of our intention to investigate the Guptas. This, and the continued deterioration of our relationship with the Minister hereafter, ultimately led to all or our resignations and departure from the Intelligence Services.

70. I was not aware that the investigation into the Guptas was pursued hereafter. Notwithstanding the clear indications that both the Minister and the former President had given that they wished us not to pursue our investigations, a final report was ultimately prepared.

71. Regrettably, no further action appears to have been taken. It is my view that had the Minister and the former President given their support to the investigation, and had proper action been taken when the influence of the Guptas first became apparent, State Capture, at least at their hands, could have been avoided.

72. In this respect, I stress that the Constitution, and the South African Intelligence legislation governing the function and purpose of national security, makes no exception as to who and what should and can legitimately be the target of an intelligence investigation; an intelligence investigation should be pursued when it is in the national interest, without regard to partisan relationships and political objectives. If this is the mantra of national intelligence, it will serve the nation and prevent the abuse of its powers by politicians.

73. This notwithstanding, it soon became readily apparent to us that there was a concerted attempt by the former President to politicize the SSA and its investigations.

THE MEMORANDUM ADDRESSED TO THE TOP SIX OF THE AFRICAN NATIONAL CONGRESS

74. In 2016, we formed a structure to raise our concerns about the state of affairs within the ANC. This was composed of former commanders and commissars of the former Umkhonto We Sizwe, represented by General Nyanda, Jabu Moleketi, Ambassador Shaik and myself, with the leadership of the ANC's top six represented by the then Secretary-General Gwede Mantashe, Deputy Secretary-General Jessie Duarte, Treasurer General, Zweli Mkhize and the then ANC Chief Whip in the general assembly, Jackson Mthembu.

75. In view of our concerns about the direction in which the ANC seemed to be moving, General Nyanda prepared a memorandum, which was circulated amongst the members of this grouping of about 100 members and presented to the top six of the ANC. The memorandum warned the ANC veterans and the

top six of, amongst other things, state capture and in particular the influence of the Gupta family.

76. I was one of the signatories to the memorandum, which I attach as Annexure "**MM3**" hereto.

77. The memorandum states, amongst other things, that:

> "*8. In light of these revelations, we demand to know what role, if any, 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 Board 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.*
>
> *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.*
>
> *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 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…."*

78. It is my firm belief that had the top 6 of the ANC acted on the concerns raised by us in the memorandum, a Commission of the nature now established to investigate State Capture could have been instituted as early as 2016 and perhaps, the further collapse of our state-owned enterprises could have been avoided.

THE POLITICIZATION OF STATE SECURITY AND THE ALLEGED CONSPIRACY AGAINST GENERAL MDLULI

79. Minister Cwele provided me with a report commissioned by General Mdluli and prepared by Crime Intelligence, averring that there was a conspiracy waged by senior generals in the SAPS to secure his removal from Crime Intelligence, which he indicated the former President wished the SSA to analyse and report on.

80. A crime report of this nature should not have been sent to the SSA directly, but should properly have been sent to the Coordinator for Intelligence for the attention of the analysts at the National Intelligence Coordinating Committee (NICOCC) to evaluate. Section 2 of the National Strategic Intelligence Act of 1994 describes the functions of the SSA to be "*to gather, correlate, evaluate and analyse domestic and foreign intelligence (excluding foreign military intelligence),"* in order to, amongst other things, "*identify any threat or potential threat to the security of the Republic or its people*."

81. But be it as it may, I nevertheless referred the report to Mr Njenje for the domestic branch to investigate. This was done and, when completed, the domestic branch found that the report had no substance and was full of unverified information. However, our SSA report, despite careful analysis, was

not accepted by the former President who chose rather to believe the commissioned by Richard Mdluli. This had the effect of stifling the murder, rape and kidnapping investigation against General Mdluli, as well as the investigation into his involvement in the irregular appointment of members to Crime Intelligence and his abuse of the Secret Services Account, vehicles and safehouse for his own purposes.

THE PAN 1 INVESTIGATION

82. By the time that I arrived at the SSA, the investigation into the PAN1 project was about 70 percent complete and all expenditure relating thereto had been suspended. I cannot recall when exactly the investigation started, but I think it was during early 2009. I participated in briefings that took place at the Ministry about this project. Mr Njenje was also present at the meetings. I remember that there was damning information about the abuse of agency resources, buying of cars, renting houses and the recruitment of former SSA members, who are supposed to have taken packages from the agency, but were then recruited back into the PAN project.

83. The SSA set up the PAN 1 project, which was authorised by Minister Ronnie Kasrils. Although there was nothing untoward in the establishment of the project itself, it was the implementation of the project by Mr Arthur Fraser, in a manner that was neither controlled by nor accountable to the SSA, that was problematic.

84. The utilisation of covert funds by Mr Fraser for the project was also irregular. Once Minister Kasrils approved the project, he would have also approved the budget for it. The DG at the time, Mr Manala Manzini, as the accounting officer who reported to Minister Kasrils, signed off on the budget for the project. It is of some significance that Mr Fraser and Mr Manzini are to this day, business partners and there can be little doubt that Mr Manzini facilitated the wholesale looting of the SSA's covert account at the hands of Mr Fraser.

85. Mr Manzini was also found wanting in his management of the project as Mr Fraser was supposed to report to him, in alignment with the new Constitutional

dispensation, but did not. In addition, Mr Fraser was obliged to report to the Operations Division of the SSA but did not. It was thus clear that the PAN1 project was pursued for objectives not aligned with those of the SSA, for which the operatives were not accountable and in respect of which the spending incurred was unchecked.

86. Apart from this blatant corruption and lack of accountability, there was a flagrant breach of the basic principles of national security by the PAN 1 project. Glaring irregularities are the fact that:

86.1. the database of the PAN1 project, which was 'the nerve centre', was not located at the national office of the SSA, but was located, in breach of all security protocols, at Mr Fraser's home;

86.2. the database was not linked or integrated into the database at the Head Office, which meant that it operated completely outside of the SSA;

86.3. there were no reporting lines to Head Office, which gave Mr Fraser a dangerous amount of unbridled power; and

86.4. there was no oversight or accountability for the projects pursued or expenditure incurred.

87. The three main problems with the PAN1 project were, in my view, therefore, the centralisation of power; the ability to draw large amounts of money, and the absence of accountability. Absent this, it could have legitimately have been conducted within the national intelligence service structures, with restricted levels of access and knowledge.

88. The difficulties with the project came to the fore when the expenditure relating to all PAN 1 projects was stopped. After the PAN1 project had been exposed, a number of the members of the SSA who had purported to have resigned and taken packages sought to return to the SSA, on the basis that they were under the impression that they were still working for the SSA when they entered the

PAN program. Another casualty was Mr "*Itumeleng*" Tsemani, who came to see me once the funding had stopped and explained that his house had been demolished, as it had been decided that a guest house should be built on it for PAN projects, which was then going to be bought by PAN 1. After the flow of funds stopped, this did not happen and he found himself without a house.

89. I wish to stress that by time we were brought in to amalgamate the Intelligence Services, the expenditure on all PAN projects had already been suspended, the investigation had virtually been completed and criminality had been established. The matter was then referred by Mr Njenje to Peter Bishop at the Special Investigating Unit (SIU).

90. In fact, Minister Cwele had himself taken the view that the investigators, and the legal team headed by Mr Willem Hanekom, had exhausted all avenues of investigation and that it was now up to the law enforcement agencies to act against those implicated. I was unaware until I heard Mr Njenje's evidence before the Commission that after my departure from the SSA, he was instructed by Minister Cwele to withdraw the PAN 1 report from the SSA, and was given an instruction to stop the PAN 1 investigation.

91. It is inexplicable to me that after we had left the SSA, Mr Fraser was brought back by the Minister as the DG of the domestic branch of the SSA, notwithstanding the damaging averments against him in the PAN1 report.

92. I have read Jacques Pauw's book, *The President's Keepers*, and from my knowledge of the PAN1 investigation, I can confirm that it is an accurate account thereof. I can provide more detail in this regard if requested.

93. I have no knowledge of the PAN 2 project embarked upon by Mr Fraser when he returned to the Intelligence Services, as this happened long after I had left the SSA.

94. I believe that Mr Fraser is currently the National Commissioner of Correctional Services.

MY RESIGNATION AS THE HEAD OF THE INTELLIGENCE SERVICES

95. After our meeting with the President concerning the investigation into the Guptas, our relationship with Minister Cwele continued to deteriorate, and soon became intolerable. The detail of this is documented in Annexure 'C' to my first statement.

96. One of the reasons for the breakdown in our relationship with Minister Cwele arose after I took the Minister to task about his abuse of the resources of the SSA to provide protection services for his wife when attending court on charges that she had been involved in drug smuggling. Soon after this, Minister Cwele began undermining my role and duties as the Head of the Intelligence Service; he gave direct instructions to members below me and precluded me from properly performing my duties under my Performance Agreement. This I set out fully in my letter of resignation addressed to the former President, annexed hereto marked Annexure "**MM2A**."

97. I am not able to annex all the attachments to this letter as they are classified. Although Ambassador Shaik, Mr Njenje and I addressed a letter to the SSA requesting declassification of certain documents for the purpose of our submissions to the Commission, my resignation letter was not provided. I was called by Mr Bob Mhlanga during May 2019, who indicated that he was in receipt of our letter and had been instructed to provide all of the documents requested to us. However, he stated that he could not find my letter of resignation, which was inexplicable to me. In a meeting with the Inspector General, Advocate Setlhomamamru Dintwe at the end of last year, he confirmed that he had given instructions to the SSA to provide us with all of the documents requested by us and I can see no reason why my letter of resignation was not provided and/or declassified.

98. Ambassador Shaik felt very strongly that we should fight to the end against what he perceived as our constructive dismissal by the Minister. I felt that the Minister had the backing of the former President and told Ambassador Shaik that we could not win the war, as the former President would ultimately get rid of us.

We thus all agreed that our time in Government was over. Mr Njenje left in October 2011. I left on 28 January 2012 and I think Ambassador Shaik ultimately left during February 2012. I was somewhat surprised when Ambassador Shaik confirmed in his evidence that which I had heard via the grapevine, that golden handshakes had been given to Mr Njenje and him.

99. Be that as it may, I believe, in retrospect, that we were all pushed out because we were not compliant and were replaced with those who can all be viewed as henchmen of the former President.

STATE CAPTURE

100. I believe that there was an organized project of state capture in the sense that there was a plan to undermine the constitutional integrity of the state-owned enterprises, which has resulted in the collapse of South African economy.

101. In my view, the Intelligence Services should have investigated this long before the Commission was tasked to do so, following upon the report of the former Public Protector. Had it, or the top six done so, the unbridled theft of state resources could have been avoided or at least substantially limited.

DEPONENT

I certify that the Deponent who acknowledges that he knows and understands the contents of this affidavit; that it is the truth to the best of his knowledge and belief and that he has no objection to taking the prescribed oath and regards same as binding on his conscience; and the administration of the oath complies with the Regulations published under Government Notice R1258 in Government Gazette 3619 of 21 July 1972, as amended. This affidavit is signed and sworn to before me at PRETORIA .....on this 09 ..... day of JULY ..... **2020**.

COMMISSIONER OF OATHS

EX OFFICIO: SAPS

FULL NAMES: N M [illegible]

PHYSICAL ADDRESS:

71 [illegible] Ave

Parow [illegible]

DESIGNATION:

Sergeant

ANNEXURE "MM1"

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

STATEMENT OF MZUVUKILE MAQETUKA TO THE COMMISSION

Introduction

1 I am a former Director General of the State Security Agency (SSA), having been appointed to that position by former President JG Zuma in 2009. I retired from the SSA in 2012.

2 This statement is presented to the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State ("the Commission) as a consequence of a meeting held with the legal and investigation team on 16 October 2018.

3 The team took me through the Terms of Reference of the Judicial Commission of Inquiry into State Capture, Corruption and Fraud in the Public Sector Including Organs of State.

4 Thereafter my attention was drawn to a copy of an article written on 2 September 2018 [https://www. timeslive.co.za/Sunday-times/news/2018-09-01-cia-alert-sa-to-gupta-nuclear-dangr-in 2009/#] by Ranjeni Munusamy (Ms. Munusamy), which I annex hereto marked "Annexure "A". I indicated to the team that I was not interviewed by Ms. Munusamy and that I have never spoken to Ms. Munusamy at any stage.

5 In regard to the content of the article by Ms. Munusamy, I confirmed that the content of the article was correct and that issues raised therein were correct. As a matter of emphasis, within Ms. Munusamy's article as it related to former President JG Zuma having been warned by the SSA bosses, I have to repeat to this Commission that it is true that the SSA, led by the Domestic Branch Director (Mr Lizo Gibson Njenje), investigated the relationship between the Guptas and President JG Zuma. This investigation emanated from information in the public domain of such relationship, and also, we got to know that even within Cabinet this matter was once debated and there were some in Cabinet who were not happy.

6 I informed the team that while the investigation was still ongoing, the then Minister for Intelligence Services, Siyabonga Cwele, apparently got wind of the investigation and summoned us (that is myself as Director-General of the SSA, Director for the Domestic Branch and Mr Moe Shaik, Director for the Foreign Branch) to a meeting in Cape Town. The meeting started in the early evening and went on until about midnight. The Minister introduced the reason why he had called us as the fact that Njenje was undertaking an investigation of the relationship between President JG Zuma and the Guptas, and that Njenje was conducting this investigation for his own business interest.

7 I insisted to the Minister that this was not Njenje's investigation but that of the SSA in terms of its mandate. This the Minister ignored and he

continued with his line of addressing the issues on Njenje. The meeting ended without resolving the matter. Later we learnt from the media that the Minister had instructed us to stop the investigation. I have to say that I do not recall him having given such an instruction, let alone that a Minister for Intelligence would have had no mandate to stop an investigation where the organisation had assessed the need to so investigate.

8 After this meeting, we arranged for a meeting with President JG Zuma shortly wherein, again, myself, Njenje and Shaik met the President in his offices in Pretoria to brief him on the investigation that we conducted, the meeting with the Minister, and our disagreements with the Minister. I introduced the intention of the meeting and thereafter handed over to Njenje to deal with the substance of the investigation on the President's relations with the Guptas. The President was listening all the way for the duration of the report and at the end asked for a copy of the report.

9 I informed the President that it would be against practice to give him such a report more so that he was cited in it, to which the President did not insist. I told the legal team that this is the only time that I can recall discussing the matter with the President. We (and I) personally had a number of meetings with the President dealing with other intelligence matters, more so our souring relationship with the Minister for Intelligence Services, Siyabonga Cwele.

Internal tensions

10 I state for the record that there had been no good relationship with the said Minister soon after our appointment, and I can cite this as a result of the following:

10.1 We disagreed on the strategic way forward for the intelligence services;

10.2 The Minister had no clue on the portfolio that he was superintending;

10.3 He had a bad social or business relationship with his senior team;

10.4 He had a negative attitude towards both Njenje and Moe Shaik;

10.5 The drug related case of the wife of Minister Cwele and her subsequent sentence to a 12-year term exacerbated the situation and became another tricky issue. The use of state resources to transport the Minister's wife to and from court became a sore point when the Domestic Service Head refused to sign payment for this transportation;

10.6 Perhaps this is why the media reported that the Minister was never supportive of our appointments and that he would have wanted his own team.

11 Again, these differences were constantly brought to the attention of the President many times and at times by myself personally and at times with the two colleagues. By the middle of 2010, relationships had completely broken down. The SSA became a playing ground of the media, with reports on it on a daily basis. I annex hereto marked "Annexure B" news clippings on how the media was reporting on the state of the relationship between the President, the Minister and the senior controllers of the SSA.

12 The state of affairs at the SSA was time and again raised with the Chairman of the Joint Standing Committee on Intelligence ("JSCI"), Mr Cecil Burgess, which culminated in a two-day meeting with the whole compliment of the Parliamentary Committee but this did not help the situation. I do not know what the Committee did with the report that we gave. I point out that this was not a written report but a verbal one.

13 As Rome was burning, the ruling party, the African National Congress ("ANC") which is supposed to have 'deployed' us, was nowhere to be seen. Newspaper report(s) made by Jackson Mthembu, Chief Whip, was that the matter had not come up for discussion but (to our surprise), it was in the public domain. President Zuma's spokesman, Mac Maharaj,

referred the matter to the office of the Minister for Intelligence (Sunday Times, September 18 2011). Only one member of the National Executive Committee of the ANC, Billy Masetlha, commented on the matter saying that:

> *"It seems as though there is an unfortunate and serious crisis within the agency, this is not good for the SSA, this is not good for the country, this is tragic, this is unfortunate. This crisis has to be resolved speedily otherwise it will have disastrous consequences for the country."* (City Press, 11 September 2011)

14 It is interesting to see the almost contradictory responses by two members of the ANC's National Executive, Billy Masetlha and Jackson Mthembu. I personally had a meeting with senior Minister Nkosazana Dlamini-Zuma to discuss with her the situation at the intelligence and advised her that this had been brought to the attention of the President. After a long briefing, her question was "*What is the President doing about it?*"

15 It became clear to us that we were on our own and had to take decisions. Njenje left the Agency. This gave rise to wide speculation from the media that myself and Moe were to follow. In middle of November 2011, I took a decision that I would be leaving. I wrote a dossier to President JG Zuma, copied the Deputy President, Kgalema Motlanthe, Chairman of the JSCI, Cecil Burgess, and Minister for State Security, SC Cwele, citing problems I

encountered with the Minister in the execution of my duties as the Director-General and giving the President fourteen [14] days to respond otherwise, I would tender my resignation.

Conclusion

16 In conclusion, I annex hereto marked "Annexure C" my recollection of the content of the dossier.

17 Looking back to the events from 2009 – 2011 at the SSA and subsequent developments that I have been following through the public domain, this institution (and to a large extent the broader security sector) of the country is in turmoil. Question[s] therefore that should be answered and that, to an extent, are perhaps within the ambit of this Commission include:

17.1 How this precipice started and who were the culprits – as my statement has tried to show, within the Civilian Intelligence Sector, President JG Zuma failed to administer and shape the services, rather he participated in their demise.

17.2 Former Minister of State Security, Dr SC Cwele participated, implemented this malice, and I am convinced that he did not act alone and had no authority and capacity to act on any material matter without his superior, the President.

17.3 The President owes it to the likes of Njenje, Shaik, myself to give light as to why he acted in the manner in which he did when in fact he is the one who brought all of us back into the intelligence service when we were already outside it. This would also apply to people such as Ambassador Welile Nhlapho, who during the same period was appointed National Security Advisor, located in the office of the President who left that office without having even started doing the work that he was appointed to do. Ambassador Vusi Mavimbela who at the same period was appointed DG in the Presidency also had to leave the office and now it has become public information [according to his latest book] the reasons why he left the office.

17.4 The then Deputy President, Kgalema Motlanthe should shed light on what his role was during this period as part of his task was dealing with government issues and reporting to Parliament. The SSA as one of those government departments were his responsibility.

17.5 Former Chairman of the Joint Standing Committee for Intelligence, Cecil Burgess who has received a number of briefings as highlighted should give account as to what he did with all the reports and briefings that he received.

17.6 **The ruling party as so-called deployer of us and others has to account.**

17.7 Various functionaries in government [intelligence] who have played a role in implementing Cwele's dirty work should come forward, functionaries such as Kau Mavhungu [former Head of Ministerial Service] still at the SSA, Brian Dube, Spokesperson, Doctor Tshwale and Lukhaimane Muvhango now at the FSB.

18 Unless everybody comes clean, the work of this Commission will still have gaps that will leave a wound in our nation.

Dated and signed at Johannesburg on this 13 day of December 2018

MZUVUKILE MAQETUKA

News

CIA alerted SA to Gupta nuclear danger in 2009

SA spies tracked the Guptas, warned their grip on Jacob Zuma was a national security risk

02 September 2018 - 00:07 By RANJENI MUNUSAMY

Former spy bosses Gibson Njenje and Moe Shaik say they had several meetings with former president Jacob Zuma about the Guptas, but quit when they realised he would not act on their warnings.
Image: Alister Russell/The Sunday Times

US intelligence flagged the Guptas' dubious activities as far back as 2009, resulting in an investigation by South African intelligence agencies that concluded that the family was a threat to national security.

As the full extent of the state capture project unfolds at the Zondo commission of inquiry, new details have emerged about how the heads of SA's intelligence agencies tried to caution former president Jacob Zuma that his relationship with the Guptas was undermining national security.

Former spy bosses Gibson Njenje, Moe Shaik and Mzuvukile Jeff Maqetuka were alarmed to learn in the course of their investigation about the scale of the Guptas' involvement in Zuma's very first cabinet reshuffle in October 2010.

Now, for the first time, Njenje and Shaik have broken their silence, giving the Sunday Times a blow-by-blow account of their investigation of the Guptas.

They were forced out of the public service in 2011 after a breakdown in relations with then state security minister Siyabonga Cwele, who called their Gupta probe "irregular".

Njenje and Shaik said they had several meetings with Zuma, but quit when they realised he would not act on their warnings.

The Sunday Times has also learnt that former communications minister Siphiwe Nyanda was fired to give the Guptas access to the communications sector, particularly the SABC.

Nyanda has for the first time revealed that after he rebuffed attempts by the Guptas to meet him, Zuma removed him as communications minister and appointed Roy Padayachie, a close ally of the family. During Padayachie's tenure, Atul Gupta and Sahara Computers were given special recognition by the ministry as tech industry leaders.

Under Padayachie, Hlaudi Motsoeneng began his ascent at the SABC and signed the broadcast agreement for the New Age business breakfasts - at no cost to the Guptas.

Njenje, the former head of the National Intelligence Agency, told the Sunday Times he received a request from his US counterparts in 2009 wanting to know about the Guptas' interest in uranium mining. This was as the Guptas' Oakbay Resources was acquiring Uranium One's Dominion mine, which they renamed Shiva Uranium.

Enriched uranium is a critical component for both nuclear power generation and military nuclear weapons.

"The Americans wanted to know why the Guptas are interested in mining uranium and where they intend sending their product. Naturally we were interested as well," said Njenje.

Shaik, the former head of the South African Secret Service, confirmed the request from the U.S's Central Intelligence Agency. An acting spokesperson at the US embassy in Pretoria, Carrie Schneider, said: "As a policy, we never comment on intelligence matters."

The investigation by the South African intelligence agencies, based on open source information and interviews, threw up alarming information about the family's activities and relationship with Zuma.

The president [Zuma] was visiting the Gupta compound at least once a week

Gibson Njenje

Njenje said: "In 2010 they started flexing their muscle and their links with the president.

"They were talking to ministers, directors-general and senior officials. From a state security point of view, we were trying to find out why this audacity. They were making an open show that they have a relationship with the president.

"We got to know the president was visiting the Gupta compound [in Saxonwold, Johannesburg] at least once a week. Every Monday, on his way from meetings at Luthuli House, he would stop there for dinner."

Njenje said they also learnt that the Guptas were in charge of arrangements during Zuma's state visits. This was particularly the case during the June 2010 state visit to India, and to China two months later.

In her testimony at the state capture inquiry this week, former ANC MP Vytjie Mentor mentioned the Guptas' unusual role in protocol arrangements for the China visit.

Njenje said one of the major issues of concern to them was the interference of the Guptas in Zuma's first cabinet reshuffle in October 2010.

Zuma replaced seven ministers in the reshuffle, axing Nyanda as communications minister, Barbara Hogan as public enterprises minister and Makhenkesi Stofile as sports & recreation minister.

Mentor testified that Ajay Gupta told her Hogan would be fired and offered her the public enterprises ministry if she canned the SAA route to Mumbai. Mentor said she became "agitated" and declined the offer and that Zuma walked into the room and tried to pacify her. Malusi Gigaba, now home affairs minister, was appointed in Hogan's place.

Shaik said they were alarmed when they found out that people were being "summoned" by the Guptas in connection with the reshuffle. He said they were also disturbed when Zuma appointed people who were perceived to be close to the Guptas in the cabinet.

Nyanda told the Sunday Times he was "taken by surprise" by his axing.

"In retrospect it all makes sense. We were the first victims of these series of Gupta purges," he said.

Zuma reshuffled his cabinet 11 times.

Nyanda is a former chief of the South African National Defence Force and was the chief of staff of the ANC's military wing, Umkhonto weSizwe.

He said during his tenure as communications minister, he received a visit at his office from Duduzane Zuma, accompanied by the Gupta brothers.

"They said they were just introducing themselves as they were doing business in the communications space. I paid no heed at the time as I met many people in the industry."

He said he was subsequently told by people working in state-owned entities under the department of communications that the Guptas wanted a meeting with him.

"They were going via other people who were trying to arrange for those guys to see us, but I did not respond," said Nyanda.

Nyanda said that during a weekend at the end of October 2010, he was in Durban when he received a call from the presidency asking him to come to a meeting with Zuma. Nyanda said he would only be back that Monday.

Former communications minister Siphiwe Nyanda.
Image: Trevor Samson

He then received a call from Zuma, who informed him that he was being removed as minister. Zuma offered to appoint him ambassador to Germany. Nyanda declined.

He said he insisted on meeting Zuma to find out the reasons for his axing.

"At the time, there was a story that I was running a security company and monitoring his affairs. I asked the president if he believed I was a threat to national security and intercepting communications because I should face criminal prosecution if I was," said Nyanda.

"He said no and told me something about the SABC. I asked what about it ... To be honest I found very little joy in that interaction," said Nyanda. He said he only realised later that Zuma wanted the SABC "under the control of his cronies".

Nyanda said he declined an offer by Zuma to become his economic adviser and remained as an ANC MP. "My enthusiasm for anything ANC and government really died. I was just going through the motions."

Nyanda, Njenje and Shaik were signatories to a public statement in May 2016 by 27 former directors-general calling for an independent public inquiry into state capture.

All three say they are willing to testify at the Zondo commission if called.

Nyanda said he would be willing to give evidence that he was at an ANC national executive committee meeting when Fikile Mbalula made an emotional declaration that the Guptas had told him he would replace Siofile as sports minister. "[Zuma] didn't say anything after such a serious allegation by Mbalula. He didn't address it at all," said Nyanda.

Njenje said he, Shaik and Maqehuka had gone to see Zuma several times about their concerns about the Guptas.

"The president gave us a story about Dudumane and Duduzile and the Guptas that we never really understood. It was clear he was not going to do anything," said Njenje.

Shaik said Zuma's response to their serious warnings made them despair.

"He said the Guptas were the only people willing to help his son," said Shaik.

PP3-MM-039

CIA alerted SA to Gupta nuclear danger in 2009

SA spies tracked the Guptas, warned their grip on Jacob Zuma was a national security risk

02 September 2018 - 00:07 BY RANJENI MUNUSAMY

Former spy bosses Gibson Njenje and Moe Shaik say they had several meetings with former president Jacob Zuma about the Guptas, but quit when they realised he would not act on their warnings. Picture: Alaister Russell/The Sunday Times

US intelligence flagged the Guptas' dubious activities as far back as 2009, resulting in an investigation by South African intelligence agencies that concluded that the family was a threat to national security.

As the full extent of the state capture project unfolds at the Zondo commission of inquiry, new details have emerged about how the heads of SA's intelligence agencies tried to caution former president Jacob Zuma that his relationship with the Guptas was undermining national security.

Former spy bosses Gibson Njenje, Moe Shaik and Mzuvukile Jeff Maqetuka were alarmed to learn in the course of their investigation about the scale of the Guptas' involvement in Zuma's very first cabinet reshuffle in October 2010.

Now, for the first time, Njenje and Shaik have broken their silence, giving the Sunday Times a blow-by-blow account of their investigation of the Guptas.

They were forced out of the public service in 2011 after a breakdown in relations with then state security minister Siyabonga Cwele, who called their Gupta probe "irregular".

Njenje and Shaik said they had several meetings with Zuma, but quit when they realised he would not act on their warnings.

The Sunday Times has also learnt that former communications minister Siphiwe Nyanda was fired to give the Guptas access to the communications sector, particularly the SABC.

Nyanda has for the first time revealed that after he rebuffed attempts by the Guptas to meet him, Zuma removed him as communications minister and appointed Roy Padayachie, a close ally of the family. During Padayachie's tenure, Atul Gupta and Sahara Computers were given special recognition by the ministry as tech industry leaders.

Under Padayachie, Hlaudi Motsoeneng began his ascent at the SABC and signed the broadcast agreement for the New Age business breakfasts - at no cost to the Guptas.

Njenje, the former head of the National Intelligence Agency, told the Sunday Times he received a request from his US counterparts in 2009 wanting to know about the Guptas' interest in uranium mining. This was as the Guptas' Oakbay Resources was acquiring Uranium One's Dominion mine, which they renamed Shiva Uranium.

Enriched uranium is a critical component for both nuclear power generation and military nuclear weapons.

"The Americans wanted to know why the Guptas are interested in mining uranium and where they intend sending their product. Naturally we were interested as well," said Njenje.

Shaik, the former head of the South African Secret Service, confirmed the request from the US's Central Intelligence Agency. An acting spokesperson at the US embassy in Pretoria, Carrie Schneider, said: "As a policy, we never comment on intelligence matters."

The investigation by the South African intelligence agencies, based on open source information and interviews, threw up alarming information about the family's activities and relationship with Zuma.

Njenje said: "In 2010 they started flexing their muscle and their links with the president. "They were talking to ministers, directors-general and senior officials. From a state security point of view, we were trying to find out why this audacity. They were making an open show that they have a relationship with the president.

"We got to know the president was visiting the Gupta compound [in Saxonwold, Johannesburg] at least once a week. Every Monday, on his way from meetings at Luthuli House, he would stop there for dinner."

Njenje said they also learnt that the Guptas were in charge of arrangements during Zuma's state visits. This was particularly the case during the June 2010 state visit to India, and to China two months later.

In her testimony at the state capture inquiry this week, former ANC MP Vytjie Mentor mentioned the Guptas' unusual role in protocol arrangements for the China visit.

Njenje said one of the major issues of concern to them was the interference of the Guptas in Zuma's first cabinet reshuffle in October 2010.

Zuma replaced seven ministers in the reshuffle, axing Nyanda as communications minister, Barbara Hogan as public enterprises minister and Makhenkesi Stofile as sports & recreation minister.

Mentor testified that Ajay Gupta told her Hogan would be fired and offered her the public enterprises ministry if she canned the SAA route to Mumbai. Mentor said she became "agitated" and declined the offer and that Zuma walked into the room and tried to pacify her. Malusi Gigaba, now home affairs minister, was appointed in Hogan's place.

Shaik said they were alarmed when they found out that people were being "summoned" by the Guptas in connection with the reshuffle. He said they were also disturbed when Zuma appointed people who were perceived to be close to the Guptas in the cabinet.

Nyanda told the Sunday Times he was "taken by surprise" by his axing.

"In retrospect it all makes sense. We were the first victims of these series of Gupta purges," he said.

Zuma reshuffled his cabinet 11 times.

Nyanda is a former chief of the South African National Defence Force and was the chief of staff of the ANC's military wing, Umkhonto weSizwe.

He said during his tenure as communications minister, he received a visit at his office from Duduzane Zuma, accompanied by the Gupta brothers.

"They said they were just introducing themselves as they were doing business in the communications space. I paid no heed at the time as I met many people in the industry."

He said he was subsequently told by people working in state-owned entities under the department of communications that the Guptas wanted a meeting with him.

"They were going via other people who were trying to arrange for those guys to see us, but I did not respond," said Nyanda.

Nyanda said that during a weekend at the end of October 2010, he was in Durban when he received a call from the presidency asking him to come to a meeting with Zuma. Nyanda said he would only be back that Monday.

He then received a call from Zuma, who informed him that he was being removed as minister. Zuma offered to appoint him ambassador to Germany. Nyanda declined.

He said he insisted on meeting Zuma to find out the reasons for his axing.

"At the time, there was a story that I was running a security company and monitoring his affairs. I asked the president if he believed I was a threat to national security and intercepting communications because I should face criminal prosecution if I was," said Nyanda.

"He said no and told me something about the SABC. I asked what about it ... To be honest I found very little joy in that interaction," said Nyanda. He said he only realised later that Zuma wanted the SABC "under the control of his cronies".

Nyanda said he declined an offer by Zuma to become his economic adviser and remained as an ANC MP. "My enthusiasm for anything ANC and government really died. I was just going through the motions."

Nyanda, Njenje and Shaik were signatories to a public statement in May 2016 by 27 former directors-general calling for an independent public inquiry into state capture.

All three say they are willing to testify at the Zondo commission if called.

Nyanda said he would be willing to give evidence that he was at an ANC national executive committee meeting when Fikile Mbalula made an emotional declaration that the Guptas had told him he would replace Stofile as sports minister. "[Zuma] didn't say anything after such a serious allegation by Mbalula. He didn't address it at all," said Nyanda.

Njenje said he, Shaik and Maqetuka had gone to see Zuma several times about their concerns about the Guptas.

"The president gave us a story about Duduzane and Duduzile and the Guptas that we never really understood. It was clear he was not going to do anything," said Njenje.

Shaik said Zuma's response to their serious warnings made them despair.

"He said the Guptas were the only people willing to help his son," said Shaik.

PP3-MM-043

"Annexure B"

Annexure B

13

MOER HULLE BOKKE!

SIMPHIWE DANA'S STOKVEL FOR SCHOOLS

See Sport PAGE 13

City Press

CWELE'S SPY WAR

Minister orders top 3 spy bosses to quit

The minister

The smuggler

The spy bosses

Who is Siyabonga Cwele?

"

This crisis has to be resolved speedily otherwise it will have disastrous consequences for the country
– BILLY MASETLHA

9/11 LOOKING BACK
Pages 12 & 13

SA's 10 RICHEST BLACK MEN
See Business

City Press

www.citypress.co.za | 11 September 2011 | R9.95 (incl VAT) Namibia: N$11.00

MOER HULLE BOKKE!

SIMPHIWE DA STOKVEL FOR SCHOOLS

See Sport PAGE 13

LOTTO 2, 5, 13, 24, 26, 31 Bonus 12

LOTTO PLUS 7, 11, 13, 15, 17, 30 Bonus 8

CWELE'S SPY WAR

Minister orders top 3 spy bosses to quit

The minister | The smuggler | The spy bosses

Siyabonga Cwele

Sheryl Cwele

Jeff Maqetuka

Gibson Njenje

Moe Shaik

JACQUES PAUW

State Security Minister Siyabonga Cwele has ordered his top three intelligence chiefs to quit.

This follows a row over official protection provided for the minister's wife during her trial on drug-trafficking charges, City Press has learnt.

This is the third scandal to hit South Africa's intelligence establishment in the past six years.

State Security ministry spokesperson Brian Dube confirmed yesterday that Gibson Njenje, the head of the State Security Agency's (SSA) domestic branch – previously known as the National Intelligence Agency (NIA) – had resigned. He would not comment on "other speculation".

Njenje's resignation and its acceptance "with immediate effect" was announced within the agency, which is responsible for domestic and international intelligence, on Friday.

Njenje declined to comment, but City Press understands that there is confusion in the agency as to whether Njenje actually resigned or was forced to do so. "News of his resignation came out of the blue... he never formally resigned. He is prepared to fight on," said an intelligence source.

Cwele also asked director-general Jeff Maqetuka and the head of the South African Secret Service – now known as the agency's foreign branch – Moe Shaik, to leave the agency.

They have allegedly refused to quit and have sought legal advice in the past week.

A showdown between the minister and his intelligence chiefs has loomed for some time, but came to a head in the past two weeks when he called them in and asked them to leave.

Insiders in the SSA say that the breakdown in trust between the minister and his intelligence chiefs are, among others, as a result of his wife Sheryl Cwele's drug-trafficking conviction in May this year.

City Press understands that the intelligence chiefs are also unhappy with the minister's management style and felt that he did not properly understand the intelligence environment.

The catalyst for the showdown was a deep unhappiness within the agency after Cwele allegedly ordered that his wife be afforded intelligence protection for the duration of her trial. She was, insiders claim, transported to and from her trial in official vehicles and protected by intelligence-agency officers.

Sheryl Cwele was afforded full protection for the duration of her trial, even though the agency does not have a VIP protection unit and any protection would have had to be authorised by Njenje himself.

The SSA only provides security for foreign heads of state and other very important visitors to the country. Ordinary VIP protection is provided to Cabinet ministers by the police.

City Press understands that Njenje recently confronted the minister with the costs, leading to a showdown with Cwele.

The row deepened when agents came across further information associated with Sheryl Cwele's involvement in drug trafficking.

The KwaZulu-Natal High Court sentenced Sheryl Cwele to 11 years' imprisonment in May after she and her co-accused Nigerian Frank Nabolisa were found guilty of procuring two women to smuggle cocaine from South America to South Africa. She is appealing the sentence.

At the time of the crime and during the trial, she was the head of health services in the Hibiscus municipality. She was fired from her job last month.

Shaik refused to comment and Maqetuka could not be reached for comment. Sheryl Cwele did not answer calls to her cellphone yesterday.

The three intelligence bosses have drawn a line in the sand with their minister, apparently telling him that only President Jacob Zuma has the authority to dismiss them because he appointed them.

Cwele had apparently offered them redeployment, probably as ambassadors. Shaik was previously South Africa's ambassador to Algeria.

Shaik is a long-time confidant of Zuma. He was active in campaigning for Zuma's corruption charges to be dropped.

While this week saw tension in the agency reaching boiling point, intelligence sources say that conflict between the intelligence chiefs began back in October 2009, largely due to Cwele's management style.

Shaik, Njenje and Maqetuka have vast previous experience in intelligence, while Cwele was appointed as minister without any prior knowledge of the spy world.

Former intelligence minister Ronnie Kasrils said he could not comment on the latest developments, but added: "I wish government would refer and take heed of the shelved Matthews Report of 2008 that talks about the necessity of reforming the country's intelligence services. It has obviously not happened."

The Matthews Report was commissioned by Kasrils and recommended tightening control over the intelligence agency's involvement in domestic political affairs.

"There are inherent and systemic problems in intelligence that, unless corrected, will leave the institution in a problematic state.

"This is made worse by a culture of excessive secrecy and paranoia that prevails in the institution and will be made worse by measures contained in the Protection of Information Bill," he said.

Former intelligence chief Billy Masetlha told City Press: "It seems as though there is an unfortunate and serious crisis within the agency.

"This is not good for the SSA, this is not good for the country. If there is one state institution you want to run smoothly and efficiently, it is your intelligence service.

"This is tragic, this is unfortunate and should have been managed better.

"This crisis has to be resolved speedily otherwise it will have disastrous consequences for the country."

Who is Siyabonga Cwele?

Apart from his wife's headline-grabbing drugs trial, State Security Minister Siyabonga Cwele has dominated headlines as the hawkish champion of the newly drafted Protection of State Information Bill.

Cwele and his department have been enthusiastic supporters of the bill, which critics regard as a body blow for whistleblowers and investigative journalism. Cwele has spoken out against the need for a public interest defence in the bill.

A former ANC underground activist in the mid-80s with roots in KwaZulu-Natal, Cwele rose to prominence in the intelligence community following Ronnie Kasrils' departure as intelligence minister. Cwele was appointed in May 2009.

He oversaw a radical restructuring of the country's intelligence structures, which resulted in the State Security Agency, with a R1 billion budget, being established.

A veteran ANC MP with a seat in Parliament since 1994, Cwele also served as chairperson of the Joint Standing Committee on Intelligence – an odd position for a medical doctor who also boasts a masters degree in economic policy from Stellenbosch University.

In this position Cwele strongly argued for the disbandment of the Scorpions during the Khampepe hearings in 2008.

His wife's travails and subsequent drug trafficking conviction have seen him criticised by opposition parties, which have demanded his removal from office. His critics argued that it was inconceivable he was unaware of her activities.

The couple said at the time she committed the crime that they were separated, but evidence was later produced that showed they had holidayed together after that and were often seen together. They celebrated 25 years of marriage last year. – Jacques Pauw

> "This crisis has to be resolved speedily otherwise it will have disastrous consequences for the country"
> – BILLY MASETLHA

SPY VERSUS SPY:

Resigned? I never resigned!

CAIPHUS KGOSANA and SIBUSISO NGALWA

MINISTER of State Security Siyabonga Cwele is at war with two of his top officials in what looks like the beginning of a major shake-up of the intelligence hierarchy.

Cwele is attempting to push out National Intelligence Agency head Gibson Njenje and his Secret Service counterpart, Mo Shaik, but the two are refusing to leave without a fight.

On Friday, Cwele's office issued a statement announcing Njenje's resignation, saying the NIA boss was leaving to "pursue other interests".

"The minister has accepted the resignation and thanked Njenje for his services and contribution to the national project of securing the country, its people and the constitutional order," it said.

But a defiant Njenje yesterday denied that he had resigned.

"I am shocked to hear from you that I have resigned. I know nothing about that. I have not resigned. I have not had any discussion with the minister with regards to my resignation. There are issues we are talking about and he has promised to come back to me with a response," he said.

"There are some issues, but not to the extent that I have left my job. That's a total misrepresentation."

However, Cwele's spokesman, Brian Dube, said Njenje had submitted his resignation letter.

"When you resign, you resign in writing, and the resignation must be accepted. Yes, we have [the resignation letter]," he said.

But Njenje retorted: "Tell him to share the letter with you. I have not resigned."

Dube refused to comment further.

Insiders in the intelligence community say tensions between Cwele and Njenje have been simmering for months. While some attribute the breakdown in relations to personality clashes, others say Njenje's close ties to ANC heavyweight Tony Yengeni and his perceived closeness to the ANC Youth League caused mistrust.

The Sunday Times has been told that there is unhappiness in the government about the youth league's alleged unfettered access to state security information, and fingers are being pointed at the NIA.

On Friday, youth league spokesman Floyd Shivambu issued a statement saying individuals who have been identified as NIA agents are interrogating members of his organisation in a number of provinces about the protest outside ANC headquarters.

SHAKE-UP: Siyabonga Cwele

"We understand that these people visit during the early hours of the morning to interrogate leaders and members about supporters of the ANC who gathered to support the charged (ANCYL) leadership in Johannesburg over the past two weeks," he said.

It is believed Njenje was offered an ambassadorial posting in return for his departure from the intelligence agency, but he declined.

"Look, he is willing to go, but not under these conditions. He has a three-year contract and wants to know how the two of them will walk away from that contract," said an intelligence official close to Njenje.

Njenje is no stranger to controversy. A previous NIA head of operations, he was suspended, along with former NIA boss Billy Masetlha, in 2005 after an unauthorised and botched surveillance operation on businessman and former ANC NEC member Saki Macozoma's house.

Insiders say Cwele also wants Shaik out and accuses him of insubordination.

A source close to Shaik confirmed that there was bad blood between him and the minister and that he was under pressure to leave.

A number of meetings will be held this week at which Shaik's fate could be decided.

SUNDAY TIMES, 11/09/2011

SPY VERSUS SPY:

Resigned? I never resigned!

CAIPHUS KGOSANA and SIBUSISO NGALWA

MINISTER of State Security Siyabonga Cwele is at war with two of his top officials in what looks like the beginning of a major shake-up of the intelligence hierarchy.

Cwele is attempting to push out National Intelligence Agency head Gibson Njenje and his Secret Service counterpart, Mo Shaik, but the two are refusing to leave without a fight.

On Friday, Cwele's office issued a statement announcing Njenje's resignation, saying the NIA boss was leaving to "pursue other interests".

"The minister has accepted the resignation and thanked Njenje for his services and contribution to the national project of securing the country, its people and the constitutional order," it said.

But a defiant Njenje yesterday denied that he had resigned.

"I am shocked to hear from you that I have resigned. I know nothing about that. I have not resigned. I have not had any discussion with the minister with regards to my resignation. There are issues we are talking about and he has promised to come back to me with a response," he said.

"There are some issues, but not to the extent that I have left my job. That's a total misrepresentation."

However, Cwele's spokesman, Brian Dube, said Njenje had submitted his resignation letter.

"When you resign, you resign in writing, and the resignation must be accepted. Yes, we have [the resignation letter]," he said.

But Njenje retorted: "Tell him to share the letter with you. I have not resigned."

Dube refused to comment further.

Insiders in the intelligence community say tensions between Cwele and Njenje have been simmering for months. While some attribute the breakdown in relations to personality clashes, others say Njenje's close ties to ANC heavyweight Tony Yengeni and his perceived closeness to the ANC Youth League caused mistrust.

The Sunday Times has been told that there is unhappiness in the government about the youth league's alleged unfettered access to state security information, and fingers are being pointed at the NIA.

On Friday, youth league spokesman Floyd Shivambu issued a statement saying individuals who have been identified as NIA agents are interrogating members of his organisation in a number of provinces about the protest outside ANC headquarters.

SHAKE-UP: Siyabonga Cwele

"We understand that these people visit during the early hours of the morning to interrogate leaders and members about supporters of the ANC who gathered to support the charged (ANCYL) leadership in Johannesburg over the past two weeks," he said.

It is believed Njenje was offered an ambassadorial posting in return for his departure from the intelligence agency, but he declined.

"Look, he is willing to go, but not under those conditions. He has a three-year contract and wants to know how the two of them will walk away from that contract," said an intelligence official close to Njenje.

Njenje is no stranger to controversy. A previous NIA head of operations, he was suspended, along with former NIA boss Billy Masetlha, in 2005 after an unauthorised and botched surveillance operation on businessman and former ANC NEC member Saki Macozoma's house.

Insiders say Cwele also wants Shaik out and accuses him of insubordination.

A source close to Shaik confirmed that there was bad blood between him and the minister and that he was under pressure to leave.

A number of meetings will be held this week at which Shaik's fate could be decided.

Sunday Times 11/9/2011

Debate on 'discord' in intelligence agencies

MONDAY SEPTEMBER 12 2011 The Star

GAYE DAVIS

REPORTS suggesting that South Africa's intelligence agencies are in fresh turmoil are likely to be discussed by Parliament's joint standing committee on intelligence (JSCI) when it convenes on Wednesday.

The committee is supposed to act as a watchdog over the country's intelligence services. Its chairman, ANC MP Cecil Burgess, confirmed yesterday the matter would be raised.

An official silence reigned yesterday on allegations suggesting a major stand-off between State Security Minister Siyabonga Cwele and the country's three top intelligence bosses.

Both The Sunday Independent and City Press reported that ministry spokesman Brian Dube had on Friday confirmed that Gibson Njenje, the head of the State Security Agency (SSA) – previously known as the National Intelligence Agency (NIA) – had resigned "with immediate effect."

However, The Sunday Independent said Njenje had denied this categorically.

City Press, meanwhile, reported that Cwele had also given director-general Jeff Maqetuka and Moe Shaik, head of the SA Secret Service (which focuses on foreign intelligence), their marching orders.

The newspaper cited a breakdown in trust between the minister and his most senior officials, based on his relative lack of experience and understanding of the intelligence environment, and his management style.

However, it said the catalyst was unhappiness within the SSA after Cwele allegedly ordered intelligence protection for his wife Sheryl during the trial that culminated in her being convicted of drug-smuggling charges. Sheryl Cwele was sentenced to 12 years in jail, which she is appealing.

The Sunday Independent cited three intelligence sources as saying Njenje, Maqetuka and Shaik deemed Cwele to be an "intelligence novice".

It also said speculation within the intelligence community was rife that Njenje had "resigned" in protest over political operations that included surveillance of unnamed ministers and others central to the ANC's succession battle ahead of its elective conference in December next year.

Former spy boss Billy Masetlha was axed by former president Thabo Mbeki in the run-up to the ANC's last elective conference in Polokwane in 2007.

A ministerial review commission ordered by former intelligence minister Ronnie Kasrils recommended in September 2008 a range of far-reaching reforms, including limiting the NIA's broad intelligence-gathering mandate. It is not clear, however, whether any or all of these were implemented.

> "Cwele is deemed to be an intelligence novice"

The ministry's Dube did not respond to repeated calls and messages yesterday.

Government spokesman Jimmy Manyi said he understood that the issue was still "a department matter" and that he expected a statement would be issued at some point.

ANC MP Cecil Burgess, who chairs the JSCI, would not comment further.

DA MP Dirk Stubbe, the party's spokesman on intelligence, and who is a member of the committee, said he had written to Cwele, asking him to fully explain what was going on in his department.

"In particular, I have asked the minister to furnish us with National Intelligence Agency head Gibson Njenje's resignation letter – a document that Njenje denies the existence of," Stubbe said.

Stubbe said he had sent a copy of his letter to Inspector-General of Intelligence advocate Faith Radebe "to keep her abreast of developments and so that she can intervene if necessary".

Debate on 'discord' in intelligence agencies

MONDAY SEPTEMBER 12 2011 The Star

GAYE DAVIS

REPORTS suggesting that South Africa's intelligence agencies are in fresh turmoil are likely to be discussed by Parliament's joint standing committee on intelligence (JSCI) when it convenes on Wednesday.

The committee is supposed to act as a watchdog over the country's intelligence services. Its chairman, ANC MP Cecil Burgess, confirmed yesterday the matter would be raised.

An official silence reigned yesterday on allegations suggesting a major stand-off between State Security Minister Siyabonga Cwele and the country's three top intelligence bosses.

Both The Sunday Independent and City Press reported that ministry spokesman Brian Dube had on Friday confirmed that Gibson Njenje, the head of the State Security Agency (SSA) – previously known as the National Intelligence Agency (NIA) – had resigned "with immediate effect.

However, The Sunday Independent said Njenje had denied this categorically.

> "Cwele is deemed to be an intelligence novice"

City Press, meanwhile, reported that Cwele had also given director-general Jeff Maqetuka and Moe Shaik, head of the SA Secret Service (which focuses on foreign intelligence), their marching orders.

The newspaper cited a breakdown in trust between the minister and his most senior officials, based on his relative lack of experience and understanding of the intelligence environment, and his management style.

However, it said the catalyst was unhappiness within the SSA after Cwele allegedly ordered intelligence protection for his wife Sheryl during the trial that culminated in her being convicted of drug-smuggling charges. Sheryl Cwele was sentenced to 12 years in jail, which she is appealing.

The Sunday Independent cited three intelligence sources as saying Njenje, Maqetuka and Shaik deemed Cwele to be an "intelligence novice".

It also said speculation within the intelligence community was rife that Njenje had "resigned" in protest over political operations that included surveillance of unnamed ministers and others central to the ANC's succession battle ahead of its elective conference in December next year.

Former spy boss Billy Masetlha was axed by former president Thabo Mbeki in the run-up to the ANC's last elective conference in Polokwane in 2007.

A ministerial review commission ordered by former intelligence minister Ronnie Kasrils recommended in September 2008 a range of far-reaching reforms, including limiting the NIA's broad intelligence-gathering mandate. It is not clear, however, whether any or all of these were implemented.

The ministry's Dube did not respond to repeated calls and messages yesterday.

Government spokesman Jimmy Manyi said he understood that the issue was still "a department matter" and that he expected a statement would be issued at some point.

ANC MP Cecil Burgess, who chairs the JSCI, would not comment further.

DA MP Dirk Stubbe, the party's spokesman on intelligence, and who is a member of the committee, said he had written to Cwele, asking him to fully explain what was going on in his department.

"In particular, I have asked the minister to furnish us with National Intelligence Agency head Gibson Njenje's resignation letter – a document that Njenje denies the existence of," Stubbe said.

Stubbe said he had sent a copy of his letter to Inspector-General of Intelligence advocate Faith Radebe "to keep her abreast of developments and so that she can intervene if necessary".

The Star

THURSDAY SEPTEMBER 15 2011 Established 1887
47 Sauer Street, Johannesburg

ANC, spies wreak havoc

LIKE A bad penny, scandals linking our spy agencies to the internal shenanigans of the ANC have turned up again. In 2007, top spies were removed after they were accused of conducting illegal surveillance related to the succession battle in the ANC. Four years later, the spy organisations are mired in yet another conflict – months before the same party goes to an elective conference.

And, as is the case in all conflicts, the truth has become the first casualty of this simmering war between State Security Minister Siyabonga Cwele and his top lieutenants. Cwele claimed that the head of the National Intelligence Agency, Gibson Njenje, had resigned.

The latter's denial of it has exposed disconcerting tensions in our most sensitive state institution. Cwele has reassured the nation that our intelligence agencies have not been compromised again by partisan infighting. But that is not enough.

Our concern is that the 2007 spy saga – in which the same Njenje, his predecessor Billy Masetlha and the then operations manager, Bob Mhlanga, were forced out – is likely to repeat itself. The implications are worrying. Clearly the introspective exercise conducted after the previous saga hasn't helped.

Former intelligence minister Ronnie Kasrils appointed a commission, headed by the late stalwart Joe Matthews. One of its key recommendations was the depoliticisation of the intelligence services. It placed an emphasis on intelligence-gathering based on the country's laws.

The office of the inspector-general was to be beefed up. But instead of focusing on the commission's recommendations, the new Jacob Zuma administration set about restructuring the agencies and its personnel – mostly purging those who served his predecessor, Thabo Mbeki.

At what cost? We have new people (and old comrades) in new structures with the same old problems. The consequences of politicised intelligence agencies are dire.

A recurrence of a spook scandal would pose a grave danger to our young and vulnerable democracy.

The Star

THURSDAY SEPTEMBER 15 2011 Established 1887
47 Sauer Street, Johannesburg

ANC, spies wreak havoc

LIKE A bad penny scandals linking our spy agencies to the internal shenanigans of the ANC have turned up again. In 2007, top spies were removed after they were accused of conducting illegal surveillance related to the succession battle in the ANC. Four years later, the spy organisations are mired in yet another conflict – months before the same party goes to an elective conference.

And, as is the case in all conflicts, the truth has become the first casualty of this simmering war between State Security Minister Siyabonga Cwele and his top lieutenants. Cwele claimed that the head of the National Intelligence Agency, Gibson Njenje, had resigned.

The latter's denial of it has exposed disconcerting tensions in our most sensitive state institution. Cwele has reassured the nation that our intelligence agencies have not been compromised again by partisan infighting. But that is not enough.

Our concern is that the 2007 spy saga – in which the same Njenje, his predecessor Billy Masetlha and the then operations manager, Bob Mhlanga, were forced out – is likely to repeat itself. The implications are worrying. Clearly, the introspective exercise conducted after the previous saga hasn't helped.

Former intelligence minister Ronnie Kasrils appointed a commission, headed by the late stalwart Joe Matthews. One of its key recommendations was the depoliticisation of the intelligence services. It placed an emphasis on intelligence-gathering based on the country's laws.

The office of the inspector-general was to be beefed up. But instead of focusing on the commission's recommendations, the new Jacob Zuma administration set about restructuring the agencies and its personnel – mostly purging those who served his predecessor, Thabo Mbeki.

At what cost? We have new people (and old comrades) in new structures with the same old problems. The consequences of politicised intelligence agencies are dire.

A recurrence of a spook scandal would pose a grave danger to our young and vulnerable democracy.

PP3-MM-052

September 12 2013

Three top spies on their way out

Tensions with minister of state security likely to lead to departure of Maqetuka, Njenje and Shaik

CALPHUS KODWA

ember 18 2011

Three top spies on their way out

Sunday Times 13

Tensions with minister of state security likely to lead to departure of Maqetuka, Njenje and Shaik

CAIPHUS KGOSANA

THREE intelligence chiefs at the centre of a battle with Minister of State Security Siyabonga Cwele are on their way out.

Intense negotiations that are likely to pave the way for the departure of state security Director-General Jeff Maqetuka, National Intelligence Agency head Gibson Njenje and secret service head Mo Shaik are taking place behind the scenes.

This follows a meltdown in the relationship between the minister and the three intelligence chiefs in what looks like a repeat of the internal battles that rocked the intelligence world prior to the ANC's Polokwane conference.

It emerged this week that the conflict between Cwele and the three intelligence bosses began as soon as they were appointed.

According to government officials, Cwele was unhappy with President Jacob Zuma's appointments as he wanted to choose his own men. Since then, the minister has been accused of undue interference — sometimes demanding briefings on intelligence issues he should not be privy to as a politician.

Njenje is believed to be negotiating an exit package.

Shaik has in the past approached Zuma about his differences with the minister, but it is understood that the president refused to be drawn into the fight.

Maqetuka took time off this week as speculation mounted about his future.

There was confusion when Cwele's office released a statement last Friday saying Njenje had resigned to pursue other interests. Njenje denied that he had resigned.

This week, state security spokesman Brian Dube would not say whether Njenje had finally left the service and whether the other two would be axed.

"We will be issuing a statement soon and put things into the public domain. But, right now, there is nothing we can say on the matter," Dube said.

Contacted for comment, Njenje said he was still employed by the department.

"No, I have not resigned, but I cannot comment any further on this matter," he said.

He told the Sunday Times last week that he had written a letter to Cwele to discuss how they could reach an amicable parting.

Those close to the negotiations said the two had accepted that their relationship had irretrievably broken down, and were now working out whether Njenje should be paid out for the remainder of his contract.

The Sunday Times has learnt staff morale at NIA headquarters is at an all-time low, with staff being kept in the dark about the goings-on.

Shaik's relationship with Cwele is also at a low, with the minister unhappy at what he perceives as Shaik disrespecting his command. Cwele wants to charge him with insubordination.

Insiders said Zuma had told Shaik to sort out his problems with Cwele.

"He was told, 'It's a problem between you and the minister. You go and sort it out,'" said an insider.

Zuma is believed to be sympathetic to Cwele and is convinced he is doing a good job.

Reports this week said Njenje and Maqetuka had differed sharply with Cwele, who wanted some ANC leaders to be spied on because he perceived them to be a security threat. The men are said to have defied the order.

Njenje's close relationship with ANC heavyweight Tony Yengeni and his perceived closeness to the ANC Youth League are other sources of tension.

Cwele could not be reached for comment. An aide who answered his phone on Friday said he was in a meeting.

Presidential spokesman Mac Maharaj referred all queries to the ministry.

Njenje was suspended with former NIA boss Billy Masetlha in 2005 after unauthorised botched surveillance of businessman and former ANC NEC member Saki Macozoma.

He later reached a settlement with former intelligence minister Ronnie Kasrils and left the agency.

MINISTER AT WAR

SIYABONGA CWELE

PERSONALITY CLASH

MO SHAIK

STAYING NEUTRAL

PRESIDENT JACOB ZUMA

Independent
SEPTEMBER 18 2011
WITH BUSINESS REPORT

ANGOLA'S LEIL
MOST BEAUTIF

ZUMA BACKS CWELE IN SPY WARS

Source says MIA boss felt betrayed when he saw president's inaction

ZUMA BACKS CWELE IN SPY WARS

Source says NIA boss felt betrayed when he saw president's inaction

GEORGE MATLALA and MOFFET MOFOKENG

PRESIDENT Jacob Zuma was given an ultimatum to choose between his three top spies and their boss, Minister of State Security Siyabonga Cwele – and he chose Cwele.

The Sunday Independent learnt this week that Zuma has decided to sever ties with the country's foremost intelligence officers – a move likely to unleash turbulence within the National Intelligence Agency (NIA) and the foreign wing Secret Service.

Two independent sources said this week that while Zuma had decided to cut ties with the spies, he had left it to Cwele to figure out how it should be managed. One of two independent sources claimed NIA boss Gibson Mjonjo threw in the towel this week when he realised that Zuma was "sitting the battle out".

The source said: "Chief (Mjonjo) left on Tuesday and returned to the Eastern Cape for a break. After he gave us hope that he would fight it to the end, he decided to throw in the towel when he realised Zuma was sitting out the battle. My view is that he feels betrayed that he was part of the top three that went to see Zuma at the Union Buildings to complain about Cwele and now that matters are coming to a head, Zuma's inaction means he sides with Cwele..."

Mjonjo and his foreign counterpart Moe Shaik and State Security director-general Jeff Maqetuka visited Zuma to raise concerns about Cwele, including that there were political operations on senior ANC members that ran against instructions that Zuma gave them on their appointments.

Zuma, buoyed by his victory at the ANC elective conference in Polokwane in December 2007, said it was important that the credibility of the intelligence services be restored by ensuring that they were not involved in intra-party politics. Cwele, on Zuma's instructions, restructured the intelligence services, creating one super-structure headed by Maqetuka.

The second source said: "The source of confusion is this: after telling the DGs to run a professional service and the DGs complaining to you that there are tendencies being introduced that run counter to what you instructed them to do, they expect you as head of state to come to their defence. So Zuma's siding with Cwele, for them, is telling and very devastating. But they are not prepared to do the dirty tricks."

Mjonjo could not be reached for comment.

Zuma's spokesman Mac Maharaj referred all queries on the matter to Cwele's office.

Brian Dube, the spokesman for Cwele, said: "We note the distortions and speculation that are rife in the media. We will not be drawn to a debate on these. Internal agency matters will not be run through the media and as we have indicated, the minister will issue a statement at the appropriate time."

ANC spokesman Jackson Mthembu declined to comment because the matter had not come to any of the ruling party's structures.

"We have never discussed those issues in the ANC. I speak on what we have discussed. How do I measure whether we are concerned or not when the matter has not come before the structures I sit in – the national working committee and the national executive committee?"

The Sunday Independent also understands suspended Crime Intelligence boss Richard Mdluli appears to have contributed to the deterioration of the relationship between Cwele and his intelligence chiefs.

Turn to Page 2

NIA 'spied' on Guptas

Spy boss probed family's 'political influence'

JACQUES P[illegible]
[illegible]@mediaI.com

Turbulence among South Africa's top spies took a further twist this week after claims that the controversial Gupta family placed under [illegible]-level surveillance.

Atul Gupta reacted with shock yesterday to the news that he and his family may have fallen victim to the possible abuse of state security services. He said the family had been unaware of any surveillance or intelligence conducted.

Gibson Nj[illegible] head of

Atul Gupta: shocked at the spying allegations || PHOTO: FELEX DLANGAMANDLA

was sentenced to 12 years in prison earlier this year after she procured drug mules to smuggle cocaine. She's appealing the sentence.

The Mail & Guardian reported on Friday that Owale allegedly wanted Njenje to put several senior ANC leaders under surveillance and intercept their communication.

Njenje is understood to have told people around him that he was uncomfortable with being badgered by his seniors to conduct surveillance for party political reasons.

Njenje is no newcomer to controversy. He was previously the intelligence agency's head of operations, but was suspended in 2006

www.citypress.co.za | 18 September 2011 | R9.95 (incl VAT) Namibia: N$11.00

NIA 'spied' on Guptas

Spy boss probed family's 'political influence'

JACQUES P[illegible]
investigations@mail[illegible].com

Atul Gupta: shocked at the spying allegations || PHOTO: FELIX DLANGAMANDLA

The fallout among South Africa's top spies took a further twist this week after claims that the controversial Gupta family was placed under high-level surveillance.

Atul Gupta reacted with shock yesterday to the news that he and his family may have fallen victim to the possible abuse of state security services. He said the family had been unaware of any surveillance or intelligence conducted.

Gibson Ndl[illegible], the head of the State Se[illegible]gency's domestic branch (previously known as the National Intelligence Agency, or NIA), allegedly ordered his agents to spy on the Guptas.

This, City Press was reliably told, contributed to his fallout with state security minister Siyabonga Cwele.

Cwele last week claimed Njenje had resigned, but the spy boss denied this, saying he was still in his job.

City Press has learnt from a highly placed intelligence source that Njenje ordered that the Gupta family, which is closely linked to President Jacob Zuma and his family, be investigated for, among other things, alleged influence on top government officials and politicians.

Cwele ordered Njenje to stop the investigation. This, according to the source, fuelled the bad relationship between Cwele and Njenje, which ultimately resulted in the minister asking him to leave.

Sports minister Fikile Mbalula reportedly told a recent meeting of the ANC's national executive committee that he was first told of his promotion to minister by the Guptas before Zuma informed him.

Atul Gupta rejected any notion that they may have asked Zuma to stop the surveillance.

Asked if he had ordered the surveillance of the Gupta family, Njenje said the issue was "not within my knowledge".

Intelligence spokesperson Brian Dube said he could not comment on any of the allegations.

City Press reported last week that Cwele had asked his three top intelligence bosses to leave the State Security Agency and be redeployed elsewhere in the civil service.

Cwele had announced Njenje's resignation last Friday "with immediate effect".

Njenje had been given until Friday to wrap up his office duties, City Press was told.

Njenje said this week he had not resigned and has indicated that he would be back at the office tomorrow.

He had told Cwele that he was willing to leave if the minister paid out the remainder of his contract, which expires in a year's time.

Cwele also asked director-general Jeff Maqetuka and Moe Shaik, the head of the South African Secret Service – now known as the agency's foreign branch – to leave the agency. Both have refused.

Njenje apparently intends to refer the issue of unauthorised spending to protect Cwele's drug-dealing wife, Sheryl, to Parliament's Joint Standing Committee on Intelligence.

City Press reported last week that Njenje took issue with Cwele using intelligence operatives to protect his wife during her drug trial. Njenje said this issue was also "not within my knowledge".

Sheryl Cwele, who was formally divorced from Siyabonga Cwele last month, was sentenced to 12 years in prison earlier this year after she procured drug mules to smuggle cocaine. She's appealing the sentence.

The Mail & Guardian reported on Friday that Cwele allegedly wanted Njenje to put several senior ANC leaders under surveillance and intercept their communication.

Njenje is understood to have told people around him that he was uncomfortable with being badgered by his sentors to conduct surveillance for party political reasons.

Njenje is no newcomer to controversy. He was previously the intelligence agency's head of operations, but was suspended in 2005.

The inspector-general of intelligence found that he had acted inappropriately in the unauthorised surveillance of former ANC national executive committee member Saki Macozoma.

Njenje initially challenged the suspension, but resigned after a settlement with former intelligence minister Ronnie Kasrils in November 2005.

It was felt that Zuma repaid a political debt by appointing Njenje as intelligence boss in 2009. It caused a stir in some government and ANC quarters.

At the time of his appointment, there were concerns about Njenje's links to Bosasa, a facilities management company that, according to a Special Investigating Unit report, was corruptly awarded multimillion-rand tenders by the prisons department.

Atul Gupta reiterated this week that there is an "ongoing campaign" against his family and that they hold no political influence on government.

October 2 2011

ON HIS WAY OUT: Gibson Njenje has accepted a settlement

Spy boss quits with a golden handshake

CAIPHUS KGOSANA

EMBATTLED intelligence boss Gibson Njenje has quietly left the agency after accepting a settlement that will result in him being paid out for the remaining three years of his contract.

Njenje, who headed the domestic branch of the State Security Agency, confirmed to the Sunday Times that he had left the department after accepting a settlement from Minister of State Security Siyabonga Cele.

"Yes, I am leaving. I am not happy about it, but I have to leave," he said.

Last month, Cwele's office announced that Njenje had resigned, but he denied it, saying he was still negotiating a proper settlement.

With Njenje out of the way, Cwele has won round one of his acrimonious battle with his intelligence chiefs. The ones who remain – State Security Agency head Jeff Maqetuka and Mo Shaik, who heads the agency's foreign service, formerly known as the Secret Service – are likely to follow suit.

Cwele, who is said to have the backing of President Jacob Zuma, has made it clear that he wants them out. Intense behind-the-scenes negotiations are now taking place.

The shake-up was sparked by a breakdown in the minister's relationship with the three men.

There are fears that the latest tensions among the spooks could mirror the events that shook the spy world before the ANC's Polokwane conference when there were indications

'Yes, I am leaving. I am not happy about it, but I have to leave'

that leaders were using intelligence agencies to advance their political careers.

Njenje, whose closeness to the ANC Youth League and ANC heavyweight Tony Yengeni caused unhappiness in senior government circles, said he was disappointed that he was being forced out.

"I had been working and putting all my energies into it, but it's not the same atmosphere as when we first arrived."

He said he was still bewildered by the effort that went into facilitating his departure and said there was no evidence that he had been negligent in his duties or had performed an act of gross misconduct.

"I still don't know, because there were no reasons given as to why I was asked to leave. I was not asked to leave because of some misdemeanour or ill-advised action on my part. I left because I didn't agree with the proposal made to me."

He refused to go into detail about the "proposal" made to him, but some reports have suggested that he had refused an order from Gwele to place a number of senior ANC leaders under surveillance.

He said the minister had not made it easy for any of the intelligence chiefs to do their work. "I doubt if any of the top executives had any meaningful relationship with him. This didn't aid the purpose of our being there, to develop an institution that we were asked to set up."

State security spokesman Brian Dube said he could not confirm or deny Njenje's departure.

Njenje said he would take a year off before deciding on his next move.

October 2 2011

ON HIS WAY OUT: Gibson Njenje has accepted a settlement

Spy boss quits with a golden handshake

CAIPHUS KGOSANA

EMBATTLED intelligence boss Gibson Njenje has quietly left the agency after accepting a settlement that will result in him being paid out for the remaining three years of his contract.

Njenje, who headed the domestic branch of the State Security Agency, confirmed to the Sunday Times that he had left the department after accepting a settlement from Minister of State Security Siyabonga Cele.

"Yes, I am leaving. I am not happy about it, but I have to leave," he said.

Last month, Cwele's office announced that Njenje had resigned, but he denied it, saying he was still negotiating a proper settlement.

With Njenje out of the way, Cwele has won round one of his acrimonious battle with his intelligence chiefs. The ones who remain — State Security Agency head Jeff Maqetuka and Mo Shaik, who heads the agency's foreign service, formerly known as the Secret Service — are likely to follow suit.

Cwele, who is said to have the backing of President Jacob Zuma, has made it clear that he wants them out. Intense behind-the-scenes negotiations are now taking place.

The shake-up was sparked by a breakdown in the minister's relationship with the three men.

There are fears that the latest tensions among the spooks could mirror the events that shook the spy world before the ANC's Polokwane conference [illegible] there were indications

'Yes, I am leaving. I am not happy about it, but I have to leave'

that leaders were using intelligence agencies to advance their political careers.

Njenje, whose closeness to the ANC Youth League and ANC heavyweight Tony Yengeni caused unhappiness in senior government circles, said he was disappointed that he was being forced out.

"I had been working and putting all my energies into it, but it's not the same atmosphere as when we first arrived."

He said he was still bewildered by the effort that went into facilitating his departure and said there was no evidence that he had been negligent in his duties or had performed an act of gross misconduct.

"I still don't know, because there were no reasons given as to why I was asked to leave. I was not asked to leave because of some misdemeanour or ill-advised action on my part. I left because I didn't agree with the proposal made to me."

He refused to go into detail about the "proposal" made to him, but some reports have suggested that he had refused an order from Cwele to place a number of senior ANC leaders under surveillance.

He said the minister had not made it easy for any of the intelligence chiefs to do their work. "I doubt if any of the top executives had any meaningful relationship with him. This didn't aid the purpose of our being there, to develop an institution that we were asked to set up."

State security spokesman Brian Dube said he could not confirm or deny Njenje's departure.

Njenje said he would take a year off before deciding on his next move.

Sunday 11 Mail & Guardian Oct 2 2011

THURSDAY 6 OCTOBER 2011 BusinessDay

Familiar signs on Zuma's thorny path to Mangaung

NEWS Analysis

Sam Mkokeli

THE road to Mangaung, site of the African National Congress's (ANC's) leadership elections next year, may ultimately mirror the thorny path to Polokwane, where the party's watershed conference was held four years ago.

The players are different but the script is similar. President Jacob Zuma finds himself where the man he defeated to the party's top post, Thabo Mbeki, was in the buildup to 2007.

Mr Mbeki's political life started to become difficult when he found himself losing control of the intelligence services. He had fallen out with top spy Billy Masetlha.

The spooks were embroiled in the ANC's succession story at the time, and went as far as running unauthorised surveillance on Mr Mbeki's ally, Saki Macozoma.

It emerged last month that State Security Agency domestic unit head Gibson Njenje, foreign branch head Mo Shaik and director-general Jeff Maqetuka were being pushed to quit. Mr Njenje has since left.

It appears that, once again, the intelligence services are caught up in the ANC's politics.

The ANC Youth League complained that some intelligence officials were interrogating its members over their support for its president, Julius Malema, at the time that he was due to appear before a disciplinary hearing of the party. The spies have also been accused of running surveillance on the Gupta family, which is close to Mr Zuma.

By the time Mr Mbeki arrived in Polokwane, he no longer had the support of Mr Masetlha, who was instrumental in his rise to the 1990s. Similarly, Mr Zuma seems not to be close to Mr Shaik and his family any more. The Shaiks supported him in the 2007 race. Just like Mr Mbeki, who had a problem with his top cop, Mr Zuma has been pressed to fire Bheki Cele.

Gen Cele has been cited for maladministration by the public protector, in connection with two big police office lease deals.

ANC secretary-general Gwede Mantashe has recently complained of divisions in the ANC's top body — the national executive committee (NEC) — in the buildup to Polokwane. Mr Mbeki controlled this committee. But his control of the ANC subsequently unravelled in the provinces and in subordinate structures.

Last month, the NEC instructed Parliament to hold off on the Protection of Information Bill, which was due to go to the assembly for debate. Members of the NEC effectively challenged the bill which, until then, seemed to have had the blessing of Mr Zuma.

A government source said Mr Zuma can also expect to be taken to task for the Dalai Lama fiasco at Cabinet and NEC meetings.

A member of the NEC says that senior party officials were also shocked when told that the ANC's top six had decided to charge Julius Malema and five other leaders of the youth league. "We were informed only after they had been charged. We didn't try to reverse the decision because we didn't want to embarrass the president."

A government official says the sensitive have spilled over to administration, with ministers caught between their loyalty to Mr Zuma, or Kgalema Motlanthe — a potential challenger for the ANC presidency next year. The ANC has put a lid on the succession debate — a move that has sent campaigns underground.

The decisive moment in the Polokwane buildup was the open revolt against Mr Mbeki at the ANC's national general council in 2005. Mr Mbeki, having fired Mr Zuma as the country's deputy president, went for the jugular and tried to strip him of his powers as the ANC's number two. The manoeuvre backfired and made sure Mr Zuma stayed put. That confirmed Mr Mbeki's status as a lame-duck leader, until the 2007 elections where he lost.

Mr Zuma's crossroads moment is yet to come. The youth league's disciplinary hearing may deliver a headache for him, or ensure that he gets a second term.

Mr Malema's backers are expected to revolt should the national disciplinary committee convict him and recommend that he gets kicked out of the party. If the revolt happens, Mr Zuma's road to Mangaung will be as rocky as Mr Mbeki's way to Polokwane. Fortunately for Mr Zuma, the NEC has taken a decision that the succession debate should remain closed until next year.

That saves him, while his opponents grumble that they are not allowed to campaign.

mkokeli@bdlive.co.za

THURSDAY 6 OCTOBER 2011 BusinessDay

Familiar signs on Zuma's thorny path to Mangaung

NEWS Analysis

Sam Mkokeli

THE road to Mangaung, site of the African National Congress's (ANC's) leadership elections next year, may ultimately mirror the thorny path to Polokwane, where the party's watershed conference was held four years ago.

The players are different but the script is similar. President Jacob Zuma finds himself where the man he defeated to the party's top post, Thabo Mbeki, was in the buildup to 2007.

Mr Mbeki's political life started to become difficult when he found himself losing control of the intelligence services. He had fallen out with top spy Billy Masetlha.

The spooks were embroiled in the ANC's succession story at the time, and went as far as running unauthorised surveillance on Mr Mbeki's ally, Said Macozoma.

It emerged last month that State Security Agency domestic unit head Gibson Njenje, foreign branch head Mo Shaik and director-general Jeff Maqetuka were being pushed to quit. Mr Njenje has since left.

It appears that, once again, the intelligence services are caught up in the ANC's politics.

The ANC Youth League complained that some intelligence officials were interrogating its members over their support for its president, Julius Malema, at the time that he was due to appear before a disciplinary hearing of the party. The spies have also been accused of running surveillance on the Gupta family, which is close to Mr Zuma.

By the time Mr Mbeki arrived in Polokwane, he no longer had the support of Mr Masetlha, who was instrumental in his rise in the 1990s. Similarly, Mr Zuma seems not to be close to Mr Shaik and his family any more. The Shaiks supported him in the 2007 race. Just like Mr Mbeki, who had a problem with his top cop, Mr Zuma has been pressed to fire Bheki Cele.

Gen Cele has been cited for maladministration by the public protector, in connection with two big police office lease deals.

ANC secretary-general Gwede Mantashe has recently complained of divisions in the ANC's top body — the national executive committee (NEC). In the buildup to Polokwane, Mr Mbeki controlled this committee. But his control of the ANC subsequently unravelled in the provinces and in subordinate structures.

Last month, the NEC instructed Parliament to hold off on the Protection of Information Bill, which was due to go to the assembly for debate. Members of the NEC effectively challenged the bill which, until then, seemed to have had the blessing of Mr Zuma.

A government source said Mr Zuma can also expect to be taken to task for the Dalai Lama visa fiasco at Cabinet and NEC meetings.

A member of the NEC says that senior party officials were also shocked when told that the ANC's top six had decided to charge Julius Malema and five other leaders of the youth league. "We were informed only after they had been charged. We didn't try to reverse the decision because we didn't want to embarrass the president."

A government official says the tensions have spilled over to administration, with ministers caught between their loyalty to Mr Zuma, or Kgalema Motlanthe — a potential challenger for the ANC presidency next year. The ANC has put a lid on the succession debate — a move that has sent campaigns underground.

The decisive moment in the Polokwane buildup was the open revolt against Mr Mbeki at the ANC's national general council in 2005. Mr Mbeki, having fired Mr Zuma as the country's deputy president, went for the jugular and tried to strip him of his powers as the ANC's number two. The majority revolted and made sure Mr Zuma stayed put. That confirmed Mr Mbeki's status as a lame-duck leader, until the 2007 elections where he lost.

Mr Zuma's crossroads moment is yet to come. The youth league's disciplinary hearing may deliver a headache for him, or ensure that he gets a second term.

Mr Malema's backers are expected to revolt should the national disciplinary committee convict him and recommend that he gets kicked out of the party. If the revolt happens, Mr Zuma's road to Mangaung will be as rocky as Mr Mbeki's way to Polokwane. Fortunately for Mr Zuma, the NEC has taken a decision that the succession debate should remain closed until next year.

That suits him, while his opponents grumble that they are not allowed to campaign.

mkokeli@bdlm.co.za

PP3-MM-063

THE SUNDAY Independent
NOVEMBER 27 2011
WITH BUSINESS REPORT

HELEN ZILLE ON THE INFO BILL/18

ZAHARA SCOOP AWARDS/3

SPY BOSS QU

The plan is to ensure that Maqetuka does not return from December leave

MOFFAT MOFOKENG

D

Jeff Maqetuka, right, and Siyabonga Gwele

THE SUNDAY Independent
NOVEMBER 27 2011
WITH BUSINESS REPORT
R15.

HELEN ZILLE ON THE INFO BILL/18

ZAHARA SCOOPS AWARDS/3

SPY BOSS QU

The plan is to ensure that Maqetuka does not return from December leave

MOFFET MOFOKENG

DIRECTOR-GENERAL of the State Security Agency Jeff Maqetuka, who has been entangled in a never-ending war with minister Siyabonga Cwele, is expected to step down this week.

The Sunday Independent can reveal today that plans are afoot to expedite Maqetuka's departure from the country's intelligence infrastructure by placing him on summer leave and then making sure he would not return to work in 2012.

Three independent sources told The Sunday Independent that Moe Shaik, head of the foreign arm of intelligence, the SA Secret Service, was also under pressure to bow out – though no formal deal was in place. This follows the departure recently of State Security boss Gibson Njenje over fundamental differences with Cwele.

The three sources said Maqetuka who, according to the restructuring introduced by President Jacob Zuma, was made a super DG, with Njenje in charge of local, Shaik of international and Maqetuka, as the super DG, was made to feel redundant because of the snail's-pace of restructuring that gave rise to the creation of his special post. "It's bad. Morale has never been lower. The restructuring in terms of which Maqetuka's post was created has all but ground to a halt. So a deal is being cooked up for him to leave quietly," said one source. The source added that "the minister is interfering and he (Maqetuka) can't do much about it".

Another source said: "They're giving him leave at the beginning of December and the plan is that by January, he will have concluded a deal and the same applies with Moe. Dennis Dlomo is likely to be acting boss. The reasons for Maqetuka's departure are similar to the ones that led Njenje to go," one source said.

Brian Dube, the spokesman for Cwele, initially said Maqetuka was "considering early retirement".

"The director-general of the State Security Agency, ambassador Jeff Maqetuka, is considering early retirement in January 2012 and the government is looking into the matter," he said.

A few minutes later, he called The Sunday Independent to request that the word "early" be taken out of his statement. "I made a mistake. I put early retirement in the statement. It is retirement, not early retirement," he said, adding that Shaik "is at work".

The protracted fight between Cwele, Njenje, Maqetuka and Shaik took a dramatic twist in October after it emerged that the minister had asked his most senior spies to resign – and also confirmed publicly that Njenje had left office.

Njenje denied this, lifting the lid on what has since been described as a crisis in the intelligence services, the most sensitive part of the country's security.

Speaking in the National Assembly last month, Cwele dismissed reports that Shaik and Maqetuka may soon lose their jobs.

"It would be appreciated if political parties abstained from making unconfirmed statements as these might have a negative impact on the morale of management and members within the State Security Agency," he said.

Njenje recently left his post, reportedly after accepting a settlement that will see him paid out for the remainder of his three-year contract. It would have run until the end of September 2012.

Yesterday, Maqetuka refused to comment. "No comment, chief," he said before hanging up.

Should Maqetuka bow out, as appears likely, Shaik would be, as they say, the last man standing.

The Sunday Independent reported in May that in 2009, former National Intelligence Co-ordinating Committee co-ordinator Silumko Sokupa and a group of intelligence chiefs including former crime intelligence boss Mulangi Mphego, briefed Deputy President Kgalema Motlanthe about the investigation into drug-dealing which involved Cwele's wife, Sheryl, convicted earlier this year.

Motlanthe was, at the time, caretaker president.

The paper also revealed earlier this year that Njenje, Shaik and Maqetuka recently complained to Zuma about difficulties in their relationship with Cwele. Njenje was reportedly unhappy about "unauthorised" operations, which included the surveillance of unnamed cabinet ministers.

This flew in the face of his efforts to ensure the SSA was not exploited for political purposes as was the case in the period leading to the ANC's December 2007 elective conference.

Jeff Maqetuka, right, and Siyabonga Cwele

PP3-MM-065

Shaik looks likely to follow Maqetuka's exit

The picture of our chaotic criminal justice system...

Suspended: Bheki Cele

Axed: Gibson Njenje

Charged: Richard Mdluli

Out: Jeff Maqetuka

'On way out': Moe Shaik

Demoted: Willie Hofmyer

Unfit: Menzi Simelane

Sunday Independent DECEMBER 04 2011

Shaik looks likely to follow Maqetuka's exit

Charles Molele & Matuma Letsoalo

Moe Shaik, the head of the South African Secret Service, is on his way out following the resignation of the director general of state security, Jeff Maqetuka, on Monday.

The *Mail & Guardian* has reliably learned that Shaik has confided to people close to him that he will be out before the end of the year.

"He has told his close associates that he has reached the end of his tether and will leave the department. He could resign within the next two weeks," intelligence sources said.

Approached for comment on Thursday, Shaik said he was still at work and had not resigned.

This week the *M&G* obtained a confidential memorandum from Maqetuka announcing his resignation to staff.

It said: "Since my last communication at Kulani on 7 October 2011 during my address on the mid-term review, I have been in communication with H.E. President JG Zuma and the Honourable Minister Dr SC Cwele wherein I have raised my concerns about the state of affairs within the State Security Agency."

He said Zuma and Cwele had accepted his resignation. Maqetuka will be 60 in January and has opted to retire then, rather than serve out his contract until the end of October next year.

Maqetuka is the second high-ranking official to leave the ministry in less than two months, following the departure of Gibson Njenje, the head of the National Intelligence Agency.

At the time of Njenje's resignation speculation was rife that Njenje, Shaik and Maqetuka had clashed with State Security Minister Siyabonga Cwele, allegedly over his request to place several senior ANC leaders under surveillance and intercept their communication following a perceived "threat analysis" in the ministry's quarterly political stability assessment report.

Earlier this year it was reported that the three spy bosses had complained to Zuma about Cwele about what they alleged were "unauthorised" operations, including the surveillance of Cabinet ministers.

A Sunday newspaper reported in October that Cwele had asked Njenje, Maqetuka and Shaik to step down. Cwele confirmed at the time that Njenje had resigned, but it took a few days for Njenje to oblige.

The men apparently tried to mobilise certain Cabinet members, including sympathetic senior ANC leaders, about their plight. However, Zuma sided with Cwele and allegedly stopped taking calls from the officials.

Said one official: "Moe [Shaik] made a statement soon after he took over that the new executives would not do what politicians want them to do. The theme was that there would be no political interference. He said this in front of the minister. He wanted officers to stay away from domestic politics and do the job of securing the country."

Zuma's cunning paranoia

President's simplicity lulls his opponents into a false sense of superiority, then his ruthlessness derails them, ite Mmanaledi Mataboge and Carien du Plessis

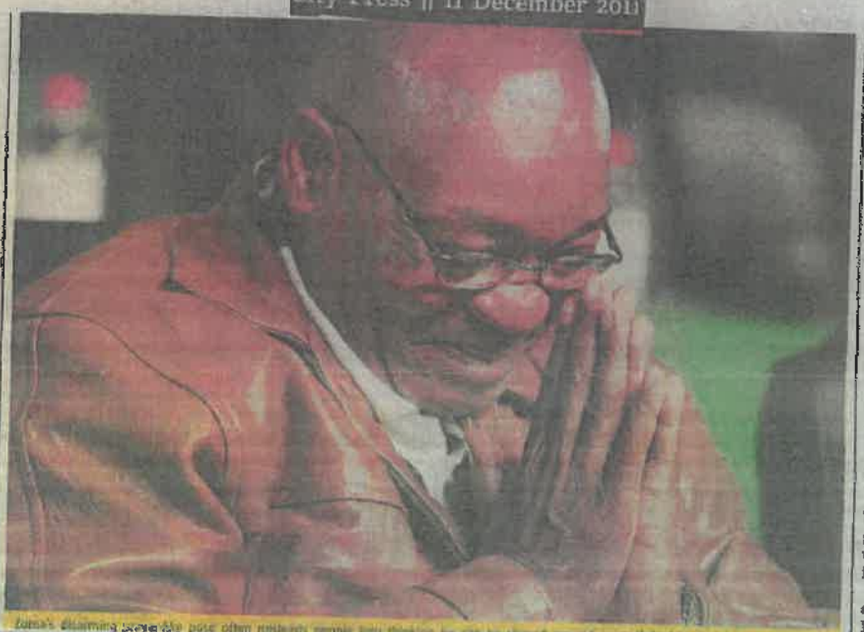
Voices

Zuma's cunning paranoia

President's simplicity lulls his opponents into a false sense of superiority, then his ruthlessness derails them, write Mmanaledi Mataboge and Carien du Plessis

Voices

City Press || 11 December 2011



Zuma's disarming pose – the pose often misleads people into thinking he can be shoved around easily || PHOTO: BRENDAN CROFT

It was an appointment that took even his close aides by surprise. President Jacob Zuma's announcement of advocate Willem Heath as head of the Special Investigating Unit (SIU) happened so suddenly that at least one person in his inner circle was said to have been thrown off balance.

Party insiders and analysts alike have remarked on the irony that Zuma's kitchen cabinet has gone smaller, even as his presidency grew from 510 employees in 2009 to 636 by March this year.

One person who was in the loop about Heath's appointment was Justice Minister Jeff Radebe, who oversees the SIU.

It was also Radebe whom the president consulted about the appointment of National Director of Public Prosecutions Menzi Simelane in 2009. This decision was recently slammed by the Supreme Court of Appeal as "irrational".

In his frequent hirings and firings, Zuma has changed his mind even about his own decisions in the space of less than a year. What is called irrationality in "polite language" many within the ANC and outside have bluntly labelled "paranoia", and Zuma seems to be sinking deeper into it as the ANC approaches its elective conference in Mangaung, which is scheduled for next year.

The apparent secrecy started with his first Cabinet reshuffle last year. One of his erstwhile firebrands, ANC national executive committee (NEC) member and then deputy minister of police Fikile Mbalula, broke down in an NEC meeting shortly after and recounted how he'd first heard of his promotion to sport minister from Zuma's friends outside the ANC, the wealthy Gupta family.

By that time, there were already questions about Zuma's business links to the family via two of his children, Duduzane and Duduzile.

Even in the party, Zuma is strengthening his hand, yet keeping the reins tight.

The suspension of his most noisy detractor, ANC Youth League leader Julius Malema, is the obvious example.

Malema complained that Zuma had done this in a desperate bid to hang on to power, insinuating that his paranoia was worse than former president Thabo Mbeki's.

In Luthuli House, Zuma has brought in former Joburg mayor Amos Masondo as head of the presidency, and Jessie Duarte as head of the ANC's new monitoring and evaluation unit.

Masondo is a tested party loyalist and unlikely to stab Zuma in the back, while Duarte can dilute Mbalula's influence as party organiser by taking some of his responsibilities.

At the party's NEC meeting last month, Zuma intimidated some leaders by promising to personally clamp down on information leaks to the media.

This bears a strong resemblance to the run-up to the ANC's Polokwane conference in 2007. Mbeki fell after party leaders complained that he hardly ever consulted them before making decisions in government.

Ahead of Mangaung, Zuma must be keenly aware that his strategy of keeping the cards close to his chest could backfire too.

Already, internal critics have latched on to the perceived weaknesses of his appointees.

Heath, who formed part of Zuma's "brains trust" in his corruption case, has been labelled an "assassin" by a detractor in the ANC's NEC. Heath's remarks to City Press last week that Mbeki was behind the corruption and rape charges against Zuma, have put Zuma in a pickle.

Zuma has apparently instructed Radebe to reverse Heath's appointment barely a week after the fact, although this is likely to make Zuma look like a man of weak judgement.

In July, Zuma roped in another ally in Mac Maharaj, an ANC veteran and fellow former intelligence operative, as his spokesperson, shunting Zizi Kodwa sideways.

Maharaj, a former transport minister, was brought back to government in 2009 as Zuma's special envoy. But only a few months into Maharaj's tenure, allegations surfaced afresh that he had lied to (the now disbanded) Scorpions investigators about his role in the arms deal.

Maharaj accused detractors of dusting off the allegations to discredit him because he is viewed as the man behind Zuma's commissioning of an arms deal commission of inquiry – a deal the party had agreed to sweep under the carpet.

Another personal ally, Michael Hulley, was roped in part time to help Zuma's legal adviser, Bonisiwe Makhene. Hulley, who acted as Zuma's personal lawyer, is a director of mining company Aurora which was partly owned by Zuma's nephew, Khulubuse.

This has been interpreted by many as a sign of Hulley's close links to the Zuma family.

Given Zuma's own intelligence background in the struggle, the goings-on in the spy agencies are telling of how Zuma is governing institutions with a private clique.

The head of intelligence's foreign arm and a former Zuma faithful, Moe Shaik, is leaving amid tensions in the agency. He follows State Security Agency director-general Jeff Maqetuka and head of the agency's domestic arm, Gibson Njenje.

Zuma's simplicity has often lulled his opponents into a false sense of superiority, only for them to find that his ruthlessness is worse than Mbeki's.

Zuma likes reminding people – in his mother tongue, isiZulu – that he is not educated. This serves to weaken, even disarm, his enemies. His favourite pose – putting his hands together in a prayer-like way under his chin and deferentially bowing even to those of lower rank – misleads many into thinking he can be shoved around easily.

Instead, he's turning out to be in control of the moves. Some say it's starting to backfire, but Zuma's apparent irrationality and paranoia have so far stood him in good stead.

Intelligence

27

Minister vs top spooks

Minister vs top spooks

Analysis: No clear boundaries in 'spy vs spy' turf war

Actively resisting the state security minister: Moe Shaik, Gibson Njenje and Jeff Maqetuka. Photos: Oupa Nkosi

Minister vs top spooks

The most senior leaders in SA's state security apparatus are fighting to keep their jobs

Charles Molele, Matuma Letsoalo & Sam Sole

The raging succession battle in the ANC ahead of its crucial elective conference next year in Mangaung in the Free State appears to be at the centre of spy wars that have pitted State Security Minister Siyabonga Cwele against his top three intelligence chiefs.

The head of the State Security Agency, Gibson Njenje, foreign branch head Moe Shaik and director general Jeff Maqetuka have reportedly clashed with Cwele over his wish to use state security to spy on ANC leaders perceived to be hostile to President Jacob Zuma.

In turn, Cwele allegedly wants to oust them from his department.

The *Mail & Guardian* has reliably learnt that Cwele wanted Njenje to put several senior ANC leaders under surveillance and intercept their communications. His request followed a "threat analysis" in the ministry's quarterly Political Stability Assessment Report, according to senior intelligence, government and ANC officials who have been briefed on the circumstances.

Njenje is understood to have told people around him that he was uncomfortable about being badgered by his seniors to conduct surveillance for party-political reasons.

Sources told the *M&G* that Cwele's tactics were triggered by a "secret intelligence report" prepared by former head of intelligence Richard Mdluli, which claimed that top ANC leaders met in Estcourt in KwaZulu-Natal to plot the ousting of Zuma. Those mentioned included Human Settlements Minister Tokyo Sexwale, national police chief General Bheki Cele, KwaZulu-Natal Premier Zweli Mkhize, Sports Minister Fikile Mbalula, Arts and Culture Minister Paul Mashatile and ANC treasurer Mathews Phosa.

These men are said to be close to embattled ANC Youth League president Julius Malema, who is seen to be leading a campaign to oust Zuma and replace him with his deputy, Kgalema Motlanthe. The anti-Zuma group also wants Mbalula to replace ANC secretary general Gwede Mantashe.

According to highly placed intelligence sources, Cwele allegedly told Njenje that ANC leaders needed to be "tailed" because they posed a threat to Zuma's party presidency.

But an angry Njenje is said to have responded by saying that he would do what was necessary in terms of legislation, and would not be told to break the law by investigating factional fights in the ANC.

Shortly after this exchange, Cwele apparently told Njenje he wanted to redeploy him elsewhere in the government. Njenje retorted that, if the minister wanted to redeploy him, he would have to pay him out in full because his contract had not expired.

Njenje is also understood to have promised to give Cwele a letter rejecting his offer to redeploy him and stating his own offer to leave if he was paid out in full for his contract.

A source said: "When it comes to a showdown between a minister and a director general, it's always the director general that goes. That's an iron law of governance. They [Njenje, Shaik and Maqetuka] don't expect things to be different in this case, so they are trying to delay things and slow the process down, because things will change next year at Mangaung."

Approached for comment about his redeployment, Njenje said: "I think he [Cwele] would be best placed to answer that question. I do not want to second-guess him."

Cwele's spokesperson, Brian Dube, said the minister would issue a

To Page 5

Siyabonga Cwele

Analysis: No clear boundaries in 'spy vs spy' turf war

The crisis at the apex of South Africa's intelligence services is at once both deeply personal and broadly structural, according to sources familiar with the players in the spy vs spy saga.

The crux of the structural problem, they allege, is the expanding efforts of State Security Minister Siyabonga Cwele to exercise operational control over the services and the active resistance from the senior managers under him: Gibo Njenje, Moe Shaik and Jeff Maqetuka. Part of the problem lies in a legislative regime that gives the minister wide but poorly regulated powers to appoint, remove and shift personnel. The minister is also empowered to issue "directions" regarding "command and control" of the services.

The problem is exacerbated by a Nixonian deadline that initially gives the president such powers but allows him to delegate them to a member of the Cabinet, effectively clothing the intelligence minister with presidential authority.

The Constitution states that the president "must appoint a woman or a man as head of each intelligence services and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility".

The restriction to "political responsibility" is not mirrored in intelligence legislation, which simply says the director general "must, subject to the directions of the minister and this Act, exercise command and control of the intelligence services" — wording that may give the minister an effective veto over operational decisions.

Up to now, the practice within the services has largely ignored the wide discretion given to the minister and has stuck with international practice that frowns on political authorities getting involved in operational matters.

Former minister Ronnie Kasrils said that on his watch he was careful not to stray into the operational prerogatives of line managers. That only changed somewhat in the wake of the Inxai email scandal and the surveillance of Saki Macozoma.

After that, Kasrils issued instructions that surveillance that was "politically sensitive" had to be cleared by him — until the service could institute mechanisms to tighten up the mandate and process of authorising such operations. Even so, Kasrils was criticised privately by intelligence managers for straying on to their turf.

Kasrils said the Intelligence Review Commission he appointed in the wake of the Inxai email saga raised some of these issues, but its recommendations were not even considered.

The commission, headed by the late Joe Matthews, noted in its report: "A number of critical issues are not covered adequately in the legislation: the provisions on the supply of intelligence to the minister, the president and government departments are unsatisfactory; the legislation does not deal with authority to task the intelligence services; it does not cover the dismissal or suspension of the director general of an intelligence service; and it does not provide for ministerial approval of intrusive operations."

But the report was seen as Kasrils's baby and was buried by the Polokwane revolution. Now it appears that staff deployments and decisions on politically sensitive operations are again at the centre of conflict between Cwele and his top directors.

As one senior intelligence manager put it: "We may disagree with the conclusions of the commission, but they raised valid issues. They were ignored and now it's come back to bite us. I hope this current crisis can persuade us to have the dialogue on where and how the boundaries should be drawn."

That appears unlikely, however. Sources sympathetic to Njenje and Shaik say that the normal turf disputes between the minister and his managers are made intractable by the minister's own insecurity and relative lack of experience in intelligence.

Said one: "This minister never worked in intelligence himself, whereas Maqetuka, Njenje and Shaik each have decades of experience. They have struggle credentials. The minister doesn't even sit on the ANC national working committee or national executive committee."

The result, they claim, has been a level of mistrust and second-guessing and a tendency on the minister's part to see conspiracies against him and to disregard advice.

One example cited has been the debacle around the Protection of Information Bill, which has been driven by Cwele and has provoked unprecedented public opposition and some embarrassing backtracking from the ANC.

According to insiders, the intelligence services made their own inputs to the minister that were also critical of the draft bill, but Cwele failed to share their comments with the parliamentary committee dealing with the legislation. — *Sam Sole*

Amabhungane, the investigative unit of the M&G Centre for Investigative Journalism, produced this story. All views are ours.

amabhungane.co.za

Minister vs top spooks

From Page 2

statement to respond to the allegations at an appropriate time.

"No amount of distortion, lies and speculation by faceless 'sources' will draw us [in]to a public debate on these matters," he said.

The *M&G* understands that Njenje and Shaik intend to take their complaints about Cwele to Zuma.

The two men are also trying to gather support from some Cabinet members, including senior party leaders who are sympathetic to their situation.

"Moe made a statement soon after he took over about the fact that the new executives would not do what politicians want them to do. They [the executives] wanted to be professional. He said this in front of the minister.

"The theme was that there would be no political interference. They wanted to build a new cadre that would not be involved in political issues. [Shaik] wanted officers to stay away from domestic politics and do the job of securing the country," said a senior government official.

But Cwele is pushing hard to get rid of the two intelligence chiefs as soon as possible. His expectation, apparently, is that Maqetuka would go of his own accord after the departures of Shaik and Njenje.

Shaik is apparently travelling overseas next week and there is concern that the minister will act while he is away. "I am still employed at the department and have not resigned or been fired," Shaik told the *M&G*.

On Thursday insiders at state security claimed that wealthy business people close to Zuma were also to blame for the deepening tension between the spy bosses. Their identities are known to the *M&G*.

Two different government sources told the *M&G* that the first crack in the relationship between Njenje and Cwele came after some of these business people complained to Zuma that Njenje was investigating them.

"Their concern was that the investigation would disadvantage them in business opportunities. They were worried that the investigation would create doubts about their credentials," said one source.

Politics

Axed spy vows to expose Guptas

Gibson Njenje says SA's top spooks were fired after investigating the Gupta family's conduct

Matshepo Letsoalo & Charles Molele

Ditching the axe: Gibson Njenje says Security Minister Siyabonga Cwele could lose his job over his denials regarding the probe. Photo: Gupa Nkosi

An investigation by intelligence agencies into the "conduct" of the Gupta family has angrily took a stand. It was also a settling, indictment by the former head of South Africa's foreign spy agency has told the Mail & Guardian, angrily rejecting claims by the country's state security Minister Siyabonga Cwele.

In a rare interview, Gibson Njenje, the former director general of the State Security Agency (previously known as the National Intelligence Agency), criticised Cwele's claim that he had shut down an improper operation, while denying there was any substantive probe of the Gupta family. Accusing Cwele of "talking nonsense," Njenje said Cwele "might lose his job" over these claims.

The row over the probe was among the key reasons Njenje was axed in 2011, along with former intelligence chief Moe Shaik and National Intelligence Coordinating Committee head Joe Maqetuka, as the M&G reported earlier this year.

The basis for the investigation into the family, it turns out, is due to its ties to President Jacob Zuma, was because of a "curiosity at how they conducted themselves".

"The issue of the Guptas has been there for a long time," said Njenje. "They have not been hiding their conduct. If intelligence was not concerned, we would have been foolish. The concern was how they conducted themselves."

On Tuesday, Cwele suggested at a media briefing in Parliament that Njenje was fired because he was involved in an irregular investigation in 2010 into the relationship between Zuma and the Guptas.

Without mentioning Njenje's name, Cwele implied that Njenje's investigation into the relationship between the president and the Guptas was irregular, saying he would not allow spies "to fight personal or individual battles, particularly business battles" by using state agencies' "platforms and capabilities".

Asked by the M&G whether Njenje, Shaik and Maqetuka were fired because of their investigation into the relationship between Zuma and the Gupta family, Cwele denied this.

"What was stopped was an irregular investigation which involved the use of state security assets to fight private business interests that have no bearing to/our work to uphold national security," Cwele said through his spokesperson Brian Dube. "We will continue to stop any use of assets by any member of the agency outside our mandate."

But Njenje described Cwele's statements as "dangerous" and "foolish", saying it would cost the minister his job. Lambasting Cwele for suggesting that he was involved in an irregular investigation, Njenje said: "If I were to explain [details of the investigations], I would have to go through everything. The[n]th 2011 and he [the minister] is talking nonsense about personal interests. In the position I held, I was able to talk to the Guptas and Zuma.

"I established certain things and I spoke to people about it. He [Cwele] attempts to protect information; it growing in the wrong direction to issue irresponsible statements. Why say there is an investigation and, in the same breath, say I was involved in an irregular investigation? [If] I were Shabangu, I would shy away. He might lose his job [for saying this]. I was responsible for that investigation. I know what happened. I divulge this now."

An angry Njenje vowed to take the matter up with ANC secretary general Gwede Mantashe.

"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 resort to all these [lies emanating] 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 is the ultimate loser. The ANC was supposed to come to where we were fixed to say, 'What is this?' Nothing of such a nature happened," said Njenje.

Meanwhile, three senior intelligence sources from different agencies told the M&G that the Gupta family had allegedly attempted to do business with the government's intelligence services.

Two senior intelligence officials, who asked not to be named because of the sensitivity regarding intelligence matters, said the Gupta family made a proposal to Cwele in 2011 to provide interception and surveillance software to the government.

The software allegedly to be provided by the Guptas would have enabled the government to intercept calls with ease, according to the two intelligence officials. Unlike the state's outdated interception software, the Guptas' system was said to be able to capture the person being investigated visually and produce a printout at the same time, according to the intelligence sources.

There were concerns in the agency about its potential abuse, intelligence officials said.

Several attempts to get comments from the Gupta family drew a blank.

Cwele's office also did not answer specific questions posed by the M&G relating to the allegations about the interception and surveillance software.

Njenje said he was not aware of the proposal, but would not be surprised if it had been submitted by the Guptas.

Zuma's spokesperson Mac Maharaj did not respond to questions emailed to him.

The latest revelations comes barely a fortnight after a private jet carrying guests for a Gupta family wedding landed illegally at the Waterkloof Air Force base, sparking a public and political outcry.

Competing factions within the ANC-led alliance were united in condemning the landing, with an angry Mantashe issuing a strongly worded statement and calling for action against those responsible.

In contrast, Zuma never attempted to distance himself from the Gupta family. Though he did not attend the lavish wedding at Sun City, his wife Bongi Ngema, nephew Khulubuse Zuma and son Duduzane did attend.

"I will be forced to tell the truth. There is a lot of information picked up from intelligence [about the Guptas]"

The wedding celebrations were also attended by several Cabinet ministers, including Public Enterprises Minister Malusi Gigaba, Trade and Industry Minister Rob Davies, Mineral Resources Minister Susan Shabangu and the deputy minister in the presidency, Obed Bapela.

Free State Premier Ace Magashule, whose son Tshepiso is a business associate of the Guptas, also attended.

The attendance by senior ANC politicians occurred despite calls by alliance structures, including Cosatu and the ANC Youth League, for leaders to stay away as it would be interpreted as an endorsement of the Guptas' political dominance and apparent influence over the ANC and the government.

"Although it is reported that the so-called Guptagate scandal has caused a falling out between Mantashe and Zuma, ANC spokesperson Keith Khoza rejected the claims.

"There are no tensions between Mantashe and the president," Khoza said. "Your sources must not speak for the secretary general or second-guess him. Claims that he is unhappy with the president's relationship with the Guptas are not true and cannot be attributed to him. The statement Mantashe released last week and the statement that the president released actually complement each other in terms of the stand taken by the ANC on the matter.

"There has never been a formal complaint in the ANC regarding the president. On what basis must he distance himself from the Guptas? People are trying to drag the president into a matter that doesn't concern him. This matter falls outside the mandate of the president. It is a line-function matter and relevant departments are dealing with it."

But ex[illegible]nts by an ANC national executive committee (NEC) member, who spoke on condition of anonymity because of the sensitivity of the matter, suggested otherwise. The leader, who is a close ally of Zuma, lambasted Mantashe for releasing what he called an incendiary statement.

"ANC leaders can't launch themselves on such things, especially in a country where the opposition wants to keep the ANC on its toes," said the ANC leader. "The ANC was supposed to write to the defence department. You can't write to them [the defence department] through the newspapers. We lead society. We are responsible for determining the gains.

"What Gwede was supposed to do was to issue a statement saying that we [had] noted the unhappiness around the landing at Waterkloof and saying we [the ANC] had conveyed our concerns to the secretary of defence. The most critical thing is political management. You can't manage issues by being reactionary."

However, another ANC NEC member, and a close ally of Mantashe defended him. "The noise [about the illegal landing] is in the right direction. I'm not sure how genuine Mantashe's statement was, but what I do know is that he did the right thing.

"It was long overdue. You don't rock up. You announce. Gwede is irritated with the president's follies. He has repeatedly defended Nkandla, but he is one of the few ANC leaders who has never been to Nkandla. With the Guptas, he put his foot down. He restored confidence in the party."

Watch our live video interview with the reporters behind this story, and send us your comments: http://mg.co.za/[illegible]

Politics

Axed spy vows to expose Guptas

Gibson Njenje says SA's top spooks were fired after investigating the Gupta family's conduct

Matuma Letsoalo & Charles Molele

An investigation by intelligence agencies into the "conduct" of the Gupta family not only took place, it was also justified, indeed necessary, the former head of South Africa's domestic spy agency has told the *Mail & Guardian*, angrily contradicting claims to the contrary made in Parliament by State Security Minister Siyabonga Cwele.

In a rare interview, Gibson Njenje, the former director general of the State Security Agency (previously known as the National Intelligence Agency) criticised Cwele's claim that he had shot down an improper operation, while denying there was any substantive probe of the Gupta family. Accusing Cwele of "talking nonsense," Njenje said Cwele "might lose his job" over these claims.

The row over the probe was among the key reasons Njenje lost his job in 2011, along with foreign intelligence chief Moe Shaik and National Intelligence co-ordinating committee head Jeff Maqetuka, as the *M&G* reported at the time.

The reason for the investigation into the family, notorious for its close ties to President Jacob Zuma, was because of a "concern at how they conducted themselves".

"The issue of the Guptas has been there for a long time," said Njenje. "They have not been hiding their conduct. If intelligence was not concerned, we would have been foolish. The concern was how they conducted themselves."

On Tuesday, Cwele suggested at a media briefing in Parliament that Njenje was fired because he was involved in an irregular investigation in 2010 into the relationship between Zuma and the Guptas.

Without mentioning Njenje's name, Cwele implied that Njenje's investigation into the relationship between the president and the Guptas was irregular, saying he would not allow spies "to fight personal or individual battles, particularly business battles" by using intelligence "platforms and capabilities".

Asked by the *M&G* whether Njenje, Shaik and Maqetuka were fired because of their investigation into the relationship between Zuma and the Gupta family, Cwele denied this.

"What was stopped was an irregular investigation which involved the use of state security assets to fight private business interests that have no bearing on our work to uphold national security," Cwele said through his spokesperson Brian Dube. "We will continue to stop any use of assets by any member of the agency outside our mandate."

But Njenje described Cwele's statements as "dangerous" and "foolish", saying it could cost the minister his job. Lambasting Cwele for suggesting that he was involved in an irregular investigation, Njenje said: "If I were to explain [details of the investigations], I would have to go through everything. I left in 2011 and he [the minister] is talking nonsense about personal interests. In the position I held, I was able to talk to the Guptas and I did.

"I established certain things and I spoke to people about it. His [Cwele] attempt to protect information is provoking us. He is using his office to issue irresponsible statements. Why say there is no investigation and in the same breath say I was involved in an irregular investigation? If I were Siyabonga, I would stay away. He might lose his job [for saying this]. I was responsible for that investigation. I know a lot, but I can't divulge [it] now."

An angry Njenje vowed to take the matter up with ANC secretary general Gwede Mantashe.

"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," said Njenje.

Meanwhile, three senior intelligence sources from different agencies told the *M&G* that the Gupta family had allegedly attempted to do business with the government's intelligence services.

Two senior intelligence officials, who asked not to be named because of the sensitivity regarding intelligence matters, said the Gupta family made a proposal to Cwele in 2011 to provide interception and surveillance software to the government.

The software allegedly to be provided by the Guptas would have enabled the government to intercept calls with ease, according to the two intelligence officials. Unlike the state's outdated interception software, the Guptas' system [illegible] not easy to detect on the phone. It was said to be able to capture the person being investigated visually and produce a printout at the same time, according to the intelligence sources.

There were concerns in the agency about its potential abuse, intelligence officials said.

Several attempts to get comments from the Gupta family drew a blank.

Cwele's office also did not answer specific questions posed by the *M&G* relating to the allegations about the interception and surveillance software.

Njenje said he was not aware of the proposal, but would not be surprised if it had been submitted by the Guptas.

Zuma spokesperson Mac Maharaj did not respond to questions emailed to him.

The latest revelations comes barely a fortnight after a private jet carrying guests for a Gupta family wedding landed illegally at the Waterkloof Air Force Base, sparking a public and political outcry.

Competing factions within the ANC-led alliance were united in condemning the landing, with an angry Mantashe issuing a strongly worded statement and calling for action against those responsible.

In contrast, Zuma never attempted to distance himself from the Gupta family. Though he did not attend the lavish wedding at Sun City, his wife Bongi Ngema, nephew Khulubuse Zuma and son Duduzane did attend.

"I will be forced to tell the truth. There is a lot of information picked up from intelligence [about the Guptas]"

The wedding celebrations were also attended by several Cabinet ministers including Public Enterprises Minister Malusi Gigaba, Trade and Industry Minister Rob Davies, Mineral Resources Minister Susan Shabangu and the deputy minister in the presidency, Obed Bapela.

Free State Premier Ace Magashule, whose son Tshepiso is a business associate of the Guptas, also attended.

The attendance by senior ANC politicians occurred despite calls by alliance structures, including Cosatu and the ANC Youth League, for leaders to stay away as it would be interpreted as an endorsement of the Guptas' political dominance and apparent influence over the ANC and the government.

Although it is reported that the so-called Guptagate scandal has caused a falling out between Mantashe and Zuma, ANC spokesperson Keith Khoza rejected the claims.

"There are no tensions between Mantashe and the president," Khoza said. "Your sources must not speak for the secretary general or second-guess him. Claims that he is unhappy with the president's relationship with the Guptas are not true and cannot be attributed to him. The statement Mantashe released last week and the statement that the president released actually complement each other in terms of the stand taken by the ANC on the matter.

"There has never been a formal complaint in the ANC regarding the president. On what basis must he distance himself from the Guptas? People are trying to drag the president into a matter that doesn't concern him. This matter falls outside the mandate of the president. It is a line-function matter and relevant departments are dealing with it."

But comments by an ANC national executive committee (NEC) member, who spoke on condition of anonymity because of the sensitivity of the matter, suggested otherwise. The leader, who is a close ally of Zuma, lambasted Mantashe for releasing what he called an inflammatory statement.

"ANC leaders can't launch themselves on such things, especially in a country where the opposition wants to keep the ANC on its toes," said the ANC leader. "The ANC was supposed to write to the defence department. You can't write to them [the defence department] through the newspapers. We lead society. We are responsible for determining the game.

"What Gwede was supposed to do was to issue a statement saying that we [had] noted the unhappiness around the landing at Waterkloof and saying we [the ANC] had conveyed our concerns to the secretary of defence. The most critical thing is political management. You can't manage issues by being reactionary."

However, another ANC NEC member and a close ally of Mantashe defended him. "The noise [about the illegal landing] is in the right direction. I'm not sure how genuine Mantashe's statement was, but what I do know is that he did the right thing.

"It was long overdue. You don't rock up. You announce. Gwede is irritated with the president's follies. He has repeatedly defended Nkandla, but he is one of the few ANC leaders who has never been to Nkandla. With the Guptas, he put his foot down. He restored confidence in the party."

Watch our live video interview with the reporters behind this story, and send us your comments: http://mg.co.za/hangouts

Dishing the dirt: Gibson Njenje says Security Minister Siyabonga Cwele could lose his job over his denials regarding the probe. Photo: Oupa Nkosi

CR-BUNDLE-06-788

BBB4-MCR-REF-BUNDLE-1435

PP3-MM-073

State capture

Ex-spy bosses to spill beans on Guptas

Senior spooks, sacked for planning a probe into the family, considered asking for Zuma to be axed

Standing firm: Former National Intelligence Agency head Gibson Njenje and others pushed for an investigation into 'undue influence'. Photos: Delwyn Verasamy & Gupa Nkosi

Carien du Plessis

ANC heavyweights including three former spy bosses fired in 2011 after they planned a probe into the Gupta family's influence on the state — briefly toyed with the idea of calling for President Jacob Zuma to be recalled.

Ultimately they took a softer line. But the spies will probably still be part of the investigation that they had tried to initiate as a matter of national security six years ago.

The probe is to be conducted within the party under secretary general Gwede Mantashe.

In 2011, the then state security minister, Siyabonga Cwele, fired domestic spy boss Gibson Njenje, his foreign intelligence counterpart Moe Shaik and Jeff Maqetuka, director general of the State Security Agency. Cwele said at the time that the investigation the group had planned in 2010 was "irregular" and would have amounted to [illegible] personal [illegible].

In 2016 Njenje told the Mail & Guardian that, as a senior official and ANC member, he had expected the party to protect him, Shaik and Maqetuka when they sought to investigate the Gupta family. Instead, they were shown the door.

The three were among 25 senior commanders and commissars from the ANC's former military wing, Umkhonto weSizwe, who signed a memorandum delivered at the ANC's national executive committee (NEC) meeting in Pretoria over the weekend.

The memorandum called for a special ANC conference to deal with the possible recall of Zuma, and for "an independent commission of inquiry, 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".

An early draft of the memorandum had called for Zuma to be recalled, but that approach was abandoned well before the final draft was agreed on. The memorandum was the initiative of retired general Siphiwe Nyanda, a former communications minister and defence force chief.

Nyanda was hijacked on Tuesday night, said former ANC spokesperson Keith Khoza. The car was apparently recovered near the site of the incident, which was still being investigated at the time of going to print.

Speaking to the M&G the day before the hijacking, Nyanda said an earlier draft of the memo called for Zuma's recall, but that was changed to asking for a special conference.

"To tell you the truth, we didn't expect that there would be a recall of the president, nor did we make such a recommendation or a request or demand," he said.

Another signatory said the group believed they should rather call for a special conference on Zuma's position because it was up to the ANC's NEC to take a decision on this.

Nyanda said the issue of state capture was too urgent to leave until the ANC's next conference, scheduled for the end of next year.

He welcomed the party's planned probe into the allegations of outside interference in appointing ministers and in government business.

"There are many people that we think should come forward and give evidence," he said.

Nyanda said when he was still in the NEC, before the 2012 Mangaung conference, Sport Minister Fikile Mbalula related at a meeting that the Guptas had told him he would be appointed to his current position.

Nyanda said Mbalula made this statement after Zuma opened the meeting with a political overview. "At the end of every meeting, the president summarises the discussion of the NEC.

"[illegible] fact that the president of the ANC did not even allude to the statement by Mbalula was very telling to some of us," Nyanda said. "We expected him to say: 'Not in my name,' but he kept quiet."

[illegible]k said he was one of those who [illegible]quested the investigation into the Gupta family's links with the government. "If I look at myself in the mirror and ask if I did the right thing as a government official to say the investigation is necessary, yes I did. If I'm doing the right thing now to bring it under the attention of the ANC leadership, yes I am."

Mantashe said "intelligence has never had a meeting with me". Asked whether he had met Njenje after the intelligence chief was fired, Mantashe said: "I never talked to him about it."

An irritated Mantashe did not want to confirm whether he would meet Njenje now. "Can you give the organisation space to deal with itself? Allow the organisation to deal with its issues," he said.

Former ANC Youth League deputy president Ronald Lamola has vowed to continue with "mass action" against Zuma after organising a picket at the entrance to the NEC meeting on Saturday. Nyanda said his group had not communicated with Lamola.

Parastatals in Guptas' web

From Page 2

companies did anything untoward.

Another Telkom executive who dealt closely with Blue Label and Pamensky was Zethembe Khoza, who served as Telkom's managing executive of consumer sales in 2010. Khoza was also appointed to the Eskom board in December 2014.

Essa and Transnet

Essa's tracks extend to Transnet.

● Essa was until recently a business partner of Iqbal Sharma, who [illegible] of Transnet until [illegible] 2015 [illegible] Mbalula [illegible] [illegible] Shabangu [illegible] company about two years ago because Salim said he wanted to work full-time with Duduzane Zuma."

● [illegible] business associate Stanley Shane is a current director of Transnet and served with Essa on the board of Aquarius Capital.

● Essa is also a former business associate of Malcolm Mabaso, whose mother, Linda Mabaso, is the chairperson of Transnet. Malcolm is now an adviser to Zwane. Malcolm was a director with Essa in a company called Premium Security and Cleaning Services, but resigned in October 2015, presumably to take up the position with Zwane. Linda Mabaso is said to be close to the Guptas and to Zuma.

Mabaso and the Duartes

Malcolm Mabaso's business and personal life is intertwined with that of the Duarte family.

He was previously the managing director of John Duarte's company, Vumela Holdings. Duarte was also a director of Premium Security and resigned on the same day as Mabaso.

Duarte's son was best man at Mabaso's wedding, which ANC deputy secretary general Jessie Duarte also attended. Jessie [illegible] John in 2002.

Their daughter Zoe is married to Ian Whitley, the adviser to former four-day finance minister Des van Rooyen. Vumela seems to be a one-stop security, consulting and lobbying business, boasting of clients that include Eskom, City Power, Transnet, the State Information and Technology Agency, Vodacom and PetroSA.

Jessie Duarte told amaBhungane: "I do know Malcolm Mabaso and have met him, he is an acquaintance of my son. I am not a partner nor shareholder at Vumela."

John Duarte refused to comment.

The Guptas

Besides the potential influence they could wield through Essa, the Guptas have direct or indirect connections with other directors of Eskom and Transnet.

● Brian Molefe, when he was appointed chief executive of Transnet in 2011, had to deny publicly that the Guptas had played a role in his appointment. But according to trade union federation Cosatu, which raised concerns even then about the Guptas, the family confirmed they were friends of Molefe but said they had not influenced his Transnet appointment.

In 2015 Molefe was transferred to become chief executive of Eskom as part of government's response to the electricity crisis.

● Eskom finance director Anoj Singh's entanglement with former Sahara executive Ashok Narayan in the Homix-Neotel scandal is well known. Sahara is the Gupta computer company. Neotel paid multimillion-rand commissions to Homix, a shelf company linked to Narayan to secure a contract with Transnet.

Singh, then at Transnet, appeared to block payments to Neotel until Homix was paid.

He denied wrongdoing and the Gupta family said Narayan had left them a year before. But a source close to Essa has claimed Narayan is still often based at Essa's Melrose Arch office when he visits South Africa from Dubai.

● Transnet director Vusi Nkonyane is a director of two companies in which the Gupta's Oakbay Investments has invested directly, according to Oakbay's website.

● Kebby Maphatsoe is the chairperson of the Umkhonto weSizwe Military Veterans' Association and one of the most vocal defenders of the Gupta family.

The veteran's association has shares in Shiva Uranium, a company owned by the Guptas and Duduzane Zuma, as does another former veteran's association office bearer, Sparks Motseki, in his personal capacity. The veteran's association treasurer is former four-day finance minister Van Rooyen.

But Maphatsoe is also a director of another veteran's association-linked company, in which Harold Klein is listed as a director. He is the husband of Eskom director Venete Klein.

The departments respond

[illegible]

Malcolm Mabaso

[illegible]

[illegible] on behalf of [illegible] minister [illegible] Zwane, [illegible] and [illegible]

[illegible]

State capture

Ex-spy bosses to spill beans on Guptas

Standing firm: Former National Intelligence Agency head Gibson Njenje and others pushed for an investigation into 'undue influence'. Photos: Delwyn Verasamy & Oupa Nkosi

Senior spooks, sacked for planning a probe into the family, considered asking for Zuma to be axed

Carien du Plessis

ANC heavyweights – including three former spy bosses fired in 2011 after they planned a probe into the Gupta family's influence on the state – briefly toyed with the idea of calling for President Jacob Zuma to be recalled.

Ultimately they took a softer line. But the spies will probably still be part of the investigation that they had tried to initiate as a matter of national security six years ago.

The probe is to be conducted within the party under secretary general Gwede Mantashe.

In 2011, the then state security minister, Siyabonga Cwele, fired domestic spy boss Gibson Njenje, his foreign intelligence counterpart Moe Shaik and Jeff Maqetuka, director general of the State Security Agency. Cwele said at the time that the investigation the group had planned in 2010 was "irregular" and would have amounted to fighting personal battles.

In 2013 Njenje told the *Mail & Guardian* that, as a senior official and ANC member, he had expected the party to protect him, Shaik and Maqetuka when they sought to investigate the Gupta family. Instead, they were shown the door.

The three were among 25 senior commanders and commissars from the ANC's former military wing, Umkhonto weSizwe, who signed a memorandum delivered at the ANC's national executive committee (NEC) meeting in Pretoria over the weekend.

The memorandum called for a special ANC conference to deal with the possible recall of Zuma, and for "an independent commission of inquiry, 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".

An early draft of the memorandum had called for Zuma to be recalled, but that approach was abandoned well before the final draft was agreed on. The memorandum was the initiative of retired general Siphiwe Nyanda, a former communications minister and defence force chief.

Nyanda was hijacked on Tuesday night, said former ANC spokesperson Keith Khoza. His car was apparently recovered near the site of the incident, which was still being investigated at the time of publication.

Speaking to the *M&G* the day before the hijacking, Nyanda said an earlier draft of the memo called for Zuma's recall, but that was changed to ask for a special conference.

"To tell you the truth, we didn't expect that there would be a recall of the president, nor did we make such a recommendation or a request or demand," he said.

Another signatory said the group believed they should rather call for a special conference on Zuma's position because it was up to the ANC's NEC to take the lead on this.

Nyanda said the issue of state capture was too urgent to leave until the ANC's next conference, scheduled for the end of next year.

He welcomed the party's planned probe into the allegations of outside interference in appointing ministers and in government business.

"There are many people that we think should come forward and give evidence," he said.

Nyanda said when he was still in the NEC, before the 2012 Mangaung conference, Sport Minister Fikile Mbalula related at a meeting that the Guptas had told him he would be appointed to his current position.

Nyanda said Mbalula made this statement after Zuma opened the meeting with a political overview. "At the end of every meeting, the president summarises the discussion of the NEC.

"The fact that the president of the ANC did not even allude to the statement by Mbalula was very telling to some of us," Nyanda said. "We expected him to say: 'Not in my name,' but he kept quiet."

Nyanda said he was one of those who had requested the investigation into the Gupta family's links with the government. "If I look at myself in the mirror and ask if I did the right thing as a government official to say the investigation is necessary, yes I did. If I'm doing the right thing now to bring it under the attention of the ANC leadership, yes I am."

Mantashe said "intelligence has never had a meeting with me". Asked whether he had met Njenje after the intelligence chief was fired, Mantashe said: "I never talked to him about it."

An irritated Mantashe did not want to confirm whether he would meet Njenje now. "Can you give the organisation space to deal with itself? Allow the organisation to deal with its issues," he said.

Former ANC Youth League deputy president Ronald Lamola has vowed to continue with "mass action" against Zuma after organising a picket at the entrance to the NEC meeting on Saturday. Nyanda said his group had not communicated with Lamola.

Parastatals in Guptas' web

From Page 2

companies did anything untoward.

Another Telkom executive who dealt closely with Blue Label and Pamensky was Zethembe Khoza, who served as Telkom's managing executive of consumer sales in 2010. Khoza was also appointed to the Eskom board in December 2014.

Essa and Transnet

Essa's tracks extend to Transnet.

● Essa was until recently a business partner of Iqbal Sharma, who served as a director of Transnet until December 2014. Sharma told amaBhungane: "We parted company about two years ago because Salim said he wanted to work full time with Duduzani Zuma."

● Essa business associate Stanley Shane is a current director of Transnet and serves with Essa on the board of Antares Capital.

● Essa is also a former business associate of Malcolm Mabaso, whose mother, Linda Mabaso, is the chairperson of Transnet. Malcolm is now an adviser to Zwane. Malcolm was a director with Essa in a company called Premium Security and Cleaning Services, but resigned in October 2015, presumably to take up the position with Zwane. Linda Mabaso is said to be close to the Guptas and to Zuma.

Mabaso and the Duartes

Malcolm Mabaso's business and personal life is intertwined with that of the Duarte family.

He was previously the managing director of John Duarte's company, Vumela Holdings. Duarte was also a director of Premium Security and resigned on the same day as Mabaso.

Duarte's son was best man at Mabaso's wedding, which ANC deputy secretary general Jessie Duarte also attended. Jessie divorced John in 2002.

Their daughter Zoe is married to Ian Whitley, the adviser to former four-day finance minister Des van Rooyen. Vumela seems to be a one-stop security, consulting and lobbying business, boasting of clients that include Eskom, City Power, Transnet, the State Information and Technology Agency, Vodacom and PetroSA.

Jessie Duarte told amaBhungane: "I do know Malcolm Mabaso and have met him; he is an acquaintance of my son. I am not a partner nor shareholder at Vumela."

John Duarte refused to comment.

The Guptas

Besides the potential influence they could wield through Essa, the Guptas have direct or indirect connections with other directors of Eskom and Transnet.

● Brian Molefe, when he was appointed chief executive of Transnet in 2011, had to deny publicly that the Guptas had played a role in his appointment. But, according to trade union federation Cosatu, which raised concerns even then about the Guptas, the family confirmed they were friends of Molefe but said they had not influenced his Transnet appointment.

In 2015, Molefe was transferred to become chief executive of Eskom as part of government's response to the electricity crisis.

● Eskom finance director Anoj Singh's entanglement with former Sahara executive Ashok Narayan in the Homix-Neotel scandal is well known. Sahara is the Gupta computer company. Neotel paid multimillion-rand commissions to Homix, a shelf company linked to Narayan to secure a contract with Transnet.

Singh, then at Transnet, appeared to block payments to Neotel until Homix was paid.

He denied wrongdoing and the Gupta family said Narayan had left them a year before. But a source close to Essa has claimed Narayan is still often based at Essa's Melrose Arch office when he visits South Africa from Dubai.

● Transnet director Vusi Nkonyane is a director of two companies in which the Gupta's Oakbay Investments has invested directly, according to Oakbay's website.

● Kebby Maphatsoe is the chairperson of the Umkhonto weSizwe Military Veterans' Association and one of the most vocal defenders of the Gupta family.

The veteran's association has shares in Shiva Uranium, a company owned by the Guptas and Duduzani Zuma, as does another former veteran's association office bearer, Sparks Motseki, in his personal capacity. The veteran's association treasurer is former four-day finance minister Van Rooyen.

But Maphatsoe is also a director of another veteran's association-linked company to which Harold Klein is listed as a director. He is the husband of Eskom director Venete Klein.

amaBhungane, the investigative unit of the MAG Centre for Investigative Journalism, produced this story. All views are ours.
amabhungane.co.za

The departments respond

These are edited responses from the departments of public enterprises and mineral resources respectively.

Lynn Brown speaking for public enterprises, the Transnet and Eskom directors and herself:

We reject any insinuation that Minister Brown "gaveh" appointed Magokare Richard Seboka as director general of the department.

Soon after her appointment in 2014, Brown reviewed all six boards within the public enterprises portfolio with a view to strengthen the skills required and in certain instances to address issues of gender, tenure and demographics.

These appointments followed a lengthy consultative process with various stakeholders, including the economic sectors and infrastructure development Cabinet committee.

It is not unusual for members of the committee to object to nominations and the list is referred back to the department. Even after this step, the list can still be rejected at Cabinet level.

Minister Brown also expressed her displeasure with the way in which your team went about harassing family members of board members for comment.

Mineral resources, on behalf of the minister Mosebenzi Zwane, Kuben Moodley and Malcolm Mabaso:

Malcolm Mabaso is not Salim Essa's business partner in any company. The company, Premium Security, in which they were nonexecutive directors, never traded, and Mabaso resigned from it a while back.

Any further insinuation of a partnership by Messrs Mabaso and Moodley with Mr Essa or any of the parties or companies mentioned is grossly incorrect.

Any such inference would be devoid of any truth and deliberately misleading.

Messrs Mabaso and Moodley do not have any interest in any mining companies and, as the minister's advisers, do not deal with administrative responsibilities.

"Annexure C"

Annexure "C"

RESOLUTION OF GOVERNANCE ISSUES IN THE CIVILIAN INTELLIGENCE SERVICE PERTAINING TO THE MANDATE OF THE DIRECTOR-GENERAL OF THE STATE SECURITY AGENCY [SSA] BY THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

1 Introduction

The intention of this document is to seek the intervention and resolution by the President to my concerns on a number of issues pertaining to how the Minister of State Security discharges his executive role within the department, thus undermining the mandate of the Director-General.

In the Performance Agreement between myself and the Minister, he confirms that "*He will create an enabling environment to facilitate effective performance by the Director-General in the running of the agency.*" (Performance Agreement, Period: 2 October 2009 – 31 March 2010; Performance Agreement, Period: 1 April 2010 – 31 March 2011; Performance Agreement, Period: 1 April 2011 – 31 March 2012. All these agreements were

signed between the Minister for State Security, Dr CS Cwele and myself as Director-General: State Security Agency).

2 Background to my appointment as Director-General

Prior to my appointment on in 2009, I was serving as the Republic of South Africa's Ambassador Plenipotentiary in the Democratic People's Republic of Algeria when I was recalled to Pretoria for a consultation with the President, the Minister of State Security and the Director-General of the Department of International Relations and Cooperation [DIRCO] for discussions on the intention of the President to appoint me as Director-General of the newly created/to be created State Security Agency. I had a telephone conversation with the Minister of State Security and the Director-General, Dr Ayanda Ntsaluba, while in Algiers on the need for me to travel to Pretoria for such consultation.

Subsequently on my arrival in Pretoria I met with the Minister and the President. Both of them gave me separately a generic brief on their intention to appoint me and that I would need to decide on the offer of appointment. The President then indicated that the details would be dealt with by the President. Thereafter I had a separate meeting with Dr Ntsaluba on the same matter but on his

side more with the processes to leave the diplomatic post and how we should proceed, should I accept the offer.

I was finally appointed on 2 October 2010 by the President and thereafter I left Algeria to resettle in South Africa.

3 Interpretation, duties and roles of the Director-General

Key to my mandate was to spearhead the amalgamation of the various structures in the Civilian Intelligence Service into the SSA and this was encapsulated in Proclamation 59 of 11 September 2009 as read with other Proclamations signed by the President of the country. The role of the Director-General in this regard need not emphasised.

Immediately after my appointment, I put in place a Senior Management Structure composed of myself, Directors of both the Domestic and Foreign Services and an Extended Executive Committee comprised of the Senior Manager National Communication Centre; Deputy Directors, Domestic and Foreign, Deputy Director-General Corporate Services and the Principal of the Intelligence Academy. We had meetings every Monday.

Furthermore, we reached an agreement with the Minister that he will meet with the extended EXCO every Tuesday where he would be briefed on progress on tasks and that periodically he will arrange for a meeting between himself, the President and EXCO.

All these initiatives were put in place within the first three months of my appointment.

4 Mechanism to deal with the restructuring and the general management of the department

For purposes of reporting on developments in regard to restructuring, a Steering Committee [STEERCOM] was set up comprising of the following people:

- Chair and Sponsor: Minister of State Security
- Director-General
- Director: Foreign Branch
- Director: Domestic Branch
- Deputy-Director General: Corporate Services

- Head of National Communication Centre

The Minister was to convene the STEERCOM.

Comments:

The STEERCOM mechanism to date has been an utter failure in that only two meetings were convened by the Convenor, one on the 25 May 2010 wherein milestones were reached. The SSA structure was presented and thoroughly discussed and in-principle decisions with the concurrence of the Minister were reached. For instance, the NC structure was agreed upon with the exception of only one element and that was the location of the Office of Interception Centre [IOC]. The Minister felt that he was not sure of its location and that we had to re-look at this and advise.

A submission was subsequently handed over to the Minister on 22 August 2011. To date this component's structure has still not been finalised.

Another structure unresolved is that of the Intelligence Academy [IA]. In the same meeting the IA structure was also presented by the Acting Principal. Two critical interventions were made by the Minister for consideration, one on the designations as he felt that

these should reflect more professionals than your classic public service management structure. The meeting resolved that a benchmark be conducted by the Deputy Director Corporate Service, Professor Sandy Africa and the Acting Principal. They immediately consulted with like training institutions in defence and police and a final structure submitted to the Minister on 29 June 2011.

Again, as in other cases, this has not been finalised. In both these two instances, I believe these delays could have long been resolved had the Minister stuck to previous arrangements, i.e. convening of STEERCOM meetings and the Tuesday's EXCO meetings with the Minister. Instead the Minister resorted in by-passing the Director-General, giving instructions to his cronies within his Ministry to deal with matters.

No meeting was ever held between the Minister, EXCO and the President as agreed upon. This was amongst certain instances that we made or direct arrangements for meetings with the President to raise our concerns.

5 Proclamation and the Legislative process and problems therein

At the beginning of 2010, EXCO, in consultation with the SSA's Legal Services, we discussed the Proclamation that founded the SSA and the then draft State Security Bill with the aim of bringing to the attention of the Minister issues that could be corrected in both the Proclamation and the Bill. Flaws were identified in the Proclamation in that it was inconsistent with follow-up pronouncements made by the Minister, for example, although the Proclamation states that the Communication Security Component [COMSEC] shall be a government component – restructuring processes announced by the Minister proceeded in pronouncing that National Communication shall be a government component, meaning outside the structures of the Agency. Furthermore, that the National Coordinating Committee [NICOC] was also problematic to us in that we believed that the Proclamation was silent on the restructuring of NICOC, and that this matter was outside the mandate of the SSA thus the Director-General. In the legislation this structure was being amended.

We therefore advised the Minister to address such anomalies and inconsistencies. Neither acknowledgment nor response was ever received in this regard.

6 The role of the National Communication Centre within the SSA

During a workshop convened by the Minister on 5 December 2009, a brief discussion on the role of this structure within the Intelligence Services ensued. It became clear to me that there was no convergence between myself and the Minister in this regard.

I made the point that in the workshop this will have to be discussed at a later stage. Later I also discovered that there was an interim policy/practice called the Interim Operational Communication Mechanism [IOPCM], a document that was issued during the time of former Minister for Intelligence, Ronnie Kasrils and that this apparently sought to resolve his conflicts with former Director-General, Billy Masetlha. Although clearly stated that this was an interim mechanism, to date it has become a permanent feature of the operational work of the Minister who decides on operational departmental matters – a practice that was an enigma to the practice of intelligence. Ministers do not run operations. This is the mandate of the department.

We convened an SSA workshop on the 12 February 2010 to discuss the document. It was attended by senior management of the NC who gave a background to the document. The workshop resolved that the present management of the SSA could not live with the document as it was politically motivated (in its language)

and seeming intention. The resolution of this workshop was submitted to the Minister asking him to resolve the matter, but to date there was no response.

7 Direct instructions to members – thus undermining the role of the Director-General

Appointments within the Agency takes place without consulting with the Director-General. This can be illustrated by a number of examples, for instance, transfer of Dennis Dlomo from the Foreign Branch to the Ministry; transfer of Bob Mhlanga from the Domestic Branch to the Ministry; transfer of Portia Molefe from the Ministry to the Domestic Branch. The recent transfer of Simon Ntombela from the Foreign Branch to the Ministry, the latter case was brought to the attention of the Minister because it was contravening the Minister's own regulations and flouting his own directives in regard to the advertising of posts when an incumbent is promoted to a higher position. During the Minister's budget Speech in 2011, he announced the appointment of a number of Deputy Directors. This came as a shock to me and my directors. I learnt later that even the Chairman of the JSCI did not know about these appointments.

In the few weeks that followed, more worrisome incidences ensued. Njenje left the Agency. The Minister never, at one stage informed me about this pending departure of Njenje, which of course Njenje had informed me about his intention. In his discussion with the Minister, the latter offered him to be deployed as ambassador, which offer Njenje told me that he declined. By this time, I was aware (from Moe) that the Minister had been putting pressure on him to resign.

I was concerned about reports in the public media and the Minister's pronouncements in Parliament that I construed in some instances as having been misleading Parliament.

8 Submissions and delays therein to and from the Minister

My office has time and time again since 2010 been dealing with submissions dating back twelve months which were submitted to the Minister, with recommendations, although some have been responded to after months and months of delays. I have been waiting for the following responses since March 2011, for example, the post of General Manager: Management Services; Foreign Branch; General-Manager Intelligence Support; General Manager: Infrastructure and Logistics in the Foreign Branch.

The worst case is that of the Head NC, a case in which in May 2011 I made a submission to the Minister. I became aware that the Minister had appointed Dr Irene Moetsane-Moeng as Acting Head of the NC.

9 Performance appraisals and appraisals therein

I am now entering my third year and final in terms of my contract as signed with the President. I signed three PA's with the Minister, but to date no appraisals have been conducted when this is supposed to be done annually.

10 Conclusion

Mr President, some of these issues raised herein might not be new to you because I have raised them with you, most personally. I humbly request that within reasonable time of fourteen days of receipt of this document you respond on how you wish to address them.

This letter/document was copied to the following people:

The Deputy President of the Republic of South Africa, Kgalema Motlanthe

PP3-MM-086

41

Chairman of the Joint Standing Committee on Intelligence (JSCI),

MP Cecil Burgess

Minister of State Security, MP Dr SC Cwele

11 Comments as at today, 23 October 2018

Ambassador Mzuvukile Maqetuka

Jeffreysbay

2018/10/23

PP3-MM-087

ANNEXURE "MM2"

Intelligence White Paper

PP3-MM-089

Intelligence White Paper

TABLE OF CONTENTS

Intelligence White Paper

1. OBJECTIVE

This White Paper is intended to provide a framework for the understanding of the philosophy, mission and role of intelligence in a democratic South Africa.

These issues should be seen within the framework of the national goals of the Government of National Unity as set out inter alia in the Reconstruction and Development Programme.

The White Paper will focus primarily on the mandates of the proposed new civilian services (domestic and foreign) and will only indirectly refer to military and criminal intelligence.

The goal of this White Paper is the creation of an effective, integrated and responsive intelligence machinery that can serve the Constitution and the government of the day, through the timeous provision of relevant, credible and reliable intelligence.

The White Paper should be read in conjunction with the three bills on intelligence.

Intelligence White Paper

2. INTRODUCTION

The democratisation of South Africa opens a new chapter in our history in which the quality of life and the security of our people, the practice of democracy and the promotion of an internal and international climate of peace and stability are the focus and priority.

Accordingly, a new mission is being set for the South African intelligence community in line with the new, non-racial, democratic order, in which much weight is given to the rights of the individual. This mission is objectively derived from an understanding of conditions international, regional and domestic - impacting on the country's security and interests, and through a remodelling of the moral codes and organisational culture governing the intelligence environment.

Intelligence White Paper

3. PHILOSOPHY OF INTELLIGENCE

3. 1 Introduction

Reshaping and transforming intelligence in South Africa is not only a matter of organisational restructuring. It should start with clarifying the philosophy, and redefining the mission, focus and priorities of intelligence in order to establish a new culture of intelligence.

Prior to the election of a democratic government, security policy was formulated by a minority government. Its ability to detail what was in the national interest, was therefore flawed.

More-over, since the minority government was faced with a struggle for liberation, this issue dominated the question of security and, consequently, the activities of the statutory instruments that served it.

A further consequence was that the role of the state's security apparatus was over-accentuated with virtually no institutional checks and balances.

The challenge of creating a secure environment for all South Africans has not abated with the establishment of a democratic Government of National Unity. Security is a goal that can only be gained and sustained through consistent effort, and must remain high on the list of national priorities, alongside the goals of reconstruction, development and reconciliation.

3.2 The definition, purpose and mission of intelligence

3.2.1 Definition of intelligence

In this document, intelligence refers to the product resulting from the collection, evaluation, analysis, integration and interpretation of all available information, supportive of the policy- and decision-making processes pertaining to the national goals of stability, security and development. Modern intelligence can thus be described as "organised policy related information", including secret information.

Intelligence may be gathered by covert or overt means, from a range of sources, human and non-human, open or secret. In addition there is a wide variety of intelligence forms, including political intelligence, economic intelligence, technological and scientific intelligence, military intelligence, criminal intelligence and counterintelligence. Each of these is characterised by its seeking out and processing a certain type of information, and may place different emphases on the methods to be used.

3.2.2 Intelligence and policy-making

Intelligence White Paper

The relationship between intelligence and policy-making is a dynamic, reciprocal one. Intelligence is but one tool in the successful implementation of domestic and foreign policy. To be of value to policy making, it must have at least some, if not all of the following attributes: accuracy; relevance; predictive capacity; an element of warning; and timeliness.

On the other hand, for the intelligence organisation to operate optimally, and to the benefit of the policy-maker, intelligence must be valued and nurtured as an instrument of policy. Sufficient resources must be invested in it by the policy and decision- makers, including finances, training and development.

3.2.3 The purpose of intelligence

In the modern, post-Cold War world, intelligence to be relevant must serve the following purposes:

- to provide the policy-makers, timeous, critical and sometimes unique information to warn them of potential risks and dangers. This allows the policy-makers to face the unknown and best reduce their uncertainty when critical decisions have to be made;
- to identify opportunities in the international environment, through assessing real or potential competitors' intentions and capabilities. This competition may involve the political, military, technological, scientific and economic spheres, particularly the field of trade; and
- to assist good governance, through providing honest critical, intelligence that highlights the weaknesses and errors of government. As guardians of peace, democracy and the constitution, intelligence services should tell government what they ought to know and not what they want to know.

3.2.4 Mission of the South African intelligence community

In the South African context the mission of the intelligence community is to provide evaluated information with the following responsibilities in mind:

- the safeguarding of the Constitution;
- the upholding of the individual rights enunciated in the chapter on Fundamental Rights (the Bill of Rights) contained in the Constitution;
- the promotion of the interrelated elements of security, stability, cooperation and development, both within South Africa and in relation to Southern Africa;

- the achievement of national prosperity whilst making an active contribution to global peace and other globally defined priorities for the well-being of humankind; and
- the promotion of South Africa's ability to face foreign threats and to enhance its competitiveness in a dynamic world.

3.3 Towards a new national security doctrine

The maintenance and promotion of national security (i.e. peace, stability, development and progress) should be a primary objective of any government. Since intelligence is an instrument to achieve this goal, the two concepts inevitably represent two sides of the same coin.

The traditional and narrower approach to security has emphasized military threats and the need for strong counter-action. Emphasis was accordingly placed on the ability of the state to secure its physical survival, territorial integrity and independence, as well as its ability to maintain law and order within its boundaries. In this framework, the classic function of intelligence has been the identification of military and paramilitary threats or potential threats endangering these core interests, as well as the evaluation of enemy intentions and capabilities.

In recent years, there has been a shift away from a narrow and almost exclusive military-strategic approach to security. Security in the modern idiom should be understood in more comprehensive terms to correspond with new realities since the end of the bipolar Cold War era. These realities include the importance of non-military elements of security, the complex nature of threats to stability and development, and the reality of international interdependence.

This more comprehensive approach to security is also endorsed by organisations like the UN and the OAU. This approach is inter alia reflected in the Kampala document of the OAU (19th May 1991) where a process was set in motion known as the Conference on Security, Stability, Development and Cooperation in Africa (CSSDEA). The purpose of this document was "providing a comprehensive framework for Africa's security and stability and measures for accelerated continental economic integration for socio-economic transformation".

The intermingling and transnational character of modern-day security issues furthermore indicate that solutions to the problems of insecurity are beyond the direct control of any single country and cannot be rectified by purely military means. The international security agenda is shifting to the full range of political, economic, military, social, religious, technological, ethnic and ethical factors that shape security issues around the world. The main threat to the well-being of individuals and the interests of nations across the world do not primarily come from a neighbouring army, but from other internal and external challenges such as economic collapse, overpopulation, mass-migration, ethnic rivalry, political oppression, terrorism, crime and disease, to mention but a few. Consequently, "security is defined less in military terms and more

Intelligence White Paper

in the broader sense of freedom from vulnerability of modern society", in the words of an American scholar.

New thinking on security has the following key features, which should form an integral part of the philosophical outlook on intelligence:

- Security is conceived as a holistic phenomenon and incorporates political, social, economic and environmental issues.
- The objectives of security policy go beyond achieving an absence of war to encompass the pursuit of democracy, sustainable economic development and social justice.
- Regional security policy seeks to advance the principles of collective security, non-aggression and Peaceful settlement of disputes.

The broader and modern interpretation of the nature and scope of security leads to the conclusion that security policy must deal effectively with the broader and more complex questions relating to the vulnerability of society. National security objectives should therefore encompass the basic principles and core values associated with a better quality of life, freedom, social justice, prosperity and development.

Applied to the South African context, the new approach to security holds that the Reconstruction and Development Programme, as an organised and collective effort of our society led by the Government of National Unity, is integral to and forms the core of the country's emerging national security doctrine. The RDP's efforts to meet the basic needs of our people, develop our human resources, build our economy, and to democratise our state and society will be in the final analysis, one of the determinants of genuine peace and lasting security.

Democracy and participation are fundamental to the success of the RDP. Democracy must mean the empowerment of all South Africans to effectively participate in the process of governance and in matters that affect them. Democratisation must ensure the modernisation of the structures and functioning of government in the pursuit of efficiency, effectiveness, responsiveness, transparency and accountability. In short, democratisation ensures "good governance".

The following lessons learned from the negotiation process should become central to the new national security doctrine:

- the determination and ability to arrive at consensus;
- the maturity to ensure the inclusiveness of the political process; and
- the ability to reconcile deep-seated political and social conflict.

Intelligence White Paper

The national security doctrine must promote the creation of a societal environment that is free of violence and instability. It must engender, within the context of a transformed judicial system, respect for the rule of law and human life.

4. BASIC PRINCIPLES OF INTELLIGENCE

It is accepted that the creation of a new intelligence dispensation in South Africa shall be accompanied by a review of the underlying principles of the system to be transformed.

The principles outlined hereunder are the result of such a review and have served as a basis for the formulation of a proposed code of conduct and a new legal framework for the creation of a national intelligence capability under our democratic dispensation. (*See Annexure A*)
Since 1990, the democratisation of South Africa has opened a new chapter in the history of the intelligence community and started a process of consultation and negotiation between the various role players. The establishment of the Sub-Council on Intelligence of the Transitional Executive Council facilitated agreement on a set of Basic Principles, which have laid the basis for the transformation and democratisation of the intelligence community. (See Annexure B)

These principles include the following:

- principle of an integrated national intelligence capability;
- principle of departmental intelligence capabilities;
- principle of political neutrality;
- principle of legislative sanction, accountability and parliamentary control;
- principle of the balance between secrecy and transparency;
- principle of the separation of intelligence from policy making;
- principle of effective management, organisation and administration;
- principle of the coordination of intelligence and liaison with departmental intelligence structures;
- principle of an ethical code of conduct to govern performance and activities of individual members of the intelligence services.

Code of Conduct

The Code of Conduct as approved by the TEC Sub-Council on Intelligence makes provision for inter alia:

- a declaration of loyalty to the State and the Constitution
- obedience to the laws of the country and subordination to the rule of law
- compliance with democratic values such as respect for human rights
- submittance to an oath of secrecy

Intelligence White Paper

- adherence to the principle of political neutrality
- a commitment to the highest degree of integrity, objectivity and unbiased evaluation of information;
- a commitment to the promotion of mutual trust between policy- makers and intelligence professionals.

Under a democratic government, those agencies entrusted with the task of intelligence work should agree to execute their tasks in the following manner:

- they should accept as primary, the authority of the democratic institutions of society, and those constitutional bodies mandated by society to participate in and/or monitor the determination of intelligence priorities;
- they should accept that no changes will be made to the doctrines, structures and procedures of the national security framework unless approved of by the people and their representative bodies; and
- they should bind themselves to the contract entered into with the electorate through a mutually agreed set of norms and code of conduct.

5. COMPOSITION OF THE INTELLIGENCE COMMUNITY

In a democracy the government must exercise meaningful control over the intelligence community through a range of measures: the separation of intelligence functions; obliging the agencies to operate in a legal capacity; controlling access to the executive; and differentiating the functions of collection, reporting, coordinating and review.

In the immediate term, and towards the achievement of a new intelligence dispensation, the creation of a National Intelligence Agency (see Intelligence Services Bill) is proposed for South Africa. This agency will amalgamate the members of the existing National Intelligence Service, the intelligence services of the former states of Transkei, Bophuthatswana and Venda, the intelligence service of the African National Congress namely the Department of Intelligence and Security, as well as any other intelligence capabilities that meet with the necessary requirements set out in the Act.

This arrangement will lead to the eventual establishment of two civilian intelligence agencies, one focusing on domestic intelligence (and retaining the name National Intelligence Agency) and a service focusing on foreign intelligence (to be named the South African Secret Service).

The mission of the domestic intelligence service (the National Intelligence Agency) will be to conduct security intelligence within the borders of the Republic of South Africa in order to protect the Constitution. The overall aim shall be to ensure the security and stability of the State and the safety and well-being of its citizens.

The mission of the foreign intelligence service (the South African Secret Service) will be to conduct intelligence in relation to external threats, opportunities and other issues that may affect the Republic of South Africa, with the aim of promoting the national security and the interests of the country and its citizens.

The most significant departure from the old dispensation is that instead of one centralised national civilian intelligence organisation, there will be two. This arrangement will not only ensure that the new intelligence dispensation in South Africa corresponds with general international trends, but will promote greater focusing, effectiveness, professionalism and expertise in the specialised fields of domestic and foreign intelligence.

The services will have distinct intelligence mandates and line functional responsibilities and will share essential support services to avoid costly and unnecessary duplication. They will accordingly create appropriate liaison mechanisms to deal with areas of mutual interest.

Intelligence White Paper

6. CONTROL AND COORDINATION OF INTELLIGENCE

6. 1 Control

It was agreed by the TEC that a number of control measures to regulate the activities of the civilian intelligence community should be implemented. The control mechanisms include the following principles and practical measures:

- Allegiance to the Constitution;
- Subordination to the Rule of Law
- A clearly defined legal mandate;
- A mechanism for parliamentary oversight;
- Budgetary control and external auditing;
- An independent Inspector-General for Intelligence - one each for the two civilian intelligence services;
- Ministerial accountability;
- The absence of law enforcement powers.

Of these measures, the most important is a proposed mechanism for parliamentary oversight over the different services and departments with functions relating to intelligence (see Parliamentary Committee on Intelligence Bill). The bill makes provision for the following:

- A Joint Standing Committee for Parliament with functions and powers that will allow it to receive reports, make recommendations, order investigations and hold hearings on matters relating to intelligence and national security. The committee will also prepare and submit reports to parliament about the performance of its duties and functions.
- Two Inspector-Generals - one each for each service - whose functions will include reviewing the activities of the intelligence services and monitoring their compliance with policy guidelines. These two persons will have unhindered access to classified information.

6.2 Coordination

In terms of the National Strategic Intelligence Bill, an interdepartmental intelligence coordinating mechanism, the National Intelligence Coordinating Committee (NICOC) will coordinate the activities of the intelligence community and will act as the key link between the intelligence community and policy-makers. NICOC will be chaired by a Coordinator for Intelligence who will be accountable to the President.

Intelligence White Paper

Specifically the NICOC will have the following functions:

- to advise the government on threats or potential threats to the security of the country and its citizens;
- to advise the government on policy relating to the conduct of intelligence at national, regional and local levels;
- to coordinate the conduct of all intelligence functions and the collective intelligence resources of the country;
- to coordinate the production of national strategic intelligence;
- to report to the Cabinet Committee on Security and Intelligence (CCSI) and to the parliamentary Joint Standing Committee on Intelligence as required; and
- to avoid and to eliminate conflict, rivalry and unhealthy competition between the members of the intelligence community.

7. 7. TRANSFORMING INTELLIGENCE METHODOLOGY

7.1 Training

Training is regarded as a crucial tool in developing intelligence professionals who will establish a viable and lasting new intelligence dispensation. To this effect processes are under way to restructure and to remodel the content and syllabi of the Intelligence Training Academy.

7.2 Effectiveness and standards

The building of new and organisationally competent intelligence services should be a prime goal. Efficient management structures, with farsighted, creative and organisationally uncompromising leadership will be the engine of a truly professional intelligence community.

The new professionalism must embrace the new priorities and changes in the scope and methodology of intelligence. In this regard, the intelligence community will have to interface with other institutions of society engaged in strategic research, in order to promote integrated analysis which is supportive of policy making.

7.3 Secrecy and declassification

The development of a more open intelligence community will go a long way towards demystifying and building trust in the national intelligence community. Where legal limits on secrecy, including criteria and time frames for classification and declassification are clearly understood and accepted by society, the dangers of the intelligence system becoming self-serving are averted.

7.4 Covert action

Measures designed to deliberately interfere with the normal political processes in other countries and with the internal workings of parties and organisations engaged in lawful activity within South Africa, must be expressly forbidden. Intelligence agencies or those within them guilty of such breaches must be disciplined in the severest terms.

7.5 Secret intelligence budget

Parliament will, through its audit mechanisms have access to the information it requires to determine whether budgetary allocations are warranted.

8. EXTERNAL AND INTERNAL REALITIES FACING SOUTH AFRICA AND THE INTELLIGENCE COMMUNITY

A complex interplay of international, regional and domestic developments, of both a positive and negative nature impact on national security, and consequently the mission of the intelligence community in South Africa. The next section of this White Paper highlights the most critical of these developments.

8.1 International dimension

With the shifting international balance of forces, intense interest has shifted onto the successful South African transition. South Africa is perceived as an area of intense economic opportunity by foreign nations competing to achieve trade and industrial advantage in this regard. Notwithstanding this, with the demise of apartheid and the Cold War, new political and economic relationships of cooperation and support with various countries have become both desirable and possible.

On a more negative note, new global political, social and economic problems are filtering South Africa's borders. International extremists have forged links with their South African counterparts, whilst international drug cartels, use our country both as a transit route for their trade and as a market, thus corrupting our social system.

Lastly, there has been a dramatic increase in foreign intelligence activities in South Africa. Apart from classic political and military espionage, other activities of foreign/hostile intelligence services and industrial espionage agents have increased markedly in the economic, technological and scientific fields.

8.2 Regional dimension

Because of its relatively advantaged economic position, South Africa is regarded as a pivotal centre of development for Southern Africa and indeed, for the rest of Africa. The social and economic problems of the region will continue to affect South Africa. It can reasonably be argued that there will not be peace and stability in South Africa until conditions of peace prevail in the rest of Southern Africa. Indeed South Africa has a moral responsibility to contribute towards the development of the rest of Africa. It must define its relationship with the continent away from domination and destabilisation, towards a relationship of cooperation and mutual respect.

At the same time unrealistic expectations of South Africa must be tempered. The pressing socio-economic problems of our own country suggest that we must make these our first priority. The relationship we enter into with other African countries must be designed to promote political stability, regional security, and our mutual economic growth and development, as well as a lessening of dependence of the African continent on the countries of the North, in favour of the development of the South.

8.3 Internal dimension

Intelligence White Paper

Massive socio-economic degradation, with poverty, hunger, homelessness and unemployment being the order of the day, will render the political changes meaningless if they are not accompanied by a significant improvement in the quality of our people's lives. Whilst politically motivated violence is on the decline, there has been an increase in common criminal activities.

These socio-economic problems call for creativity and commitment in the implementation of the RDP. At the same time the government and society must be firm in dealing with crime and lawlessness.

9. CONCLUSION

Our country is poised on the brink of tremendous opportunity, in which the human potential of our people can be harnessed to make South Africa a beacon of hope and success for the world.

Intelligence has a critical role to play in identifying threats, potential threats as well as opportunities for the democratic dispensation in South Africa. The transformation of the intelligence community is a process already under way, and must be encouraged so as to allow the intelligence community to play its rightful role in meeting our national goals, particularly those set out in the RDP.

Ultimately, it is through the approach to security outlined in the RDP the meeting of the basic needs of the people through development, sustained economic growth and mass participation in the building of a new South Africa - that the cherished goals of peace and stability will be reached.

Annexure A

CODE OF CONDUCT FOR INTELLIGENCE WORKERS

In the fulfilment of their duties and professional responsibilities all members of intelligence services:

1. Shall openly declare their loyalty to the Republic of South Africa, the Constitution and the laws of the Country.
2. Will be loyal to their organisation and assiduously guard and protect the integrity of their profession, its methods and sources.
3. Shall adhere to the basic principles of their profession, as well as the policies, regulations and directives of their respective services.
4. Shall respect the norms, values and principles of a democratic society including the basic human rights of individuals.
5. Shall strive, in the execution of their duties, to attain the highest degree of objectivity, integrity and professionalism.
6. Shall strive to be responsible in the handling of information and intelligence, and shall at all cost prevent the wrongful disclosure of national security interests.
7. Shall commit themselves to the promotion of mutual trust between policymakers and professional intelligence workers, as well as cooperation with all the members of the Intelligence Community.
8. Shall commit themselves to carry out their duties without seeking personal gain or advantage by reason of the duties, facilities, funds and knowledge entrusted to them.
9. Will conduct themselves in their personal life in a manner which will not prejudice their organisation, their profession and fellow craftsmen, or the facilities entrusted to them.
10. Shall commit themselves to report any violations of this code through command channels to the relevant authorities.

Intelligence White Paper

Annexure B

BASIC PRINCIPLES AND GUIDELINES OF NATIONAL INTELLIGENCE

1. INTRODUCTION

It is accepted that the creation of a new political dispensation in South Africa shall have to be accompanied by the process of reviewing the security system, including the role, culture, methodology and structures of intelligence.

The principles discussed in this document shall serve as a basis for the formulation of a code of conduct, legislation and the creation of a national intelligence capability in a new dispensation.

2. DEFINITIONS

In this document:

2.1 "national intelligence" means integrated intelligence that covers the broad aspects of national policy and national security of special concern to strategic decision-making at national level;

2.2 "counter-intelligence" deals with offensive and defensive activities to neutralise the effectiveness of foreign/hostile intelligence operation; to protect sensitive information; and to counter subversion, sabotage and terrorism directed against personnel, strategic installations and material;

2.3 "departmental intelligence" means the intelligence which Government departments and agencies need or generate to execute their (own) legal and functional responsibilities (in the interest of the State):

2.4 "foreign intelligence" deals with information on external threats (or potential threats) as well as opportunities relevant to the protection and promotion of national interests and which can be used in the formulation of foreign policy;

2.5 "domestic intelligence" deals with information of internal activities, factors and developments detrimental to national stability, as well as threats (or potential threats) to the constitutional order and the safety and well-being of the citizens of a country.

3. GUIDELINES ON NATIONAL SECURITY

National security should be understood in comprehensive terms to include the military, political, economic, social, technological and environmental dimensions.

National security should, therefore, besides its traditional concern with defence, violence and subversion, encompass the basic principles and core values associated

with and essential to the quality of life, freedom, justice, prosperity and development. The following broad principles should underpin the activities of the intelligence community:

South Africa shall be committed to resolving internal and external conflict primarily through non-violent means.

National, social and individual security shall be sought primarily through efforts to meet the social, political, economic and cultural needs of the citizenry.

South Africa shall pursue peaceful and cooperative relations with neighbouring states in order to promote regional security, stability and development.

4. THE MISSION, PURPOSE AND FUNCTIONS OF NATIONAL INTELLIGENCE

The primary mission of national intelligence is to gather, collate, evaluate information and disseminate intelligence that pertains to the security of the state and its citizenry.

Intelligence services are required to act in the interests of the country as a whole. In this respect intelligence should enhance national security, protect and promote the interests of the state and the wellbeing of its citizens.

National intelligence functions shall include those of counter-intelligence, foreign intelligence (which includes special activities as defined by an Act of Parliament), and domestic intelligence.

Given the actual and potential moments of conflict in South Africa and the dynamic interaction with the international environment, it is suggested that the above-mentioned functions will be indispensable for government decision-making in a future South Africa.

5. BASIC PRINCIPLES AND POINTS OF DEPARTURE

The functions of intelligence in a new constitutional dispensation, in order to enhance national security in South Africa, shall be governed by the following:

5.1 The principle of national intelligence organisation

The intelligence needs and responsibilities of central government in a highly diversified and complex society require the existence of a national intelligence capability essential for effective government and decision-making. Such a service is necessary to collate, interpret and integrate national strategic intelligence as well as to recommend national intelligence priorities and to provide a balanced framework for national policy.

Irrespective of South Africa's constitutional model, a national intelligence capability needs to exist. National intelligence is a function and responsibility of central government that cannot be delegated to regional governments.

The national intelligence organisation shall uphold the principles of integrity, objectivity and credibility. Further, it shall strive at all times to be relevant to the maintenance, promotion and protection of national security. The national intelligence organisation shall be loyal to the State and the Constitution.

5.2 The principle of departmental intelligence capabilities

The necessity for departmental intelligence capabilities to support line-functional responsibilities and departmental decision-making is recognised.

Such structures will observe the legal obligations, style, character and culture of the departments they serve, but it is essential that they observe the same fundamental approach to their tasks that are applicable to the national intelligence organisation.

5.3 The principle of political neutrality

A national intelligence organisation is a national asset and shall therefore be politically non-partisan.

No intelligence or security service/organisation shall be allowed to carry out any operations or activities that are intended to undermine, promote or influence any South African political party or organisation at the expense of another by means of any acts (eg "active measures" or "covert action") or by means of disinformation.

5.4 The principle of legislative sanction, accountability and parliamentary control

The mission, function and activities shall be regulated by relevant legislation, the Bill of Rights, the Constitution and an appropriate Code of Conduct.

Intelligence work shall derive its authority from a legal framework and shall be subordinate to measures of accountability and parliamentary control.

Legislation must provide the intelligence service with the mandate to carry out their typical intelligence activities pertaining to the security, stability, well-being and interests of the State and its citizens.

5.5 The principle of the balance between transparency and secrecy

Effective intelligence, whilst requiring among others the essential component of secrecy, needs to be sensitive to the interests and values of a democratic society. In pursuance of this, a reasonable balance between secrecy and transparency needs to be found. The need for intelligence should be reconciled with fundamental civil

liberties, ethical norms and democratic values of society. A system of declassification should be considered to enhance the principle of public accountability and openness.

5.6 The principle of effective management and organisation and sound administration

The flow of intelligence to the Government of the day should always be maintained. Efficiency and continuity should be constant objectives whilst making provision for transformational needs.

The compilation of a national intelligence service shall endeavour to reflect the gender and racial composition of society whilst also taking into consideration the objective criteria of merit. To this end, an affirmative action programme shall be implemented to address imbalances. Necessary security requirements shall always be a prerequisite for membership of the intelligence organisation.

Provision should be made that all recruits/appointees in an intelligence service be optimally enabled by relevant training programmes to perform their duties at the required level.

The national intelligence organisation shall ensure effective management, organisation and administration of its activities. It shall strive to promote a strong organisational culture that reflects high standards, professionalism and moral integrity. Management shall strive constantly to improve the objectivity, timeliness and accuracy of information and the quality of its intelligence estimates.

The national intelligence organisation shall strive to develop the full potential of all its members and promote the qualities of loyalty, esprit de corps, expertise, creativity, courage of conviction, adaptability and foresight.

5.7 An ethical code of conduct for intelligence work

All members of intelligence services shall be required to accept a code of conduct that governs their performance. The code of conduct should have the support of all relevant parties, be based on universally accepted democratic principles and inclusive of accepted intelligence principles, norms and practices.

5.8 Coordination of intelligence and liaison with departmental intelligence structures

A national security system should include structures and opportunities to facilitate an input by those domestic departmental intelligence/information structures as authorised by law.

A well-functioning intelligence coordinating mechanism is essential to coordinate the flow of information, priorities, duplication of resources, the audi alteram partem

principle with regard to interpretation and other matters pertaining to the other functions of intelligence.

The scope and degree of coordination between a national intelligence organisation and departmental intelligence/information structures will be influenced by the constitutional arrangements of the new South African State.

PP3-MM-112

ANNEXURE "MM2A"

PP3-MM-113

state security
State Security Agency
REPUBLIC OF SOUTH AFRICA

Private Bag X87, PRETORIA, 0001 State Security Agency Headquarters, Musanda, Delmas Road, PRETORIA
Tel: (012) 427 4000, Fax: (012) 480 7582, www.ssa.gov.za

HE Mr JG Zuma

President of the Republic of South Africa

Union Buildings

Pretoria

November 2011

Dear Mr President

RESOLUTION OF GOVERNANCE ISSUES IN THE CIVILIAN INTELLIGENCE SERVICE PERTAINING TO THE MANDATE OF THE DIRECTOR-GENERAL OF THE STATE SECURITY AGENCY (SSA) BY THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

1.

Introduction:

The intention of this document is to seek for the intervention and resolution by the President to my concerns on a number of issues pertaining to how the Minister of State Security Agency, runs the department thus undermining the mandate of the Director-General, reference is made to a section of the Director-General's performance agreement wherein the Minister confirms that he will

"create an enabling environment to facilitate effective performance by the Director-General in the running of the agency". For easy reference please refer to Performance Agreement Period: 2 October 2009-31 March 2010; Performance Agreement Period: 1 April 2010-31March 2011; Performance Agreement Period: 1 April 2011-31 March 2012 as attached; all agreements signed between Minister State Security, Dr C.S. Cwele (MP) and Director-General: State Security Agency, Ambassador Mzuvukile Maqetuka.

2.

Background to the appointment as Director-General

Prior to my appointment on the 2 October 2009, I was serving as the Republic of South Africa's Ambassador Plenipotentiary in the Democratic People's Republic of Algeria, when I was recalled to Pretoria for a consultation with the President , the Minister of State Security and the Director-General of the Department of Department of International Relations and Cooperation (DIRCO) for discussions on the intention of the President to appoint me as Director-General of the newly created/to be created State Security Agency. I had a telephone conversation with the Minister of State Security and the Director-General of DIRCO, Dr A Ntsaluba whilst in Algiers on the need for me to travel to Pretoria for such a consultation.

I met both the President and the Minister who gave me a generic brief on their intention and that I would need to decide on the offer made of having identified me for the post and further informed by the President that the details would be dealt with by the Minister. Thereafter I met Dr Ntsaluba on the same matter. I was finally appointed on the 2 October 2010 by the President and this culminated in me having to go back to Algeria to wind up my duties and I reported back to the Minister of State Security to resume my new assignment and this was in November 2010.

3.

Interpretation, duties and roles

Based on discussions with the President, Minister and subsequently the other two directors appointed to work with me, the task was very clear – marshalling the restructuring of the services as encapsulated in the Proclamation 59 of 11 September 2009 as read with other proclamations in this regard, signed by the President of the Republic, changing the way the intelligence service was operating back to what it was intended for. The role and duties of a Director-General in this regard need not be emphasised (a part that I will deal with later).

After my appointment, I put in place senior management structures in the department i.e. an Executive Committee (EXCO) comprised of myself, the Director: Domestic Branch and Director: Foreign Branch and an EXTENDED Executive Committee comprised of the, National Communication Centre Head, Deputy Directors Foreign and Domestic Branch and the Deputy Director-General Corporate Services and the Principal of the Intelligence Academy (IA). We meet every Mondays. Furthermore we reached an agreement with the Minister that he will meet with his EXCO every Tuesdays and periodically he will arrange a meeting between himself, EXCO and the President. All these initiatives were put in place within the first three to four months of my appointment.

Mechanism to deal with the restructuring & the general management of the department

For purposes of reporting on developments in regard to the restructuring, a Steering Committee (STEERCOM) was set up comprising of the following people;

Chair and Sponsor: Minister of State Security

Director-General

Directors: Foreign and Domestic

Deputy-Director General; Corporate Services

Head of the NCC

The Minister was to convene this structure.

Comments:

The Steercom mechanism to date has been an utter failure in that only two meetings were convened by the Minister in the last two years, one on the 25 May 2010 wherein milestones were reached.

The SSA structures were presented and thoroughly discussed and in principle decisions with the concurrence of the Minister were reached. For instance, the NC structure was agreed upon with the exception of only one element and that was the location of the Office of Interception Centre (OIC) within the NC structure. The Minister felt that he was not sure of its location and that we had to re-look at this and advise. A submission was handed over to the Minister on 22 August 2011. To date this component's structure is still to be finalised.

Another unresolved structure is that of the Intelligence Academy (IA). In the same meeting the IA structure was also presented by the Acting Principal. Two critical interventions were made by the Minister for consideration, one on the designations as he felt that these should reflect more professionals than your classical public service management structure. The meeting resolved that a benchmark be conducted – Professor Africa and the Acting Principal consulted with the training colleges of defence and the police and a final structure submitted to the Minister on 29 June 2011. Again as in the above case this has still not been finalised.

In both these two instances I believe these delays could have long been resolved had the Minister stuck to previous arrangements, i.e. convening of the Steercom meetings and the Tuesday's EXCO with the Minister. Instead of convening meetings the Minister tended to resort to direct instructions bypassing me, a situation which has immensely intensified till today.

No meeting was ever held between members of EXCO and the President as agreed although we raised this several times with the Minister and at the beginning of 2011 were forced to make our own arrangements to meet the President to raise our concerns.

5.

Proclamation and Legislative processes and problems therein

As at the beginning of 2010, EXCO in consultation with Legal Services discussed the proclamation and the then draft State Security Bill with the aim of bringing to the attention of the Minister issues that could be corrected in both the proclamation and the bill. Flaws were identified in the Proclamation in that it was not consistent with follow-up announcements made by the Minister, for example although the Proclamation states that the Communication Security Component (COMSEC) shall be a government component – restructuring processes as directed by the Minister proceeded

in making rather the NC as a government component. In regard to the State Security Bill – the way forward for the National Coordinating Committee (NICOC) was also problematic to us in that we felt that the proclamation was silent on the restructuring of NICOC and of course fell outside the mandate of the Director-General. But in the legislation this structure was being amended. EXCO submitted to the Minister on the 28 April 2010 a document entitled: **"The State Security Agency: Legislative Framework"**, as attached, the intention of which was to advise the Minister on these abnormalities. Neither acknowledgement nor response was ever received in this regard.

6.

The role and position of the National Communications (NC) within the SSA

During the very first workshop convened by the Minister in Krugersdorp on the 5 December 2009 a brief debate on the role and the strategic importance of this structure within the intelligence services ensued, it became clear to me at the time and till to date that there is no common vision and understanding between myself and herein I can with confidence also include members of EXCO with the Minister in this regard.

I made the point in the workshop that this needs to be discussed at some stage. I later discovered that in the operation of the NC there was a policy/practice governed by what is called the Interim Operational Communication Mechanism (IOPCM), a document that was issued during the time of former Minister of Intelligence Ronnie Kasrils and this apparently sought to resolve his conflicts with Billy Masetlha. Although clearly stated that this was an interim mechanism, to date it has become a permanent feature of the operational work of the Minister who decides on operational departmental matters – a practice which is an enigma in the intelligence.

We convened an SSA workshop on the 12 February 2010 to discuss the document attended by the senior management of the NC who gave a background to the document. Communication between the then Minister and his DG was scrutinised. Workshop resolved that the present management of the SSA could not live with the document as it was a politically motivated document intended to intervene in the operational work of the DG. This was finally submitted to Minister Cwele and no response was ever received by me in this regard. (See attached the IOPCM document).

7.

Direct instructions to members – thus undermining the role of the Director-General

Appointments within the agency takes place without even consulting with the Director-General – this can be illustrated by a number of examples; e.g. transfer of Dennis Dlomo from the Foreign Branch to the Ministry, transfer of Bob Mhlanga from the Domestic Branch to the Ministry, transfer of Portia Molefe from the Ministry to the Domestic Branch. The recent transfer of Simon Ntombela from the Foreign Branch to the Ministry, the latter case was brought to the attention of the Minister because it was contravening the Minister's own regulations and flouted his own directives in regard to the advertising of posts when an incumbent is promoted but more so MPD 3.6.6.

Announcements in regard to the appointment of Deputy Directors during the Minister's budget speech, 2011 came as a surprise and shock to me and members of the Agency even to those who were appointed. I later came to realise that even the Chairperson of the Joint Standing Committee on Intelligence (JSCI) only heard of this when the Minister announced it in the Assembly.

In the last few weeks – more worrisome incidents have occurred – on coming back from my annual leave I got to know through the media that Director Domestic Gibson Njenje has left the Agency, although I came to know from the grapevine and to some extent from Njenje himself about the

meetings he had had with the Minister, at no stage has the Minister discussed this with me. I am aware again through the grapevine of discussions, influences and pressure that is put by the Minister on Ambassador Shaik to leave the Agency – this of course not coming from him but from the colleague. I am concerned about reports in the public domain made by the Minister in this regard, for if I have to believe what Ambassador Shaik is telling me and I have no reason not to, the Minister is then misleading both parliament and the public in this regard. For the past week of the writing of this report the newly appointed Acting Director: Domestic Branch has been absent from Head Office on missions accompanying the Minister in provinces – this again done without due communication by the Minister with me.

This practice does not bode well with the principles of good governance

8.

Submissions and delays therein

My office has time and time again since 2010 been dealing with submissions dating back twelve months which were submitted to the Minister with recommendations, although some have been responded to after months and months. I have been waiting for the following responses since March 2011 for example General Manager: Management Services, Foreign Branch, General Manager Intelligence Support, Foreign Branch; General Manager: Infrastructure and Logistics.

The worst case is that of the Head NC, a case in which in May 2011 I made a submission to the Minister. The member has failed his probation and a detailed report on the matter was discussed in conjunction with Corporate Services DDG, Prof Africa. To date I cannot account as to whether the case has been resolved, but am aware that during my leave Dr Irene Moetsana-Moeng was appointed Acting Head of the NC. Did the Minister accept my recommendations on the case or

not? I do not know, but what I know is that the Head: NC does not report at work. There are a host of other cases that I can cite if given the time.

9.

Performance Agreements and the appraisals therein

I am now entering my third year and final year of my contract as signed by the President. I signed three PA's with the Minister, but no appraisals have been conducted when this is supposed to be done annually (see attached documents).

10.

Conclusion:

Mr President some of the issues raised herein might not be new to you because I have raised them with you personally. I humbly request that within a reasonable time of fourteen days of receipt of this document you respond on how you wish to address them.

AMBASSADOR M MAQETUKA

DIRECTOR-GENERAL: STATE SECURITY AGENCY

CC: HE, Deputy President of the Republic of South Africa, Kgalema Motlanthe

Chair of the Joint Standing Committee on Intelligence (JSCI), MP Cecil Burgess

Minister of State Security, MP Dr SC Cwele

ANNEXURE "MM3"

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

Derick de Beer

From: Boipelo B. Ratshikana
Sent: 06 July 2020 13:21
To: Veruschka V. September; Derick de Beer
Subject: FW: DECLASSIFICATION OF A LETTER DATED NOVEMBER 2011 FROM AMBASSADOR MAQETUKA
Attachments: DECLASSIFICATION AMB MAQETUKA.pdf

From: Brigitte Shabalala <BrigitteS@commissionsc.org.za>
Sent: Sunday, 05 July 2020 14:22
To: DG@ssa.gov.za
Cc: MarumoO@ssa.gov.za; NeneS@ssa.gov.za; QinisileD@ssa.gov.za; Boipelo B. Ratshikana <BoipeloR@commissionsc.org.za>
Subject: DECLASSIFICATION OF A LETTER DATED NOVEMBER 2011 FROM AMBASSADOR MAQETUKA

Dear Minister Dlodlo

Please find the attached letter from the Commissioner of Inquiry into State Capture for your further attention.

Kind regards
K.B Shabalala

Acting Secretary

COMMISSION OF INQUIRY INTO STATE CAPTURE | Hillside House, 3rd Floor, 17 Empire Road, Parktown, Johannesburg, 2193|Gauteng| South Africa| email: secretary@commissionsc.org.za | www.sastatecapture.org.za; | Mobile +27(0)71320 8293

PP3-MM-120

2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193
Tel (International): +27 (10) 214-0651
Tel (Tollfree): 0800 222 097
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

3 July 2020

To: Minister Dlodlo

State Security Agency

The Office of Minister, SSA

Bogare Building

2 Atterbury Road

Menlyn

Email: dg@ssa.gov.za; MarumoO@ssa.gov.za; NeneS@ssa.gov.za; QinisileD@ssa.gov.za; MarumoO@ssa.gov.za; NeneS@ssa.gov.za;

Dear Minister Dlodlo.

RE: JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION & FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE // REQUEST FOR DECLASSIFICATION OF A LETTER DATED, NOVEMBER 2011 FROM AMBASSADOR MAQETUKA TO THE FORMER PRESIDENT, MR JACOB ZUMA

1. In his evidence, the Ambassador refers to a letter addressed by him to the former President, Mr Jacob Zuma, dated November 2011.

2. This letter contains certain annexures which are marked "confidential". In these circumstances, it is necessary to obtain declassification of this document before it can be referred to during Ambassador Maqetuka's evidence.

3. The Commission, accordingly, seeks your assistance in declassifying the aforementioned document.

Yours sincerely.

.....

Ms Brigitte. Shabalala
Acting Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State

Derick de Beer

Subject: MAQETUKA Bundle Item 4.2: Request for Declassification of Documents
Attachments: Request for Declassification_07072020 VS tracked.pdf

From: Boipelo B. Ratshikana
Sent: Tuesday, 07 July 2020 18:56
To: dg@ssa.gov.za; marumoo@ssa.gov.za; nenes@ssa.gov.za; qinisiled@ssa.gov.za; abelford@ssa.gov.za; elsac@ssa.gov.za; ti.rama@gmail.com; ramabelanat@ssa.gov.za
Subject: Request for Declassification of Documents

Dear Sir/Madam

Please find the attached letter for your attention and kindly acknowledge receipt.

Kind Regards,

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

2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193
Tel (International): +27 (10) 214-0651
Tel (Tollfree): 0800 222 097
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

7 July 2020

Tracking Number: RPS18/0219/PL

To: Minister Dlodlo
State Security Agency
The Office of Minister, SSA
Bogare Building
2 Atterbury Road
Menlyn

Email: dg@ssa.gov.za; marumoo@ssa.gov.za; nenes@ssa.gov.za; qinisiled@ssa.gov.za; abelford@ssa.gov.za; elsac@ssa.gov.za; ti.rama@gmail.co; ramabelanat@ssa.gov.za

Dear Minister Dlodlo

RE: JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION & FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE // REQUEST FOR DECLASSIFICATION OF THE DOCUMENT SUBMITTED TO THE MINISTER ON 28 APRIL 2010 ENTITLED, "THE STATE SECURITY AGENCY LEGISLATIVE FRAMEWORK", WHICH IS MARKED "CONFIDENTIAL"

1. The Legal Team of the Commission intends to present the evidence of Ambassador Mzuvukile Maqetuka on Thursday, 9 July 2020 at 10h00 or so soon thereafter as the Chairperson of the Commission may determine.

2. The evidence of Ambassador Maqetuka refers to a document which is titled **"*The State Security Agency Legislative Framework*"** addressed to the then Minister of

the State Security Agency dated 28 April 2010 ("*the document*"). The document is marked "*Confidential*".

3. The Commission hereby requests declassification of the document.

4. In view of the imminent hearing, urgent attention to this request will be appreciated.

Yours faithfully

.....
Ms Brigitte Shabalala
ACTING SECRETARY
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State

CHAPTER 11

SECURITY SERVICES

Governing principles

198. The following principles govern national security in the Republic:

(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.

(b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.

(c) National security must be pursued in compliance with the law, including international law.

(d) National security is subject to the authority of Parliament and the national executive.

Establishment, structuring and conduct of security services

199. (1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

(2) The defence force is the only lawful military force in the Republic.

(3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.

(4) The security services must be structured and regulated by national legislation.

(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.

(6) No member of any security service may obey a manifestly illegal order.

(7) Neither the security services, nor any of their members, may, in the performance of their functions—

(a) prejudice a political party interest that is legitimate in terms of the Constitution; or

(b) further, in a partisan manner, any interest of a political party.

(8) To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.

Defence

Defence force

200. (1) The defence force must be structured and managed as a disciplined military force.

(2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

Political responsibility

201. (1) A member of the Cabinet must be responsible for defence.

(2) Only the President, as head of the national executive, may authorise the employment of the defence force—

(a) in co-operation with the police service;

(b) in defence of the Republic; or

(c) in fulfilment of an international obligation.

(3) When the defence force is employed for any purpose mentioned in subsection (2), the President must inform Parliament, promptly and in appropriate detail, of—

(a) the reasons for the employment of the defence force;

(b) any place where the force is being employed;

(c) the number of people involved; and

(d) the period for which the force is expected to be employed.

(4) If Parliament does not sit during the first seven days after the defence force is employed as envisaged in subsection (2), the President must provide the information required in subsection (3) to the appropriate oversight committee.

Command of defence force

202. (1) The President as head of the national executive is Commander-in-Chief of the defence force, and must appoint the Military Command of the defence force.

(2) Command of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence, under the authority of the President.

State of national defence

203. (1) The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate detail of—
(a) the reasons for the declaration;
(b) any place where the defence force is being employed; and
(c) the number of people involved.
(2) If Parliament is not sitting when a state of national defence is declared, the President must summon Parliament to an extraordinary sitting within seven days of the declaration.
(3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration.

Defence civilian secretariat

204. A civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member responsible for defence.

Police

Police service

205. (1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.
(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.
(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

Political responsibility

206. (1) A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.

(2) The national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces.

(3) Each province is entitled—

(a) to monitor police conduct;

(b) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;

(c) to promote good relations between the police and the community;

(d) to assess the effectiveness of visible policing; and

(e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.

(4) A provincial executive is responsible for policing functions—

(a) vested in it by this Chapter;

(b) assigned to it in terms of national legislation; and

(c) allocated to it in the national policing policy.

(5) In order to perform the functions set out in subsection (3), a province—

(a) may investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community; and

(b) must make recommendations to the Cabinet member responsible for policing.

(6) On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.

(7) National legislation must provide a framework for the establishment, powers, functions and control of municipal police services.

(8) A committee composed of the Cabinet member and the members of the Executive Councils responsible for policing must be established to ensure effective co-ordination of the police service and effective co-operation among the spheres of government.

(9) A provincial legislature may require the provincial commissioner of the province to appear before it or any of its committees to answer questions.

Control of police service

207. (1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.

(3) The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.

(4) The provincial commissioners are responsible for policing in their respective provinces—

(a) as prescribed by national legislation; and

(b) subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).

(5) The provincial commissioner must report to the provincial legislature annually on policing in the province, and must send a copy of the report to the National Commissioner.

(6) If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of, or disciplinary action against, that commissioner, in accordance with national legislation.

Police civilian secretariat

208. A civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing.

Intelligence

Establishment and control of intelligence services

209. (1) Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation.

(2) The President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility.

Powers, functions and monitoring

210. National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for—

(a) the co-ordination of all intelligence services; and

(b) civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.

INPUT INTO THE DRAFT GENERAL INTELLIGENCE LAWS AMENDMENT BILL, 2011

1. Introduction

While we have been asked to make an input into the Draft General Intelligence Laws Amendment Bill, we need to register the fact that we have not been privy to the discussions hereof and our input may for the lack of such insight be wanting.

The above notwithstanding, our input will be informed, among other things, by the Constitution, the existing White Paper on Intelligence, case law and commitments made by the Minister of State Security to Parliament.

Our input will refer only to those sections of the draft Bill that we believe we need to comment on and finally make a general input to the Bill as a whole.

2. The Bill

PART 1: AMENDMENTS TO THE INTELLIGENCE SERVICES ACT 65 OF 2002

2.1 AD Section 3(a)

We are concerned with the proposal that the Minister and not the President shall appoint the Director-General. In terms of section 209(2) of the Constitution, the President is not obliged to appoint a Minister and may personally "assume political responsibility for the control and direction" of the Intelligence Services.

Secondly, this provision is in conflict with the norm in the entire Public Service where the Directors-General are appointed by the President. Section 12(1)(a) of the Public Service Act provides that "a head of a national department or national government component" shall be appointed by the President. We do not understand why this has to change in respect of the Director-General for the Agency. Are we hereby not reducing the status of the incumbent?

It may be argued that the Public Service Act does not apply to the Agency. However, it must be noted that the Constitutional Court in the matter of **Masetlha v The President of the**

Republic of South Africa and Another 2008 (1) SA 566 (CC) the Court held that "the provisions of the PSA apply to the conditions of service of a head and members of the Agency when they are not at odds with the provisions of ISA".

2.2 AD Section 4(b) and (c)

Since the Minister or President, where he/she exercises political control of the Agency, is responsible for the political control of the Agency and the Director-General is responsible for the administration of the Agency, it is our submission that the establishment or creation of Chief Directorates, Directorates, divisions and components and the prescription of their functions and post structures is an administrative function which should be able to be adapted quite easily with minimal red-tape and is therefore best left to the Director-General.

2.3 AD Section 10(2)(a) and 10(3)

Our experience has been that while the Act and the Bill requires the "consideration" by the Intelligence Service Council or the Conditions of Services Council of the functional directives applicable to conditions of service and human resources, it is not clear what this "consideration" is and what value it has to add to these directives. We believe that that the Council's responsibilities in this regard must be spelt out more clearly, otherwise we may need to consider its continued relevance.

It is our view that the approval of the functional directives is an administrative function properly resident with the Director-General who is after all the accounting officer. There is no need for these to be approved by the Minister.

2.4 AD Section 10(6)

We welcome this amendment and recommend that it not only be limited to persons "employed in or associated with a government or statutory body". We know that in investigations, the Agency usually needs to access bank accounts and other databases. As an Intelligence organisation, it is imperative to be able to access them lawfully.

Further, there is no definition of what the words "associated" with a government is.

2.5 AD Section 20

2.5.1 S4(1)(b)- In respect of the establishment of Chief Directorates, Directorates and their functions, we repeat that this ought to be the function of the Director-General.

2.5.2 S10(2) and (3)- We repeat what is stated in paragraph 2.3 hereabove.

PART 2: AMENDMETS TO THE NATIONAL STRATEGIC INTELLIGENCE ACT 39 OF 1994

1. AD Section 5(1)

To the extent that the Co-ordinator for Intelligence is an equivalent to the Director-General, in respect of his/her appointment we repeat what we said about the appointment of the Director-General.

GENERAL INPUT

The current organisation of the Agency and its component structures are largely aligned to the existing White Paper on Intelligence. In a press address on the 2nd October 2009, the Honourable Dr. Siyabonga Cwele, the Minister for State Security indicated among other things that "we are also reviewing the White Paper on Intelligence which will inform our national security doctrine and strategy. The process of review will involve government departments, civil society and the general public. We have noted the allegations of the politicisation of members of the intelligence community."

Similarly, in his budget vote on the 1st July 2009, the Minister promised that "we will prioritise the finalisation of the National Security Strategy to guide our common approach in upholding national security. This will also spell out a management system that will ensure that all the capabilities of our government and nation are effectively harnessed and coordinated to better deal with the threats confronting us".

It is our submission that this Draft Bill is an integral part of "our national security doctrine and strategy" and ought to have been preceded by the review of the White Paper on Intelligence and informed by the National Security Strategy.

It is therefore our belief that this Bill ought to be a transitional legislation pending the final and more comprehensive legislation that will be informed by a new White Paper and National Security Strategy.

We also note that the Bill, while making reference to branches, Executive Directors and Deputy Executive Directors, does not define what these branches are, nor does it define their functions or those of the Executive Directors and Deputy Executive Directors. This may cause unnecessary tensions and anxieties.

CONCLUSION

In conclusion, we believe that this Bill is a necessary and best way to regularise the current transition and must not be seen to be an end in itself. We are confident that the drafters will give our input the attention it deserves.

DECLASSIFIED

state security

State Security Agency
REPUBLIC OF SOUTH AFRICA

OFFICE
HEAD MINISTERIAL SERVICES
Date Received : 28/04/10
Doc Nr : 449/10
File Ref : ....

Private Bag X87, PRETORIA, 0001 · State Security Agency Headquarters, Musanda, Delmas Road, PRETORIA
Tel: (012) 427 4000, Fax: (012) 480 7582, www.ssa.gov.za

DG-SSA/OG/MIN/04/01

Office of the Director-General
State Security Agency

April 2010

Dr S Cwele (MP)
Minister of State Security
Bogare

Dear Honourable Minister

THE STATE SECURITY AGENCY: LEGISLATIVE FRAMEWORK

1. I would respectfully like to make the Minister aware of certain anomalies that arise from the present legislative framework governing the State Security Agency and its components at the present time. In this regard specific attention will be paid to the transformation of COMSEC into a government component and the envisaged National Communications Branch (NC).

2. It is the understanding that the NC will comprise of COMSEC, the National Communications Centre (NCC) and the Office of Interception Centres (OIC). The fact that COMSEC is currently a government component and the NC is not accommodated within that legal framework creates various practical problems, especially in regard to reporting lines.

3. The current situation also has a very negative effect on the development of the Ministerial Payment Directive (MPD). In terms of the delegation of powers COMSEC and not the NC has to be dealt with as a component on the same level as the NIA and SASS.

4. It is foreseen that if this situation continues until the enactment of the National State Security Act, it can have a very detrimental effect on the administration of the SSA as well as the development of structures and a regulatory framework.

CONFIDENTIAL

DECLASSIFIED

5. I, therefore deem it necessary to advise the Honourable Minister, with respect, to amend the current legislative framework in the following manner:

5.1 To request the President to amend Part A of Schedule 3 to the Public Service Act, 1994 [PSA] by way of notice in the *Gazette* to the effect that National Communications is established as a government component in accordance with Section 7(5)(c) of the said PSA. Section 7(5)(c) of the Public Service Act, 1994 provides that any national government component can be established or abolished at the request of the relevant Minister and on the advice of the Minister for Public Service and Administration and the Minister of Finance.

5.2 The Honourable Minister in terms of the above-mentioned Proclamation repeals the current Notice 515 dated 17 September 2009 and issues a new notice concerning National Communications. The functions of National Communications are then included in the Schedule to the new Notice.

5.3 The Honourable Minister de-registers COMSEC in order to dissolve it as a government entity. It is foreseen that as long as COMSEC is going to remain a government entity, even as a shelved company, it will remain a liability for the SSA in terms of accountability processes. Furthermore, it is highly doubtful whether COMSEC can ever successfully be utilised for intelligence purposes due to the exposure it already has. In order to establish National Communications as a government component it is deemed a necessity to deregister COMSEC.

6. The following factors will have to be taken into account:

6.1 In terms of the PSA a Minister may only request the establishment of a government component if the prescribed feasibility study is conducted and its findings recommend the establishment of such component. It should therefore be established from DPSA whether the previous feasibility study will remain valid.

6.2 The PSA also prescribes that for each government component the relevant Minister, shall list functions and duties by notice in the *Gazette* after consultation with the Ministers of the Public Service and Administration and Finance. Clarity on this matter should also be obtained from the DPSA.

7. It therefore, seems necessary, with respect, for the Ministry to urgently liaise with the DPSA on this issue, as the Proclamation has to be issued by the President and the notice by the Minister.

8. In regard to the incorporation of the OIC into the NC the following aspects will have to be considered and be taken into account:

8.1 The OIC was established in terms of Chapter 6 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 (RICA). It is necessary to note that the RICA resorts under the auspices of the Minister of Justice and Constitutional Development, except Chapter 6 that resorts under the Minister of State Security.

8.2 The OIC is also rendering a service to more than one department and therefore the amendment of its legal status can have certain implications.

8.3 It is therefore clear that any amendment to the legal status of the OIC will only be possible if the Minister of State Security can obtain the support of the following Ministers:

- Justice and Constitutional Development;
- Communications;
- Police; and
- Defence and Military Veterans.

8.4 In view of the fact that the OIC must be incorporated into the NC, the RICA will have to be amended to the effect that the OIC resorts under the DG of the SSA.

8.5 In regard to amendments to the RICA it will also have to be considered whether the amendments must be contained in a RICA Amendment Act or whether the amendments must be contained in the Schedule to the NSS Bill.

9. Attached hereto for your kind consideration is the following documentation:

9.1 A draft Proclamation to amend Part A of Schedule 3 to the Public Service Act, 1994;

9.2 A draft Notice to repeal Notice 915 of 17 September 2009 and establish National Communications as a government component;

9.3 A draft Schedule to the above-mentioned draft Notice; and

8.4 A draft Regulation of Interception of Communications and Provision of Communication-Related Information Amendment Bill.

10. Thanking you for your attention and kind consideration.

Ambassador MJ Ntsaluba
Director-General: SSA

AFRICAN NATIONAL CONGRESS

SECRETARY GENERAL'S OFFICE

Chief Albert Luthuli House 54 Sauer Street Johannesburg 2001 PO Box 61884 Marshalltown 2107 RSA
Tel: 27.11.376.1000 Website: www.anc.org.za

Ms K.B. Shabalala
Acting Secretary
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

8 July 2020

By email: secretary@commissionsc.org.za

Madam

RULE 3.3 NOTICES SERVED ON FORMER DEPUTY PRESIDENT KGALEMA MOTLANTHE, MS JESSIE DUARTE, DR ZWELI MKHIZE JACKSON MTHEMBU AND BALEKA MBETE

Enclosed please find affidavits of:-

1. Jessie Duarte
2. Baleka Mbete
3.Jackson Mthembu

The affidavit of Minister Mthembu will be recommissioned and sent to you later today. The originals will be filed in due course.

The affidavits of former Deputy President Kgalema Motlanthe and Minister Mkhize will be sent to you as soon as I receive them.

Regards

KRISH NAIDOO
ANC LEGAL ADVISER

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

PP3-MM-147

AFFIDAVIT

I, the undersigned,

BALEKA MMAKOTA MBETE

do hereby make oath and say that:-

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

2. I am in retirement.

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

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

5. Together with the President, Deputy President, Secretary General, Deputy Secretary General and Treasurer 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 6 July 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 file an affidavit in response to the Rule 3.3 Notice.

9. The annexure to the Notice makes reference to a meeting which was held on 31 March 2016 at the ANC Headquarters, Luthuli House, Johannesburg between the Officials and former commanders and commissars of the ANC's military wing, Mkhonto we Sizwe.

10. I was not present at the said meeting and have no knowledge of what was discussed.

DEPONENT

THUS DONE AND SWORN TO before me at JOHANNESBURG on this 07 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.

7083325-9
WO
EJ Thutlwa

COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
PRESIDENTIAL PROTECTION SERVICE
2020 -07- 07
PRESIDENTIAL PROTECTION SERVICE
SOUTH AFRICAN POLICE SERVICE

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 7

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,

KGALEMA PETRUS MOTLANTHE

do hereby make oath and say that:-

1. The facts contained in this Affidavit herein are within my personal knowledge and belief and are both true and correct.

2. I served as President of the Republic of South Africa between 25 September 2008 and 9 May 2009.

3. In 2009 I was appointed as the Deputy President of the Republic and served in that capacity for 5 (five) years until 2014.

4. My legal representative, Mr Krish Naidoo received a Notice in terms of Rule 3.3 dated 29 June 2020 informing me that the Commission's Legal Team intends to present the evidence of Mr Mzuvukile Maqetuka, which implicates or may implicate me in relation to my duties as the former Deputy President.

5. I am willing to appear before the Commission, if so directed by the Chairperson, to testify on any matter related to the evidence of Mr Maqetuka which is being investigated by the Commission if such evidence is deemed relevant to the work of the Commission and is within my personal knowledge.

6. With specific reference to paragraph 2.1 of the Notice in terms of Rule 3.3:-

   6.1. To the best of my recollection Mr Maqetuka did not bring any matters effecting the operations of the State Security Agency ("SSA") to my attention;

   6.2. I confirm that I was appointed Leader of Government Business in the National Assembly. However, the State Security Agency did not

fall under my responsibility, and I am consequently unable to "shed light" as suggested by Mr Maqetuka in paragraph 17.4 of his statement to the Commission, dated 13 December 2018.

7. The contents of the said paragraph 17.4 above are incorrect insofar as they suggest that the SSA was one of the government departments for which I was responsible.

8. The Leader of Government Business in the National Assembly is appointed by the President in terms of Section 91 (4) of the Constitution of the Republic of South Africa, 1996.

9. In general terms, the Leader of Government Business takes care of the affairs of the executive in Parliament. In simple terms, the Leader of Government Business is the link between the executive and the legislature. At no stage was I given any responsibility for the SSA.

10. With specific reference to paragraph 10 of Annexure "C", I do not recall if I was copied with the document referred to. I certainly have no recollection of having received it. But in any event, the SSA was not my responsibility.

11. It is clear from the above, that in my capacity as Leader of Government Business I had no connection whatsoever to the SSA.

DEPONENT

THUS DONE AND SWORN TO before me at Houghton Estate on this 6th 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

MAURIZIO GIUSEPPE MARIANO
Commissioner of Oaths
Ex Officio
Practising Attorney R.S.A.
112 Oxford Road, Houghton Estate
Johannesburg

PP3-MM-154

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

Government Gazette
Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 531 Pretoria, 11 September 2009 No. 32566

CONTENTS

INHOUD

PROCLAMATION

by the

President of the Republic of South Africa

No. 58, 2009

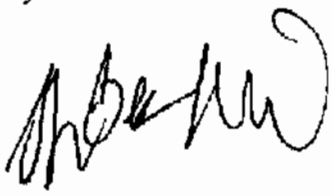
AMENDMENT OF PART A OF SCHEDULE 3 TO THE PUBLIC SERVICE ACT, 1994

In terms of section 7(5)(c) of the Public Service Act, 1994 (promulgated under Proclamation No. 103 of 1994), I hereby amend, at the request of the Minister of Home Affairs and on the advice of the Minister for the Public Service and Administration and the Minister of Finance, Part A of Schedule 3 to the said Act by insertion in columns 1, 2 and 3 of Part A of Schedule 3, after the words "Centre of Public Service Innovation", "Executive Director" and "Department of Public Service and Administration", of the words "Government Printing Works", "Chief Executive Officer" and "Department of Home Affairs", respectively.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria, this 12th day of August, Two Thousand and Nine.

President

By Order of the President-in-Cabinet:



Minister of the Cabinet

PROKLAMASIE

van die

President van die Republiek van Suid-Afrika

No. 58, 2009

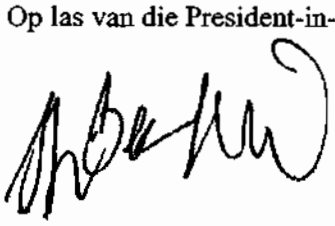
WYSIGING VAN DEEL A VAN BYLAE 3 BY DIE STAATSDIENSWET, 1994

Ingevolge artikel 7(5)(c) van die Staatsdienswet, 1994 (gepromulgeer deur Proklamasie No. 103 van 1994), wysig ek hierby, op versoek van die Minister van Binnelandse Sake en op advies van die Minister vir die Staatsdiens en Administrasie en die Minister van Finansies, Deel A van Bylae 3 by vermelde Wet deur in kolomme 1, 2 en 3 , van Deel A van Bylae 3 na die woorde "Sentrum van Staatsdiensinnovering", "Uitvoerende Direkteur" en "Departement van Staatsdiens en Administrasie" onderskeidelik die woorde "Staatsdrukkery", "Hoof Uitvoerende Beampte" en "Departement van Binnelandse Sake" in te voeg.

Gegee onder my Hand en die Seël van die Republiek van Suid-Afrika te Pretoria, op hede die 12de dag van Augustus, Tweeduisend en Nege.

President

Op las van die President-in-Kabinet:



Minster van die Kabinet

PROCLAMATION

by the

President of the Republic of South Africa

No. 59, 2009

AMENDMENT OF SCHEDULES 1 AND 3 TO THE PUBLIC SERVICE ACT, 1994

In terms of-

(a) section 7(5)(a) of the Public Service Act, 1994 (promulgated under Proclamation No. 103 of 1994), I hereby, on the advice of the Minister for Public Service and Administration, amend Schedule 1 to the said Act, by-

(i) the deletion in Columns 1 and 2, of the words "National Intelligence Agency" and "Director-General: National Intelligence Agency" and "South African Secret Service" and "Director-General: South African Secret Service", respectively; and

(ii) the insertion in Columns 1 and 2 after the words "Sport and Recreation South Africa" and "Director-General: Sport and Recreation South Africa" of the words "State Security Agency" and "Director-General: State Security Agency", respectively; and

(b) section 7(5)(c) of the Public Service Act, 1994, I hereby, at the request of the Minister of State Security and on the advice of the Minister for Public Service and Administration and the Minister of Finance, substitute Part A of Schedule 3 for the following:

Column 1 Name of national government component	Column 2 Designation of head of national government component	Column 3 Principal national department
Centre of Public Service Innovation	Executive Director: Centre of Public Service Innovation	Department of Public Service and Administration
COMSEC	Head: COMSEC	State Security Agency
Government Printing Works	Chief Executive Officer: Government Printing Works	Department of Home Affairs
Intelligence Academy	Head: Intelligence Academy	State Security Agency
National Intelligence Agency	Head: National Intelligence Agency	State Security Agency
South African Secret Service	Head: South African Secret Service	State Security Agency

Given under my Hand and the Seal of the Republic of South Africa at Pretoria, this 4th day of September, Two Thousand and Nine.

President

By Order of the President-in-Cabinet:

Minister of the Cabinet[2]

[2] To be countersigned by the Minister for the Public Service and Administration as the Minister responsible for administering the Public Service Act.

PROKLAMASIE

van die

President van die Republiek van Suid-Afrika

No. 59, 2009

WYSIGING VAN BYLAES 1 EN 3 BY DIE STAATSDIENSWET, 1994

Ingevolge-

(a) artikel 7(5)(a) van die Staatsdienswet, 1994 (gepromulgeer deur Proklamasie No. 103 van 1994), wysig ek hierby, op advies van die Minister vir die Staatsdiens en Administrasie, Bylae 1 by vermelde Wet deur in Kolomme 1 en 2-

(i) die woorde "Nasionale Intelligensie-agentskap" en "Direkteur-generaal: Nasionale Intelligensie-agentskap" en "Suid-Afrikaanse Geheimediens" en "Direkteur-generaal: Suid-Afrikaanse Geheimediens" te skrap; en

(ii) die woorde "Staatsveiligheidsagentskap" en "Direkteur-generaal: Staatsveiligheidsagentskap" na die woorde "Statistieke Suid-Afrika" en "Statistikus-generaal: Statistieke Suid-Afrika", in te voeg; en

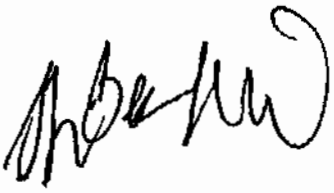
(b) artikel 7(5)(c) van die Staatsdienswet, 1994, vervang ek hierby, op versoek van die Minister van Staatsveiligheid en op advies van die Minister vir die Staatsdiens en Administrasie en die Minister van Finansies, Deel A van Bylae 3 met die volgende:

Kolom 1 **Naam van nasionale regeringskomponent**	**Kolom 2** **Benaming van hoof van nasionale regeringskomponent**	**Kolom 3** **Hoof- nasionale departement**
Comsec	Hoof: Comsec	Staatsveiligheidsagentskap
Intelligensie-akademie	Hoof : Intelligensie-akademie	Staatsveiligheidsagentskap
Nasionale Intelligensie-agentskap	Hoof: Nasionale Intelligensie-agentskap	Staatsveiligheidsagentskap
Sentrum van Staatsdiensinnovering	Uitvoerende Direkteur: Sentrum van Staatsdiensinnovering	Departement van Staatsdiens en Administrasie
Staatsdrukkery	Hoof Uitvoerende Beampte: Staatsdrukkery	Departement van Binnelandse Sake
Suid-Afrikaanse Geheimediens	Hoof: Suid-Afrikaanse Geheimediens	Staatsveiligheidsagentskap

Gegee onder my Hand en die Seël van die Republiek van Suid-Afrika te Pretoria, op hede die 4de dag van September, Tweeduisend en Nege.

President

Op las van die President-in-Kabinet:



Minster van die Kabinet[3]

[3] To be countersigned by the Minister for the Public Service and Administration as the Minister responsible for administering the Public Service Act.

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

29 JUNE 2021

DAY 419

Gauteng Transcribers

Recording & Transcriptions

22 Woodlands Drive
Irene Woods, Centurion
TEL: 012 941 0587 FAX: 086 742 7088
MOBILE: 066 513 1757
info@gautengtranscribers.co.za

CERTIFICATE OF VERACITY

I, the undersigned, hereby certify that, ***in as far as it is audible***, the aforegoing is a ***VERBATIM*** transcription from the soundtrack of proceedings, as was ordered to be transcribed by Gauteng Transcribers and which had been recorded by the client

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

DATE OF HEARING:	29 JUNE 2021
TRANSCRIBERS:	B KLINE; Y KLIEM; V FAASEN; D STANIFORTH

Gauteng Transcribers
Recording & Transcriptions

PROCEEDINGS RESUME ON 29 JUNE 2021

REGISTRAR: Good morning

AMBASSADOR CWELE: Yebo. Yes Hi.

REGISTRAR: Do you take the – I am well, how are you Ambassador? Do you take the oath or the affirmation Sir?

AMBASSADOR CWELE: I take the oath.

REGISTRAR: Thank you Ambassador. I am informed the DCJ that you are ready to begin – waiting for him to log on now – DCJ is logging in now.

CHAIRPERSON: Good morning Mr Pretorius, good morning everybody.

ADV PRETORIUS SC: Morning Chair.

ADV SEMENYA SC: Chair good morning.

AMBASSADOR CWELE: Good morning Chair.

CHAIRPERSON: Good morning, good morning. I am terribly sorry about this delay. There have been challenges from my side. I understand there were some challenges of a technical nature but my Registrar who normally helps me is not well and did not come to assist me today but I only saw her message about ten minutes to ten. So when I have nobody I cannot make a move – I cannot do anything technologically. So – so I have needed to try and see how I am going to manage so that is why there has been this delay. But we – we can start now. Good morning Ambassador Cwele.

AMBASSADOR CWELE: Good morning or good afternoon Deputy Chief Justice. I am not sure which one to [?].

CHAIRPERSON: Well you see because it is English you have got to think about whether it is morning or afternoon and if you are in another country where it is afternoon and I am in a country where it is morning it gets confusing. But if you used Zulu then you would not bother about whether it is morning or afternoon.

AMBASSADOR CWELE: Sawubona – Sawubona.

CHAIRPERSON: Sawubona Ambassador.

AMBASSADOR CWELE: Sawubona Chief Justice.

CHAIRPERSON: Okay all right. Thank you for availing yourself – thank you. All right Mr Pretorius – okay no Mr Pretorius you want to start?

ADV PRETORIUS SC: Thank you Chair. Your connection is not consistent so we having difficulty hearing you. You freezing occasionally.

CHAIRPERSON: Is that so?

ADV PRETORIUS SC: Yes. But let us – let us continue and I will let you know if it is such that we need to take a break for some technical assistance.

CHAIRPERSON: Yes. There is some – there is somebody – there is a technical person from the court who I think he might have left now but he is going to come back so that he is available to assist me from this end if there are technical

glitches. So let us continue but obviously any glitches that can be fixed from somewhere else it can be fixed from somewhere else and that would be helpful.

ADV PRETORIUS SC: Yes.

CHAIRPERSON: If the glitches are not from this end.

ADV PRETORIUS SC: Chair the witness set down for today as we now know is Ambassador Cwele. He is testifying remotely from China so there is a time difference but we – on your direction will try and finish by one o'clock our time which is well within the Ambassador's capacity in China. May the Ambassador be sworn and then I can just outline what documents and files should be before you Chair.

CHAIRPERSON: Okay no that is fine. My acting Registrar will administer the oath or affirmation. Registrar please do that.

REGISTRAR: Ambassador

AMBASSADOR CWELE: Yes.

REGISTRAR: Could you please state your full names for the record.

ADV PRETORIUS SC: Doctor Siyabonga Cyprian Cwele.

REGISTRAR: Do you have any objections to taking the prescribed oath?

AMBASSADOR CWELE: No, no objection.

REGISTRAR: Do you consider the oath binding on your conscience?

AMBASSADOR CWELE: I do.

REGISTRAR: Do you solemnly swear that all the evidence you will give will be the truth; the whole truth and nothing but the truth; if so please raise your right hand and say, so help me God.

AMBASSADOR CWELE: So help me God.

REGISTRAR: Thank you excellent.

CHAIRPERSON: Thank you very much – thank you very much. Okay Mr Pretorius.

ADV PRETORIUS SC: Thank you. Chair you should have before you a number of bundles. The principle bundle prepared for the Ambassador's evidence is SSA Bundle 05. It is Exhibit YY19. It comprises just on 800 pages.

CHAIRPERSON: I have got it.

ADV PRETORIUS SC: And then in addition you should have before you Exhibit PP1, PP2 and PP3.

CHAIRPERSON: I have got them.

ADV PRETORIUS SC: And then SSA Bundle 2A and 2B.

CHAIRPERSON: I have got them.

ADV PRETORIUS SC: We probably will not need those to the time available but they should be available for you.

CHAIRPERSON: Okay no that fine. I have got them. Let us try and see if we can finish by one o'clock but if we have not done justice to the issues we – we could use a little bit of time after lunch and hopefully maybe we will not

need more than thirty minutes but let us play it ear and see how it goes and let us just do the best we can. But of course we want to – the bottom line is that the issues should be dealt with properly.

ADV PRETORIUS SC: Understood Chair. Ambassador

ADV SEMENYA SC: Chairperson might I just place myself on record. I am appearing on behalf of Doctor Cwele.

CHAIRPERSON: Oh I – I thought I saw somebody but I did not have enough time to see who it was. That is why I asked whether Ambassador Cwele was legally represented you - I am sure you did not hear. Okay that is – that is Advocate Ismail Simenya SC. You representing Ambassador Cwele.

ADV SEMENYA SC: Indeed Chairperson.

CHAIRPERSON: Okay no thank you very much – thank you. Okay, all right. Let us continue then. Mr Pretorius.

ADV PRETORIUS SC: Ambassador I understand that you were Minister of State Security during the period September 2008 to May 2014, is that correct?

AMBASSADOR CWELE: That is correct Sir.

ADV PRETORIUS SC: And prior to that you were Chair of the Joint Standing Committee on Intelligence. Do I understand the position correctly?

AMBASSADOR CWELE: That is correct I was the Chairperson.

ADV PRETORIUS SC: Yes. Ambassador we would like to deal today with certain categories of evidence that have already been led. The first of which is the fate of the contemplated investigation or the actual investigation into the Gupta brothers that originated within the State Security Agency at the time.

As you will know from the evidence of Messrs Shaik and the others who testified they became aware of a report in a Sunday National newspaper to the effect that one Fikile Mbalula had reported to the ANC NEC of certain matters that had occurred involving him and the Gupta's in relation to his appointment as the Minister of Sport before it occurred. You are aware of that series of incidents are you?

AMBASSADOR CWELE: If I am correct they said in 2012 – 2011.

ADV PRETORIUS SC: Yes 2011 is the date given.

AMBASSADOR CWELE: I have heard of that from their evidence.

ADV PRETORIUS SC: Right. Now they Messrs Shaik, Njenje and Maqethuka discussed that incident and determined that it is a matter that should have or should be investigated and you are aware of their evidence in that regard. I am not going to detail that evidence simply to put on record by way of preparatory information for questions

to follow that this decision was taken by the three senior officials within the SSA, correct?

AMBASSADOR CWELE: I have read that in their evidence Chair.

ADV PRETORIUS SC: Right. There was another reason for them having decided to conduct an investigation and that was the report received by them from a foreign agency that the Gupta's intended to purchase a Uranium Mine and there was a concern about that.

AMBASSADOR CWELE: Are you asking question? I have – I have seen that in their evidence. I was not aware of it.

ADV PRETORIUS SC: Right. Now to get to your own involvement in these issues is it correct that you summoned the top 3 persons we have just mentioned to your offices?

AMBASSADOR CWELE: No that is not correct Chair. The correct version is that if you have read my statement it was not in 2011 as they claimed that they had a super 00:13:08 in 2011. It was in 2010. It was in 2010 as I have put it I called Mr Njenje to my office in Cape Town which is Deputy and to come and explain what I have discussed as I have said with my deputy – with his deputy in his absence. Because I first requested to hear from Njenje about these allegation of interception at monitoring – yes.

ADV PRETORIUS SC: Well who told you about

interception?

AMBASSADOR CWELE: I have put in my statement. It was a DDG of Njenje – DDG of Domestic branch what was called NIA then.

ADV PRETORIUS SC: Was he communicating directly with you in relation to investigations?

AMBASSADOR CWELE: No. As I have said my first interaction with the Gupta's – I first met them in the ANC fund raising dinner in Durban. That was somewhere between the 20th and the 24th of September 2010 when we have National – General Council of the ruling party. That was a fund raising dinner of the ruling party. I have explained what happened in m presence in the DP – if you want me I can go into details. But what worried me was the allegation of intercepting a person.

ADV PRETORIUS SC: Yes please explain to the Chair.

AMBASSADOR CWELE: I called Njenje and I was told he was on leave.

ADV PRETORIUS SC: Before we get there if I may interrupt you Ambassador Cwele.

AMBASSADOR CWELE: Ja.

ADV PRETORIUS SC: The 00:14:40 communication about an alleged interception came directly from a subordinate of the head of the SSA to you. You were communicating directly with him about operations, correct.

AMBASSADOR CWELE: I was communicating directly because Mr Njenje was alleged to be on leave at that time.

ADV PRETORIUS SC: All right.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: What was the communication about?

AMBASSADOR CWELE: I was – I wanted to communicated first with Njenje. I was told he is not around, he is leave for that week.

ADV PRETORIUS SC: And what did you want to communicate with him about?

AMBASSADOR CWELE: I wanted to ask whether they were conducting any interception and to these people or the so called Gupta's as they alleged and he did say yes we are. I asked him, did you have the direction of the Judge? He said, no they were instructed by the top 3 which was the top management.

ADV PRETORIUS SC: So are you saying now Ambassador that you – someone told you that there was in fact an interception.

ADV PRETORIUS SC: That is what happened in that first meeting yes.

ADV PRETORIUS SC: Who told you that?

AMBASSADOR CWELE: Unless – it is the DDG for – for Domestic Branch what was called MIA then. Unless you

want me to disclose the name.

ADV PRETORIUS SC: (Inaudible)

AMBASSADOR CWELE: He was the DDG of Mr Njenje.

ADV PRETORIUS SC: Right and according to your evidence he told you directly that there was an interception – what interception was this?

AMBASSADOR CWELE: Not for 00:16:37.

ADV PRETORIUS SC: (Inaudible) interception tape.

AMBASSADOR CWELE: It is the interception – interception of communication.

ADV PRETORIUS SC: Right that is not clear from the evidence that we have on your affidavit but we will come back to that in a moment. You then – how did it come about that the top 3 met with you in Cape Town in your office?

AMBASSADOR CWELE: I then requested the DDG to come with his director which was Mr Njenje when he comes back from leave. But instead of him coming with the DDG he came with these other top 3 people in the meeting in Cape Town.

ADV PRETORIUS SC: Right.

AMBASSADOR CWELE: So I see most of the statement they are saying I summoned them especially Mr Shaik. I never summoned Mr Shaik to that meeting. I never asked even – I do not know what they mean by summon to come

to that meeting. I never asked him. I never asked Mr Maqethuka to come. I asked for Mr Njenje and his deputy.

ADV PRETORIUS SC: Now – Ambassador it is not necessary to debate the difference between summoned and called but as I understand it you called Njenje and his deputy to your office in Cape Town.

AMBASSADOR CWELE: Yes that is correct. Yes Sir.

ADV PRETORIUS SC: You then had a meeting pursuant to that with the top 3.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: Right. That meeting I think it is common cause on the papers was a tense and confrontational one

AMBASSADOR CWELE: You know Chair about tense but I was enquiring about whether they had the direction of the judges. You know, if you want to intercept a person as a Minister who is responsible for oversight one of the responsibilities is that I must make sure that they act within the law. If somebody is alleging interception and a direct – a Deputy Director General says, no they did not have the direction of a judge that worried me a lot. Because those things have happened in the past. Those bad incidences.

ADV PRETORIUS SC: Yes well – Ambassador the three persons besides yourself who attended the meeting are all

at one that this was not discussed at the meeting but let us just clarify it was quite permissible for the SSA to conduct an investigation.

AMBASSADOR CWELE: It is. It is permissible.

ADV PRETORIUS SC: Correct.

AMBASSADOR CWELE: I had no problem with investigations.

ADV PRETORIUS SC: And you had ...

AMBASSADOR CWELE: The problem I had was investigating without a direction of a judge.

ADV PRETORIUS SC: Yes and well the question is, did you communicate to the three at the meeting that firstly an operational decision to conduct an investigation was a decision that they made and were authorised to make without any interference from your part. Was that clear to them?

AMBASSADOR CWELE: I made it clear as I said the meeting lasted too long Mr Pretorius. We started in the early evening it finished in the early hours of the morning.

ADV PRETORIUS SC: No the question is a simple one. Was it made clear to them Ambassador firstly that any operational decision to conduct an investigation.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: And I stress the word investigation was theirs to make.

AMBASSADOR CWELE: It was clearly put to them.

ADV PRETORIUS SC: And they were free to make ...

AMBASSADOR CWELE: And I will try and explain so that you understand. I was one who called the meeting. I am the one who also concluded the meeting. After listening to all the stories I made it clear that if you believe that there is some wrongdoing by any person we are authorised by law to investigate and even intercept that person.

ADV PRETORIUS SC: Yes well that is not stated within your affidavit Ambassador.

CHAIRPERSON: Mr Pretorius let him finish. Let him finish Mr Pretorius.

ADV PRETORIUS SC: Yes Chair.

CHAIRPERSON: I think he has not finished his answer.

AMBASSADOR CWELE: I said – I made it clear after listening to all the discussion particularly from Njenje because it was Njenje who was answering. That I had no problem with them doing any investigation but it must be done in terms of the law. If you are intercepting a person you must have a direction of the judge. It is put there in my statement.

2. The other problem I also had because there were many things emanated in that meeting was the issue of conflict of interest particularly by those director – Deputy – particularly in concerning Njenje in this matter. I will

explain later in details why I said so.

I clearly remember saying, when we employed you we asked yourselves to – and the 00:22:02 to stop all business operation we were doing because we were coming to this environment. But I was disappointed now that he was conducting businesses and he was also investigating people in relation to his personal interests in those businesses. Those were the things I put at the summary. I did say also that as I said at no stage I said they must stop the investigation. I said go and get a direction from a judge because if it is true there is no judge who will refuse you – the direction from the allegations they were putting. There were many allegations they were putting and I was convinced that it would be easy for them to get a direction from the judge.

ADV PRETORIUS SC: Yes. You are aware of the fact that the three persons besides yourself you attended that meeting deny that there was any discussion about interception. Yes Chair. DCJ you are on mute. Can you hear?

CHAIRPERSON: Okay can you hear me now? You can – (bad audio).

ADV PRETORIUS SC: For part of when you were apparently talking Chair you were on mute but even when you unmuted you were still not audible.

CHAIRPERSON: Okay can you hear me now?

ADV PRETORIUS SC: We can hear you now.

CHAIRPERSON: Okay all right. I was saying earlier on that there were a few seconds when my connection stopped and I did not hear what the Ambassador was saying. I wanted him to go back so that I do not lose anything of importance. I had heard some part and then I think there may have been about maybe 20 seconds or so. Or maybe – Ambassador do you want to just summarise your last answer. I did hear that you – I did hear that the fact that you said you called the meeting, Njenje was the one who was answering most of the time. You made it clear to them that they were entitled to investigate if they wanted to investigate but you had a problem with the – with them intercepting people's communications without the directive of a Judge but you made it clear to them that otherwise they could investigate. You also – I heard you also say that there was an issue of conflict of interest on the part of Mr Njenje and you remember having told him when you are – when he was appointed that he should make sure that there was no conflict of interest. If I have – If I have heard everything of importance in what you said they can just tell me the parts that you think I did not hear.

AMBASSADOR CWELE: Ja the las part I said when we employed Mr Njenje other – everything is correct Chair.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: We told him he must stop his business interests.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: Because he could not do business while he is in charge of State Security.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: And he agreed. Same thing was said to Moshe but in this respect I said I was then disappointed in that meeting after the discussion – lengthy discussion that there was – he was still pursuing some business mining in business and – and they now using the same people who are his business partner to intercept them. I said that is wrong. It should not happen because that is a conflict of interest. That is why we spend a lot of discussion on that but I summarise it like that at the end Chair like you are correctly putting it.

CHAIRPERSON: Okay no that is fine. Mr Pretorius I said earlier on if we go into after lunch maybe thirty minutes but we can go even to three if it becomes necessary.

ADV PRETORIUS SC: Thank you Chair. Well –

CHAIRPERSON: Did you hear me Mr Pretorius?

ADV PRETORIUS SC: I am just going to go as far as I can in the time allotted and any decision will be yours Chair.

CHAIRPERSON: But – but I – I want you to use your own

judgment whether you are able to do justice to the issues. You must tell me when you think there is need for more time otherwise we are not going to be able to do justice to the issues because the bottom line.

ADV PRETORIUS SC: Absolutely Chair.

CHAIRPERSON: Ja – the bottom line is that we must do justice to the issues.

ADV PRETORIUS SC: Ambassador there were two issues discussed at that meeting so far at least according to your evidence. The first issue was the injunction from yourself that if there was to be an interception of communications it should be done according to the law. In other words a judge's directive should be obtained. Correct?

AMBASSADOR CWELE: Yes. That is correct.

ADV PRETORIUS SC: Now the version of the three persons concerned is that there was no such discussion at that meeting.

AMBASSADOR CWELE: I am not sure what is their version but I called the meeting and that was the reason.

ADV PRETORIUS SC: All right.

AMBASSADOR CWELE: I – that is the first thing I put when I – that is why I was saying Mr Chair the constraint I have I put this in my several statement I do not have access to these documents. I do not have access to the records of those minutes because the record of those

minutes will clearly indicate and if I remember correctly some of the- that meeting was recorded. So we have asked for these minutes and – but I called the meeting about this alleged interception. That was the main reason I called.

ADV PRETORIUS SC: Yes we have heard your version Ambassador.

AMBASSADOR CWELE: The issue of business interest arose while we were discussing the issue of interception.

ADV PRETORIUS SC: I will come to the issue of the business interests in due course.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: But as I understand it the conclusion on your evidence was that they were perfectly authorised, entitled to continue with the investigation provided if there was an interception to be conducted that would be done with a judge's approval in terms of the legislation. Is – do I understand the position correctly?

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: There would be therefore no need for them to take further steps by going directly to the President to reverse any negative decision that you had communicated to them. They could just simply go back to Johannesburg or Pretoria and continue the investigation. Correct.

CHAIRPERSON: It looks like

ADV PRETORIUS SC: We have all frozen Chair.

CHAIRPERSON: Well you are not frozen but I think the Ambassador is. I do not know whether the technicians will do anything. I think the technicians will – will – should work on it. Registrar are you able to get hold the technicians and see if they are working on it. Zonaka. It looks like she cannot hear me.

ADV PRETORIUS SC: Now the problem maybe one in China Chair.

CHAIRPERSON: Oh – oh ja maybe.

ADV PRETORIUS SC: Or somewhere between.

CHAIRPERSON: Ja. I wonder whether – one second. Is he back? He is on his way. Zonaka can you hear me now?

REGISTRAR: Yes I can DCJ.

CHAIRPERSON: Are you able to get hold of the technicians to check whether it is a problem in China or on our side?

REGISTRAR: I will do.

CHAIRPERSON: Maybe Mr Pretorius maybe we should use this time when they are attending to the technical problems to take the tea break.

ADV PRETORIUS SC: Okay there – the Ambassador is back but Ambassador you are on mute.

AMBASSADOR CWELE: I am back Chair. It was an

internet connection that was the problem.

CHAIRPERSON: Oh (inaudible).

AMBASSADOR CWELE: Ja it was an internet connection.

CHAIRPERSON: Oh okay all right. Okay. Let us continue. Well if he is back let us continue we will take it quarter past eleven.

ADV PRETORIUS SC: Let us just recap Ambassador. There were two issues discussed at that meeting according to the evidence. The one was the investigation into the Gupta's and any interception that might be involved in that investigation and the other was the conflict of interest as you describe it in relation to Director Njenje. In relation to the first issue as I understand it the conclusion of the meeting was that the SSA officials at the highest level were perfectly entitled and authorised to continue with the investigation provided that if there was to be any interception of electronic communications that would be done with the approval of a judge in terms of the Regulation – in terms of the legislation. Is that the position?

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: That being so there would be no need for the top 3 to go over your head to the President in relation to their concern that the investigation was being halted.

AMBASSADOR CWELE: I was not aware that they went to the President. I only read that later. They never informed me that they went to President.

ADV PRETORIUS SC: Yes.

AMBASSADOR CWELE: But they had the rights – they used to meet the President without me anyway.

ADV PRETORIUS SC: Yes. Well Ambassador the only point I am making is that there was no need – if they were concerned there was no need for them to be concerned about the investigation and their ability to continue the investigation. There was no need to address the President on that issue. Correct.

AMBASSADOR CWELE: No according to me there was no need. I was not even aware that they went to see the President on that issue.

ADV PRETORIUS SC: Right.

AMBASSADOR CWELE: But as I have read your statement they did not see the President only on that issue.

ADV PRETORIUS SC: Well let us deal with the second issue.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: And that is the conflict of interest issue. Was your communication to Njenje that unless and until he seized his personal business interests or

terminated his personal business interests he could not conduct the investigation.

AMBASSADOR CWELE: No. I did not expect Mr Njenje to be involved in business. At the end while he said yes I will tell you it was about the mining company, the business. And at the end he said no he was not directly involved it was somebody who was holding his shares in that company who was directly involved. But I said even if you are not directly involved now that you are involved in that company and we are then investigating your people, your business partners you cannot use state security resources to investigate your dispute you have with your business partners. That is what I said.

ADV PRETORIUS SC: But did you see his personal business affairs as being a hurdle or obstacle to the continuation of the investigation as such?

AMBASSADOR CWELE: No.

ADV PRETORIUS SC: And did you communicate it?

AMBASSADOR CWELE: It was his behaviour which was a problem because eventually he said, no he was not directly involved. But it was him who was explaining how this relationship with the mining company how Gupta's got the stake in their companies and all sort of those things.

ADV PRETORIUS SC: Well ..

AMBASSADOR CWELE: At the end when I was saying but

– but I asked you not to be involved in business he say no I was not directly involved. I had my business partner who was doing these things for me. I said but why were you even dealing (inaudible) your business partners here – businesses.

ADV PRETORIUS SC: All right. On that issue there was nothing to preclude the investigation from continuing.

AMBASSADOR CWELE: No. No.

ADV PRETORIUS SC: All right.

AMBASSADOR CWELE: As I have said the investigation on what they alleged they were investigating I said any judge will easily give you a direction to do that investigation.

ADV PRETORIUS SC: Okay so again there was nothing that you communicated to them on your version at that meeting that would have required them to go and have a discussion with the President in relation to the continuation of the investigation.

AMBASSADOR CWELE: No except that I did express my great displeasure that they were doing business and at the same time they were part of the state security but there is nothing else which I said, yes.

ADV PRETORIUS SC: All right. So in a word the investigation as far as you are concerned at that meeting could continue without hindrance.

AMBASSADOR CWELE: I had no power. What I said should not happen. I want to be clear. What I categorically put should not happen is to intercept any citizen without following the legal prescripts of asking a judge. That one I put it very clear that it should happen. When it is our problem with investigation going on anyway that is why I encourage them to go to the judge if they want to continue with interception and get the direction.

ADV PRETORIUS SC: So as I understand your evidence now is that you actually encouraged them to continue with the investigation.

AMBASSADOR CWELE: At no stage I stopped the investigation.

ADV PRETORIUS SC: No, no you put a positive spin on the – on your attitude.

AMBASSADOR CWELE: I said

ADV PRETORIUS SC: To an extent to go ahead – you get the directive from the judge.

AMBASSADOR CWELE: I said

ADV PRETORIUS SC: You have encouraged the – I am sorry Ambassador.

CHAIRPERSON: Hang on. You are both speaking at the same time. Okay.

ADV PRETORIUS SC: If I can just finish my

CHAIRPERSON: Question okay.

ADV PRETORIUS SC: I understand your evidence Ambassador you actually encouraged them to continue with the investigation amongst other things to go and get the directive from the judge.

AMBASSADOR CWELE: I am not sure I did say that if they continue with the investigation they must get the direction of the judge. I did say to them in my view there was going to be no difficulty from any judge from the reason they were giving me to grant them that direction.

ADV PRETORIUS SC: Yes. Well I am...

CHAIRPERSON: What – what was their response to this difficulty you said you had about this part of their investigation namely interception of somebody's communications without the judge's directive?

AMBASSADOR CWELE: Ja. Their story changed Chairperson their response was that no actually they were not doing interception. The DDG misinformed me. They were just doing 00:40:41. Not interception that was their response. But I said if they want to continue with any interception they must go and get a direction of the judge.

CHAIRPERSON: So at the meeting your said to them you are understood that they were engaged in interception of communications and you wanted to know whether they had a directive from a judge permitting them to do that. And in response they said they were not doing interception they

were doing – I think did you say scoping – I am not sure? Is that the sum total of their response?

AMBASSADOR CWELE: Ja. Like environmental scanning. They were just scoping ja.

CHAIRPERSON: Ja. Okay.

AMBASSADOR CWELE: Ja. Let me – that is fine. Ja. They said the DDG who informed me that they were intercepting was wrong. And I asked them why did you not bring him to the meeting because I requested you to come with him. They said no they thought they would bring the senior people. But they were denying that they were intercepting but they were just scoping. Yes.

CHAIRPERSON: And scoping does not need a judge's directive I guess.

AMBASSADOR CWELE: No.

CHAIRPERSON: Oh okay. And what was your response to this? When they said this was that the end of this discussion about interception or not?

AMBASSADOR CWELE: It ended when I asked them why they did not bring the DDG who informed me that – who in actually because that was the word from that DDG.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: And then they were invasive to that answer, no we thought we should come as senior leaders. But I did not ask Mr Maqethuka to come to the

meeting. I did not ask also Mr Shaiks to come to the meeting because the matter was with the SSA. Yes. It was really domestic bribes which was – yes.

CHAIRPERSON: Yes. Would this discussion about interception have been right at the beginning of the meeting more or less?

AMBASSADOR CWELE: It was – it was the first thing Mr Chairperson. I was chairing the meeting.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: I told them I have had this meeting. I told them about the incidents what happened in the ANC fund raising dinner. The meeting I had with the Deputy Director General and what he said. And I asked them to respond. I asked Mr Njenje to respond to that.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: That is correct.

CHAIRPERSON: Okay. Mr Pretorius continue.

ADV PRETORIUS SC: Chair it is eleven – oh yes. I presume you take the short adjournment at eleven fifteen?

CHAIRPERSON: Ja.

ADV PRETORIUS SC: Ambassador the version and you are aware of this of the three – the top three is that at no stage during that meeting did any discussion about interception and the lawfulness of interception take place at this point.

AMBASSADOR CWELE: I have not seen that evidence. I have read all their statements so Chair unless you can highlight to me.

ADV PRETORIUS SC: No they –

AMBASSADOR CWELE: What is – what – yes.

ADV PRETORIUS SC: They do say or it is said that the – there was no discussion about interception. I can give you the reference if you like but you can – you can rest assured.

AMBASSADOR CWELE: Okay that is not true. That is not true. That was the first question they have to answer. That was the first thing I put to them.

ADV PRETORIUS SC: The second point of difference is that they concluded from that meeting that you did not wish the investigation and I stress investigation to continue.

AMBASSADOR CWELE: No that is not correct Chair.

ADV PRETORIUS SC: All right.

AMBASSADOR CWELE: I think I have explained that Chair.

ADV PRETORIUS SC: All right. And because of the conclusion that they drew they found it necessary to meet with the President and actually asked you or told you that they were going to do so.

AMBASSADOR CWELE: No they never asked me and I was not aware that they went to the President.

ADV PRETORIUS SC: Yes. But as I understand your evidence there would have been no need to complain about any attitude that you took to the President.

AMBASSADOR CWELE: I cannot speak about that – that will be their own judgment.

ADV PRETORIUS SC: Ja well I (inaudible).

AMBASSADOR CWELE: According to what I have said. I was not expecting – as far as I am concerned there was no need to go to the President.

ADV PRETORIUS SC: Right.

AMBASSADOR CWELE: On that matter.

ADV PRETORIUS SC: Yes. Would you accept that even if Mr Njenje was conflicted he denies it but even if he was that would not preclude the SSA from continuing with the investigation. Correct.

AMBASSADOR CWELE: No he never denied it Chair.

ADV PRETORIUS SC: Well...

AMBASSADOR CWELE: As I have said the meeting took I think from about half past six until about one or two in the morning.

ADV PRETORIUS SC: Ja. Ambassador the question is that...

AMBASSADOR CWELE: So he did not deny the conflict of interest.

ADV PRETORIUS SC: No he denied a conflict of interest.

He did not deny his business interest but I do not want to debate that with you at present. What I want to put to you is that even if there was a conflict of interest as understood by yourself that would not preclude the SSA from continuing with the investigation, correct.

AMBASSADOR CWELE: It should not preclude them from continuing with the investigation Chair.

ADV PRETORIUS SC: Right. He did...

CHAIRPERSON: Sorry Mr Pretorius. The two of you may be speaking at cross-purposes. I think what the Ambassador wants to say and he must tell me if I misunderstand him. He wants to say to do with the question of whether Mr Njenje denied the conflict of interest at that meeting whereas I understand Mr Pretorius to be saying either at the hearing (bad audio) evidence before the commission which I think or you may have been speaking at cross purposes. Mr – Mr Ambassador do you want to comment on this?

ADV PRETORIUS SC: Chair you became inaudible once again for a great deal of what you said so perhaps you could repeat it.

CHAIRPERSON: Yes okay. Let me check whether the Ambassador can hear me now.

AMBASSADOR CWELE: I can hear you now Chair.

CHAIRPERSON: Can you hear me? Okay all right.

AMBASSADOR CWELE: Ja I can hear you.

CHAIRPERSON: I will – yes I was saying to

AMBASSADOR CWELE: You are cutting.

CHAIRPERSON: Me that Mr Pretorius (Inaudible).

ADV PRETORIUS SC: Chair you are inaudible again or at least the connection is not relaying your ...

CHAIRPERSON: What I am saying. Okay. Can we take the tea break – can you hear that part?

AMBASSADOR CWELE: Ja we can hear that.

CHAIRPERSON: Oh okay can we take the tea break

ADV PRETORIUS SC: That is perfectly audible Chair.

CHAIRPERSON: Okay all right. Let us take the tea break until twenty five past and then the technicians can attend to the problem that we are having. Okay thank you. We adjourn.

AMBASSADOR CWELE: Thank you.

INQUIRY ADJOURNS

INQUIRY RESUMES

REGISTRAR: The Chair is ready... [speaker unclear – distortion present]

CHAIRPERSON: [No audible reply]

REGISTRAR: DCJ, can you hear us?

CHAIRPERSON: [Speaker unclear – distortion in video link] Registrar, I am here now.

REGISTRAR: Thank you, Mr Chair.

CHAIRPERSON: Can you hear me?

REGISTRAR: Yes, I can.

ADV PRETORIUS SC: Yes, we can hear you.

CHAIRPERSON: Can everybody hear me?

ADV PRETORIUS SC: Very clearly, Chair.

CHAIRPERSON: Okay, thank you very much. Let us continue. We – I have got somebody to attend to technical glitzes from this side now. So, let us hope -if there are any problems, they can be sorted out quickly. Okay, alright. Let us continue, Mr Pretorius.

ADV PRETORIUS SC: In the meeting that we had been discussing, at least as far as we are concerned, this morning, or, as far as you are concerned, this evening. Is it correct that you told Njenje that he could not use state resources to pursue private interests?

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: And you also said that in communicating this to Mr Njenje, you were discharging your responsibility as Minister to prevent the abuse of state resources?

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: The implication of that is, that unless and until Mr Njenje abandoned his private interests, the investigation could not continue.

AMBASSADOR CWELE: No.

ADV PRETORIUS SC: State resources were being used for an improper purpose, as I understand what you said.

AMBASSADOR CWELE: I did direct him. You remember, I told you that at the beginning, there was an agreement that they will abandon any business interests. I showed disappointment that there was some link to business interests. I knew that ...[intervenes]

ADV PRETORIUS SC: Yes, it was ...[intervenes]

AMBASSADOR CWELE: ...the investigation.

ADV PRETORIUS SC: Yes. Well, it is more than disappointment on your version. And for the record, I am referring to SSA-05 at page 720, paragraph 74 and SSA-05, 720 at paragraph 35. The import of those statements was that the investigation was an abuse of private resources which had to be stopped and that was the reason for your intervention.

AMBASSADOR CWELE: Yes, I did say the abuse of the state resources was not acceptable. I still maintain that, but I did not say the investigation into the Gupta matter on whether they alleged their investigating must stop.

ADV PRETORIUS SC: Well, you said that Njenje could not use state resources to pursue private interests. In other words. The use of state resources should be haltered.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: ...investigation.

AMBASSADOR CWELE: No. I did not say the investigation. I am saying. Him pursuing his business interest and competing with his business partners when they have got conflict must stop. That one I did say must stop.

ADV PRETORIUS SC: Ja. Well ...[intervenes]

AMBASSADOR CWELE: I did not say the investigation they were conducting must stop.

ADV PRETORIUS SC: But how does one conduct an investigation without the use of state resources? Does not one follow from the other?

AMBASSADOR CWELE: No, no. You will remember, Mr Njenje was a director. He was not involved in direct investigation in this case. My understanding. But his intervention and directing people that do this investigation was wrong because they knew it was conflicted.

ADV PRETORIUS SC: As part of the SSA, he would have at least remotely been connected with an investigation which used state resources.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: And you say that the use of state resources should be haltered for as long as those private interests existed. That is your evidence.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: Okay.

CHAIRPERSON: Okay. I am sorry. Can I understand this? Was your position, Ambassador, at that meeting that the investigation which was – which required the use of state resources should stop until such time that what you regarded as the conflict of interest had ended, had been terminated?

AMBASSADOR CWELE: No ...[intervenes]

CHAIRPERSON: What was the position? What had to stop?

AMBASSADOR CWELE: The – what had to stop was what was alleged to be interception without a direction. The two – what had to stop was Mr Njenje to continue doing business interests while he is still in the State Security Agency.

CHAIRPERSON: Now the issue of interception.

AMBASSADOR CWELE: H'm?

CHAIRPERSON: You said that they had said to you they had not been – they had not conduct – they were not conducting any interception.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: And the matter ended when – that issue ended when you asked them why they had not brought along the DDG who had told and then they said to you: We thought it should just be the senior three who should come

to the meeting. You said that is where that issue ended?

AMBASSADOR CWELE: That is correct.

CHAIRPERSON: And you said that was quite early in the meeting because that was the first issue you raised.

AMBASSADOR CWELE: That is correct.

CHAIRPERSON: Okay. Now, why would you have said that should stop, the interception, in circumstances where they had said there has been no interception and ...[intervenes]

AMBASSADOR CWELE: [speaker unclear – distortion in video link]

CHAIRPERSON: ...you seemed to have accepted that?

AMBASSADOR CWELE: Yes. Now, I had to – not that I had accepted that. There are two versions.

CHAIRPERSON: Ja. Yes.

AMBASSADOR CWELE: The first version was that there was interception. That is what I have heard in a meeting a week prior.

CHAIRPERSON: H'm.

AMBASSADOR CWELE: ...in the coming(?) now, was that no, there was no interception. It was scoping(?).

CHAIRPERSON: H'm.

AMBASSADOR CWELE: I thought - interception without direction of that must stop.

CHAIRPERSON: Yes. Okay. And then on the issue of the

conflict of interest. You said it was Mr Njenje who had a conflict of interest from your information. Is that right?

AMBASSADOR CWELE: Yes.

CHAIRPERSON: Now... And from what you have told me. It seems that he was not the one directly involved in the investigation or conducting the investigation. It was somebody else who – in his department. Is that correct?

AMBASSADOR CWELE: Yes, Chair.

CHAIRPERSON: So ...[intervenes]

AMBASSADOR CWELE: But ...[intervenes]

CHAIRPERSON: Yes?

AMBASSADOR CWELE: But as I have told you.

CHAIRPERSON: Yes?

AMBASSADOR CWELE: When I had a meeting with his director, Deputy Director General ...[intervenes]

CHAIRPERSON: Yes.

AMBASSADOR CWELE: ...the way instructed when I asked Njenje why he had intercepted and did not do that. He said the way he instructed by top chain.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: And above him was Mr Njenje who was supervisor. Yes.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: Okay. So, now why – if Director Njenje

was not the one actually conducting the investigation, other than that he may have given instructions that somebody must conduct the investigation. Why would you link the termination of the conflict of interest to the abuse of state resources? Because it was going to be somebody else conducting the investigation.

AMBASSADOR CWELE: Yes, Chair. That is correct. As I have said. The meeting did not – was not a short meeting. Mr Njenje went at length explaining this relationship with Guptas.

CHAIRPERSON: H'm?

AMBASSADOR CWELE: That is what then led to me to believe in that there was a conflict...

CHAIRPERSON: H'm, h'm.

AMBASSADOR CWELE: ...in his involvement on his partner in the mining(?) and the Guptas and the Guptas trying to rob them and asking for more stakes(?) and all these things. It was then when I asked him but why are you doing this, doing this business interest while they are here? Then he changed: Oh, no, no, no, no. I am not directly involved.

But he was one who was explaining in detail how Gupta – how they got the state(?) first. How the Gupta wanted their state for free. How they wanted to increase. How other people were giving them better offers. I listened

and at the end I said: Oh, right. I think you are involved in something quite funny, and I am actually worried what will happen when this thing comes in the media. Because it was clear to me from his own explanation how they got the license was irregular.

How they were then involved with these Guptas, trying to ...[indistinct] each other with shares(?). Was something funny. They were in court. It did not ...[indistinct] all those things. And I became worried because when things are in court, the inquiries then come to me as the Minister. They did not go to the DG. It is by the time how do you respond to these things when they come?

So that is why the meeting took so long and my unhappiness then was that there should not be business dealing where you have clearly demonstrated you were part of this company whether direct or indirectly. Now we are busy using state resources ...[indistinct] same people yet they were business partner, yet you are in court, yet it is very not very clear how you all got this license.

So those were the people which were coming to me to say: Well, these things are wrong. And I did put them to them that these things are wrong, and they must stop. But not ...[indistinct] what they were calling the investigating the Guptas for. Yes.

CHAIRPERSON: But the – as I understand you. You say you asked – you said the abuse of state resources should stop. Is that correct?

AMBASSADOR CWELE: Ja.

CHAIRPERSON: Now in the context of that investigation, what was the abuse of state resources? Was it not the investigation?

AMBASSADOR CWELE: No, the abuse of state resources, Chair, is partly(?) being investigation. I will explain why I have a problem.

CHAIRPERSON: H'm?

AMBASSADOR CWELE: If you say you are the business partner of Mr Pretorius.

CHAIRPERSON: H'm?

AMBASSADOR CWELE: Now Mr Pretorius who ...[intervenes]

CHAIRPERSON: On a lighter note. I will never go into business with him. [laughs]

AMBASSADOR CWELE: [Indistinct]

CHAIRPERSON: No, no I am just being light-hearted.

AMBASSADOR CWELE: [Indistinct]

ADV PRETORIUS SC: Thankfully, I have no business, Chair.

CHAIRPERSON: [laughs]

AMBASSADOR CWELE: [Indistinct] If Mr Pretorius say

now he wants 50% of your business, but he did not contribute anything. You got this business and ...[indistinct] away(?), rogue way you got it, but he demands now 50%. And you got Advocate Semenya who is giving you five times what this person is offering you for the 50%. And I said you are involved in ...[indistinct], directly or indirectly and that should stop.

And you cannot use our own state resources to pursue your own personal business interest. That is what I said. That one should stop. Not that the investigation they are conducting according what they said should stop, but then him being the DDG and using his own ...[indistinct] of business interest to instruct officials to do interception, not investigation. I did not say investigation must stop.

CHAIRPERSON: If there was good reason for an investigation to be undertaken into the Guptas ...[intervenes]

AMBASSADOR CWELE: That is correct.

CHAIRPERSON: ...and he was the director of the branch.

AMBASSADOR CWELE: H'm?

CHAIRPERSON: What do you say he should have done? Let us say he became aware that there was a good reason to launch an investigation into the Guptas. It so happened that for argument sake he had conflict of interest.

AMBASSADOR CWELE: That is correct.

CHAIRPERSON: Should he have ignored whatever there was on the basis that if I say this investigation must be undertaken I will have – I will be accused of abusing state resources because of this conflict? Or should he have said: Look, I will not conduct the investigation myself, but let me get somebody else senior, but the investigation must still continue? What should he – how should he have dealt with that if your – if indeed there was a conflict?

AMBASSADOR CWELE: Yes. If there was a conflict, it(?) be very careful. He will still continue with the investigation, but he will follow the due processes of the investigation because intelligence agencies are heavily regulated.

CHAIRPERSON: H'm?

AMBASSADOR CWELE: You would not allow or direct that there must be interception without a directive.

CHAIRPERSON: H'm?

AMBASSADOR CWELE: You will make sure that the investigation, whoever, junior official or senior official who is doing it, is doing it properly.

CHAIRPERSON: H'm.

AMBASSADOR CWELE: That is what I will except. Not that he should stop the investigation.

CHAIRPERSON: H'm. But ...[intervenes]

AMBASSADOR CWELE: Yes.

CHAIRPERSON: But at what stage then, if it did it that way, the way you have explained ...[intervenes]

AMBASSADOR CWELE: Yes ...[intervenes]

CHAIRPERSON: ...leave out for argument sake the issue of the interception and getting a judge's directive, because they disputed that. They said they had not been doing that. There are different versions. But if you leave that out and you look at everything else that needed to be done to pursue the investigation. Would it have been fine for him to get somebody within his department to pursue that investigation? To do all the other things that are supposed to be done and to say it is your investigation. You go ahead. You can report back to me. Would that be acceptable?

AMBASSADOR CWELE: [Indistinct]... but you must remember, Chair.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: I never said they must stop the investigation.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: I said if you want to intercept, please go to the judge. And Mr Pretorius say that – I even said I believe it would be very easy to get the judge granting permission for the reason you were mentioning what he ...[intervenes]

CHAIRPERSON: Yes, yes. So ...[intervenes]

AMBASSADOR CWELE: So... And two. I did not call the meeting because of conflict of interest. Primarily the meeting was around the interception without a direction(?). Yes, the issue of conflict of interest then arose because he himself was explaining this thing how – because when I asked him about this business interest, he did explain at length.

CHAIRPERSON: H'm, ja.

AMBASSADOR CWELE: But the main purpose of the meeting was not the conflict of interest, but it did arise.

CHAIRPERSON: H'm.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: You see, I understood you to say you asked them to or him to stop the abuse of resources of state resources. So, I am trying to understand at a practical level. What was his approach ...[intervenes]

AMBASSADOR CWELE: [Speaker unclear – distortion present]

CHAIRPERSON: H'm.

AMBASSADOR CWELE: Because abuse(?) – if you allege to be intercepting without a direction as a ...[indistinct] feature(?) you know ...[indistinct] That is an abuse, you see? So that we understand this abuse.

CHAIRPERSON: H'm?

AMBASSADOR CWELE: There is abuse and then the issue of conflict of interest because arose during those discussion. I then raised but why are you involved in this ...[indistinct] with these people of ...[indistinct]

CHAIRPERSON: H'm.

AMBASSADOR CWELE: And now you are claiming that they are trying to rob you of your business when he ...[indistinct] to stop the business but will not have any conflict of interest maybe you are doing your investigation. It is then he said: No, I ...[indistinct] involved indirectly, not directly.

CHAIRPERSON: H'm. Mr Pretorius, do you want to take it from there?

ADV PRETORIUS SC: Yes, thank you, Chair. Your evidence today and I will put your affidavits to you in a moment, Ambassador.

AMBASSADOR CWELE: Okay.

ADV PRETORIUS SC: As I understand it, is clear, that at the conclusion of that meeting they could not – that is the top three – have been any under illusion that you opposed the investigation on principle. That they continue – could continue with your approval provided if there was interception they got the say so of the judge.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: Right. The version on paper,

however, is somewhat different, but let me just conclude that proposition with one more that you confirmed before the break and that is that there would have been no need for the top three to approach the President to reverse your opposition to or any perceived opposition to the investigation. Correct? We have established that.

AMBASSADOR CWELE: No, there was no opposition to the investigation.

ADV PRETORIUS SC: Alright. Okay.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: That answers the question partly. But in the passages that the judge has just been dealing with. You made it very clear in your own words to Njenje: Mr Njenje, you cannot use state resources to pursue private interests. In other words. You were saying to Njenje this investigation is being conducted for the purpose of pursuit to the private interests and you cannot use state resources to do that. That is what you are saying here. Do you want to go to the passage?

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: [No audible reply]

AMBASSADOR CWELE: Which passage are you referring to?

ADV PRETORIUS SC: I am referring to paragraph 34 on SSA-05 at page 720.

CHAIRPERSON: Just repeat the reference, Mr Pretorius. Bundle ...[intervenes]

ADV PRETORIUS SC: SSA-05, page 720.

CHAIRPERSON: Bundle 5? Oh, this one?

ADV PRETORIUS SC: Yes.

CHAIRPERSON: 720.

ADV PRETORIUS SC: Yes.

CHAIRPERSON: That will be black numbers?

ADV PRETORIUS SC: Yes.

AMBASSADOR CWELE: Oh, on 20?

CHAIRPERSON: Bundle 5, page 720. Bundle 5 is the one that has Exhibit 19. Are you looking at a hard copy or electronic copy?

AMBASSADOR CWELE: I am looking at the hard copy. My 720 talks about ad(?) paragraph 82 to 94, PAN Project.

ADV PRETORIUS SC: Yes. Ambassador, we are talking about the page references in the top left-hand corner of the bundle.

CHAIRPERSON: Look at the black page numbers. You see at the top of each page there are red numbers and black numbers.

AMBASSADOR CWELE: Oh. All mine are black.

CHAIRPERSON: Ja, use the black ones. Use the black numbers.

AMBASSADOR CWELE: The left-hand side?

CHAIRPERSON: Yes.

AMBASSADOR CWELE: It says SA-05-720.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: Yes.

CHAIRPERSON: But we will ...[intervenes]

AMBASSADOR CWELE: [Indistinct]

CHAIRPERSON: We will just say 720. We will not start from SSA when we refer to pages.

AMBASSADOR CWELE: Okay. That is correct.

CHAIRPERSON: Paragraph 34, Mr Pretorius?

ADV PRETORIUS SC: Correct, Chair.

CHAIRPERSON: Yes, okay. Continue, Mr Pretorius.

ADV PRETORIUS SC: At the bottom of the paragraph:

> "I even reminded Mr Njenje that conducting private business while at the helm of the Domestic Branch was against what we had agreed before his appointment, let alone utilising state resources to pursue private interests..."

AMBASSADOR CWELE: Ja, but you must read the whole of 34, *né*? Can I read it for you?

ADV PRETORIUS SC: Well ...[intervenes]

CHAIRPERSON: Ja?

ADV PRETORIUS SC: Perhaps – even ...[indistinct] you can ...[intervenes]

AMBASSADOR CWELE: No, that is very important because ...[intervenes]

CHAIRPERSON: Ja, let him read it Mr Pretorius.

ADV PRETORIUS SC: [No audible reply]

CHAIRPERSON: Okay, read it Ambassador.

AMBASSADOR CWELE: It says:

"The meeting with Mr Makashu(?) that you are refers to in these paragraphs was indeed called by me.

There is a Cape Town meeting.

It is untrue that I called the meeting because of the relationship between Guptas family and former President, Mr Zuma.

I reiterate. My primary concern related to business relationship Mr Njenje was having with Gupta and his alleged instruction to institute an illegal interception of that Gupta person.

I requested to be furnished with a directive of the judge authorising such interception which they did not have.

I mentioned to them that they must get a direction(?) if they want to proceed with such interception as law requires.

At no stage did I ever say or suggest that they

must stop any legal operation that they were pursuing.

I even reminded Mr Njenje that conducting private business while at the helm of Domestic Branch was against what we have agreed before his appointment..."

Just reminded, you see?

CHAIRPERSON: H'm.

AMBASSADOR CWELE: "...not alone utilising the state resources to pursue private interests..."

So, if you read it correctly, then you will understand what I say.

CHAIRPERSON: H'm.

ADV PRETORIUS SC: Right.

AMBASSADOR CWELE: But if you extract just a sentence, at the end, you will not understand the contents.

CHAIRPERSON: Well, let me put this – check this, Ambassador. As I recall. The evidence of the top three before the Commission was that two of them made it clear that they did not think you instructed them to stop the investigation.

ADV PRETORIUS SC: Right.

AMBASSADOR CWELE: That is correct, Chair.

CHAIRPERSON: I think there is one of them, I do not know which one, who ...[intervenes]

AMBASSADOR CWELE: [Indistinct]

CHAIRPERSON: ...whose recollection was that he would had ...[intervenes]

AMBASSADOR CWELE: [Indistinct]

CHAIRPERSON: Yes.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: But where they were all unanimous. It was that your stand, your position during the meeting was that you were opposed to the investigation even though two of them said you did not say to them they must stop it. So, I just wanted to say. That is what they said. But I think ...[intervenes]

AMBASSADOR CWELE: Can I ...[intervenes]

CHAIRPERSON: I think you have made your position that you were not opposed ...[intervenes]

AMBASSADOR CWELE: Yes.

CHAIRPERSON: ...to the investigation. And actually, as far as you are concerned, they could carry on the investigation as long as they did it in a lawful way.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: And of course you have talked about the conflict of interest. Is that right?

AMBASSADOR CWELE: That is correct, Chair. May I assist the Chair?

CHAIRPERSON: Ja.

AMBASSADOR CWELE: In most of my statements and affidavit, I have raised the issue of accessed the documents.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: If Chair wants the truth ...[intervenes]

CHAIRPERSON: Yes.

AMBASSADOR CWELE: ...[indistinct] should be kept in the ministry.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: Because the meeting was in Cape Town. They should be filed in Cape Town office.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: The transcript, the record of the meeting is what were tell the truth.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: Okay, no, thank you very much.

AMBASSADOR CWELE: And Chair has got the power to ...[indistinct] I can tell you. That meeting happened, I think end of September of early October, but it was ...[intervenes]

CHAIRPERSON: Yes.

AMBASSADOR CWELE: ...not too long after that ANC meeting ...[intervenes]

CHAIRPERSON: Yes.

AMBASSADOR CWELE: ...in Durban(?)

CHAIRPERSON: Yes.

AMBASSADOR CWELE: It should have been probably around the 1st of October 2010.

CHAIRPERSON: Yes. Well, at a certain stage. I was going through your application for leave to cross-examine and I realised that you were complaining that, or you were making the point that you needed certain documents in order to be able to put your side of the story properly.

I made enquiries and was informed by the Legal Team that a communication had been sent to your attorney to say they must approach SSA directly to get documents. And as I understand the position. I was told that whether they did so or not, the Commission, I think, does not know, but I was told that the Commission did inform your lawyers to say they must approach SSA directly.

But insofar as there are documents that might been seen as critical. For myself, I certainly would ask the Secretary with the assistance of the Legal Team of the Commission to try and get that. You have made the point that this meeting was recorded and that there should be even a recording and so on. So, I think attempts should be made to try and get that.

UNIDENTIFIED SPEAKER: ...[Indistinct]

CHAIRPERSON: Oh, okay, alright. Okay, Mr Pretorius, continue?

ADV PRETORIUS SC: The meeting in Cape Town, was that recorded?

AMBASSADOR CWELE: That is correct, that is what I have said, it was recorded.

ADV PRETORIUS SC: And where would that recording be now?

AMBASSADOR CWELE: As I have said, the recordings of the meetings, they are kept in the office where they are. The meeting was in Cape Town, minister's office.

ADV PRETORIUS SC: Well we will [inaudible – speaking simultaneously]

AMBASSADOR CWELE: We have really appealing and we have asking because we did not get any assistance from SAA in terms of reports.

ADV PRETORIUS SC: Alright. Ambassador, did you make it clear to Njenje that he was not permitted or authorised to use state resources to pursue private interests?

AMBASSADOR CWELE: I said I reminded him, if you read my statement, because I agreed.

ADV PRETORIUS SC: Yes, your words were:

> "Let alone utilising state resources to pursue private interests."

That was a reference to the investigation.

AMBASSADOR CWELE: That was a reference to what appeared, that he was still linked to the business.

ADV PRETORIUS SC: Well, the words are clear, I will not debate those. But in doing so, in making these communications, as I understand it, you were discharging your responsibility, and I use your words, to prevent or preventing abuse of state resources. That was your stance. You were intent on preventing the abuse of state resources and you were discharging that obligation in this meeting.

AMBASSADOR CWELE: As I said, as a minister, you are answerable for whatever the services(?) are doing and we have had many instances where things went wrong and it was my duty to keep on telling the management on things which should not happen.

ADV PRETORIUS SC: Right.

AMBASSADOR CWELE: It was not the first meeting, in many meetings we were [indistinct] that, that we need to act professionally and also avoid abusing any of the state resources because when you have got resources to Intelligence you have got powerful tools.

ADV PRETORIUS SC: You are also on record as having said – this is also in your affidavit at page 691 of bundle 5, you can go there, if you wish.

CHAIRPERSON: What is the page number, Mr Pretorius?

ADV PRETORIUS SC: 691.

CHAIRPERSON: 691.

ADV PRETORIUS SC: You are on record as saying, and I quote:

> "I later confronted Njenje who could not give me the direction of the judge for the monitoring of the Gupta family. He could not produce it, making his conflict of business interests more untenable. I invite him to produce the directions for the covert surveillance of that operation."

From that statement it appears firstly that you demanded the authorisation of the judge and you wanted to see it and his failure to do so made his alleged conflict of business interest untenable for you, not just something you should raise, but untenable. That is a very clear statement of opposition to the continuation of the investigation.

AMBASSADOR CWELE: No, you are wrong, I have explained that. The first thing we discussed I confronted him whether he had a directorship. Remember I told you what I had been informed by his deputy the previous week. He could not produce any. It was after long discussion this thing that they were doing, [indistinct] and not even from him, I think it came from one of the directors, not from him. When we started, I asked him, do you any direction to intercept this people? He said no.

ADV PRETORIUS SC: Well, they also told you that they were not intercepting, that is the ...[intervenes]

AMBASSADOR CWELE: That was later, yes. That came later.

ADV PRETORIUS SC: Yes, alright, let me ...[intervenes]

AMBASSADOR CWELE: And, if I remember well, it did not come from him.

ADV PRETORIUS SC: Yes, let me put the position to you.

AMBASSADOR CWELE: Ja.

ADV PRETORIUS SC: In your evidence this morning, Ambassador, giving the Chair the impression that you did not express any opposition in principle to the investigation and you made it clear to them that the investigation could continue, subject to the directive of the judge being obtained. The passages I am putting to you paint a different picture.

AMBASSADOR CWELE: Oh.

ADV PRETORIUS SC: The (indistinct – recording distorted) of you taking a stance that could well be interpreted as being in opposition to the continuation of the investigation.

AMBASSADOR CWELE: No.

ADV PRETORIUS SC: [inaudible – speaking simultaneously] putting to you.

AMBASSADOR CWELE: These were my responses to my

statement, but as I have explained, at no stage – and they are also saying so, at no stage did I ever said they must stop the investigation.

ADV PRETORIUS SC: Well, let us look at paragraph 18 on page 705.

AMBASSADOR CWELE: 705?

ADV PRETORIUS SC: Yes.

CHAIRPERSON: I am sorry, Mr Pretorius, are you moving away from 690?

ADV PRETORIUS SC: Yes, Chair, I am now going to 705.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: There you say ...[intervenes]

CHAIRPERSON: And what paragraph?

ADV PRETORIUS SC: Paragraph 18.

CHAIRPERSON: Okay, alright, I have got it.

ADV PRETORIUS SC: Reads:

> "I inquired whether the surveillance..."

And you there referred to surveillance, not interception.

> "...was authorised by a designated judge as required by law. To this day I was never given a copy of the direction by the designated judge. My intervention was that no surveillance should be done unless authorised by law."

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: So that statement is clear, that you

could not conduct any surveillance at all until and unless you produced to me that authorisation from the judge.

AMBASSADOR CWELE: Interception is part of surveillance, Mr Pretorius.

ADV PRETORIUS SC: Well, that is precisely the point but what you were talking about here was surveillance, not interception.

AMBASSADOR CWELE: Interception is part of surveillance.

ADV PRETORIUS SC: No.

AMBASSADOR CWELE: Surveillance is part of interception.

ADV PRETORIUS SC: Ambassador, you are far more knowledgeable on these issues than I am, as you now point out. But surveillance is far broader [inaudible – speaking simultaneously]

AMBASSADOR CWELE: No, interception, let me tell you what it is about. Let me just help you.

CHAIRPERSON: Hang on, Ambassador, let Mr Pretorius finish.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: Surveillance is a far broader concept than interception.

AMBASSADOR CWELE: Interception is electronic surveillance, that is what it is, it is electronic surveillance.

ADV PRETORIUS SC: There could be surveillance that does not require the intervention of a judge.

AMBASSADOR CWELE: They may be found but interception is electronic surveillance, Mr Pretorius.

ADV PRETORIUS SC: Yes, I know that but what you say here and the DCJ can make up his own mind, I do not want to belabour this point, it is semantic, we are clear on the meaning.

> "My intervention was that no surveillance should be done unless authorised by law."

And there you were referring to the direction of a judge.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: Right. You make it clear again at page 706, paragraph 21. There you say:

> "I made it plain that any surveillance of the Gupta family must be authorised in law and that Njenje must stop doing private business whilst in office."

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: Right. And then at page 719, paragraph 32, you say ...[intervenes]

AMBASSADOR CWELE: Paragraph?

ADV PRETORIUS SC: 32, page 719. You say:

> "I have pointed out that the only concern I had about the investigation of the Gupta brothers was whether the surveillance was authorised by a

designated judge. No such proof was furnished to me."

AMBASSADOR CWELE: It is page 7...? I am just lost.

ADV PRETORIUS SC: 719.

CHAIRPERSON: Paragraph 32.

AMBASSADOR CWELE: Yes, I am in paragraph 32. Yes, what is the passage?

ADV PRETORIUS SC: You say there:

"I have pointed out that the only concern I had about the investigation of the Gupta brothers was whether the surveillance..."

And I stress the word surveillance.

"...was authorised by a designated judge. No such proof was furnished to me."

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: Okay. In summary, it appears that the version that you are putting before the judge today differs at the very least in [indistinct] from the version that appears in the affidavits.

AMBASSADOR CWELE: No, it is still the same. All my statements are still the same.

ADV PRETORIUS SC: Alright, well we can look at the two and compare, Ambassador.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: I want to put to you the version of

Mr Shaik who says you instructed that the investigation be stopped.

AMBASSADOR CWELE: I do not know how I could instruct the investigation to stop, to be honest.

ADV PRETORIUS SC: Yes, it would be quite improper for a minister to tell operatives or officials ...[intervenes]

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: ...to stop an investigation. Do you agree with that?

AMBASSADOR CWELE: I agree and I did not stop any investigation.

ADV PRETORIUS SC: Alright, okay.

CHAIRPERSON: Would it be part of – what role would you be permitted to play in regard to whether an investigation should or should not be conducted or should or should not be pursued? Would it be permissible for you to approve an investigation that it should be conducted or to oppose it even if you do not say it must stop? What would be acceptable for a Minister of State Security in a situation where the leadership of SAA, as we know it now, thought that there is good reason to conduct a certain investigation?

AMBASSADOR CWELE: The Minister has got no role.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: The only role I just said as a

Minister is a supervision role.

CHAIRPERSON: Ja.

AMBASSADOR CWELE: So that things were done according to the law.

CHAIRPERSON: Ja.

AMBASSADOR CWELE: I do not authorise investigations, I do not direct investigation as a Minister.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: I get reports when the investigations are done.

CHAIRPERSON: Ja.

AMBASSADOR CWELE: Yes, because I do get.

CHAIRPERSON: Yes. So if their version were to be true that – at least the version of two of them, that even though you might not have instructed that the investigation be stopped nevertheless you expressed very strong opposition, that would not be something that would be appropriate for you to have done, if it did happen.

AMBASSADOR CWELE: I did not express any opposition, Deputy Chief Justice or Chairman, to the investigation. I put that (indistinct – recording distorted).

CHAIRPERSON: Ja. Okay, alright, Mr Pretorius?

ADV PRETORIUS SC: Yes. Just for the record, Chair, Shaik's evidence was clear that the Minister instructed that the investigations be stopped. Well, even if that became

clear from the context and what was communicated at the meeting.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: Mr Njenje said although he might not have said so in so many words, in effect the Ambassador was telling them to stop the investigation.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: Mr Maqetuka said:

> "The only aspect on which I differ with Ambassador Shaik in his evidence before the Commission is the place where the meeting with the President took place."

So the versions are compatible if not precisely the same in their description of the detail.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: I want to put the outcome to you, Ambassador. There were two consequences of that meeting. The first is that the top three went to see the President to discuss the continuation of the investigation. Correct?

AMBASSADOR CWELE: I do not know, I said I was not aware of that meeting, it is what I wrote.

ADV PRETORIUS SC: Alright. There is no basis upon which, or knowledge, that you have to contradict that.

AMBASSADOR CWELE: Yes, correct.

ADV PRETORIUS SC: The second thing is the investigation to all intents and purposes stopped.

AMBASSADOR CWELE: Mr Pretorius, really, who stopped the investigation?

ADV PRETORIUS SC: That is precisely the point. Three persons who were intent ...[intervenes]

AMBASSADOR CWELE: Let me start with this ...[intervenes]

CHAIRPERSON: Okay, Ambassador, you asked him the question, Ambassador, let him respond. Mr Pretorius, you are responding ...[intervenes]

ADV PRETORIUS SC: Three persons intent on pursuing an investigation meet with you in Cape Town, hear what you have to say, decide they have to got the President to clarify whether this investigation can continue or not and conclude after meeting you and after meeting the President that the investigation should stop and it does stop despite their keenness and despite their intent to conduct the investigation. It stopped.

AMBASSADOR CWELE: What I can say, it was not stopped by me. I do not know who stopped it. The (indistinct – recording distorted) because it was not stopped by me. The statement of Mr Shaik is the only statement. The other two directors were very clear that there was no instructions from me to stop the investigation.

I will ask if you can go – that is why we ask to cross-examine these people because we are going to expose the lies of this person(?) that I instructed the investigation to stop. He is the only one who is saying that but even him, he say even if I instructed, they were not going to stop. So why did they stop? So because clearly others were clear that at no stage did I said they must stop the investigation. I can go through their statements, if you want to.

ADV PRETORIUS SC: Well, so can we and we will do so, Ambassador, but for the present, you make the point precisely, they did stop the investigation.

AMBASSADOR CWELE: Not by me.

ADV PRETORIUS SC: Well...

CHAIRPERSON: One second, Mr Pretorius. If, Ambassador, you wanted to refer to certain statements or evidence by them, I want to give you that opportunity because it is a very important part of the issues that we are looking at if you particularly wish to draw to my attention certain statements which support what you are saying, that is fine.

AMBASSADOR CWELE: Okay. Maybe in general terms I will go then to maybe Maqetuka's statement.

CHAIRPERSON: Ja.

AMBASSADOR CWELE: If you read Njenje's statement, first one because there are so many versions of these

statements. Njenje, I think, is only one who wrote one statement. Others wrote two or three. And he never even mentioned the meeting in Cape Town, nè? When we come to Maqetuka, I hope – I have read these things but I am trying to get what is the documents. But, Maqetuka, whatever, in his first statement ...[intervenes]

CHAIRPERSON: Well, one second, Ambassador. Mr Pretorius, are you able to assist the Ambassador to tell him where to find Mr Maqetuka's affidavit?

AMBASSADOR CWELE: I think I will find it EXHIBIT PP3.

CHAIRPERSON: EXHIBIT PP3, what bundle is it, are you able to...?

AMBASSADOR CWELE: Go to annexure MM1, the first statement.

CHAIRPERSON: Oh, okay. PP3, I have got it. Yes?

AMBASSADOR CWELE: I am just trying to go to the point.

CHAIRPERSON: Yes, I see that on this one you will not find black numbers for pagination but you can use the red numbers for this one.

ADV PRETORIUS SC: They had not been invented by that stage, Chair.

CHAIRPERSON: Ja.

AMBASSADOR CWELE: I will try and get it but...

CHAIRPERSON: Well, I can tell you that I see in paragraph 4, Ambassador, where Maqetuka's statement,

which I think is the first one, in paragraph 4 he said – no, not paragraph 4, paragraph 7, at the end, he says ...[intervenes]

AMBASSADOR CWELE: It is the same, ja.

CHAIRPERSON: Ja, is that the paragraph you are looking for?

AMBASSADOR CWELE: Yes.

CHAIRPERSON: Okay, read the relevant part that you want to draw my attention to.

AMBASSADOR CWELE: Ja, paragraph 7, if you go to what starts with page 3 on top, where you reading from.

CHAIRPERSON: Yes, ja.

AMBASSADOR CWELE: It says:

> "The meeting ended without resolving the matter. Later we learnt from the media that Minister has instructed us to stop investigation."

We learnt from the media. I do not which we were learning from.

> "I have to state that I do not recall him having given such an instruction. To put it very clear, that I did not give that instruction."

So Mr Pretorius, you say they are collaborating. Certain statements of Mr Maqetuka is trying to collaborate what Mr Shaik was saying. But it is even there he does not say that I said I must stop the investigation.

CHAIRPERSON: Yes. Okay, alright. Thank you. Mr Pretorius?

AMBASSADOR CWELE: So the conclusion is wrong, Chair, Mr Pretorius' conclusion is wrong.

CHAIRPERSON: Mr Pretorius?

ADV PRETORIUS SC: Let us deal with the first statement of Mr Maqetuka which appears at page 12 of that bundle of EXHIBIT PP3.

CHAIRPERSON: Are you referring to an annexure to his statement?

ADV PRETORIUS SC: I am referring to his first statement at the beginning of the bundle, Chair.

CHAIRPERSON: Oh.

AMBASSADOR CWELE: That is correct.

CHAIRPERSON: Ja?

AMBASSADOR CWELE: Paragraph?

CHAIRPERSON: That starts from what paragraph?

ADV PRETORIUS SC: Well, the investigation into the Gupta affairs is dealt with at page 12, paragraph 52, but I want to refer the Ambassador to paragraph 58 on page 14.

CHAIRPERSON: No, it looks like, Mr Pretorius, you and I – there is something wrong with your file references. You said you are looking for Mr Njenje's statement, Mr Pretorius, is that right?

ADV PRETORIUS SC: Mr Maqetuka.

CHAIRPERSON: Mr Maqetuka and you are using the bundle that we were using just a few minutes ago when the Ambassador was looking for a page?

ADV PRETORIUS SC: Yes, we are in EXHIBIT PP3. I will come to Njenje in a moment, Chair.

CHAIRPERSON: Okay, no, no, no, I am looking – I think we were not – I do not think we were in that one, I do not know if it is a duplication. Okay, I have taken another one now that has got PP3. The other one has got – you said page 12, I think I have got the right one, now.

ADV PRETORIUS SC: Ja and if you go to page 14?

CHAIRPERSON: Page 14. Yes, I have got page 14. Have you got it, Ambassador?

AMBASSADOR CWELE: Yes, Chair.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: Paragraph 58:

> "Minister Cwele stated that he had called us to the meeting because he had been told that Mr Njenje was conducting an investigation into the relationship between the Gupta family and the former President which he believed to be irregular. He paused there and looked around at us to, I believe, gauge our reaction."

Then there is an interlude at paragraph 59. Paragraph 60 reads:

"After the presence of the Minister's officials had been sorted out Minister Cwele stated that he objected to the Gupta investigation because in his view it was not being pursued *bona fide* but was rather being pursued by Mr Njenje in order to protect his own business interests which were in conflict with those of the Guptas."

Do you see that?

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: Then over the page, paragraph 61:

"Mr Cwele never responded to this..."

And that is what was set out in paragraph 60.

"...and it was clear that we would not be able to resolve the issue with the Minister. I therefore told Minister Cwele that there were no purposes in debating the issue any further and that it was our intention to take the matter up with the former President directly."

Paragraph 62:

"I do not remember the Minister categorically and directly instructing us to stop the investigation. However, he made it quite clear by his attitude to the investigation that it should be stopped. He was not interested in the merits of the investigation and sought only to question Mr Njenje's motives for

pursuing it."

Do you see, that is his version.

AMBASSADOR CWELE: Okay, let us start in paragraph 58.

CHAIRPERSON: Five eight?

AMBASSADOR CWELE: Paragraph 58 on page 14.

CHAIRPERSON: Okay.

AMBASSADOR CWELE: Yes, Chair, I have explained the reason why I called the meeting. I did not call the meeting because of the relationship between Guptas and the President, I called the meeting because of the alleged illegal interception. So I just want to put that on record because that is what he says and also on page 60, the way that paragraph is written, I have tried to explain to the Chairperson that know that Njenje's business was in conflict with the Gupta's business, they were business partners according to what he said in that meeting. At page 61 I have explained Chair, no one said they are going to the President and as I said if you want me to get the transcript of that meeting because at one stage some of them deemed the meetings took very short and because of a disagreement people walked out. It is not true. We finished the meeting correctly, very late, after lengthy discussions.

CHAIRPERSON: H'm.

AMBASSADOR CWELE: And I summarised what was my concern and what should happen, as I have explained to the Chairperson that they were going to see the President, I am just trying to put that.

CHAIRPERSON: Would the information be - would there be any declassification necessary to obtain the transcript or the minutes and so on, as far as you know?

AMBASSADOR CWELE: All the document, why I cannot get all of them they are tagged there as classified document, even the transcript recording.

CHAIRPERSON: Okay, no, that is fine.

AMBASSADOR CWELE: But maybe to conclude.

CHAIRPERSON: H'm.

AMBASSADOR CWELE: He still say he did not give any instruction, I do not know where this thing Mr Pretorius gather, they gave instruction.

CHAIRPERSON: Well, he read earlier on you may recall, he read a passage where, as I recall, one of them said in his statement or affidavit that you in effect, stopped or instructed them to stop, even though I am putting notes now in my own words, even though you did not expressly give the instruction. He so - Mr Pretorius said refer to a passage where somebody - one of them was saying, in effect, your opposition was such that even though you were not saying stop this thing, to them, it was clear that you

were actually saying they must stop it without expressly saying so that that is my understanding of a passage that he read.

But an another one, I think it is Maqethuka says he has no recollection of you giving an instruction to stop and then of course, I think Mr Moshaik is saying no, you did actually give the instruction but I think maybe we have given the matter enough consideration, maybe we should move on Mr Pretorius.

ADV PRETORIUS SC: Yes, well, if we could just clarify, Mr Njenje's evidence that was clarified in the transcript to be his evidence of 26 November 2019 and the passages appear at SSA 5 page 303 to 304.

CHAIRPERSON: Okay.

AMBASSADOR CWELE: Which document now?

ADV PRETORIUS SC: The same, Bundle SSA 5 the document before you Ambassador. Do you want to go to 105.

AMBASSADOR CWELE: 104 to 105, is it a transcript statement?

ADV PRETORIUS SC: No, I am sorry, we must look at the figure the page numbers at the top of the page, it is page 303, my apologies.

CHAIRPERSON: That cannot be the same bundle then Mr Pretorius?

ADV PRETORIUS SC: Yes, Chair.

CHAIRPERSON: Because the same bundle goes up to 161.

ADV PRETORIUS SC: It is bundled 5, SSA 05, I am referring to.

CHAIRPERSON: Okay, Bundle 5, what page again?

ADV PRETORIUS SC: 303.

CHAIRPERSON: Okay.

AMBASSADOR CWELE: Is that page with the SSA 805305 on the left?

ADV PRETORIUS SC: 303 on the left, yeah.

AMBASSADOR CWELE: Okay.

CHAIRPERSON: The black numbers, use the black numbers ambassador, page 303. Have you got it?

AMBASSADOR CWELE: Yeah, they all black, Chair.

CHAIRPERSON: Well I have got black and red, have you got the right bundle?

ADV PRETORIUS SC: There is no red ink in China.

CHAIRPERSON: Okay, alright but you are on the right page. Okay, continue Mr Pretorius.

ADV PRETORIUS SC: On page 303 halfway down the page. The issue is raised by you Chair, about whether Minister Cwele clearly instructed the three to stop the investigation. The Chairperson says and I am going to go, just to the outcome of the discussion at the bottom of the

page says:

> "So, you say he might not have put it in so many words but as far as you are concerned, that was the effect of what he was saying, Director Njenje on page 304, that is correct, Chair."

So that is Njenje's version. The outcome must be seen. Ambassador Cwele against the background of your raising, whether as an abuse of resources or otherwise, your opposition to the investigation continuing whilst the conflict of interest, as you alleged continued. That matter was not resolved at the meeting, according to Mr Maqethuka and according to Mr Njenje, and according to Mr Moshaik, and that is why they went to see the President.

AMBASSADOR CWELE: I do not know why they went to see the President but I want to put it here because now, I was not given a chance to cross examine these gentlemen. If you said they record what happened when they met with the President they didn't discuss the issue of the meeting in Cape Town, if you read what I think is Mr Moshaik they discussed the issue of some ...[indistinct] report, that is the first thing.

So if he is not correct that they went there in my own view just because there was some concerns in the meeting in Cape Town. No one, I repeat no one told me that they were going to see the President and I want to say

Mr Chairperson you can always be evasive of this matter, the truth will come from those transcripts.

CHAIRPERSON: H'm, h'm.

AMBASSADOR CWELE: Yes, because they themselves they are clear that I never instructed most of them but when they come but Mr Moshaik say this, oh ja, the Minister is angry, oh ja, maybe he said it not in ways but by expression, I don't know what that means. Two of them agreed that I never gave such instruction.

ADV PRETORIUS SC: That's not entirely correct but Ambassador let's move on, I just want to put one proposition to you, when this investigation was initiated the top three were intent for reasons that they explained on pursuing the investigation where evidence, you agree with that at least?

AMBASSADOR CWELE: Yes I am listening.

ADV PRETORIUS SC: Do you agree with that proposition, they wanted this investigation to be pursued?

AMBASSADOR CWELE: Yes I am listening.

ADV PRETORIUS SC: No, do you agree with that?

AMBASSADOR CWELE: [laughing] I don't know, I was not in that meeting, I cannot comment on that.

ADV PRETORIUS SC: Well you sat in a meeting with them for several hours ambassador, you must have concluded that they wanted this investigation to continue,

it was you who raised objections to it continuing.

AMBASSADOR CWELE: No, I never raised Mr Pretorius any objection or a legitimate investigation to continue, I repeat I have said ...[indistinct – distorted]

ADV PRETORIUS SC: The point I am making [parties speaking simultaneously]

CHAIRPERSON: Hang on, hang on, hang on, don't speak at the same time, let the ambassador finish Mr Pretorius.

AMBASSADOR CWELE: Thank you sir. I am saying the answer I give for Mr Pretorius at no stage did I never stop any legitimate investigation.

ADV PRETORIUS SC: You have stopped ...[intervenes]

AMBASSADOR CWELE: I never gave any instruction and I pointed out to you even in their statements where they clearly say I never gave such instruction.

ADV PRETORIUS SC: They left that meeting with the clear understanding that you opposed the investigation, that is their evidence, but I don't want to go there because the record is clear Ambassador and we can debate for many days the nuances of the language, what I want to put to you, which you seem to be unwilling to concede is that the top three wanted this investigation to continue, and that was made clear to you in the meeting.

AMBASSADOR CWELE: Yes, but I never stopped any investigation, that is what I am saying.

ADV PRETORIUS SC: I am not dealing with that issue at the moment Ambassador, what I am putting to you is that they were intent on pursuing this investigation to finality.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: You concede that, good. After meeting with you and after meeting with the President the investigation was stopped, would you concede that?

AMBASSADOR CWELE: No. The investigation was not stopped after meeting with me. If you look Mr Pretorius, I will tell you why, If you look [laughing] at their statements they were clear that even if - this is what they said, even if ...[indistinct] and Maqethuka even I was against they were going to continue.

ADV PRETORIUS SC: Yes.

AMBASSADOR CWELE: This is true.

ADV PRETORIUS SC: And then finally – not but ...[intervenes]

AMBASSADOR CWELE: I was answering you, I am stil answering you.

CHAIRPERSON: Yes continue Ambassador.

AMBASSADOR CWELE: For whatever reason they went to the President because they have this belief if they read their documents that if the President says stop they will proceed with the investigation.

CHAIRPERSON: Yes okay, Mr Pretorius ...[intervenes]

AMBASSADOR CWELE: Their ...[indistinct] statements is there, you can go through it if you give me time I can go through those statements.

ADV PRETORIUS SC: Ambassador I made it very clear and their evidence is very clear that after the meeting with you and after the meeting with the President that investigation stopped.

AMBASSADOR CWELE: Do you want me to refer to the statement Mr Pretorius?

ADV PRETORIUS SC: I know the statement you are referring to ...[intervenes]

AMBASSADOR CWELE: ...[Indistinct] you are saying I am not speaking the truth.

CHAIRPERSON: Hang on one second Mr Pretorius and Mr Ambassador, let me ask this question before you refer to the statements ambassador, in terms of time if we talk about time do you know roundabout when after you had met them that investigation stopped, do you know about how long it took before you got to know that the investigation was no longer being pursued because I assume you must have been told at some stage that it was no longer being pursued.

AMBASSADOR CWELE: I was never told that it is not being pursued Chair.

CHAIRPERSON: Yes. This – but I guess that wouldn't

you need to know from time to time what was going on in order for you to have to play your oversight role, would they not be needing to give you reports from time to time of certain investigations maybe at least, maybe not all of them.

AMBASSADOR CWELE: Mr Chair yes what normally happens, once they have concluded their report and they give me a report, I never received any report until they left.

CHAIRPERSON: But before they conclude an investigation would they not generally speaking give you updates from time to time regularly, particularly maybe with regard to certain investigations, maybe not all of them, certain important ones.

AMBASSADOR CWELE: Yes if there is an important investigation they will give that if they produce a report.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: Then I will ...[indistinct – distortion] there was never a report on this matter Chair.

CHAIRPERSON: Yes, and you – did you ever get to know whether an investigation had stopped or until you left the position of Minister of State Security you didn't know whether that was still going on or not?

AMBASSADOR CWELE: I didn't know.

CHAIRPERSON: Oh, okay. Mr Pretorius.

ADV PRETORIUS SC: Well it seems that you are in no

position Ambassador from what you are saying now to comment on the proposition that the top three concluded after their meeting with you and – and I stress this – after their meeting with the President the investigation should stop and it was stopped.

AMBASSADOR CWELE: I have stated my position Mr Pretorius, I never stopped any investigation, I repeat that.

ADV PRETORIUS SC: That is a different point Ambassador. I put it to you again please, are you able to dispute the evidence that the top three stopped the investigation after they had met with you and with the President?

AMBASSADOR CWELE: I don't know when they stopped the investigation.

ADV PRETORIUS SC: You don't know, alright.

AMBASSADOR CWELE: Yes, I have said that.

ADV PRETORIUS SC: What you do know and what you do say is that you enquired as to whether they had the designation from the judge and you never received that designation?

AMBASSADOR CWELE: I did say, I still say that.

ADV PRETORIUS SC: Okay.

AMBASSADOR CWELE: Following my meeting with the Deputy Director of ...[indistinct].

ADV PRETORIUS SC: Let's move on then to another

issue and that is the principal agent network plan. We have been told in evidence and I don't think there will be any difference between us Ambassador that the establishment of a principal agent network is an accepted practice in Intelligence Agencies worldwide?

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: It is properly done.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: Right and what it is, is the recruitment of Principal Agents outside the agency who in turn handles sources and agents in order to accumulate intelligence, more or less, I am again ...[intervenes]

AMBASSADOR CWELE: It depends, it would depend on the nature of the operation. If it is a deep cover operation it should not link to the agents at all, so if it is a deep cover.

ADV PRETORIUS SC: Right.

AMBASSADOR CWELE: But if it is not a deep cover it should be part of the intelligence system.

ADV PRETORIUS SC: And whilst you were a Minister of the State Security Agency a plan was established, a principal agency network was established?

AMBASSADOR CWELE: No.

ADV PRETORIUS SC: Was it established before you?

AMBASSADOR CWELE: Before me.

ADV PRETORIUS SC: Alright. You had concerns about the implementation of the project whilst you were Minister, is that correct?

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: And you state these concerns in your evidence? In fact you say that the work to clean up the PAN Programme was initiated by you soon after your appointment?

AMBASSADOR CWELE: ...[Indistinct – distorted]

ADV PRETORIUS SC: Do you want that reference?

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: Page 717 of Bundle SSA 05 at paragraph 26.

CHAIRPERSON: Page 717?

ADV PRETORIUS SC: 717 yes Chair.

CHAIRPERSON: Thank you.

AMBASSADOR CWELE: The ...[indistinct] page?

CHAIRPERSON: Ja, the black pages.

AMBASSADOR CWELE: Okay which paragraph specifically?

ADV PRETORIUS SC: Paragraph 26

AMBASSADOR CWELE: 26, yes. Yes I am there.

ADV PRETORIUS SC: You say there that the work to clean up the programme was initiated by yourself soon after your appointment?

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: Right. And your concern as appears at page 754 of the same bundle, paragraph 2.1 was that ...[intervenes]

AMBASSADOR CWELE: [distorted]

CHAIRPERSON: What page is that Mr Pretorius?

ADV PRETORIUS SC: 754.

CHAIRPERSON: Okay.

AMBASSADOR CWELE: 754, yes which paragraph?

ADV PRETORIUS SC: One of the concerns as appears from the summary of the PAN investigation which we will come back to later was that there was an overspending of allocated budget and the subsequent use of rollover funds and budget savings, which was just one of the concerns.

AMBASSADOR CWELE: May I just get there, I think I am on the wrong page. Page?

CHAIRPERSON: 754.

AMBASSADOR CWELE: 754.

ADV PRETORIUS SC: Yes it is not your affidavit, it is merely a summary of the PAN investigation.

AMBASSADOR CWELE: Oh I thought I was going to my affidavit. Yes?

ADV PRETORIUS SC: You express your concerns differently and perhaps we should go straight there Ambassador can I take you to a different passage. If you

go to page 689 of your affidavit, at para 13.

CHAIRPERSON: That's 689 of Bundle 5 but that happens to be his affidavit. 689.

AMBASSADOR CWELE: Yes I am there Chair.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: We see in paragraph 13 they did in fact task Njenje to investigate the activities of what was called the Principal Agent Network PAN programme, but did hold the view that the PAN Programme required closer scrutiny, in particular one of the elements of my concern was that the PAN programme started with a relatively small budget which ballooned almost tenfold over a short space of time and with questionable acquisition of operational, moveable and fixed assets. The State Security Agency has since stopped the programme and recouped some of the assets.

AMBASSADOR CWELE: That's right.

ADV PRETORIUS SC: That is correct is it?

AMBASSADOR CWELE: That is correct Chair.

ADV PRETORIUS SC: You make several references in your affidavits Ambassador to the activities that required scrutiny in the PAN programme, would it be fair to say that there was a need to investigate criminal activity?

AMBASSADOR CWELE: Yes Chair, let me just answer, as I said the PAN programme investigation I asked it to be

instituted well before the three gentlemen were involved, for the reasons ...[indistinct] they found the investigation going and I asked them to continue and I briefed them on the investigation. There were different, but of course you are correct that my concern this was not supposed to be a deep cover operation it was supposed ...[indistinct] cover operation ...[indistinct]. I was concerned about the budget ballooning, I was concerned because the first person who raised the matter with me was the CFO, the then CFO even before I was still ...[indistinct] just before I got appointed, but he was concerned, the CFO of MIA was concerned about the way of funds which were not accounted and the demand for budget and that this programme was taking the operational budget ...[indistinct] the provinces and other operations, so it was like siphoning the budgets of the Domestic Branch or ...[indistinct].

So that was my concern. We ...[indistinct] at this establishment, yes it was authorised by the Minister, the then Minister, then I then said because this thing is ballooning and there is no accountability of money like the agency do it is all investigation, there were several investigations. Our first one was an audit, the second one was a counter-intelligence operation and the third one which completed in 2013 was what I tasked the Inspector General to do because at that time we were clear that

there was some disciplinary things which needed to be done and ...[indistinct] that there will be criminal charges that may need to be charged.

ADV PRETORIUS SC: Alright, there was an internal audit conducted which raised issues concerning mal-administration and non-compliance with directives, do you recall that?

AMBASSADOR CWELE: Alright.

ADV PRETORIUS SC: And the internal audit has in fact recommended a full and independent forensic audit be conducted.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: Right, and pursuant to that internal audit Director Njenje appointed an investigation team during 2010 to investigate maladministration and allegations of financial irregularities, is that correct?

AMBASSADOR CWELE: That was the certain investigation which was the counter-intelligence.

ADV PRETORIUS SC: Right, now we have a summary of that investigation which has now been declassified and it appears at page 754 and following, do you see that?

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: Now we can go into the text of the summary if you wish but I could put it to you at a high level that this report has not one but many allegations of

criminal activity, you must be aware of this report, it was presented to you apparently.

AMBASSADOR CWELE: I am just trying to see what is the date of the report.

ADV PRETORIUS SC: Okay. I don't think it is there.

CHAIRPERSON: There is no date ...[intervenes]

AMBASSADOR CWELE: But I think there were many update report Mr Pretorius. I start getting all these reports I took a vision because it was clear that we may have to pursue criminal investigation.

ADV PRETORIUS SC: Yes, but just for completeness if you look at page 754, para 1. It reads:

> "The purpose of this report is to provide a summary of the findings as contained in the final report of the PAN programme investigation with reference SSA/6/4/5 dated May 2012, that was presented to the Minister of State Security and the Acting Director General on 19 June 2012."

Do you see that?

AMBASSADOR CWELE: On page 64?\

CHAIRPERSON: Page 754.

ADV PRETORIUS SC: 754 paragraph 1.

CHAIRPERSON: Using the black numbers on the left hand corner. Have you found it?

AMBASSADOR CWELE: Ja.

CHAIRPERSON: Okay, he is reading from paragraph 1.

AMBASSADOR CWELE: H'm.

CHAIRPERSON: Mr Pretorius maybe it is convenient to take the lunch break now, it is one o'clock so if he wants to refresh his memory he can do that.

ADV PRETORIUS SC: Thank you Chair.

CHAIRPERSON: Ja, let's do that. Ambassador let's – and Mr Semenya let's take the lunch break, we will resume at two'clock.

We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Am I unmuted now?

UNKNOWN: Yes, you are DCJ.

CHAIRPERSON: Okay, alright. Mr Pretorius, Mr Semenya and Ambassador, I hope you were informed privately why I was delayed. Today it looks like a very abnormal day. First of all my Registrar is sick and she could not come here.

Then the technical glitches. Then other things that happened outside the Commission which affect the Commission never the less, so but it is okay. Now we can continue. Thank you.

ADV PRETORIUS SC: Ambassador, we were dealing with the summary of the PAN report which appears in bundle

SSA05 at page 754 and following. We dealt with paragraph 1. I would like to refer you to paragraph 2.3 please.

AMBASSADOR CWELE: [indistinct]

CHAIRPERSON: Bundle 5, remember where there was the summary of the PAN report of the findings.

AMBASSADOR CWELE: Page seven hundred and?

CHAIRPERSON: 754. Black numbers, left top corner.

AMBASSADOR CWELE: Ja, I have gone back to it now.

CHAIRPERSON: Okay.

AMBASSADOR CWELE: Yes. I am just trying, I do not know whether I missed my ...[intervenes]

CHAIRPERSON: That is the report that Mr Pretorius had started asking you questions on just before we adjourned.

AMBASSADOR CWELE: Okay, I think I am ... seven ...[intervenes]

CHAIRPERSON: 754.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: Paragraph 2.3.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: Okay, Mr Pretorius?

ADV PRETORIUS SC: It reads Ambassador as follows:

> "During the course of the investigation, the investigators identified numerous incidents of breach of the state security agency's regulatory framework as well as the irregular

> authorisation and utilisation of funds. The result of the investigation indicates that there is sufficient indication to institute criminal investigations against the following persons, as well as against certain persons still unknown ..."

And then there is listed a number of 14 persons. We do not need to mention the names for the present. Do you see that?

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: The report goes into further detail including the illegal bugging of the work of the internal auditors in the board room at SSA, but if one goes to page, I am going to try and cut this down, but if one goes to page 760 under the head operational project, paragraph 5.3 on page 761 reads:

> "All indications are that criminal offences in terms of the Prevention and Combating of Corrupt Activities Act 2004 as well as the Public Finance Management Act have been committed."

Do you see that?

AMBASSADOR CWELE: That is paragraph?

ADV PRETORIUS SC: 5.3 on page 761.

AMBASSADOR CWELE: 761, yes.

ADV PRETORIUS SC: And then paragraph 5.4 refers to a series of incidents and concludes:

> "There are strong indications that offences in terms of the Prevention and Combating of Corrupt Activities Act 2004 have been committed."

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: You see that?

AMBASSADOR CWELE: Ja.

ADV PRETORIUS SC: And then under paragraph 6, the conclusion in paragraph 6.1 having referred to certain incidents is the following. It reads:

> "It is clear that forgery and uttering, fraud and various offences in terms of the Prevention and Combating of Corrupt Activities Act 2004 as well as the Companies Act 2008 have been committed."

You see that?

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: Similar comments are made in relation to other circumstances, in paragraph 6.2, 6.3, 6.4. You see that?

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: Then in paragraph 9.1 ...[intervenes]

CHAIRPERSON: Mr Pretorius.

ADV PRETORIUS SC: Yes Chair.

CHAIRPERSON: I do not know whether the problem is on my side only, but you were frozen initially but now I think I have lost connection. Can you hear me or not?

ADV PRETORIUS SC: I can hear you perfectly Chair.

CHAIRPERSON: Oh, okay. [indistinct] will help me here.

ADV PRETORIUS SC: Now you have frozen Chair. Can you hear me Chair?

CHAIRPERSON: I can hear you yes, it is just that I do not see you. Oh ...[intervenes]

UNKNOWN: The technician is on the way to sort it out DCJ.

CHAIRPERSON: Ja, the technician seems to have sorted it out for now. Can you hear me Mr Pretorius?

ADV PRETORIUS SC: Yes, I can Chair.

CHAIRPERSON: Okay, alright. Let us continue. Maybe start two or three sentences back because you were frozen when you were still speaking.

ADV PRETORIUS SC: Right, in paragraph 6 there are at least four conclusions in relation to different circumstances along the lines of forgery and uttering, fraud and various offences in terms of the Prevention and Combating of Corrupt Activities Act and other acts having been committed.

I am summarising at a high level Ambassador.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: Alright. If I can go then to paragraph 9.1 and I have just extracted by way of example some of the findings in the report. Just to illustrate what you have already clearly conceded Ambassador Cwele, that we had to do here with criminal conduct.

If one goes to paragraph 9.1 there is a section that deals with liaison with law enforcement agencies. 9.1 reads:

> "During a meeting at OR Tambo airport with the Minister of State Security on 9 November 2010 it was resolved that the CSU matter ..."

That is the matter we are talking about:

> "Will be referred to the national prosecuting authority forthwith for a criminal investigation into the alleged irregularities in the PAN program."

Was that decision made as recorded there?

AMBASSADOR CWELE: Yes, the decision was preferred to law enforcement agencies.

ADV PRETORIUS SC: Right. Then in paragraph 9.6 after a series of procedural matters had occurred, the following appears:

> "On 23 February 2011 the investigation team

met with representatives of the SIU and it was resolved that the SIU will conduct a pre-assessment investigation commencing on 28 February 2011."

Do you recall that happening?

AMBASSADOR CWELE: Correct.

ADV PRETORIUS SC: A pre-assessment investigation is an investigation conducted to take place before the president to issue a proclamation directing the SIU to continue with its investigations and other work in relation to particular matters, is that correct?

AMBASSADOR CWELE: Yes, I am listening.

ADV PRETORIUS SC: Right.

AMBASSADOR CWELE: I do not know about the pre-assessment in that context. Let me say why I was pausing. The pre-assessment sir, was explained that after initial investigation, they estimated that there was some amount which was supposed to be paid.

That was my understanding. The primary investigation.

ADV PRETORIUS SC: Yes.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: There were discussions about the amount to be paid. That amount was reduced significantly in the course of time.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: Bear with me a moment Chair.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: Would you please Ambassador, go to page 786 of Bundle 5. Now these documents are the fruits of investigation that took place over the weekend and this affidavit was only very recently obtained, and I hope it has reached you.

If not, I am going to have to read ...[intervenes]

AMBASSADOR CWELE: No, I do not have. Mine ends at 783.

ADV PRETORIUS SC: Alright. My apologies. Chair, do you have page 786 in your file? Chair ...[intervenes]

UNKNOWN: It seems the DCJ has been disconnected. Could we please have a moment to sort that out.

ADV PRETORIUS SC: Yes. Ambassador I am informed that it was sent to your attorney at 10H41 this morning. I do not know ...[intervenes]

AMBASSADOR CWELE: I have not received it Chair.

ADV PRETORIUS SC: I am sorry?

AMBASSADOR CWELE: I have not received it.

ADV PRETORIUS SC: Alright, well I will give you the just of it, because I do not think it is controversial.

AMBASSADOR CWELE: No, I do not have any mail.

ADV PRETORIUS SC: Right.

CHAIRPERSON: Can you hear me?

UNKNOWN: Yes, we can DCJ.

CHAIRPERSON: Okay, thank you. Okay Mr Pretorius, continue. These ...[intervenes]

ADV PRETORIUS SC: Do you have an affidavit of Peter Henry Bishop at page 786? It is Bundle 5.

CHAIRPERSON: That is the same bundle, have you got it ambassador?

AMBASSADOR CWELE: No, mine ends at 783.

CHAIRPERSON: Oh.

ADV PRETORIUS SC: It was sent this morning. This is a product of an investigation that took place over the weekend. It was sent this morning to the Ambassador's attorney, but I believe has not reached the Ambassador, so ...[intervenes]

CHAIRPERSON: Ja.

ADV PRETORIUS SC: Be that as it may Chair, I can just place we should not be controversial and if there is controversy then we can deal with it but ...[intervenes]

CHAIRPERSON: Ja, ja.

ADV PRETORIUS SC: But if I could just place the facts attested to by Peter Bishop.

CHAIRPERSON: Ja, okay.

ADV PRETORIUS SC: During March 2011 he says Ambassador, he served as a member of the executive

committee of the Special Investigating Unit and was appointed as the acting project [indistinct] and head of operations.

Do you know that or are you able to comment?

AMBASSADOR CWELE: No, I cannot comment because I do not have anything which says that.

ADV PRETORIUS SC: No, I understand.

CHAIRPERSON: Ja.

AMBASSADOR CWELE: Ja.

ADV PRETORIUS SC: Paragraph 4 reads:

> "On 31 March 2011 I prepared and forwarded an overview to the then head of the national intelligence agency, Mr LG Njenje of the SIU's business proposal to assist the NIA with a preliminary assessment of alleged irregularities in relation to the Covid support unit's principle agent network program."

He then continues to say:

> "The business proposal came about after several meetings were held in March 2011 between members of NIA and my office. That the meetings NIA requested that the SIU appoint a dedicated capacity to firstly identify, investigate and redress improprieties, including fraud, corruption and

maladministration within NIA's Covid support unit principle agent network program. Two, facilitate the recovery of any losses incurred. Three, facilitate the laying of criminal charges where evidence collected support such improprieties / allegations."

He then continues to say:

"The purpose of conducting that pre-assessment once a government agency requests the SIU's assistance, is to establish whether grounds exist to apply for a presidential proclamation for purposes of investigating such alleged irregularities."

Then paragraph 7:

"After I had forwarded the overview of the SIU's assessment to Njenje, I received a call from one of the NIA members that had met with me and requested if I could amend the costing. I subsequently discussed this with the then head of the SIU, Mr Willie Hofmeyer who agreed that we reduce the project cost."

That issue you seem to have some knowledge of Ambassador?

AMBASSADOR CWELE: Yes, I did hear about that.

ADV PRETORIUS SC: Yes, then paragraph 8:

"Shortly after I had received ..."

I am going to start again, I am sorry:

"Shortly after I had advised NIA that the SIU would consider reducing the said project costs, I received another phone call from NIA who advised that NIA's management had advised that the investigation should rather be dealt with by the inspector general of intelligence. The SIU had no further dealings thereafter with the NIA with regards to the PAN investigation."

Does that record of the facts in so far as they are alluded to by Mr Bishop, accord with your own understanding of the situation?

AMBASSADOR CWELE: I think some of them, I know that there was ... I did receive ... like I said, there were many reports and updates I was receiving on this matter. Even this one which you have just read earlier on. That is why I was asking what was the date of it, because there were many reports.

Not only that one.

ADV PRETORIUS SC: Ja.

AMBASSADOR CWELE: I am aware that there was approach to NPA, there was approach to police, there was approach to SIU. I remember during one of the

discussions that the issue of the SIU initially was the cost and then I was informed that they were negotiating them down.

I cannot remember what was the finalisation of it. The rest of the statement I cannot comment on.

ADV PRETORIUS SC: Now the essence of what is said in the papers and in the summary to which I have just referred, is that the and in the affidavit of Mr Bishop is that the SIU was a law enforcement agency finally tasked to conduct the investigation and to deal with criminal prosecutions.

That is the first point. That is clear from the documentation. The second point is that it was taken away from them on the instructions of the NIA. That is the SSA.

AMBASSADOR CWELE: I do not know about that.

ADV PRETORIUS SC: Well ...[intervenes]

AMBASSADOR CWELE: You say the instruction came from the top management. I was not in top management.

ADV PRETORIUS SC: No, I understand that.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: But here I need to put to you how that came about, according to the witnesses. The first issue is that the investigation was taken away from SIU and instead the matter was referred to the office of the inspector general of intelligence.

You know that because you made that referral.

AMBASSADOR CWELE: No, I am aware of the investigation. I directed the investigation that we should also approach the inspector general, not because there was investigation by law enforcement agencies.

ADV PRETORIUS SC: Well, what happened ...[intervenes]

AMBASSADOR CWELE: The issue, the reason ... yes sir. Yes sir. The reason why I asked the inspector general, as I was saying there were several issue. First the reports somehow they were not clear. They were somehow contradicting while they were agreeing on many issues.

As you remember, the second thing was that there was also the issues what do we start with. Other reports were suggesting we start with disciplinary measures so that we can get some of them becoming state witnesses because we needed state witnesses in the case which we did not have.

So there were these type of contradictions. You must also remember that intelligence is not given as evidence in courts. I asked an independent assessment by an independent board, which is inspector general which could assist us also on taking matters forward, while they were reporting to the law enforcement agencies.

I am aware because the inspector general did release the report, I think it was beginning of 2013.

ADV PRETORIUS SC: Ja, let us not confuse the issue with respect Ambassador. The fact is that there were serious allegations of criminality, in an internal report.

AMBASSADOR CWELE: I am saying ...[intervenes]

ADV PRETORIUS SC: We have agreed on that.

AMBASSADOR CWELE: The investigation by the inspector general was not because there was something done by law enforcement agencies. It was to assist ...[intervenes]

ADV PRETORIUS SC: No ...[intervenes]

AMBASSADOR CWELE: With our own reports which we had. That is all what I am saying.

ADV PRETORIUS SC: Let us take it step by step. The first proposition is that a number of allegations of serious criminality were tabled in an internal investigatory report of the SSA. Is that correct?

AMBASSADOR CWELE: Yes, Mr Bishop. If you remember this report ...[intervenes]

ADV PRETORIUS SC: Mr Pretorius.

AMBASSADOR CWELE: Started very early. It was started by me. I was [indistinct] of corruption here. I am the one who started this thing when I was appointed. I will come back when I am dealing with my statement on this matter so that you understand clearly.

ADV PRETORIUS SC: Right, okay.

AMBASSADOR CWELE: Even, let me finish. Even the top officials you are relying on, they said the report by the time it was implemented was almost 70% done. There were issues, I am telling you so that you understand what were the challenges.

We did recover a lot of assets even before the three gentlemen were appointed. Not that we were sitting down and just conducting investigation. We stopped funding this program and we tried to get, identify the assets they were having so that we do not lose them.

These were things which were done internally by the SSA, mainly by NIA who were giving me progressive reports on a regular basis and we will have discussion after each and every report on the best way forward on what are the gaps and what needs to be closed.

ADV PRETORIUS SC: Ambassador, the point I was attempting to make was that an internal investigation report which we have just summarised, tabled allegations of serious criminality. Is that correct?

AMBASSADOR CWELE: That is correct. Many reports were pointing towards criminality.

ADV PRETORIUS SC: The second point that we have established is that the, in the law enforcement agencies were approached and these approaches culminated in a referral to the special investigation unit. Now I am not too

concerned with the sequence of events. You may differ, but the matter came before the special investigation unit.

We have agreed that, have we?

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: According to Bishop, the matter was then taken away from them. In fact they had to return all the documentation to the NIA. Can you dispute that?

AMBASSADOR CWELE: I never had any interaction with Mr Bishop. I do not know how can I answer that.

ADV PRETORIUS SC: Can you dispute it is the question.

AMBASSADOR CWELE: I cannot dispute something I do not know.

ADV PRETORIUS SC: Alright, good.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: The matter was not again referred to any law enforcement agency after it had been removed from the SIU. Would not have gone to the inspector general of the intelligence, but it did not go back to a law enforcement agency.

AMBASSADOR CWELE: The inspector general issue was not related to the reporting to the law enforcement agencies. That is the duty of an accounting officer, not the minister.

ADV PRETORIUS SC: Alright, so but the proposition I am making to you is that the matter never returned to the law

enforcement agency network. That was the end of it, once it had been taken away from the SIU.

AMBASSADOR CWELE: I am not aware, because I have heard that they were engaging NGA, they were engaging the police, they were engaging the SIU. The last thing I heard about SIU was that the costs were high and they were negotiating to bring the prices down.

ADV PRETORIUS SC: Yes, but I, we have agreed that you cannot dispute that at the stage the matter was removed by the NIA officials from the SIU, we know that. I cannot understand why that creates difficulty for you Ambassador?

AMBASSADOR CWELE: It was not removed by me. You can ask that to the people who removed it. It was not removed by me.

ADV PRETORIUS SC: Ja, well that is where I am coming to Ambassador. The further fact that appears from the evidence that we have obtained is that there have been no criminal prosecutions since then. In fact the PAN report 1 has given rise to no criminal prosecution whatsoever.

You do not know that?

AMBASSADOR CWELE: I do not ...[intervenes]

ADV PRETORIUS SC: Well Minister, you were the one keeping a close eye on these matters to the extent that you were instrumental in referring it to the IGI.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: You should have known ...[intervenes]

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: Let me finish please. You should have known that the law enforcement agencies were no longer involved. It had been removed from them and it was never returned to their jurisdiction. You should have known that.

AMBASSADOR CWELE: How would I have known?

ADV PRETORIUS SC: Because you are a minister.

AMBASSADOR CWELE: No Mr Bishop. I have told you the issue, sorry. No listen.

CHAIRPERSON: Let him finish Mr Pretorius.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: Yes, Ambassador?

AMBASSADOR CWELE: I am saying the issue of reporting to law enforcement agencies was not done by me. It was the duty of the accounting officers. I was briefed and I heard that they were discussing with the police, they were discussing with the NPA and they were discussing with the SIU so that they can close the case.

So that was the duty of the accounting officers. Yes, while they were there, I was getting brief on these things, even after the final report I got from the inspector general I did discuss with the management of the agency

which was existing.

That was now in 2013, long before the three gentlemen have left.

ADV PRETORIUS SC: Long after?

AMBASSADOR CWELE: In 2013. You remember I said the final report of inspector general came in 2013.

ADV PRETORIUS SC: 2014?

AMBASSADOR CWELE: 2013.

ADV PRETORIUS SC: Minister, sorry Ambassador Cwele.

AMBASSADOR CWELE: Yes sir.

ADV PRETORIUS SC: I am not sure that it is a reasonable answer that the decision to refer to a law enforcement agency was not yours. You had a supervisory duty ...[intervenes]

AMBASSADOR CWELE: I supported it.

ADV PRETORIUS SC: Let me finish.

AMBASSADOR CWELE: I supported it.

ADV PRETORIUS SC: Let me finish please. You had a supervisory duty. You kept a close eye on operations to the extent that you dealt very, very firmly with the failure earlier to obtain the directive of a judge. I simply find it difficult to accept with respect, that you would not have known two things.

One, that the PAN 1 investigatory issues were removed from the SIU and never returned to any law

enforcement agency and two, that no prosecutions were ever conducted, let alone successfully arising out of the PAN 1 investigations.

You must have known.

AMBASSADOR CWELE: Let me help you. I think it was Njenje's statement. Remember, no Makatuka's statement, I cannot remember exactly, but if you go through Makatuka's statement, it clearly said that you heard that it was stopped when he has left himself.

Remember, he was the DG. The accounting officer. So now you are blaming me that I did not know that it was stopped. I did not know that it was stopped.

ADV PRETORIUS SC: Well, I have confined ...[intervenes]

AMBASSADOR CWELE: Because some people decided to stop it.

ADV PRETORIUS SC: I find it extraordinary that the Minister of State Security who keeps a close eye on operation management issues, is very concerned about legality. Receives a report with the allegations, most serious allegations contained in PAN 1, recommends himself that it goes to a law enforcement agency.

It is then removed, never returns to a law enforcement agency and there are no prosecutions. You must have known that.

AMBASSADOR CWELE: As I said, there were a lot of

outstanding issues when we took this thing to inspector general. One amongst them was the risk assessment. Risk assessment was just to say what is the likelihood, is there anything which will compromise the agents or national security by going to court so that we prepare ourselves for it, because you know why?

When things go to court, the judges in our experience they were not keen to say anything is going to be secret. We were not going to hide any corruption. All what we wanted was to get a risk assessment so that we know that we have covered everything.

We are not shocked as we move forward. That was the only thing which was outstanding from the SSA. We ...[intervenes]

CHAIRPERSON: Ja, continue Ambassador.

AMBASSADOR CWELE: I said that was one of the things which was outstanding and that is what Mr Njenje was supposed to provide, and the issue of what we start with, we have explained whether we start with disciplinary issues.

We try and get more witnesses from the people who were there, because at some stage some of the reports were saying people are willing to be witnesses, but other reports were saying they are not willing to be witnesses, and that is why we then said let them take it through the

law enforcement agencies and law enforcement agencies will do their own investigation and assist with the way forward.

ADV PRETORIUS SC: Is the purpose of a risk assessment to understand what the consequences of a criminal prosecution would be for state security?

AMBASSADOR CWELE: No.

ADV PRETORIUS SC: Alright.

AMBASSADOR CWELE: It was not an issue of criminal prosecution. Remember, we were the one who were concerned that our resources were abused. The issue of risk assessment, when you take things to court even now you were showing me things of names of people who are blocked and so on.

Because in our experience, they were not prepared ... that is why I was saying you cannot take intelligence to court. You can share intelligence with law enforcement agencies. Like crime intelligence. The intelligence is accepted in courts.

But if you bring the type of strategic intelligence NIA brings, it always cause a problem, because you do not know what else you are going to compromise in your own operation. That was the risk assessment, not to say we want to prevent the corruption.

To say are there any risk, we should just be aware

of them and put, normally where there are risk, you put mitigation. How are you going to deal with it.

ADV PRETORIUS SC: So a risk assessment and the absence of a risk assessment would not prevent the matter being referred to a law enforcement agency for its investigation?

AMBASSADOR CWELE: I agreed with the matter being referred to law enforcement agencies, I said that.

ADV PRETORIUS SC: So having agreed that the matter should go to a law enforcement agency, in particular this case the SIU, the matter is removed from their jurisdiction and never returns to a law enforcement agency and secondly no prosecutions result at all, despite the investigations and despite the content of the report.

Those I have asked that question several times. You have given what I do not hear as a clear answer.

AMBASSADOR CWELE: My recollection Mr Pretorius, is that after I received the report of the inspector general, I had a meeting with the top management then to say here is the report, then we have to find a way of moving forward with the report.

ADV PRETORIUS SC: Ambassador, but that was in 2014 according to your evidence.

AMBASSADOR CWELE: 2013, it was not 2014. I do not know where you get ...[intervenes]

ADV PRETORIUS SC: I thought I heard that.

AMBASSADOR CWELE: No, I said 2013.

ADV PRETORIUS SC: Let me put to you the evidence of Mr Njenje of which you are now aware Ambassador.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: Njenje said that once the matter was still in the hands of the law enforcement agencies, he received a call from you, asking to meet you at OR Tambo international airport.

AMBASSADOR CWELE: Okay, which document are you referring to?

ADV PRETORIUS SC: I am referring to Exhibit PP3, para 23, at page LN06.

AMBASSADOR CWELE: 23, page?

ADV PRETORIUS SC: LN06.

CHAIRPERSON: L for Lulu, N for Nellie Mr Pretorius?

ADV PRETORIUS SC: I am sure it is LM06.

AMBASSADOR CWELE: Mine says [indistinct].

ADV PRETORIUS SC: I may have the wrong reference, just bear with me please. I have a profuse apology from across the table Chair. PP2, my apology.

CHAIRPERSON: PP2?

ADV PRETORIUS SC: PP2. LN06.

AMBASSADOR CWELE: Njenje ...[intervenes]

ADV PRETORIUS SC: Yes.

AMBASSADOR CWELE: LN?

ADV PRETORIUS SC: 06.

AMBASSADOR CWELE: 06, yes.

ADV PRETORIUS SC: The bottom of the page, paragraph 23.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: I am going to read it.

CHAIRPERSON: Before you read it, excuse me ... Mr Pretorius. PP, the bundle is PP and then it is Exhibit PP2. Is that right?

ADV PRETORIUS SC: Yes Chair. It is behind a divider marked 2.

CHAIRPERSON: You know, these pagination arrangements that we had before can be quite, very confusing now that we are used to just a sequential pagination. Sequential ...[intervenes]

ADV PRETORIUS SC: [indistinct] Chair.

CHAIRPERSON: Okay. Did you say LN06?

ADV PRETORIUS SC: Yes Chair.

CHAIRPERSON: Okay, I am there.

ADV PRETORIUS SC: Right. Paragraph 23, may I put it on record?

CHAIRPERSON: Ja.

ADV PRETORIUS SC: Mr Njenje says the following Ambassador:

"I got a call from Minister Cwele, asking that we meet at OR Tambo international airport. At the meeting, he told me about his meeting with President Zuma, where the latter expressed strong opposition in us taking Arthur Frazer to court. He said there were concerns of national security. I was gobsmacked and all my attempts to something sensible from Minister Cwele drew a blank."

I am reading as it appears:

"He finally said it is the president's decision. I had the misfortune of having to go to my team of dedicated investigators and convey this decision by the president."

AMBASSADOR CWELE: That is what he says.

ADV PRETORIUS SC: Yes, and what do you say?

AMBASSADOR CWELE: I say this is not correct. If you check my statement, I am just trying to ...[intervenes]

ADV PRETORIUS SC: You do not mention in your reply, you do not mention the airport meeting at all.

AMBASSADOR CWELE: Okay, just help me. I have got so many replies on this. I will try to find that, but they are all the same.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: I am just trying to get a response

to paragraph ...[intervenes]

ADV PRETORIUS SC: Look at SSA5. 05 page 692 to 693.

AMBASSADOR CWELE: 692, yes. Yes, I hope you have read my statement.

ADV PRETORIUS SC: Yes, yes.

AMBASSADOR CWELE: In paragraph 24. It says, can I read it for you?

CHAIRPERSON: Ja, read it.

AMBASSADOR CWELE: "There were various reports about PAN program. The investigation suggestion from investigators was that we follow disciplinary and the court routes as appropriate for alleged transgressors. The sequencing of the proceeding was still to be finalised. The risk assessment report on the impact on national circulate in relation to matters that were going to court was still outstanding. The agency promised to furnish me with the risk assessment. In my recollection, the final report of the SSA investigation team was submitted around November 2012, about a year after Njenje has left the agency."

I hope you underlined that:

"There were several contradictions in various

reports of NIA investigation team. At about June 2013 I requested the inspector general to conduct an investigation into PAN program of NIA with specific terms of reference. The investigation was concluded in 2013."

CHAIRPERSON: Well, Ambassador Mr Pretorius's proposition or question is do you agree with this version that there was a meeting between you and Mr Njenje at OR Tambo international airport at which meeting according to him, you told him that you had had a meeting with President Zuma where President Zuma had expressed strong opposition to taking Mr Arthur Frazer to court and that you said there were concerns of national security and that you said the president had made a decision which as I understand it, was that that route should not be pursued.

So his request is for your version on this issue.

AMBASSADOR CWELE: No, that is not correct Chair. As far as I could remember, yes we had several meetings at the airport on this matter. Some of the meetings were in my office, others were at the airport. If I remember, in one of the meetings when they were talking and consulting with the law enforcement agency, I did raise the issue where is the risk assessment, because it was the concern because remember we were reporting even to the president.

The president never expressed any concern about

pursuing the matter. He was also saying but we must be careful and do the risk assessment like we have promised in our own report. So that would be my answer Chairperson.

CHAIRPERSON: Mr Pretorius?

ADV PRETORIUS SC: The timing of the referral to the SIU and its recall from the SIU was in and about March 2011. That is according to the affidavit of Peter Bishop.

AMBASSADOR CWELE: I hear that.

ADV PRETORIUS SC: You as a minister with supervisory responsibility, had already directed that the matter should go to law enforcement agencies.

AMBASSADOR CWELE: Yes, I agree that we should also involve law enforcement agencies.

ADV PRETORIUS SC: The matter was removed from law enforcement agencies.

AMBASSADOR CWELE: I did not remove any matter from law enforcement agency, I have said that.

ADV PRETORIUS SC: But it was removed by the head of the NIA or the senior officials with NIA. The question is why? The only rational explanation for that is that they received an instruction from above and that could only have been yourself and the president.

AMBASSADOR CWELE: That is totally incorrect. I will tell you why.

ADV PRETORIUS SC: Let me finish, let me finish.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: Allow Mr Pretorius to finish.

AMBASSADOR CWELE: Okay.

ADV PRETORIUS SC: That is the only rational explanation for what we know occurred.

AMBASSADOR CWELE: Okay. That is totally incorrect. Mr Pretorius, I have told you I was not aware of a stoppage of investigation. As I have said, the final report even from the SSA, came in 2012 well after Mr Njenje has left. So in my view there was no stopping of the work they were doing.

That is why I asked you this report they are telling me now, what is the date because I had so many reports. My recollection was that the final report was well after Mr Njenje left. So the notion that the things were stopped is not correct.

ADV PRETORIUS SC: Well, once again Minister Cwele or Ambassador Cwele, according to your evidence you had several meetings with the leadership of the NIA or the SSA. You had a concern about the progress of the consequences of the PAN investigation.

You met at OR Tambo airport, you met at your offices. Having instructed the matter to be taken to the SIU or to law enforcement agencies, are you telling me you

never made a query as to the fate of that process and you never received an answer?

That is extraordinary.

AMBASSADOR CWELE: Ja, that will be extraordinary if I instructed. I agreed with the accounting officer reporting the matter to the law enforcement agencies. Not that I instructed, I supported that very strongly.

CHAIRPERSON: Mr Pretorius?

ADV PRETORIUS SC: And Minister Cwele, I would like to put one more paragraph to you which appears on SSA05 page 766. This is, I am reverting to the summary once more.

AMBASSADOR CWELE: Seven?

ADV PRETORIUS SC: 766. SSA05.

AMBASSADOR CWELE: Oh, this is the report with no date?

ADV PRETORIUS SC: Yes.

AMBASSADOR CWELE: Okay. 766?

ADV PRETORIUS SC: Yes.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: It reads:

> "During 2011 the investigation team also made a presentation in regard to the CSU matter ..."

That is the PAN investigation:

> "To the Minister of Justice and Constitutional

> Development, Minister J Radebe in Cape Town on instruction and in the presence of the Minister of State Security."

Did you instruct that such a meeting take place and was it held in your presence?

AMBASSADOR CWELE: No, I do not recall instructing the minister, with the Minister of Justice to be honest.

ADV PRETORIUS SC: No, it is an instruction to the investigation team to make a presentation to the Minister of Justice and Constitutional Development.

AMBASSADOR CWELE: No. I do not remember making any instruction.

ADV PRETORIUS SC: Alright, it continues:

> "Minister Radebe indicated that he has heard and seen enough and that it is a *prima facie* case that must be dealt with by law enforcement. The minister also indicated that his department will render such assistance as may be required."

Did that occur?

AMBASSADOR CWELE: It might be correct, but I do not recall this meeting from the head.

ADV PRETORIUS SC: If I may just summarise ...[intervenes]

AMBASSADOR CWELE: I cannot give you that.

ADV PRETORIUS SC: Yes, the major summarise then Ambassador Cwele:

> "PAN 1 produced the most serious allegations of criminal conduct. The matter was referred to law enforcement agencies, in particular the SIU. The matter was retrieved from the SIU and they heard nothing more of it, nor did any other law enforcement agency. There were no criminal prosecutions to date that have emanated from PAN 1."

And you must have known about that.

AMBASSADOR CWELE: Well, as I said Mr Pretorius, it will be strange, even the DG said he was not aware that the matter has been stopped. You were giving an impression that I was aware. I was not aware. If you read Makatuka's statement, he say he was not aware, he only read it when he, after he has left.

ADV PRETORIUS SC: We are talking about you as the minister.

AMBASSADOR CWELE: My understanding, let me finish. My understanding we were continuing with work. I was continuing to get briefing until somewhere in 2012, even after Mr Njenje has left. The team was still working. Did not stop.

I was not made aware that there is anything which

is stopped by that side on the law enforcement agency. I was not. Even after receiving the final report from the SSA, and the final report from the inspector general, I called the management to continue with the work.

ADV PRETORIUS SC: Now we hear your response, I might just remark that Ambassador Makatuka had left the agency. He found out, it seems rather extraordinary that a hands on minister with great concern who directed the matter to go to the law enforcement agencies in the first place did not know about it.

AMBASSADOR CWELE: Ja, but Mr Makatuka did you read how did he found out?

ADV PRETORIUS SC: My point is that you should have known.

AMBASSADOR CWELE: Yes, if you read that ...[intervenes]

ADV PRETORIUS SC: I do not want to belabour the point, yet again.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: Chair ...[intervenes]

CHAIRPERSON: Ambassador Cwele.

AMBASSADOR CWELE: Yes Chair.

CHAIRPERSON: Did you mention how Ambassador Makatuka finally find out? Do you want to mention that?

AMBASSADOR CWELE: I must go to my notes now,

because you see, okay. If you go to page 89 of Makatuka ...[intervenes]

ADV PRETORIUS SC: PP3.

AMBASSADOR CWELE: [indistinct]

CHAIRPERSON: Is it Exhibit PP3?

AMBASSADOR CWELE: I think it was, I am just trying to find out now.

CHAIRPERSON: If you, maybe we might not need to go and check. If you just read, if you have got the paragraph ...[intervenes]

AMBASSADOR CWELE: I have just wrote summary. I say in that P002 ...[intervenes]

CHAIRPERSON: Ja.

AMBASSADOR CWELE: Makatuka confirmed that when they came in the investigation was already well on its way.

CHAIRPERSON: Hm.

AMBASSADOR CWELE: Because I am the one who started it. He then say on paragraph 9:

> "Minister Cwele agreed with law enforcement agencies."

He then, after 9 it then say:

> "He was not aware until Njenje gave evidence that it was stopped."

CHAIRPERSON: Okay. That ...[intervenes]

AMBASSADOR CWELE: So I just want to say this things

of strangeness that I did not know, even the accounting officer he was not aware. Until they gave evidence that it was stopped.

CHAIRPERSON: Okay, Mr Pretorius?

ADV PRETORIUS SC: Ambassador, do you dispute that the investigation was stopped?

AMBASSADOR CWELE: I did not stop the investigation. I do not dispute, from what I have read, Mr Njenje stopped the investigation. I was not aware that he stopped the investigation.

ADV PRETORIUS SC: Is it not a matter of concern to you as a former minister that arising out of the PAN investigation, there has been no conclusion of a criminal investigation and no prosecution, is that a matter that concerns you?

AMBASSADOR CWELE: Yes, I left the state security agency early in 2014. I do not know what happened thereafter.

ADV PRETORIUS SC: Is it a matter that concerns you Ambassador?

AMBASSADOR CWELE: It will concern me, but what will console me, Mr Pretorius, is that we stopped the funding of the agency, of that program under my supervision. Two, we recovered most of the assets, whether is it houses, whether is it cars.

We recovered those on behalf of the state, because that was a priority to us, to minimise the risk while we are still trying to deal with issues of evidence either for, for disciplinary case and for criminal cases.

ADV PRETORIUS SC: Ambassador Cwele, I assume you accept the proposition that where there is an allegation of serious criminal conduct involving the abuse of state resources, it should be fully investigated by law enforcement agencies and prosecuted.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: Do you accept that proposition?

AMBASSADOR CWELE: I agree, thank you.

ADV PRETORIUS SC: Good. Chair.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: I know that the Commission is pressed for time.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: I have, I would in the ordinary course have dealt with issues regarding the restructuring of SSA and the Ambassador's version in relation to that. I also would have dealt with the allegations made against Mr Shaik, and certain other issues, but those can be dealt with by reference to the evidence, given your own time constraints and given the fact that I have expired or my time has expired.

CHAIRPERSON: Well, how much time do you think that might need?

ADV PRETORIUS SC: Chair, it would need another half hour really but I will just place, I can cut it short by [indistinct] to the Ambassador.

CHAIRPERSON: No, half an hour might still be fine but I think we will just need to adjourn a bit. I need to talk to the evidence leaders who are going to come in later. I think it should be fine. So let us just take a short adjournment, maybe ten minutes and then we will try and finalise properly.

ADV PRETORIUS SC: Thank you Chair.

CHAIRPERSON: Okay, we adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Please bring my pens Letho. Hello is – can you hear me?

REGISTRAR: Yes DCJ.

CHAIRPERSON: Okay all right. We can continue. Mr Pretorius, Mr Semenya, Ambassador I have spoken to the evidence leaders who must come in after we have finished with Mr Cwele – with Ambassador Cwele. Mr Pretorius we can continue – I can let – we can continue for another thirty minutes or so if that will be enough. I just want to make sure that even though we have time constraints the issues

are dealt with properly. So let us continue.

ADV PRETORIUS SC: The principle issues or the appearance of the Ambassador have been dealt with. These are collateral issues but nevertheless I would want to deal very briefly with two of them.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: Ambassador we can deal with this very briefly if you care to or are comfortable to do. The amalgamation of the SSA and the various components of the SSA in 2009 took place by way of proclamation, do you agree to that?

AMBASSADOR CWELE: No.

ADV PRETORIUS SC: I am sorry.

AMBASSADOR CWELE: No I do not agree with that.

ADV PRETORIUS SC: What happened in 2000 and – well would you go please to the proclamation of 11 September 2009.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: Which appears in Bundle PP3 MM159 right at the end of the bundle.

AMBASSADOR CWELE: Or maybe before I go there I will tell them – let me just say there were proclamations but there was a legislative process to establish the new agencies. That is the point I just wanted to make.

ADV PRETORIUS SC: No but – all right. I think we are

going to have to go the long route.

AMBASSADOR CWELE: Okay let me before you go to the long route may I just – in the last – previous session I referred to a session I want to so that you put it on record where I was speaking about the issue of statement of Maqethuka. I just want so that you have it on record. Remember I said I did not know where it is. It is in Exhibit PP3 just for the record.

CHAIRPERSON: Ja.

AMBASSADOR CWELE: And if you go to – is written PP3 MM022 and number 89 and 90.

CHAIRPERSON: That is PP?

AMBASSADOR CWELE: That is PP3

CHAIRPERSON: Ja.

AMBASSADOR CWELE: Mr Maqethuka MM022.

CHAIRPERSON: Okay.

AMBASSADOR CWELE: It is among the first bundle. There is a statement by Maqethuka.

ADV PRETORIUS SC: Do you agree with those statements?

AMBASSADOR CWELE: Yes I just want to take you very quickly. But – in the first statement of Mr Maqethuka which is MM1 he never mentioned the issues of the Pan Program. I just want to put that for record. He was then called for this statement which he made which is the PP3 – his second

statement. And at the beginning he goes on issue where he was asked by the commission to sort of elaborate on issues. It was to canvass on his views on some of the matters. In point number 7 among those things is an issue and 8 is an issue of the Pan Program. That is page 002 for your reference. Now this is his second statement where he is canvassed for views. If you lack 5.7 it goes with the Pan Program and 5.8 the interference. But kindly know that in his first statement he never mentioned anything about this. Let me come to the – the issues on this which I have raised.

ADV PRETORIUS SC: Well just before you go on Ambassador.

AMBASSADOR CWELE: On point 3.

ADV PRETORIUS SC: Are you suggesting that there was anything unsatisfactory or untoward in him making a further statement?

AMBASSADOR CWELE: No I am just saying in his original statement he never mentioned anything about – but he was asked. He say I was canvassed.

ADV PRETORIUS SC: (Inaudible).

AMBASSADOR CWELE: Yes but let me go to the point I am making. In page 222.

CHAIRPERSON: In the same bundle?

AMBASSADOR CWELE: Yes. It is table 89. .89 in the same – same document.

CHAIRPERSON: 1.

AMBASSADOR CWELE: It is PP3 – PP3 MM022.

CHAIRPERSON: Oh that is page 22.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: Oh I think ...

AMBASSADOR CWELE: If you look at point number 89.

CHAIRPERSON: Hang on, hang on Mr – Ambassador. When you give the page just say 22. The MM we normally do not mention it but now when you mentioned it – it confuses me because we normally do not mention it. Just 22 will do.

AMBASSADOR CWELE: Oh my apologies.

CHAIRPERSON: No, no that is fine. Well it looks like for some reason my bundle does not have pages 17 to 23 but read

AMBASSADOR CWELE: I can read it.

CHAIRPERSON: Ja read it – ja read it.

AMBASSADOR CWELE: Ja. On the point number 89 he say – that is Maqethuka.

> "I wish to stress that by the time we are brought into the amalgamation of intelligence services the expenditure on all Pan Projects had already been suspended. The investigation has virtually been complete and criminality has been

established."

And then he said the matter was referred to Njenje by Njenje to Peter Bishop. It was referred by Njenje. In 00:07:38 he say

> "In fact Minister Cwele had himself taken a view that the investigators and the legal team headed by Mr so and so has exhausted all avenues of investigation and it – it – that it is now up to the law enforcement agency to act against those implicated."
>
> "I was unaware 00:08:08 I was unaware until I heard Mr Njenje's evidence before the commission that is the Director General now that after my departure from SSA he was instructed by Minister Cwele to withdraw the Pan Program."

1. Remember Mr Njenje left first and Mr Maqethuka left after Mr Njenje. So that is the point I was trying to illustrate in my previous thing when he was – Mr Pretorius say, why were you not aware? Even the accounting officer was not aware. So that is the point I was making. I was just making so that you can have a reference from it because I spoke to it. Then we can come to your questions Mr Pretorius. I hope – I hope I have made my point clear on that.

ADV PRETORIUS SC: Well not entirely Ambassador. Do

you agree with the sentences contained or the sentiments expressed or the views set out in paragraph 89 and 90? Are they correct?

AMBASSADOR CWELE: I will tell you what I agree with.

ADV PRETORIUS SC: Do you agree with them?

AMBASSADOR CWELE: I agree – no I said I agree that most of the investigation have started and they done by the time they arrive. I have said that before. That is what I agree with.

2. I agree that I supported the issue of criminal investigation. Yes.

ADV PRETORIUS SC: So what do you not agree with in paragraphs 89 and 90? What is wrong there?

AMBASSADOR CWELE: I (inaudible) agree with them I was pointing to you because you were saying as a Minister I was not aware that investigation was stopped.

ADV PRETORIUS SC: Yes.

AMBASSADOR CWELE: The point I was raising – I can listen – can I finish?

CHAIRPERSON: Ja finish.

AMBASSADOR CWELE: Because 00:10:00.

CHAIRPERSON: Ja finish.

AMBASSADOR CWELE: The point I was raising that I was not aware even the accounting officer say he was not aware until Mr Njenje appeared before you. Remember Mr

Maqethuka was the accounting officer.

ADV PRETORIUS SC: Ambassador my proposition was not an argument it was a question. What in paragraphs 89 and 90 do you not agree with?

AMBASSADOR CWELE: I said I told the things I agree with.

ADV PRETORIUS SC: Is there anything you do not agree with.

AMBASSADOR CWELE: In 89 – I may not agree with the language and all those type of things. That is why I am saying I agree that most of the investigation started before that. I put that – I can take you through my statements because I have made statements on these matters.

ADV PRETORIUS SC: I am referring to this statement to which you have drawn our attention Ambassador. Do you agree that criminality had been...

AMBASSADOR CWELE: Do you want me to go to my statement because I have responded to that statement.

CHAIRPERSON: Hang on – hang on. Okay. Mr Pretorius I think to the extent that it is important to establish whether Ambassador is – or agrees with the contents of those paragraphs I think just take them one – sentence by sentence and let us hear if he agrees with each sentence. I think that will be easier. And Ambassador you listen to what he will be reading and indicate if you agree. If you do not

agree with how it is put but you agree with the substance you can say you agree with the substance but you would have put it in differently if you want to say that. Because I think Mr Pretorius wants to be sure whether you are – you have the same version as the version put in here in regard to the paragraph. So going to your statement is not going to help for now. It is not going to help. Later before we finish if you need to put it to draw attention to how you put it in your statement that – that will – can be done. But he just wants to know which parts if any in these paragraphs you take issue with. Mr Pretorius go ahead.

AMBASSADOR CWELE: Maybe before this Chair if you may.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: As I said yes I can refer you I have responded to these paragraphs.

CHAIRPERSON: No it is fine.

AMBASSADOR CWELE: In my – on my statement.

CHAIRPERSON: It is fine. Even if you have responded it is oral evidence now.

AMBASSADOR CWELE: Okay.

CHAIRPERSON: So – ja you have got to deal with it orally for now. Mr Pretorius just go ahead in regard to the paragraphs in question.

ADV PRETORIUS SC: Thank you Chair. Ambassador

paragraph 89 it is said as follows:

"I wish to stress that by a time we were brought in to amalgamate the intelligence services the expenditure on all Pan Projects had already been suspended."

Do you agree with that?

AMBASSADOR CWELE: Agree.

ADV PRETORIUS SC: All right. The sentence continues.

"The investigation had virtually been completed."

Do you agree with that?

AMBASSADOR CWELE: Not 100%. That is why I say I will refer most of it has been done but there were still issues. Yes.

ADV PRETORIUS SC:

"Criminality had been established."

AMBASSADOR CWELE: Criminality was established at some stage yes not in – not into 00:13:43.

ADV PRETORIUS SC:

"The matter was then referred by Mr Njenje to Peter Bishop at the special investigating unit."

AMBASSADOR CWELE: I agree with that.

ADV PRETORIUS SC: Paragraph 90.

"In fact Minister Cwele had himself taken the

view that the investigators and the legal team headed by Advocate Willem Hanekom had exhausted all avenues of investigation and that it was now up to the law enforcement agencies to act against those implicated."

AMBASSADOR CWELE: I do not fully agree with that. I agree – as I have told you. There were many reports – there were many outstanding issues and I supported the issue of involving the law enforcement agencies.

ADV PRETORIUS SC: Okay.

AMBASSADOR CWELE: Not that everything – not that the investigation was virtually complete. The final report came in 2012.

ADV PRETORIUS SC: All right. And why is it relevant to whether you as a Minister with supervisory duties which you executed in detailed fashion – why is it relevant that Mr Njenje learnt after his departure that something happened after his departure? Why is that relevant?

AMBASSADOR CWELE: Not Mr Njenje Mr Maqethuka. That is what those statements of Mr Maqethuka.

ADV PRETORIUS SC: Yes. I am sorry let me put it again. Why is it relevant that Ambassador Maqethuka heard that Mr Njenje had received an instruction from you after his departure from the SSA? Why is that relevant?

AMBASSADOR CWELE: It is very relevant. I have said earlier

ADV PRETORIUS SC: Why though?

AMBASSADOR CWELE: It is the duty of the...

CHAIRPERSON: Hang on Mr Pretorius.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: No I was saying to Mr Pretorius he must give you a chance.

AMBASSADOR CWELE: Oh.

CHAIRPERSON: Yes go – go ahead Ambassador.

AMBASSADOR CWELE: I was saying it is very relevant because it is the duty of the accounting officer to report the criminal case where he is 00:15:56. It is not the duty of the Minister in terms of the PFMA.

ADV PRETORIUS SC: No. No. Ambassador.

AMBASSADOR CWELE: What – you do not allow me to speak – ask me questions.

CHAIRPERSON: Let him finish.

AMBASSADOR CWELE: And you do not even listen.

CHAIRPERSON: Ja he will let you – he will let you finish Mr – Ambassador. Continue Ambassador.

AMBASSADOR CWELE: The point is relevant then here is an accounting officer. You remember the so called Super GG was the main accounting officer. He say he was not aware that the investigation was stopped.

ADV PRETORIUS SC: No please Ambassador if you would hear my question. I know it is late in China but what is said here is that after his departure from the SSA Mr Njenje was instructed by you to withdraw the Pan 1 Report from the SIU.

AMBASSADOR CWELE: He could not. Mr Njenje left before – before Mr Maqethuka.

CHAIRPERSON: Oh.

AMBASSADOR CWELE: He was the first to leave. It is not probable.

ADV PRETORIUS SC: Well let us – Ambassador let us go slowly because it is clear that we are in a semantic quagmire here. What he says

AMBASSADOR CWELE: Well.

ADV PRETORIUS SC: Let me finish Ambassador. He says

> "I was unaware until I heard Mr Njenje's evidence before the commission that after my departure from the SSA he was instructed by Minister Cwele to withdraw the Pan 1 Report from the SIU."

Do you understand what is being said there? Where is that sheet now. You hear that Ambassador.

CHAIRPERSON: Ambassador can you still hear us? It looks like he is frozen. Ambassador. Ja it looks like he is frozen.

ADV PRETORIUS SC: Well I am going to move on Chair the point is clear.

CHAIRPERSON: Ambassador. Can you hear us now? Okay I think you must unmute yourself. Hello. Can you hear us?

AMBASSADOR CWELE: Ja I can hear you now Chair.

CHAIRPERSON: Oh okay all right. Mr Pretorius.

ADV PRETORIUS SC: Just give me the page. Ja I have moved on but I can go back if – if you like. Paragraph 90 second sentence reads Ambassador Cwele.

> "I was unaware until I heard Mr Njenje's evidence before the commission that after my departure from the SSA."

In other words Ambassador Maqethuka had left.

> "He was instructed by Minister Cwele to withdraw the report from the SIU."

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: So I do not understand why the fact that someone who had left the SSA did not know what had happened is indicative of an explanation why the Minister – the sitting Minister should not know what is going on when these matters were directly under his instruction and supervision. But anyway I have put the question. I do not understand your answers and I am happy to move on.

AMBASSADOR CWELE: No, the answer is clear,

Mr Pretorius. You are refusing to say Mr Njenje left before Mr Maquetuka. Well, he saw.

ADV PRETORIUS SC: Your point is?

AMBASSADOR CWELE: The point is. He, as an accounting officer, he says he was not aware until Mr Maquetuka appeared before your Commission that the investigation was stopped.

ADV PRETORIUS SC: I understand that point.

AMBASSADOR CWELE: Thank you.

ADV PRETORIUS SC: Nevertheless, it does not explain why – we do not know why he knew, why he did not know, but we do know that you were a Minister seized of those matters directly under your control. You gave instructions to the Law Enforcement Agencies, you gave instructions for the IGI to investigate, and you do not know that it was withdrawn. That is extraordinary, Ambassador.

AMBASSADOR CWELE: It is not. You keep on saying I gave instruction to sent to Law Enforcement Agency. I supported that the matter should be referred to. Because I am not the one who refers the matter to the Law – I did not give instruction. I have dealt with that point.

ADV PRETORIUS SC: Right. I refer to your affidavit in due course. Let us move on, if we may, to ...[intervenes]

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: ...PP-3. Have you got that in front

of you, page 159?

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: This is the proclamation which effected an amendment to the Public Service Act which in effect amalgamated the National Intelligence Agency and the South African Secret Service into the State Security Agency. On your advice ...[indistinct]

AMBASSADOR CWELE: H'm?

ADV PRETORIUS SC: Now, in paragraph 12 of SSA-05, 712.

AMBASSADOR CWELE: Paragraph?

CHAIRPERSON: Paragraph 12 of...?

ADV PRETORIUS SC: SSA-05, 712.

CHAIRPERSON: Is that the same bundle?

ADV PRETORIUS SC: No, it is a different bundle, Chair. We are not going to SSA-05.

CHAIRPERSON: Okay, that is Bundle 5.

ADV PRETORIUS SC: Ja

CHAIRPERSON: And what is the page on Bundle 5?

ADV PRETORIUS SC: 712.

CHAIRPERSON: Yes? Are you still looking for it, Ambassador?

AMBASSADOR CWELE: Ja, I am just trying. There are just so many files here.

CHAIRPERSON: Ja, well, that is alright. 712 is the page

and it is Bundle 5.

AMBASSADOR CWELE: Bundle 5... 712?

CHAIRPERSON: Ja. Black numbers, top left. Almost there.

CHAIRPERSON: Okay.

AMBASSADOR CWELE: [speaker unclear – distortion in video link] 702 or 712?

CHAIRPERSON: 712.

AMBASSADOR CWELE: Yes, I am there.

CHAIRPERSON: Okay. Mr Pretorius.

ADV PRETORIUS SC: In paragraph 12 to which I am referring, Ambassador, refers to the very legislative process to which you referred earlier. It reads:

> "Mr Maquetuka, having served as the Director General of the department, must know that there is a long and complex process involving many stakeholders which result, ultimately, in a bill that classed by both Houses of Parliament.
>
> In summary, a process of amalgamating various structures of Intelligence would include a business case for the suggested change that must be approved by both Ministers of Finance and of Public Service and Administration, drafting of a bill by the

department, certification of the bill by state law advisors(?), consideration of the bill by Cabinet, submission of the bill by Parliament, consideration of the bill by Parliament, and if passed, is signed into law by the President..."

So, that is precisely the legislative process that should have taken place before the proclamation effected the amalgamation.

AMBASSADOR CWELE: Mr Pretorius, I fully agree with the statement up to there. Unfortunately, I do not know who the Minister is who signed there. That is not my signature. But the first starting point you do is to develop a business case and that business case must be approved because we are changing the structure of a department. Must be approved by Minister of Public Service as well as the Minister of Finance.

After you have done that, you notify Parliament just for information. After you have done that, then you start the drafting process of the legislation. Clearly, this proclamation probably followed. Remember, the President after election, he reorganises departments and these things are done by proclamation and not by legislation. The legislation follows because there are these processes which needs to be followed.

You prepare the legislation, you send it for

consultation, you send it to Cabinet, then you send it to Parliament. That is my understanding of the process.

ADV PRETORIUS SC: That is a democratic process as enjoined by the Constitution that must take place before the amalgamation.

AMBASSADOR CWELE: The proclamation is not amalgamation.

ADV PRETORIUS SC: Well ...[intervenes]

AMBASSADOR CWELE: The proclamation will in turn of the organisation of the Department of State. It is done after each and every election.

ADV PRETORIUS SC: No, Ambassador. If you read the proclamation ...[intervenes]

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: ...it affects(?) the amalgamation. The schedule is actually amended by this proclamation not by any subsequent legislation after the democratic procedure that you outlined has been followed.

AMBASSADOR CWELE: It was. It was eventually amended. I told you about the process in that paragraph. That was my understanding.

ADV PRETORIUS SC: No, Ambassador ...[intervenes]

CHAIRPERSON: Let us go to the proclamation. Mr Pretorius, can you find it easily or not?

ADV PRETORIUS SC: Yes, page 159, PP-3 ...[intervenes]

CHAIRPERSON: 159?

ADV PRETORIUS SC: Yes.

ADV PRETORIUS SC: That is dated 2009, Ambassador.

AMBASSADOR CWELE: That is correct.

CHAIRPERSON: I am sorry. That is 159 of... It cannot be of the same bundle because I have got something else at 159.

ADV PRETORIUS SC: Of PP-3, Chair.

CHAIRPERSON: Ja, we were at Bundle 5.

ADV PRETORIUS SC: No, no, no. Bundle PP-3, Chair.

CHAIRPERSON: Ja, you remember you said let us go to Bundle 5 for that passage that you are reading about the process.

ADV PRETORIUS SC: Yes, it is PP-3.

CHAIRPERSON: Ja, but you did not say so earlier. Sp, that is why I was looking ...[intervenes]

ADV PRETORIUS SC: Apologies, Chair.

CHAIRPERSON: I was looking at the wrong bundle. Okay, I am at PP-3 now. What page again?

ADV PRETORIUS SC: 159.

CHAIRPERSON: 159. Okay, alright. I am thee.

ADV PRETORIUS SC: That is the proclamation to which we are referring. It amends the Public Service Act, and it is dated 2009.

AMBASSADOR CWELE: My understanding of this

proclamation is that proclamation the President issues, is not issues by me.

ADV PRETORIUS SC: No, that is correct. It says it issued on your ...[intervenes]

AMBASSADOR CWELE: The President, after each and every election, issues a proclamation and asked the Minister of the Public Service to reorganise the department. It happens in each and every election, Mr Pretorius. After each and every election.

ADV PRETORIUS SC: It is a matter of law and Ambassador we can argue to late today and even later on your part as to its meaning, but that is a matter of law, and the Chair will decide. This proclamation says what it says, and it is dated 2009. That is all I am putting to you.

AMBASSADOR CWELE: What is the date?

ADV PRETORIUS SC: 59 of 2009. Do you see that?

AMBASSADOR CWELE: H'm.

ADV PRETORIUS SC: 4 September 2009 is the date of its signature by the President and the Minister who is the Minister of Public Service and Administration. I must correct something I put to you. It was not on your advice. It was on the advice of the Minister of Public Service and Administration.

AMBASSADOR CWELE: Mr Pretorius, I was in government. I was in government in most of the

departments where I was serving. There were changes. I know that after each and every election, the President will announce which departments he wants, how he wants to reorganise the state. But anyway, it is not my proclamation. Maybe let me just put it like that, but I am aware of that.

And that is a long process which is done by the Minister of Public Service and consulting the relevant department as you change – make changes. Then that is followed after that by a process of legislation, as I have put in my statement.

ADV PRETORIUS SC: Ambassador ...[intervenes]

AMBASSADOR CWELE: And if you say that is a matter of law, I am not a lawyer, but that is my understanding what has been happening in each – after each and every administration when there are changes.

ADV PRETORIUS SC: Ambassador, the Constitution makes it very clear that reorganisation of the State Security Agency can only take place through legislation. It may be so that other departments can be reorganised, but not the SSA. Do you know of that?

AMBASSADOR CWELE: Mr Pretorius, I have said there was a legislative process which was followed. The proclamation was proclaiming which departments are going to be fault(?). That is the wish of the President. It is not a

wish of the minister. I am not involved with that.

ADV PRETORIUS SC: Alright.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: It seems that this is a matter of stamina, Ambassador Cwele. [laughs] I am going to see if I can last it out. In 2009, the proclamation was issued by the President. Under the hand of the President, amalgamating and reorganising the State Security Agency. Do you accept that?

AMBASSADOR CWELE: I see that.

ADV PRETORIUS SC: Right.

AMBASSADOR CWELE: Yes.

ADV PRETORIUS SC: In 2013, the General Intelligence Laws Amendment Act purported or regularised that change but only in 2013. Do you agree with that?

AMBASSADOR CWELE: It did not accord(?). It, actually, regularised that.

ADV PRETORIUS SC: Well, there is doubt about that.

AMBASSADOR CWELE: It went through Parliament. It was signed into legislation.

ADV PRETORIUS SC: Let us accept your view on the evidence for the moment. The matter was regularised by the General Intelligence Laws Amendment Act in 2013. Do you accept that?

AMBASSADOR CWELE: I accept it.

ADV PRETORIUS SC: Alright. I do not need to take that any further then. Then, finally, you were at pains to take to task Mr Shaik. Your evidence on affidavit was quite clear that there was an SSA Intelligence report adverse to him and that you invited him to respond to it. So far, I think, we are in agreement.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: You say in your affidavit he failed to do so.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: Well, I – we have done some investigation on that, Ambassador. In fact, he did do so.

AMBASSADOR CWELE: Not to me.

ADV PRETORIUS SC: He was, on his version, instructed to make an explanation to Ambassador Maquetuka.

AMBASSADOR CWELE: That is not true.

ADV PRETORIUS SC: I am just looking for the relevant... If you will just bear with me for a moment, Chair. These documents, again, where it is out of more recent investigations.

CHAIRPERSON: Okay. Which bundle are you using now? It is still PP-3, mister ...[intervenes]

ADV PRETORIUS SC: We are now back on Bundle SSA-5, Chair.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: You have Bundle 5, page 768?

AMBASSADOR CWELE: ...six, eight.

CHAIRPERSON: Ja, Bundle 5, page 768.

ADV PRETORIUS SC: Is that SSA-05, 768?

ADV PRETORIUS SC: No, SSA-768.

AMBASSADOR CWELE: Ja, let me open it. Yes, we... 768?

ADV PRETORIUS SC: Yes.

AMBASSADOR CWELE: Yes. Yes.

ADV PRETORIUS SC: You have that?

AMBASSADOR CWELE: Yes. Is on a matter?

ADV PRETORIUS SC: Yes, it is addressed to Ambassador Maquetuka.

AMBASSADOR CWELE: Yes?

ADV PRETORIUS SC: It is not marked secret at all, but...

AMBASSADOR CWELE: Is it marked secret?

ADV PRETORIUS SC: No, it is not. I will come to the secret ...[intervenes]

AMBASSADOR CWELE: [speaker unclear – distortion in video link] At the bottom.

ADV PRETORIUS SC: Yes, it is been declassified though. It reads:

> "Report to of the Director of State Security Agency Foreign Branch... [That is Mr Shaik] ...to the Minister of State Security on his

involvement with the J&J Groups purchase of the ICOP Mobile Satellite System..."

Do you see that?

AMBASSADOR CWELE: I see that.

ADV PRETORIUS SC: He says:

"The above-mentioned heading has reference. Attached, please find the report as requested by the Minister on 12 Jun 2011, and as further specified that this report be forwarded to him through your good office.

I trust that you find this in order..."

Do you accept that that letter was sent?

AMBASSADOR CWELE: I see the letter was sent. I do not know what this report of the J&J Group is purchasing. It is not a report that ...[intervenes]

ADV PRETORIUS SC: Well ...[intervenes]

AMBASSADOR CWELE: It is not the report I am referring to.

ADV PRETORIUS SC: No, but it is a report that you mentioned. It is a report of Ambassador Shaik, explaining the concerns raised in the SSA report and that report by Ambassador Shaik is at page SSA-05, 769 and following. In other words ...[intervenes]

AMBASSADOR CWELE: It is the first time I am seeing this report. It was never sent to me by Mr Shaik nor

Mr Maquetuka.

ADV PRETORIUS SC: Well, that is ...[intervenes]

AMBASSADOR CWELE: The report... Let me finish. The report I gave Mr Shaik, it was submitted to me by the Director of the Domestic Branch, Mr Njenje earlier that year of 2010. And the report had serious allegations. I do not see that report attached here. It had very serious allegations against Mr Shaik. I gave Mr Shaik the ...[indistinct] of the report. I said: Please respond to me to this, because it is quite serious on you. He promised that he will respond, but there was never any report coming back except for verbal denial.

ADV PRETORIUS SC: Well, this is precisely what I am putting to you, Ambassador. And again, I understand, it is late in the day, especially for you.

AMBASSADOR CWELE: No, I am very fresh. I am very fresh.

CHAIRPERSON: [laughs]

ADV PRETORIUS SC: I put it to you at page 768 of SSA-05 and what is annexed thereto is the very report of Mr Shaik. It was forwarded to Ambassador Maquetuka to be forwarded to you. He cannot help it if it was not done, or you did not receive it. He did it.

CHAIRPERSON: Okay, okay, okay. I think maybe you might be talking at cross purposes. So, as I understand

what Mr Pretorius is saying, Ambassador, and what you are saying. You are saying, you gave Mr Shaik a certain report ...[intervenes]

AMBASSADOR CWELE: Yes.

CHAIRPERSON: ...that contains serious allegations against him.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: And you are saying that this report that Mr Pretorius is referring to, is not that report. Mr Pretorius is saying that this report that start at page 769 is Mr Shaik's response to the report that you gave him which you say contains serious allegation against him. Let me first check. Mr Pretorius, is my understanding of what you are saying correct?

ADV PRETORIUS SC: Yes, Chair.

CHAIRPERSON: Yes. Ambassador, that ...[intervenes]

AMBASSADOR CWELE: That is not true. I am just reading this report now, Mr Chair.

CHAIRPERSON: Okay?

AMBASSADOR CWELE: It is was never sent to me, first of all. To get the seriousness. If you mention – remember, I asked that the report which was given to me by SSA be declassified. I did not speak about his response, that his response must be... Because I never received his response. That report is not here. I do not know which

report is this one.

CHAIRPERSON: Yes. No, but ...[intervenes]

AMBASSADOR CWELE: But I think that there is something about him in this report.

CHAIRPERSON: No, listen, Ambassador. I think you said you have not seen this report before.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: So, you have not read it, I would imagine.

AMBASSADOR CWELE: Yes.

CHAIRPERSON: So, what Mr Pretorius is saying is that, in effect, Mr Shaik has said he did respond to the report you say you gave him, and he says he sent that report of his response to Mr Maquetuka to pass it on to you. So, I think at this stage, what is important is, that we know whether you ever received this report and maybe you might not be able to say without having read it, whether you received it or not.

AMBASSADOR CWELE: Okay. Mr Chairperson.

CHAIRPERSON: Ja?

AMBASSADOR CWELE: I have just glanced through this report.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: Chair, Mr Shaik alleges in his statement that I asked him to report to the DG on the

report. I never asked that. I asked him to respond to me because it was me who was giving the report. I told him that the report was serious, and I have to report it even to the Head of State because of this nature, but I wanted to give him a chance because it was serious. It was not about the purchase.

CHAIRPERSON: Okay, I think ...[intervenes]

AMBASSADOR CWELE: It was nothing(?) deeper, Mr Chair.

CHAIRPERSON: I think to – the way to deal with this, Mr Pretorius, because Ambassador Cwele says he has not read it. Let us leave it and give him a chance after the hearing today to read it and then send an affidavit where he will say, one, whether he ever received this report. Two, whether he regards it as a response to the serious allegations that he says were contained in the report that he gave to Mr Shaik but let him read it first after today's hearing and then he can respond. I think that is the best way.

ADV PRETORIUS SC: If I could just place two matters on record, Chair?

CHAIRPERSON: Ja?

ADV PRETORIUS SC: The first is that there is a full explanation on oath by Mr Shaik. The second is that Mr Shaik's version is that this report of his, that is

Mr Shaik's, in response to the allegations raised against him is a full explanation of all the circumstances, and that he, in fact, did supply the report or intended to supply the report, his explanation, that is, to the then Minister, Ambassador Cwele. We have asked the State Security Agency to provide us with a declassified version of the first report not Mr Shaik's response which we have here of the first report.

AMBASSADOR CWELE: Yes. ...[indistinct]

ADV PRETORIUS SC: So, my suggestion, with respect Chair, is that we get that declassified.

AMBASSADOR CWELE: That is correct.

ADV PRETORIUS SC: We give that to the Ambassador, together with the response and it can be dealt with on paper.

CHAIRPERSON: Ja, that is fine. Is that fine, Ambassador.

AMBASSADOR CWELE: That is fine with me. We have been asking for that, Mr Chair ...[intervenes]

CHAIRPERSON: Yes.

AMBASSADOR CWELE: ...since 2019.

CHAIRPERSON: Yes. Okay, no, that is alright.

ADV SEMENYA SC: Chair ...[intervenes]

CHAIRPERSON: Oh, Mr Semenya?

ADV SEMENYA SC: May I ...[intervenes]

CHAIRPERSON: Yes.

ADV SEMENYA SC: [speaker unclear – distortion in video link]

CHAIRPERSON: We kind of forgot about you. [laughs]

ADV SEMENYA SC: I know. I am ...[indistinct] and listening to all of this, Chairperson.

CHAIRPERSON: Yes, yes.

ADV SEMENYA SC: To me, we have written several letters including with the application to cross-examine.

CHAIRPERSON: Ja.

ADV SEMENYA SC: There is a report implicating Mr Shaik ...[intervenes]

CHAIRPERSON: Ja.

ADV SEMENYA SC: ...which is classified in the possession of ministry. So that report, which is not in front of you, as we speak.

CHAIRPERSON: H'm.

ADV SEMENYA SC: So, to say there is a response to it. It is a non-answer, with respect.

CHAIRPERSON: Well, as I understand the position. What Mr Pretorius is saying, Mr Semenya, is that I think in one of his affidavits, mister, or Ambassador Cwele alluded to having become aware of certain serious allegations against Mr Shaik. And my understanding ...[intervenes]

ADV SEMENYA SC: Correct.

CHAIRPERSON: And my understanding would be that, ahead of today's hearing, Mr Pretorius would have raised those issues with Mr Shaik and that what Mr Shaik probably has done, is to say to Mr Pretorius: I did respond to those allegations. Here is a document in which I responded. But we do not have the other – the report to which he was responding.

So, the best way is, therefore, to try, as Mr Pretorius suggests, and see that report, a copy of which Ambassador Cwele gave to Mr Shaik can be obtained. And then that report plus this response by Mr Shaik to that report or to the allegations in that document can then be studied by Ambassador Cwele.

And then he can put up an affidavit, where he says: I have read this response. Yes, I agree it is a response to the allegations. Or: No, I do not think it is. And I had not received it before. Or something along those lines. Then we look at what will be in the affidavits. So, that is the suggestion.

ADV SEMENYA SC: And I go along with the suggestion, Chairperson. The only point we are making.

CHAIRPERSON: Ja?

ADV SEMENYA SC: The contents of that report is that according to Mr Shaik the relationship deterioration between themselves and the Minister at the time was a

major problem.

CHAIRPERSON: Yes.

ADV SEMENYA SC: Then the ...[indistinct] in his affidavit. No, Mr Shaik, our difficult – my difficulties with you related to your conduct with Foreign Services – Intelligence Services. It is that document which you wanted classified, and it is still not at hand.

CHAIRPERSON: Ja.

ADV SEMENYA SC: That ...[indistinct] [speaker unclear – distortion in video link]

CHAIRPERSON: Ja. No, no that is fine. Okay. Mr Pretorius?

ADV PRETORIUS SC: If I may just say? We have asked for that document to be declassified. The SSA have come back to us, saying that their offices are closed, and we have got other explanations, but we are pressing them.

CHAIRPERSON: Ja.

ADV SEMENYA SC: Thank you.

CHAIRPERSON: Okay. Mr Pretorius.

ADV PRETORIUS SC: I have no further questions, Chair.

CHAIRPERSON: Okay. Mr Semenya, do you have any re-examination?

ADV SEMENYA SC: Yes. Yes, Chair. Can I put some few questions to the witness?

CHAIRPERSON: Yes. Yes, you may do so. Ambassador,

your counsel will ...[intervenes]

ADV SEMENYA SC: Your line is breaking for me, Chair.

CHAIRPERSON: Oh, okay. Can you hear me now?

ADV SEMENYA SC: [No audible reply]

CHAIRPERSON: Can you hear me now, Mr Semenya?

ADV SEMENYA SC: Yes, Chair. Your line is breaking. I do not know if you can hear me?

CHAIRPERSON: I can hear you quite well. I think maybe my ...[intervenes]

ADV SEMENYA SC: Your line has frozen completely in...

CHAIRPERSON: Oh. The people helping me ...[intervenes]

ADV SEMENYA SC: I cannot hear you at all, Mr Chair.

CHAIRPERSON: Okay.

ADV SEMENYA SC: Yes.

CHAIRPERSON: Can you hear me now?

ADV SEMENYA SC: [No audible reply]

CHAIRPERSON: No? Let me get my staff to help me. They say I am frozen.

ADV SEMENYA SC: But ...[intervenes]

CHAIRPERSON: Can you hear me now?

ADV SEMENYA SC: Yes, you are frozen.

REGISTRAR: You are audible, DCJ. You are not frozen. We can hear you. I am not sure. The problem might be on Mr Semenya's side.

CHAIRPERSON: Oh. Can you see me, and can you both see me and hear me?

ADV SEMENYA SC: ...once you advice I do.

REGISTRAR: I can see you. I can hear you.

CHAIRPERSON: Mr Semenya?

ADV SEMENYA SC: [speaker unclear – distortion in video link]

CHAIRPERSON: I can hear you quite well. Can you hear me quite well?

ADV SEMENYA SC: [No audible reply]

CHAIRPERSON: Mr Semenya.

ADV SEMENYA SC: I can. I can. Can I perhaps move ...[indistinct] radio(?), but I will continue on the mic.

CHAIRPERSON: But I can see you well.

ADV SEMENYA SC: Okay. [Indistinct] as well ...[intervenes]

CHAIRPERSON: Yes, I can hear you. I can see you.

ADV SEMENYA SC: Okay, thank you, Chair. Let me proceed.

CHAIRPERSON: Okay, alright. Okay, Ambassador, your counsel is going to put some questions to you in re-examination. That is just intended to clarify issues where he thinks there is a need for clarification. Mr Semenya.

RE-EXAMINATION BY ADV SEMENYA SC: Yes, Ambassador. As you know ...[intervenes]

AMBASSADOR CWELE: Yes.

ADV SEMENYA SC: As you know, the characters of Messrs Shaik, Njenje and Maquetuka. Are they type of persons who would succumb to a blatant illegally [speaker unclear – distortion in video link] ...from the minister?

AMBASSADOR CWELE: No, not. No.

CHAIRPERSON: Mr Semenya.

ADV SEMENYA SC: Did you hear me?

AMBASSADOR CWELE: I said no, not at all.

CHAIRPERSON: Did you hear the answer, Mr Semenya?

ADV SEMENYA SC: Okay. If there was ...[indistinct] [speaker unclear – distortion in video link]

AMBASSADOR CWELE: Yes, I did.

CHAIRPERSON: Okay. It looks like there are some technical glitzes. Can you hear, Mr Semenya?

ADV SEMENYA SC: [No audible reply]

REV STEMELA: The problem is with Mr Semenya's line, DCJ. You are clear, but the connection of Mr Semenya is the one that has a problem.

CHAIRPERSON: Ja.

REV STEMELA: Maybe he should stop the video?

[Background discussions]

CHAIRPERSON: Oh, okay. The – my technician says the problem would be maybe on Mr Semenya's side or the Ambassador's side and not this side, but the Ambassador, I

think, we can hear him. Mr Semenya?

ADV SEMENYA SC: [No audible reply]

CHAIRPERSON: It looks like there is a problem on Mr Semenya's side. Maybe we should adjourn.

ADV PRETORIUS SC: [Indistinct] ...Chair.

CHAIRPERSON: Yes?

ADV PRETORIUS SC: It may not entirely be satisfactory, but Mr Semenya may put his questions to Ambassador Cwele, and we have no objection to them being responded to in writing.

CHAIRPERSON: Yes, I was going to check with him whether he will be fine with that because we have done that sometimes and everybody agrees. But we need to hear him and hear what he has to say.

AMBASSADOR CWELE: May I suggest, Chair?

CHAIRPERSON: Yes?

AMBASSADOR CWELE: I think his video is consuming his data. Maybe if he switch off the video, maybe we can hear him.

CHAIRPERSON: Well, we do not ...[intervenes]

AMBASSADOR CWELE: Because I can hear everybody.

CHAIRPERSON: Including him?

AMBASSADOR CWELE: Sometimes he breaks. I think his video is one which is consuming the data.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: Maybe you could allow him to switch on and speak. Maybe we can hear him better.

CHAIRPERSON: Ja, the only thing is just whether we do not know whether he can hear us now or he does not.

AMBASSADOR CWELE: He did request earlier on to switch off the video.

CHAIRPERSON: Ja, that is on his side. He can switch it off on his side, as long as we can hear him.

AMBASSADOR CWELE: Yes.

ADV SEMENYA SC: That is right, Chairperson. Now I can hear everyone. Can I proceed?

CHAIRPERSON: Oh, okay, alright. You may proceed, ja.

ADV SEMENYA SC: The next question, Ambassador, was this. If there were instructions of the nature alleged i.e. you stopped an investigation. Would there not be a report filed with the service?

AMBASSADOR CWELE: Maybe there will be a report, but like I said, there was no way, as I know them, that they could be stopped just because some minister said they must stop illegal investigation if it was illegal.

ADV SEMENYA SC: And if there was such a report, it would even state the reasons why that instructions was given, would it not?

AMBASSADOR CWELE: It will. If you instruct people, then you must make it in writing, that report, that you are

making such instruction.

ADV SEMENYA SC: Well, are there such a recordal by any of the three that you were to – they were to stop investigating the Gupta family?

AMBASSADOR CWELE: No, I do not have any record of that.

ADV SEMENYA SC: Was there such a report written>?

AMBASSADOR CWELE: No.

ADV SEMENYA SC: Okay, okay. Now, let us go to the Pen(?) report. Was there any recordal that you gave an instruction for it to be stopped?

AMBASSADOR CWELE: I only saw it now. There was never any report. As I said, the Pen thing continued i.e. after the – Mr Njenje left, the investigation continued.

ADV SEMENYA SC: Ja, you spent some time with Mr Pretorius on this. First, I am going to put it in leading's(?) way and if it is objectionable, Mr Pretorius will take me up. Firstly, it is Mr Njenje who leaves the service. Is that right?

AMBASSADOR CWELE: That is correct.

ADV SEMENYA SC: And it is Mr Maquetuka who leaves later, right?

AMBASSADOR CWELE: That is correct.

ADV SEMENYA SC: And it is Mr Maquetuka who is the accounting officer in that space. Is that right?

AMBASSADOR CWELE: That is correct.

ADV SEMENYA SC: And if you had instructed Mr Njenje at that time before he left, he would clearly have spoken to Mr Maquetuka about it? Is that correct?

AMBASSADOR CWELE: Definitely. And particularly because they were meeting every Monday.

ADV SEMENYA SC: Yes, and that is why you are surprised – not surprised, when Mr Maquetuka says he hears about this very stoppage(?) for the first time in 2019.

AMBASSADOR CWELE: That is correct.

ADV SEMENYA SC: Is that not what you are clarifying?

AMBASSADOR CWELE: That is correct.

ADV SEMENYA SC: Okay. Let us go to the next point. Would you be responsible as the Minister of Intelligence Services to stop a law enforcement operatives like those in SIU?

AMBASSADOR CWELE: No, I would not. First of all, I do not instruct them to do the investigation. It were under – I have got no power at all to stop any investigation because those are independent institutions.

ADV SEMENYA SC: Would you have the power to call on the record to be brought back to you as Intelligence Services?

AMBASSADOR CWELE: Not at all.

ADV SEMENYA SC: Would you have any power to stop

criminal prosecutions of those who may have been implicated and subject to criminal prosecution?

AMBASSADOR CWELE: I do not have that power at all.

ADV SEMENYA SC: Okay. And lastly. Are you saying at the production of that intelligence, it got pointing finger at Mr Shaik would help? Even the Commission are judging where the truth lies in respect of these matters?

AMBASSADOR CWELE: That is correct. That is why I have been asking access to that report.

ADV SEMENYA SC: Yes. Those are the questions I have for the Ambassador, Chair.

CHAIRPERSON: Thank you very much, Mr Semenya. Ambassador?

AMBASSADOR CWELE: Yes, Mr Chair?

CHAIRPERSON: We have come to the end of your evidence. Before I thank you and excuse you and Mr Semenya. Is there anything that you feel you had not had a chance to deal with properly that you want to say before I excuse you?

AMBASSADOR CWELE: Thank you very much, Chair. Let me first say. I am very grateful to you that at last you gave me the chance to give my own version.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: This matter has been paining me since 2019 when it was first raised with the Commission.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: And since then, I have been writing statement and requesting to question these statements.

CHAIRPERSON: Yes.

AMBASSADOR CWELE: Instead, I was not. Instead, I suffered a lot, Chairperson ...[intervenes]

CHAIRPERSON: H'm.

AMBASSADOR CWELE: ...during that period. I had a sense that whatever responding to, the gentlemen were given a chance, please respond to this. That is why I was raising the sequence of events. The first thing I responded was the statements.

CHAIRPERSON: H'm.

AMBASSADOR CWELE: It was the three statements. And later on, as I said, Mr Maquetuka had three statements. Mr Goshe, two statements.

CHAIRPERSON: H'm.

AMBASSADOR CWELE: So, but that as may be, I am grateful that you have given me this chance because this matter, as much as it is painful, as I have said to you, in matters of Intelligence I can only respond to you at a high level ...[intervenes]

CHAIRPERSON: H'm.

AMBASSADOR CWELE: ...for the reason you know.

CHAIRPERSON: H'm.

AMBASSADOR CWELE: And I have been stating that in my – but I am grateful that you have given us this chance. I am grateful that you said that you are going to look at this document which were troubling me.

CHAIRPERSON: H'm, h'm.

AMBASSADOR CWELE: And the records which I said we should really look into.

CHAIRPERSON: Ja.

AMBASSADOR CWELE: Because they will speak for themselves.

CHAIRPERSON: Okay.

AMBASSADOR CWELE: What were the... [speaker unclear – distortion in video link] I want to put it, lastly, that as much as they received that report, I still gave Mr Shaik the benefit of the doubt. That is why I took it to him. I asked him to respond to me directly not to anybody else. It was only when he was not giving me the report that I really became concerned. So, I thought I should just bring those issues. I think I have clarified the issue of the meeting in Cape Town, and if you get the transcript of that recording, it will tell a different story.

CHAIRPERSON: Okay.

AMBASSADOR CWELE: ...from what Mr Mo Shaik was saying. It is very important, lastly, Chair, that Mr Mo Shaik

talk about that investigation happened after 2011 events. I insist, that is incorrect. The investigation was happening in 2010. I know this for a fact because the first incident happened in 2010 at the end, you see, of the ruling party in Durban. That conference was in September in 2010. Immediate after that, that is when I called them, not in 2011 as Mr Mo Shaik in his statement is putting.

CHAIRPERSON: Okay.

AMBASSADOR CWELE: ...I really like. That is why we were saying. If we are giving a chance to interact(?) with these people, they are going to expose some of the marginations(?) they were saying in respond to this. I thank you very much, Mr Chairperson.

CHAIRPERSON: Okay, no. Thank you very much, Ambassador. Thank you very much, Mr Semenya. I will now excuse both of you. I will also excuse you, Mr Pretorius because it has been a long day for you as well. And I will adjourn for about ten minutes. And then when we resume, the counsel for Mr Gigaba, Mr Solomon will cross-examine Ms Mngoma. So I will take an adjournment of ten minutes.

AMBASSADOR CWELE: Thank you, Chair.

CHAIRPERSON: We adjourn.

ADV PRETORIUS SC: Thank you. Thank you, Ambassador.

AMBASSADOR CWELE: Thank you.

INQUIRY ADJOURNS

[redacted]

SSA-02-064

STATE SECURITY AGENCY

EXHIBIT YY 4

MR Y

SSA-02-065

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
Tel: (010) 214 to 0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

INDEX: EXHIBIT YY 4

#	Description	SSA Bundle	Bundle Page	Exhibit Pages
1.	Affidavit of Mr Y	02	066 to 142	01 to 77

AFFIDAVIT

I, the undersigned;

TERRENCE aka Mr Y

do hereby declare under oath and state that:

1.

1.1. I am an adult male employed by the South African State Security Agency ("**SSA**" or "**Agency**")

1.2. I confirm that the averments contained in this affidavit fall within my personal knowledge or knowledge gained by me in the course of the above-mentioned investigations, or knowledge gained by me from documents under my control, except where the converse is expressly stated or where the converse appears from the context in which the statement is made. The averments are, to the best of my knowledge and belief, both true and correct.

CG VAN SCHANKE
CAPTAIN
530690-6

OVERVIEW AND PURPOSE OF THIS AFFIDAVIT

2.

Co-operation with the Commission

2.1. On 11 February 2020, I received from the Office of the Acting Director General ("**DG**") of the SSA, Mr Loyiso Jafta, a Request For Information ("**RFI**") from the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("**the Commission**"). The RFI was issued by the Acting Secretary of the Commission and is dated 03 February 2020. It bears reference number RPS18/0219/ARN.

2.2. In the RFI, the SSA was asked to provide information with regard to its internal investigation into irregularities within the CDSO. A number of reports, presentations, and assessments were handed over to the Commission in response to this RFI.

2.3. Further documentation, presentations, reports, transcripts and other materials related to unlawful and/or irregular activities within the SSA were produced pursuant to a summons issued by the Commission dated 26 August 2020 (reference SPS18/0266/ARN). Supplementary materials were produced in response to further summonses and RFIs subsequently issued by the Commission.

2.4. It should be noted that many of the above-mentioned materials relating to the CDSO were found during an inspection of a walk-in safe at the SSA Headquarters. The documents found in this safe have formed the foundation for our internal investigation into irregularities within the CDSO.

2.5. During the course of this affidavit, reference will be made to documentation that has been declassified by the SSA in the interests of transparency and accountability. This is also done with an appreciation

CC VAN SCHANKE
CAPTAIN
8530690-6

that classification may not be used to conceal violations of law, inefficiency or administrative errors, or to prevent embarrassment to a person and/or organisation.[2] Indeed, much of this previously classified material constitutes evidence of criminal activity. These documents are contained in the SSA Bundle consisting of three files prepared by the Commission.

2.6. In this regard, it should be noted that the documentation provided to the Commission was also handed over to the Directorate of Priority Crime Investigation ("**DPCI**") on 10 June 2019 and the Investigating Directorate ("**ID**") on 15 October 2020, pursuant to two inquiries opened by the SSA on 10 April 2019 in terms of the Prevention and Combatting Corrupt Activities Act 12 of 2004 ("**PRECCA**").

The Project Veza investigation

2.7. Stemming from the Budget Vote address delivered by the former Minister of State Security, Ms Dipuo Letsatsi-Duba, on 18 May 2018, an internal investigation called Project Momentum was established in June 2018 to address allegations of corruption within the SSA. However, limited progress was made owing to challenges relating to access to information. The investigation was therefore reinforced and relaunched by the Acting DG Loyiso Jafta on 5 December 2018 under the name Project Veza.

2.8. The Project Veza investigation team was tasked with investigating irregularities and criminality arising from contraventions of the SSA's governance, operational and financial prescripts during the period 2012-2018. The investigation has focused on various units within the SSA – chiefly the projects carried out by the CDSO, as the covert

[2] Regulation 3(3) of Chapter XXV of the Intelligence Services Regulations 2014 published under GN R63 in *GG* 37280 (29 January 2014) in terms of section 37 of the Intelligence Services Act 65 of 2002.

G VAN SCHANKE
CAPTAIN
0530690-6

operational structure within the SSA, but also the Cover Support Unit and operations run from the Office of the DG.

2.9. Given the scope, extent and impact of the irregularities that occurred within the SSA during this period (2012-2018), Project Veza has adopted a multi-phased, multi-disciplinary approach to the investigation. It has a long-term vision of attaining a sustained and institutionalised clean governance culture within the SSA.

2.10. I have 14 years' experience in matters of deep cover, the compilation of the SSA's Operational Directives ("**ODs**") governing this cover, as well as investigations into irregularities committed in the covert space at the SSA.

I am giving the evidence contained in this affidavit on behalf of the Project Veza investigation team. Threats have been made against individual members of the investigation team by certain implicated parties. It should further be noted that several individuals, including implicated persons who have been assisting our investigation team, have also been intimidated. There have been attempts to interfere with and even sabotage the Project Veza investigation.

2.11. This affidavit deals, *inter alia*, with the creation and unlawful operations of a parallel intelligence structure within the SSA and the financial irregularities that accompanied it during the period 2012-2018. However, some of the activities detailed in this affidavit reflect a continuation of the irregularities that accompanied the implementation of the Principal Agent Network ("**PAN**") programme during the period 2007-2010. Both the PAN and Project Veza investigations uncovered the unlawful use of parallel intelligence structures to bypass internal controls and avoid accountability for gross financial irregularities and abuses of SSA resources for improper purposes.

DG VAN SCHANKE
CAPTAIN
C530690-6

The structure of this affidavit

2.12. This affidavit summarises the evidence and preliminary findings of the ongoing Project Veza investigation which are relevant to this Commission's Terms of Reference. The affidavit is structured under the following headings:

2.12.1. The "*Introduction*" outlines the lawful mandate of the SSA in contrast to high-level observations concerning the CDSO's unlawful activities.

2.12.2. "*The creation of a parallel intelligence structure*" details the irregular recruitment and training of SSA "co-workers" as well as their infiltration into the Agency. This was facilitated by the restructuring of the Counter Intelligence sub-division, and the CDSO in particular, in December 2011.

2.12.3. "*Overreach of the SSA's duly authorised mandate*" concerns the irregular establishment of the Presidential Security Support ("**PSS**") service and the assumption by the SSA of functions that properly reside with the South African Police Services ("**SAPS**") or with the South African National Defence Force ("**SANDF**").

2.12.4. "*Illegal counter-intelligence operations*" provides details of the unlawful operations and expenditure of the CDSO.

2.12.5. "*Operations within the Office of the DG*" highlights executive interference in operational matters and the irregular operations that were run out of the Office of the DG.

2.12.6. "*The breach of governance and financial controls*" details the CDSO's unlawful contracts with front companies, the irregular use of Temporary Advances, the role of CFOs and DGs in budgeting and planning, and the abuse of the Cover Support Unit's resources.

2.12.7. "*Parallel and irregular vetting processes*" describes the parallel vetting structure that enabled the infiltration of the SSA. This section also details the vetting irregularities relating to Mr Arthur Fraser's appointment as DG in September 2016.

2.12.8. "*The illegal use of SSA firearms*" details the lack of controls over access to firearms from the SSA armoury, their use and return.

2.12.9. The "*Conclusion*" reflects on how the use of parallel structures and covert operations allowed for the greatest capture of the SSA with the least scrutiny, and emphasises the need for the unlawful activities that have been uncovered during our investigation to be pursued by law enforcement agencies.

INTRODUCTION

3.

The pursuit of national security within the constraints of the law

3.1. Chapter 11 of the Constitution sets out the governing principles for national security and provides for the establishment, structure and conduct of the security services comprising Intelligence, Defence and Police. These provisions could not more clearly state that the security services are subject to constitutional constraints and must operate within the bounds of the law:

3.1.1. Section 198(c) stipulates that "*[n]ational security must be pursued in compliance with the law, including international law*".

3.1.2. Section 199(5) reinforces this imperative: "*The security services must act, and must teach and require their members*

CS VAN SCHALKE
CAPTAIN
C530690-6

to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic".

3.1.3. Section 199(6) states that "*[n]o member of any security service may obey a manifestly unlawful order*".

3.1.4. Section 210 of the Constitution requires that "*[n]ational legislation must regulate the objects, powers, and functions of the intelligence services*".

3.2. These constitutional principles are consistent with the White Paper on Intelligence 1994, which provides a policy framework for the establishment, principles and functioning of the intelligence services in a democratic South Africa. It sets out the mandate of the civilian services (domestic and foreign) as the provision of an effective, integrated and responsive intelligence machinery that can serve the Constitution and the government of the day through the timeous provision of relevant, credible and reliable intelligence.

3.3. While the Intelligence Services Act 65 of 2002 establishes the intelligence services, the National Strategic Intelligence Act 39 of 1994 outlines the mandate of the intelligence services. In terms of the National Strategic Intelligence Act, only the intelligence divisions of the SANDF and the SAPS as well as the civilian intelligence services (namely, the SSA) may conduct intelligence functions. Intelligence functions thus may not be performed by other state institutions or outsourced to private bodies.

3.4. In addition, the counter-intelligence mandate with which the civilian intelligence agencies are entrusted is defined in section 1 of the National Strategic Intelligence Act as "*measures and activities conducted, instituted or taken to impede and to neutralise the effectiveness of foreign or hostile intelligence operations, to protect intelligence or any classified information, to conduct vetting investigations and to counter any threat or potential threat to national security*".

CC VAN SCHANKE
CAPTAIN
C530696-6

The SSA's organisational and governance structures

3.5. Political responsibility for the SSA lies with the duly designated Minister of State Security ("**Minister**") who has extensive power to create structures and posts in the SSA, make appointments and issue regulations. The SSA governance structure comprises various levels of executive managers under the leadership of the DG, who is the main interface with the Minister as a member of the Executive.

3.6. While the Ministry exercises political oversight, the DG is the Accounting Officer entrusted with the administration of the Department. Other senior/executive managers are tasked with running the operations. The separation of these functions – political oversight, administration and operations – is crucial for an intelligence service to insulate itself from political interference, thus ensuring that it serves the national security interests of the State rather than the political interests of the government of the day. Indeed, section 199(7) of the Constitution prohibits the security services and their members from either (a) prejudicing a political party interest or (b) furthering, in a partisan manner, any interest of a political party, in the performance of their functions.

3.7. In addition to the constitutional and legislative framework governing the SSA's governance and operations, the SSA has its own regulatory prescripts. Two are particularly important for purposes of assessing the pervasive and serious irregularities in the SSA CDSO between 2012-2018:

3.7.1. The Ministerial Delegation of Powers and Direction of Payment ("**MPD**") enables managers at various levels to run the operations of the Agency. The MPD sets out the scope of delegated authority applicable to each managerial level in respect of financial management, logistics and supply chain management, human resources management, security (vetting) and operational expenditure. Importantly, chapter 5.2 of the MPD specifically addresses the delegations of authority and

CG VAN SCHANKE
CAPTAIN
C530690-6

respective limits for the approval of operational expenditure for cover structures and projects. Chapter 5 of the MPD is contained in **file 1** of the SSA Bundle and is marked as "**Annexure B**".

3.7.2. The SSA's Operational Directives ("**ODs**") constitute a rigorous and comprehensive regulatory framework governing its operational activities, including deep cover operations.[3] These ODs not only align with the constitutional imperative that national security be pursued in compliance with the law, but also recognise that the need for accountability is greater in the context of covert operations where there is a risk that secrecy, while a necessary component of intelligence, may be abused to conceal unlawful activities.

High-level observations

3.8. The evidence collected by the Project Veza investigation team reveals that the operations run by the CDSO fell outside the lawful mandate of the SSA, did not follow prescribed procedures, and totally ignored the applicable governance, financial and ODs of the SSA.

3.9. Unlawful intelligence operations and front companies were used to siphon funds from the SSA and create parallel intelligence capacities which, if not abated, would have continued to pose a risk to national security and the constitutionally established state. These unaccountable intelligence structures extended to parallel procurement services, vetting, counter-intelligence, VIP protection and domestic operations.

3.10. The implicated members (or former members) used their positions of authority to ensure that they or their family members or close associates

[3] These ODs have been supplied to the Commission under summons.

JG VAN SCHANKE
CAPTAIN
C530690-6

directly benefitted from unauthorised contracts with front companies and/or illegal operations.

3.11. In certain instances, these structures were used to further political ends by drawing political heads into the security space and by undue interference in the political process, both in respect of opposition parties and within the ruling African National Congress ("**ANC**"). This political interference is in contravention of the SSA's mandate and the constitutional prescripts relating to civilian intelligence structures.

3.12. In assessing these parallel intelligence structures, the Project Veza investigation uncovered networks of individuals that appear to employ a similar modus operandi, which can be characterised as an illicit value chain with three distinct, yet interrelated, tiers of operation:

3.12.1. Initiators – persons who conceive and direct illicit operations;

3.12.2. Facilitators – persons who execute operations under the direction of superiors; and

3.12.3. Primary / secondary beneficiaries, which include, but are not limited to, the political and executive heads of the Agency as well as senior government officials.

3.13. At an executive level, the abuse of the SSA and its mandate occurred primarily under the political leadership of Ministers Siyabonga Cwele, David Mahlobo and Bongani Bongo, and was executed or implemented primarily – although not exclusively – by Mr Moruti (Stan) Noosi, Mr Dennis Dlomo, Ambassador Thulani Dlomo, Ambassador Sonto Kudjoe, and Mr Arthur Fraser.

SG VAN SCHANKE
CAPTAIN
0530690-6

THE CREATION OF A PARALLEL INTELLIGENCE STRUCTURE

4.

The recruitment and training of "co-workers"[4]

4.1. A timeline analysis of events indicates a deliberate and planned system of patronage and corruption, which entrenched and sustained executive and mandate overreach, political interference, and abuse of power in the SSA.

4.2. In 2008 and 2009, a group of approximately 48 non-SSA members were recruited and trained in preparation for their deployment after the May 2009 elections to various roles, with responsibilities that included VIP protection and intelligence collection. Their recruitment and training was directed by Ambassador Thulani Dlomo, then a security manager at the KwaZulu-Natal Department of Social Development ("**DSD**"). Ambassador Dlomo had previously been a member of President Jacob Zuma's protection team.

4.3. The new recruits were mostly drawn from KwaZulu-Natal and received training on, *inter alia*, counter-intelligence, weapons training, counter-terrorism and VIP protection. This training was undertaken both elsewhere on the continent and locally, at the South African National Academy of Intelligence ("**SANAI**") in May 2009.

4.4. According to one of the SANAI trainers who reported to the investigation team, the rationale proffered by Ambassador Dlomo for the training was to build a presidential protection unit that is like the United States Secret Service which would collect intelligence affecting the President. These recruited personnel would subsequently be deployed to SANDF, SAPS and SSA (bypassing official recruitment and vetting processes) when President Zuma assumed leadership after the elections in 2009.

---

[4] Throughout this affidavit, the term "co-worker" is used to denote non-SSA members who were irregularly recruited and employed as part of the CDSO.

CG VAN SCHANKE
CAPTAIN
0530690-6

4.5. By the end of 2009, only about 27 of the original 48 recruits remained as others had left the programme. Ambassador Dlomo's direct involvement in the recruitment and training of these non-SSA members is noteworthy as he was still employed by the KwaZulu-Natal DSD and had no official position at the SSA during this period.

4.6. Ambassador Dlomo's involvement in the training of these new recruits was facilitated by the then Principal of SANAI who sent letters to Ambassador Dlomo's employers confirming that he was assisting the SSA with "*training for the Presidential Protection Unit*". Sample letters that we have in our possession are dated 10 June 2009 and 30 October 2011, and thus clearly predate the establishment of a Directorate for Presidential Security Support ("**PSS**") within the SSA on 27 December 2011 and Ambassador Dlomo's appointment to the SSA on 18 January 2012 as General Manager: Special Operations.

4.7. The evidence available to the Project Veza investigation team indicates that the groundwork was being laid during this period for a private protection unit dedicated to President Zuma. As detailed below, the restructuring of the SSA, which coincided with Ambassador Dlomo's appointment, saw these non-SSA members absorbed within the CDSO and deployed to various structures within the Justice, Crime Prevention and Security Cluster. These non-SSA members were not subject to the formal recruitment and vetting processes of the SSA, but were rather "*co-workers*" not formally employed by the SSA. They were given access to SSA funds and resources and provided with firearms from the SSA armoury. Through the CDSO, the SSA assumed responsibility for President Zuma's food and toxin security, his physical security and the static protection of the President's aircraft. In doing so, funds and resources which should have been utilised by legitimate intelligence structures were channelled to this parallel structure, serving the interests of President Zuma rather than the national interest.

4.8. Accordingly, and in summary:

CG VAN SCHANKE
CAPTAIN
0530690-6

4.8.1. Recruitment and selection of this private force took place outside formal structures.

4.8.2. At least part of the training was done beyond the borders of South Africa and not by formal training structures within South Africa.

4.8.3. Persons within this force were armed and financed by SSA.

4.8.4. At least some were deployed to various security structures within South Africa.

4.8.5. It is apparent that they were accountable to Ambassador Dlomo and served the interests of President Zuma.

4.8.6. They performed their "duties" outside formal SSA structures, at least initially.

The restructuring of the SSA

4.9. In this section, I describe how key structures within the SSA were taken from their original locations and centralised, inappropriately, within a single sub-division of the SSA, namely Counter Intelligence. These structures would subsequently be brought under Ambassador Dlomo's control.

4.10. On 27 December 2011, a proposal compiled by Mr Noosi (the then Acting Director: Domestic Branch) was recommended by Mr Dennis Dlomo (the then Acting DG) for Minister Cwele's approval. This proposal is included in **file 1** of the SSA Bundle and is marked "**Annexure A**". This recommendation sought Minister Cwele's authorisation for the following structural changes within the SSA:

CG VAN SCHANKE
CAPTAIN
0530690-6

4.10.1. The relocation of the CDSO from the line function authority of the Deputy Director: Domestic Intelligence to the Deputy Director: Counter Intelligence;

4.10.2. The relocation of the Cover Support Unit from the office of the Director: SSA Domestic Branch to the office of the Deputy Director: Counter Intelligence;

4.10.3. The establishment of the Directorate Presidential Security Support ("**PSS**") within the existing CDSO.

4.11. These three structural changes were approved by Minister Cwele on the same day they were recommended to him, namely 27 December 2011. This was shortly before Ambassador Dlomo's appointment on 18 January 2012, which would see him step into the much-expanded role of General Manager Special Operations and, a year later, to the position of Deputy Director: Counter Intelligence.

4.12. The nature of the restructuring sought and recommended, and the manner in which it was addressed, indicates that there was a perceived need to expedite a process of "re-aligning and re-focussing the available operational resources within the realm of counter intelligence". In short, the CDSO and the Cover Support Unit were relocated to Counter Intelligence and the Presidential Security Support service was established under the CDSO. The proposed restructuring thus entailed a significant concentration of power in the office of the Deputy Director: Counter Intelligence and envisaged a leading strategic role for the CDSO.

4.13. The general motion for centralising these key assets within Counter Intelligence was explained with reference to "*immediate identified security deficiencies*" that had left the President "*vulnerable to all sorts of threats*". Vague references were made in the proposal to the role of the media in undermining of the office of the Presidency, but no intelligence assessment or evidence was provided in support of this:

CG VAN SCHANKE
CAPTAIN
0530690-6

> *"Proponents of maximum access by the public to State held information are beginning to undermine the need to protect the image and integrity of the Presidency. This unfortunate development has since left the President of the Republic vulnerable to all sorts of threats. An examination conducted by the Sub-Branch Counter Intelligence recommended that measures should be taken with immediate effect to enhance security around the person of the President."*

4.14. The reason advanced for the relocation of the CDSO was its unique strategic role in "*counter-intelligence activities that are serious in nature and require emergency responses from the SSA*". The motivation described the CDSO as "*an elite and highly centralised out of the ordinary function of counter intelligence*" that would not be "*optimally utilised*" within the sub-branch of Domestic Intelligence. Owing to the CDSO's remoteness from Counter Intelligence, this "*misalignment*" was said to create "*potential for operational and functional paralysis*".

4.15. The proposed relocation of the Cover Support Unit was explained on the basis that it would be able to provide proper "*backstopping*" to the CDSO and the Presidential Security Support service.[5] Although in theory, the CDSO, as a legitimate deep cover operational arm of the Agency, would benefit from a close working relationship with the Cover Support Unit, the deployment of close protection officers does not require backstopping; hence the rationale does not extend to the Presidential Security Support service. It should also be noted that backstopping and proper cover support are not limited to counter-intelligence operations. On the contrary, most operational activity within the SSA would require basic backstopping for the purposes of cover. The placement of the Cover Support Unit in the Counter Intelligence sub-division is therefore questionable as it renders the unit remote to other areas of operation that would benefit from its support.

---

[5] "Backstopping" means the arrangements made to support cover structures, operations and identities.

CG VAN SCHANKE
CAPTAIN
C530690-6

4.16. The recommendation justified the establishment of the Presidential Security Support service as a response to "*immediate identified security deficiencies associated with VIP protection and Technical Surveillance Counter Measures (TSCM) services*". The motivation accordingly called for an "*intelligence driven*" approach to VIP protection to be realised by locating the Presidential Security Support service at the heart of the CDSO's specialised counter-intelligence mandate. Significantly, no reference was made in the proposal to existing state structures tasked with providing VIP and TSCM services, nor was there any indication that this shift in the SSA's mandate had been canvassed with other stakeholders or was even necessary. Instead, the submission creates the impression that VIP Protection was the responsibility of the SSA without outlining the origin of this doctrinal shift or its approval by SAPS and SANDF.

4.17. Importantly, the recommendation to create the Presidential Security Support service "*includes approving the employment of twenty (20) officers who were assembled and sent for training on the outlined function of the Directorate Presidential Security Support. These are officers who met both the soft and core-business skills who were head-hunted and trained.*" The impression created in the recommendation is that these "*officers*" were legitimately recruited and employed by the SSA.

4.18. However, the "*head-hunted*" officers listed in Attachment A of the recommendation are in fact the same individuals who were recruited and trained under the direction of Ambassador Dlomo in 2008-2009. They had not been subject to the official recruitment and vetting processes of the SSA yet, two years later, they were absorbed into a newly established Presidential Security Support service, coinciding with Ambassador Dlomo's appointment as the General Manager of the CDSO.

4.19. Sharon played a key role in the implementation of these structural changes. In February 2012, she was seconded from Mr Noosi's office to assist Ambassador Dlomo as the acting Component Head:

Business Support and Development. In August 2013, Sharon was appointed to act as the Manager of the Presidential Security Support service. In these support roles to Ambassador Dlomo, she facilitated the compilation of "*contracts*" with so-called "*co-workers*", their placement within the CDSO as well as the preparation of submissions relating to their registration and payment.

4.20. Shortly after Ambassador Dlomo's appointment on 18 January 2012, the scope of his authority as General Manager of Special Operations was further expanded. While the 27 December 2011 restructuring brought the Cover Support Unit within the Counter Intelligence subdivision, I am aware that "*urgent approval*" was sought in February 2012 for a further "*structural realignment*" to bring the Cover Support Unit under Special Operations. The effect of this proposal, which was compiled by Sharon, was that all three units –the Chief Directorate Special Operations ("**CDSO**"), the Presidential Security Support ("**PSS**") service, and the Cover Support Unit ("**CSU**") –were brought under Ambassador Dlomo's control as General Manager Special Operations.

4.21. The timeline set out above demonstrates that the restructuring within the SSA to centralise control of counter-intelligence operations under Ambassador Dlomo was a plan in the making long before he was officially appointed in January 2012. The groundwork for this restructured and repurposed CDSO was laid by Ambassador Dlomo in 2008-2009 with his recruitment and training of the "*co-workers*" who would subsequently be deployed for "*the President's projects*" at the SSA. The structural changes approved by Minister Cwele in December 2011 meant that when Ambassador Dlomo was officially appointed in January 2012, the SSA's counter-intelligence architecture had already been transformed in order to provide him with the power and resources to directly serve the political interests of President Zuma through intelligence operations that were clearly unconstitutional and illegal. Under Ambassador Dlomo's watch, the CDSO engaged in exponential over-spending and flouted the SSA's

DG VAN SCHANKE
CAPTAIN
0530696-6

financial, operational and HR directives through covert mechanisms and illegal contracts.

4.22. The impact of this centralisation of power within Counter-Intelligence is borne out by the activities subsequently carried out by the CDSO, the Presidential Security Support service and Cover Support Unit, as detailed below. In summary, the consequences of these structural changes were:

4.22.1. the infiltration into the SSA by "*co-workers*" who bypassed official recruitment, training and vetting processes;

4.22.2. the overreach of the duly authorised mandate of the SSA;

4.22.3. illegal activities carried out by a parallel counter-intelligence structure under the guise of covert operations;

4.22.4. executive interference in operational activities;

4.22.5. the rampant looting of SSA funds; and

4.22.6. the illegal use of SSA firearms.

OVERREACH OF THE SSA'S DULY AUTHORISED MANDATE

5.

The Directorate for Presidential Security Support (PSS)

5.1. As part of our investigation, the Project Veza team has examined the extent to which the activities conducted by the SSA's CDSO exceeded the duly authorised mandate of the Agency. The establishment and operation of the Directorate for Presidential Security Support represents the clearest example of mandate overreach by the CDSO under Ambassador Dlomo's leadership. More generally, it reflects the shift in intelligence philosophy that accompanied the restructuring of the SSA from 2009 onwards,

CG VAN SCHANKE
CAPTAIN
C530690-6

bearing out in practical terms how SSA resources were increasingly channelled towards "*state security*", and the security of the former President in particular, rather than "*national security*".

5.2. As noted above, Minister Cwele approved the establishment of the Directorate for Presidential Security Support on 27 December 2011 in response to the alleged perceived deficiencies associated with VIP protections and Technical Surveillance Counter Measures ("**TSCM**") services. However, in motivating for an intelligence driven approach to presidential protection, no reference was made in the recommendation to existing structures tasked with providing these services.

5.3. The Presidential Handbook sets out the extent of administrative, logistical, security and general support services to be rendered to the President, Deputy President and their spouses and children. A stated objective of the Presidential Handbook is to provide "*a concise operational guide to relevant government departmental staff with clearly indicated responsibilities and duties, and by implication, lines of accountability*".

5.4. The Presidential Handbook outlines that, firstly, the responsibility for the President's medical and health care resides with the Surgeon General and the South African Military and Health Services unit of the SANDF. Secondly, the SAPS is obliged to take "*full responsibility for the protection and security of the President and Deputy President*", with the intelligence services providing regular and comprehensive security assessments. According to the handbook, protection and security measures of the President and Deputy President include, but are not limited to, the following:

5.4.1. Regular security assessments in conjunction with the intelligence agencies;

5.4.2. Static protection at all official and private residences and office accommodation used from time to time during the term of office;

CG VAN SCHANKE
CAPTAIN
C530690-6

5.4.3. In-transit protection during all domestic and international movements;

5.4.4. Regular vetting of protectors, medical personnel and other staff;

5.4.5. Screening of service providers;

5.4.6. Static protection of aircraft; and

5.4.7. Regular revision of ICT security systems.

5.5. Notwithstanding this clear assignment of responsibility and the existing structures rendering medical and security support services to the President, the SSA established the Directorate for Presidential Security Support to perform exactly these same functions. In terms of formal documentation outlining the mandate of the Presidential Security Support service, the directorate comprised the following functions:

5.5.1. VIP protection;

5.5.2. Cyber security;

5.5.3. Technical Surveillance Counter Measures ("**TSCM**"); and

5.5.4. Toxicology.

5.6. This not only broadened the mandate of the SSA without following legislative processes, but effectively usurped functions that were duly assigned to the SAPS Presidential Protection Unit and the South African Military and Health Services unit of the SANDF. According to witness reports received during our investigations, the Presidential Security Support service functioned without any Memorandum of Understanding with the SAPS or SANDF regarding the provision of protection services to the President and Deputy President of the country. Whilst the legitimate SSA channels would receive requests for support, such as the provision of threat and risk assessments, secure communication and TSCM, these

CG VAN SCHANKE
CAPTAIN
0530690-8

were used as the justification for the deployment of Presidential Security Support service. As a result of these unclear lines of communication and a lack of agreement and co-ordination with the relevant stakeholders, tensions were reported between members of the CDSO's Presidential Security Support unit and members of the SAPS Presidential Protection Unit, to the detriment of the effective working of the protective services of SAPS.

5.7. According to members within the Presidential Security Support service, they were responsible for security around accommodation, venues, routes and crowds in relation to the President and Deputy President. Members of the unit would be deployed as "*advance teams*" to detect any potential risk or threat to the President or Deputy President when travelling. The information, if any that was generated from these trips, would be channelled only to Ambassador Dlomo and not the formal Information Management structure within the SSA. There is no indication that threat and risk assessments, which according to the Presidential Handbook should have been provided by intelligence, were made available to the SAPS or SANDF regularly or at all.

5.8. In summary, a separate and discrete force was established within the SSA reporting to and accountable to, in the main, Ambassador Dlomo. The lawful structure for the personal protection of the President, namely SAPS, was entirely side-lined. My information is that Ambassador Dlomo reported directly to President Zuma. In the result, President Zuma benefitted from an SSA-based protection service, financed and controlled by the SSA, which was possibly performing intelligence functions – as it had been trained to do.

The Toxicology Unit

5.9. In 2012, a Toxicology Unit was established within the CDSO under Ambassador Dlomo's management. There were no indications that this

JG VAN SCHALKE
CAPTAIN
0530690-8

unit was established legitimately or with even an attempt to comply with the threshold governance prescripts of the SSA. Ambassador Dlomo, in conjunction with a non-SSA member, Dr Mandisa Mokwena, were involved in the recruitment and training of individuals in the toxicology environment to capacitate this new unit. This was done in conjunction with an organisation referred to as a foreign International Development Agency for Food Safety and Security. Based on our investigations, this organisation does not appear to exist in any official records.

5.10. The recruitment and training agreement was signed by Ambassador Dlomo on behalf of the Republic of South Africa and by an unidentified representative on behalf of the foreign organisation. In terms of the agreement, the foreign side would provide course curriculum, training, equipment and installation, with an overall implementation date of 20 January 2013. During 2012, individuals were identified, through referrals, and invited to submit their curriculum vitaes. Four individuals were selected – two toxicologists and two lab assistants. The individuals were not interviewed, but were allegedly vetted and sent for polygraph examinations conducted by the foreign country before attending a three-week course in their country in December 2012.

5.11. The Toxicology Unit was located within the Directorate for Presidential Security Support in terms of organisational design. However, it also fell within a CDSO project called Project Khusela (previously called Project Accurate), of which Dr Mokwena was the project manager. Project Khusela is dealt with further below. The Toxicology Unit's laboratory, including a vivarium, was established in an SSA safe house in Waterkloof. There appears to have been a "*double dipping*" of funds as members of the Toxicology Unit reported to Directorate for Presidential Security Support for their travelling funds (subsistence and travel allowance, accommodation costs), whilst funds were also paid to Project Khusela as part of the CDSO operational expenditure. The leader of the Toxicology Unit, who was one of the trained toxicologists, indicated to the investigation team that she had used her own business entity called

CG VAN SCHANKE
CAPTAIN
0530690-6

Remix, which had been established in 2007, as a special purpose vehicle for receiving and disbursing operational funds from the SSA for this project.

5.12. Members of the Toxicology Unit were deployed in line with the other Presidential Security Support services, such as Technical Surveillance Counter Measures ("**TSCM**"), to all areas that the President would be exposed to, both internationally and domestically. They were responsible for checking rooms, kitchens and dining spaces that would be occupied by the President, but not the presidential aircraft. In one document, Ambassador Dlomo is cited as a "*donor*" to the establishment of the Toxicology unit and referred to as "*Chief*".

5.13. However, the actual purpose of the Toxicology Unit is questionable and it appears to have had little impact since its establishment in 2012. Notwithstanding the specialised training and considerable resources at its disposal, the Toxicology Unit failed to detect or prevent the alleged poisoning of the former President in 2014. Indeed, during an interview with a person employed by the Toxicology Unit, it was indicated that in all the years that they had serviced the former President, the only threat that had been detected was expired cool drinks. The failure to detect the poisoning of a sitting President was either a major intelligence failure by a specialised unit that had been trained and resourced for this sole purpose, or exposes the Toxicology Unit as a structure used to siphon funds out of the SSA and/or use such funds for other, non-disclosed purposes.

The protection of the Presidential aircraft

5.14. In November 2014, Ambassador Dlomo (by then Deputy Director-General: Counter Intelligence) instituted a project for the protection of the Presidential aircraft. The rationale for the project, according to witness accounts, was that Ambassador Dlomo was made aware that pilots and crewmembers were bringing in unauthorised individuals to sleep in the

CG VAN SCHANKE
CAPTAIN
0530690-6

aircraft. No formal Threat and Risk Assessment on the alleged concerns formed the basis of the project. Individuals selected for the project had no training or knowledge of aviation matters, yet they accepted and carried duties to guard the Presidential plane and helicopter. This mandate was based on a verbal briefing from Ambassador Dlomo on a purported threat.

5.15. Although Ambassador Dlomo selected the SSA members that were tasked with protecting the Presidential aircraft, the project was formally allocated to the Chief Directorate Internal Security ("**CDIS**") headed by Johan (General Manager: Protective Security / Internal Security). It is unclear why this project, which like the Presidential Security Support service encroached on the SAPS mandate to render Presidential protection of this kind, was set up within CDIS. It is reasonable to infer that this was done to deliberately remove all things related to the protection of the former President out of the realm of SAPS and to instead place them under the control of Ambassador Dlomo.

5.16. It is highly likely that this project was not catered for in the CDIS budget owing to the fact that protection of the Presidential aircraft did not fall within the SSA's duly authorised mandate. At an organisational level, the CDIS incurred approximately R1.5 million per month in unplanned expenditure. Given that the entire CDIS operational budget for the 2015/16 and 2016/17 financial years was R48 million and R38 million respectively, this means that almost 40% of the CDIS budget was redirected from other operational activities in order to meet the requirements of this project for the alleged protection of the presidential aircraft.

5.17. Rather than fulfilling its function of protecting the Agency from internal threats, the CDIS during Johan's tenure was weakened and the integrity of its vetting processes was eroded. CDIS members were wittingly or unwittingly complicit in facilitating the abuse of SSA resources. This included enabling CDSO members' illegal access to firearms, the transportation of cash for CDSO operations and involvement in a parallel

CG VAN SCHANKE
CAPTAIN
0530690-6

vetting structure. CDIS members were also implicated in the robbery of R17 million from a safe inside the SSA complex at Musanda in December 2015.

A shift in intelligence philosophy

5.18. In conclusion, the Constitution together with legislative and policy prescripts, including the Presidential Handbook, clearly set out the mandates of the various security cluster stakeholders. The extension of the mandate of the SSA through internal reconfiguring of the CDSO and external usurpation of the functions of the South African Military and Health Services and the SAPS Presidential Protection Unit breached this architecture. The irregular establishment and implementation of Presidential Security Support services, the Toxicology Unit, and a static security force for the protection of the Presidential aircraft disrupted the reporting lines for duly assigned functions and thereby undermined accountability.

5.19. The Directorate for Presidential Security Support became one of the greatest consumers of SSA resources. Members of CDSO and the so-called "*co-workers*", who were irregularly recruited and trained by CDSO, travelled extensively using valuable state resources without providing any intelligence or information back to the SSA in support of its sanctioned mandate. The Project Veza investigation has found no discernible benefit to the SSA or the nation from these activities.

5.20. The cost of this increase in security not only lies in the actual rand-value expenditure, but also the cost of weakened State functioning with the eroding of legitimate structures. The duplication of services strained relations between stakeholders and inadvertently led to a paralysis of the legitimate functionaries whose responsibility the security of the President actually is. This duplication also led to a disabling of legitimate SSA resources by under-capacitating crucial functions within the Agency. Where the SSA does have a role to play in the protection of the President,

CG VAN SCHANKE
CAPTAIN
C530690-8

such as regular intelligence assessments, these were functions that would ordinarily be carried out by legitimate SSA operational arms such as the Special Events Unit, Operational Support, the Chief Directorate: Intelligence Management and the Foreign Branch.

5.21. The greatest risk, however, is that unskilled, un-vetted persons were deployed within the inner perimeter of presidential security. The principal client (the President) was guided by individuals with no coherent approach to intelligence or competence to assist with proper policy-making. There was at best a haphazard approach to the work undertaken by CDSO – a stark contrast to the way in which the legitimate activities of the SSA are carried out. Intelligence is a deliberate effort. Yet there is no indication that any of the CDSO's work was informed by thorough planning and scanning efforts or intelligence assessments. Moreover, the Agency was aware of this and nothing was done to curb this risk from within. On the contrary, those entrusted with responsibility for protecting the integrity of the SSA's internal security, such as the Chief Directorate Internal Security ("**CDIS**"), appear to have been complicit in the CDSO's bypassing of official accountability structures.

5.22. The overreach of the SSA's duly authorised mandate by the CDSO, and the Presidential Security Support service in particular, reflects a shift in intelligence philosophy during this period. The deployment of improperly vetted and trained individuals, with exclusive reporting lines to Ambassador Dlomo, and thereafter to the former President, resulted in the creation of a personal force, at the disposal of Ambassador Dlomo, with state resources. During this period, the focus of the security cluster shifted from security of all the people in South Africa to the security and tenor of one individual, former President Zuma. The fact that these services were stopped when the President Ramaphosa entered office demonstrates that these services were indeed established and operated for the sole protection of former President Zuma.

CG VAN SCHANKE
CAPTAIN
0530690-6

5.23. The High-Level Review Panel on the SSA recommended that the broad interpretation of the SSA mandate should be reviewed; this is a sentiment that is echoed by the Project Veza investigation team in light of the impunity with which individuals acted at the cost of national security.

ILLEGAL COUNTER-INTELLIGENCE OPERATIONS

6.

Overarching assessment of CDSO counter-intelligence projects

6.1. During the period 2012-2018, the CDSO undertook a number of counter-intelligence projects and operations. The Project Veza team has evaluated these projects and operations from a number of aspects, including their alignment with the SSA and/or CDSO's mandate, their compliance with policy prescripts and processes for establishment, the controls applied to the disbursement of funds, and the nature of the operational activities purportedly carried out.

6.2. A few general observations may be made about the CDSO's operational activities during the period under review:

6.2.1. The documentary motivation for the establishment of the projects was entirely inadequate. The establishment documents for these projects contained only a generic, all--encapsulating reference to the SSA's counter-intelligence mandate.

6.2.2. No or limited detail was disclosed regarding the proposed plans and outcomes of these operational activities, and there are conflicting accounts of the projects' deliverables.

EG VAN SCHANKE
CAPTAIN
C530690-6

6.2.3. There is no record of how or when or what intelligence was provided to the client, if any, as a result of these activities.

6.2.4. The operational activities undertaken exceeded the mandate of the SSA, and at times constituted conduct that undermined the very core of the Constitution, was manifestly unlawful and involved criminality.

6.3. The SSA has policy prescripts setting out the regular procedures to be followed for the establishment of all projects, including deep cover projects. In comparing the policy and regulatory prescripts with the establishment and management of the CDSO projects identified below, the Project Veza investigation team found that the majority, if not all, of these projects were established in breach of these regulations. Further, the grounds provided for the establishment of these projects make generic references to the counter-intelligence mandate of the SSA. This deliberate vagueness emerges as a trend across CDSO projects. The attempts to comply (or at least appear to comply) with policy prescripts increasingly appeared to be aimed at meeting only the minimum requirements for gaining authorisation to access funds.

6.4. By way of example, the submissions motivating for the establishment of Project Construção, Project Mayibuye and Project Wave (discussed below) all contained the same wording, were all authorised by the same individuals and were all approved on the same day, 23 January 2015. These submissions for the establishment of Project Construção, Project Mayibuye and Project Wave are contained in **file 2** of the SSA Bundle and marked as "**Annexure C0**", "**Annexure M0**" and "**Annexure W0**" respectively.

6.5. Notwithstanding the vague and generic motivations for the establishment of these projects, the operational activities that were purportedly undertaken are in clear breach of the constitutional prohibition against partisan and politicised intelligence. This politicisation of the CDSO can be traced back to the restructuring of the SSA's counter-intelligence

CG VAN SCHANKE
CAPTAIN
2530690-6

capacity, which shifted focus and resources to countering perceived threats to the personal and political security of former President Zuma. The operations run by the CDSO under Ambassador Dlomo are the concrete result of these politicised intelligence priorities.

6.6. The extent of this politicisation is further illustrated by the executive interference in operational activities which occurred during this period. Of particular concern is the considerable evidence of Minister David Mahlobo's direct involvement in operational activities, including his alleged handling of large amounts of cash that were drawn under CDSO projects. Indeed, there is evidence that in seeking budgetary approval for projects in November 2015, provision was made for a large portion of retained funds for what were described as the "*Minister's projects*" or "*projects approved by the Minister*". This submission is contained in **file 1** of the SSA Bundle and is marked as "**Annexure C**".

6.7. This evidence of executive overreach underscores the importance of maintaining a balance between political authority and operational authority in the security services. Without political restraint and operational independence, there is a risk that the intelligence services will be pressured to provide intelligence that serves the narrow political interests of the political authority rather than the national security interests of the country.

6.8. Finally, it should be noted that pervasive financial irregularities and weak financial controls make it difficult to ascertain the full extent of the operational expenditure incurred under these projects. The outlay of funds was fast and loose, and mostly in cash. There was a frequent blurring of lines between projects, with the CDSO structure utilising projects, ostensibly created for one purpose, to facilitate funding for another. There was also frequent "*double dipping*" of funds, as illustrated by Project Khusela (dealt with below) in relation to the Toxicology Unit. The abuse of the Temporary Advance system, with cash being disbursed to CDSO members without subsequent reconciliation against expenditure,

EG VAN SCHANKE
CAPTAIN
C530690-6

means that the actual use and final destination of these cash payments are difficult to verify.

6.9. A representative example of the irregularities referenced above is a submission dated 22 March 2016 requesting authorisation for the "payment of related expenses as per the approved Project[s] Mayibuye, Wave and Construção". This submission sets out the estimated financial implications for various CDSO projects and operations, totalling R9.9 million. This submission in contained in **file 2** of the SSA Bundle and is marked as "**Annexure C.8**".

6.10. Notwithstanding the challenges that arise from poor record-keeping, the investigation team has calculated that, on a conservative estimate, a total of R1 billion was expended on these CDSO projects during the period 2012-2018. Not only were these projects unlawful in their establishment, purpose and operation, but they were in any event of very little benefit to the SSA. Instead, these projects were used to channel SSA funds to the parallel intelligence structure engaged in unlawful operations that appear to have been primarily undertaken for the personal and political benefit of President Zuma and other high-ranking officials.

Project Construção

6.11. According to the request for authorisation to establish Project Construção, this cover project had "*an aim of gathering, influencing, penetrat[ing] and neutralis[ing] any form of threats or potential threats capable of destabilising the democratic rule of the Republic of South Africa*". Although this proposal, dated 12 December 2014, stated that operatives would begin work as early as 17 December 2014, official approval for the project was only given on 23 January 2015. The Project Manager was Frank who reported directly to Ambassador Dlomo (then Deputy Director: Counter Intelligence). This submission for the

CG VAN SCHALKE
CAPTAIN
0530690-6

establishment of Project Construção is included in **file 2** of the SSA Bundle and is marked as "**Annexure C0**".

6.12. Project Construção involved the further recruitment and training of "co-workers" for the CDSO. (This should not be confused with the earlier recruitment and training of individuals at Ambassador Dlomo's direction in 2008/09 who were subsequently deployed into personal protection units and the Directorate for Presidential Security Support in particular.) Under Project Construção, 22 people were recruited, 18 of whom were sent for overseas training during the latter half of 2015. The operatives were trained in two groups – 8 were trained in VIP protection and 10 were trained in counter-intelligence trade craft. It is of concern that this VIP training was conducted outside the available diplomatic channels provided by the agreement on training that was in place at the time, with the foreign-based trainers apparently under the impression they were training SAPS members rather than new intelligence recruits. During the "graduation" ceremony of the recruits, they were allegedly instructed by Ambassador Dlomo that upon return to South Africa they would report only to him.

6.13. Most of these individuals were drawn from KwaZulu-Natal, although it is unclear what criteria were followed in recruitment. None were vetted by the SSA. According to Lilly (Component Head: Finance and Asset), one of the reasons for launching the project was that former President Zuma wanted younger VIP protectors to be trained. In his interview with our investigation team, Frank confirmed that this project was linked to the VIP protection that was offered to high-ranking officials such as Ms Dudu Myeni, but these "*co-workers*" were also deployed by Ambassador Dlomo to work on other CDSO operations like Project Lock, dealt with below. It should further be noted that Ambassador Dlomo himself benefitted from personal protection services using the resources of the SSA.

CG VAN SCHANKE
CAPTAIN
C530690-6

6.14. An initial operational budget of R30 million was approved for Project Construção, which was expected to run until 31 January 2016. In July 2016, belated approval was given for the renewal of Project Construção for the period 1 April 2016 – 31 March 2017 and a further R24 million in operational expenditure. This submission for the renewal and further funding of Project Construção is included in **file 2** of the SSA Bundle and is marked as **"Annexure C9".**

6.15. Three invoices were issued by the "Carrot Export Company" during February and March 2015 totalling R20 million, thus using almost all the allocated budget within three months of the Project establishment. These invoices are contained in **file 2** of the SSA Bundle as are marked as **"Annexure C1"**, **"Annexure C2"** and **"Annexure C3"**. It should further be noted that we have not been able to verify the existence of this company.

6.16. Additional invoices were submitted under Project Construção by two companies, namely Napa and Squash, as reflected in the **index** to the documentation relating to Project Construção in **file 2** of the SSA Bundle. Under Project Construção alone, six invoices totalling R14.9 million were submitted by Napa and a further six invoices totalling R10.427 million were submitted by Squash. Further invoices were submitted by these entities in respect of other projects as will be dealt with further below.

6.17. In December 2016, a submission was compiled to request the DG (then Mr Arthur Fraser), to waive the advertising and appointment processes in respect of 33 people attached to Project Construção. This submission is contained in **file 2** of the SSA bundle as is marked as **"Annexure C12"**. The urgency of the proposed waiver was motivated on the basis that the project would soon end as it had been decided by *"the Principal Client and the SSA executive to call for a termination of the Project when the term allocated expires at the end of March 2017"*. However, Project Construção was extended several times after the Cover Support Unit took

CG VAN SCHANKE
CAPTAIN
2530690-6

over operational expenses for the project in September 2017, and final payments to remaining "*co-workers*" were only made in September 2018.

Project Mayibuye

6.18. Project Mayibuye was initiated by Mr Thulani Dlomo and was initially approved by Ambassador Kudjoe in January 2015 at the same time as other CDSO projects were approved. This submission for the establishment of Project Mayibuye is contained in file 2 of the SSA bundle and is marked as "**Annexure M0**". It was renewed and continued after the departure of Ambassador Kudjoe and the subsequent arrival of Mr Fraser as DG in September 2016.

6.19. According to the motivation put forward in seeking approval for Project Mayibuye, it was established "*to provide counter-intelligence support that will enable to step up State authority and its organs of governance (Justice, Parliament, Provincial Legislatures) against hostile behaviour or radical intents aimed at undermining the rule of law and governance in general*". Minister Mahlobo continuously approved the utilisation of retained earnings to fund these operations, despite advice that the retained earnings (unexpended funds) should be saved and utilised for infrastructure development to develop the intelligence capabilities of the SSA.

6.20. In a submission dated 31 May 2016, authorisation was given for the renewal of Project Mayibuye and payment of related expenditure between 1 April 2016 and 31 March 2017, approving the budget of R54.1 million. This submission for the renewal and further funding of Project Mayibuye is contained in **file 2** of the SSA Bundle and is marked as "**Annexure M25**".

6.21. By way of example as to how operational funds would be withdrawn for Project Mayibuye, this approval is attached as support for a Temporary Advance ("**TA**") dated 30 June 2016 for R4.4 million, with the accompanying certificates bearing the signature of those who took receipt

DG VAN SCHANKE
CAPTAIN
C530690-8

of the cash for various operations under Project Mayibuye. This TA is included in **file 2** of the SSA Bundle and is marked as "**Annexure M15**".

6.22. Based on the TAs which have been located during our investigation, the total paid in respect of Project Mayibuye amounts to R84. 79 million. This includes eight invoices totalling R38.88 million which were submitted by Napa and one invoice for R6.9 million submitted by Squash.

6.23. Project Mayibuye comprised several operations, including Operation Commitment, Operation Justice / Simunye, Operation Lock and Operation Sesikhona, which are detailed separately below. Reference is also made in submissions for Project Mayibuye to Operation Safe Return and Operation Platinum, but little is known about these operations.

Operation Commitment

6.24. Operation Commitment involved monthly withdrawals of cash by, among others, Frank, Darryl and Sharon, which were delivered on more than one occasion to the Minister during the period when Mr Mahlobo was Minister of State Security. The allegation made to the investigation team was that these funds were intended for onward delivery by Minister Mahlobo to President Zuma. In his interview with our investigation team, Frank confirmed that he dropped off monthly withdrawals of R2.5 million to Minister Mahlobo's office under Operation Commitment and indicated he had heard that these payments were going to "*the Project of the President*" but could not confirm that this was indeed the case. It should be noted that the Project Veza investigation team has not found any proof that President Zuma in fact received these payments, nor is there any acknowledgment of such receipt by him.

6.25. According to Lilly, these monthly payments amounted to about R24 million in the 2015/16 financial year and increased to R54.1 million in the 2016/17 year. Frank reported that he

CG VAN SCHANKE
CAPTAIN
0530690 5

received firm instructions from Minister Mahlobo that these amounts must be made available, notwithstanding challenges in accessing these funds.

Operation Justice / Simunye

6.26. Operation Justice concerned the alleged influencing, recruiting and handling of sources within the Judiciary. The purported aim was to ensure harmony between the State and the justice fraternity, and allegedly included efforts to influence the outcome of cases.

6.27. From a submission dated 20 July 2015 requesting authorisation for the renewal and funding of Project Mayibuye, it appears that Operation Justice was the continuation of an earlier project called Simunye. This submission is included in **file 2** of the SSA Bundle and is marked as "**Annexure M4**". The submission notes in this regard that due to their "*common objective outcomes (asserting State Authority) Project Simunye was collapsed and incorporated into Project Mayibuye as such necessitate [sic] that additional funding be requested to support all operational requirements*".

6.28. This motivation provides an insight into the how Operation Justice, with its inherited focus on the Judiciary, relates to the broader purposes of Project Mayibuye: "*Project Simunye was intended to intensify and strengthen State Authority within the judiciary system under which contact and relevant assets were to be acquired, utilized, for the purpose of positive influencing State Power and control over the judiciary.*"

6.29. In a submission dated 31 May 2016 seeking renewal for Project Mayibuye, Operation Justice was highlighted for its "*achievements*" in gaining "*access and interaction with the justice system through what was becoming an alarming concern over the friction that existed between the State and the justice fertility [sic]. In the same breath CDSO contributed largely to the rise in confidence in the justice [sic] by the public through its influential role in the media reporting utilizing well placed media*

CG VAN SCHANKE
CAPTAIN
0530690-6

personnel". This submission is included in **file 2** of the SSA Bundle and is marked as "**Annexure M15**".

6.30. Amounts of between R1.2 million and R4.5 million were regularly taken from the SSA and allegedly hand-delivered to Minister Mahlobo, who was reported to be the person directly making onward payments as part of Operation Justice. One of the implicated individuals confirmed that she had personally delivered R4.5 million to Minister Mahlobo's office on at least three occasions.

6.31. Mr Frank confirmed to the investigation team that he was instructed to deliver money regularly to Minister Mahlobo for Project Justice, starting at R1.3 million but extending upward to R21.8 million. He asserted that he was not aware of the details of Operation Justice beyond the general context that "*there was a complaint that the judges were colluding to overthrow the government so an operation was established*" and his deliveries of cash to the Minister's office were "*to deal with the issue of the judges*".

6.32. Needless to say, the very existence and stated purpose of Operation Justice, irrespective of whether it was indeed implemented, constitutes a fundamental breach of the separation of powers and an unconstitutional attempt to compromise the independence of the Judiciary.

Operation Lock

6.33. Operation Lock involved the provision of a safe house and protection to Mr Eugene de Kock after he was released from prison, apparently on the basis of a Memorandum of Understanding with the Department of Correctional Services. Lilly indicated that Operation Lock was allocated around R100 000 – R200 000 per month, which included the lease of a safe house, living expenses and a salary (of around R40 000) to Mr de Kock, for which he signed acknowledgment receipts.

CG VAN SCHANKE
CAPTAIN
0536690-6

6.34. The reason for the CDSO assuming responsibility for Mr de Kock, who was coded as Mr Lock, apparently arose from concerns about his continued links to right-wing groupings. Minister Mahlobo was reported to have had close personal involvement with this operation. Indeed, Frank informed the investigation team that tensions arose between Ambassador Dlomo and Minister Mahlobo as a result of the Minister's continued access to Mr de Kock.

Operation Sesikhona

6.35. Operation Sesikhona was purportedly aimed at stabilising the nature of public protest by a Cape Town based group of homeless activists who demonstrated and spilled human waste on the streets and at national key points, such as Cape Town International Airport. The cause of concern for the CDSO was that the nature of these protests could undermine the integrity of the state and create a negative impression to investors. In the request for the renewal of Project Mayibuye, Operation Sesikhona was singled out, along with Operation Justice, for its "*achievements*". This submission is included in **file 2** of the SSA Bundle and is marked as "**Annexure M15**".

6.36. [redacted]

6.36.1. [redacted]

CG VAN SCHANKE
CAPTAIN
0330095-8

6.36.2. [redacted]

6.36.3. [redacted]

6.37. [redacted]

Project Hollywood

6.38. Project Hollywood was established on 16 November 2015 to commence in April 2016, renewable every three months. This submission for the establishment of Project Hollywood is included in **file 3** of the SSA Bundle as is marked as "**Annexure H0**". The stated objective of the project was conducting surveillance and monitoring, and involved the illegal interception of high-profile, politically prominent or connected individuals and government officials. Monthly withdrawals of R800 000 cash were made to pay Innovation Insight Network (Pty) Ltd, purportedly for the provision of intelligence and security services, including the remuneration of operatives, surveillance platform setting and encrypted communication hire. These invoices submitted by Innovation Insight Network (Pty) Ltd are reflected in the **index** to Project Hollywood contained in **file 3**.

CG VAN SCHANKE
CAPTAIN
0530690-6

6.39. However, the details provided by the service provider were found to be fictitious and no evidence of a contract between Innovation Insight Network (Pty) Ltd and the SSA could be found in the course of our investigations. In any event, this arrangement – irrespective of whether the purported services were in fact rendered – constitutes an unlawful outsourcing of the SSA's counter-intelligence mandate and the creation of a parallel intelligence network.

Project Lungisa

6.40. Similar to Project Hollywood, Project Lungisa was established on 29 December 2015, renewable every three months. The submission for the establishment of Project Lungisa is included in **file 3** of the SSA Bundle as is marked as "**Annexure L0**". The stated objective of the project was to "*neutralise and counter [the] activities of individuals intent on undermining the authorities*". Monthly withdrawals of R500 000 cash were used to pay an entity called Zenzele Economic Advisory, purportedly for the provision of economic services, including data collection and analysis, the collection of financial statements from banks, company and ownership analysis, the interviewing of assets and the compiling of reports.

6.41. However, as in the case of Project Hollywood, the details provided by this service provider appear to be fictitious and no evidence of a contract between the SSA and Zenzele Economic Advisory has been established so far. In addition, there is no correlation between the stated objectives of Project Lungisa as per its approved submission and the services that were purportedly provided. In any event, these purported services constitute an unlawful outsourcing of the SSA's mandate and duplicate the services of the Financial Intelligence Centre ("**FIC**").

6.42. The key persons implicated in both Project Hollywood and Project Lungisa are Ambassador Dlomo (as Deputy Director: Counter Intelligence),

CG VAN SCHANKE
CAPTAIN
0530690-6

Darryl, Lilly and Mandy.

Project Accurate / Khusela

6.43. Project Khusela was a CDSO project run by Dr Mandisa Mokwena, a non-SSA member, but its activities overlapped with those of the Toxicology Unit established in 2012 as part of the Directorate for Presidential Security Support. The establishment of Project Khusela was approved on 30 April 2015 as reflected in Annexure "**AK0**" of **file 3** of the SSA Bundle.

6.44. Project Khusela was purportedly established to substitute Project Accurate, with the 2013 Project Accurate operational plan (without a budget) being relied on to obtain approval for the "*establishment*" of Project Khusela in April 2015. The SSA's Operational Directives (ODs) do not permit substitution but, in any event, Project Accurate continued to run parallel to Project Khusela.

6.45. The irregularities extended to the monthly payments of R1.8 million for Project Khusela as, in certain instances, submissions of Project Mayibuye were attached as the basis for the withdrawals. These withdrawals listed to Project Khusela included two invoices totalling R9.5 million from Napa (dealt with below). These invoices are reflected in the index to Project Khusela in **file 3** of the SSA Bundle.

6.46. The stated objectives of Project Khusela also differed from submission to submission, ranging from bioterrorism threats and threats to economic security, to subversive acts and sabotage directed at strategic installations and national key points. These discrepancies are borne out in the accounts of those involved in the project. Dr Mokwena has stated under oath that all intelligence products were submitted directly to President Zuma, such that it cannot be confirmed whether the content of the

CG VAN SCHANKE
CAPTAIN
0530690-6

professed intelligence products met the differing objectives of the project. Moreover, this direct reporting line operated outside the formal SSA intelligence clearance channels, thus constituting a parallel information management process.

6.47. As highlighted in relation to the Toxicology Unit, the incident of the alleged poisoning of the former President raises the question as to the role of Project Khusela given that one of its purported objectives was to counter "*bio-terrorism threats emanating from foreign intelligence services targeting the President and Deputy President*" for which toxicologists were recruited. Given the costs invested in the Toxicology Unit and the operational expenditure under Project Khusela, the lack of detection of the alleged poisoning of the former President is either a major intelligence failure or suggests that these parallel structures were used to siphon funds from the CDSO, under the guise of covert counter-intelligence operations.

Project Tin Roof

6.48. Project Tin Roof related to an investigation into the alleged poisoning of former President Zuma by his wife MaNtuli. According to media reports, the diagnosis of former President Zuma's poisoning occurred during his trip to the United States in August 2014 and was subsequently confirmed in a foreign country. Project Tin Roof was established in December 2014, at the insistence of former Minister Mahlobo, who had MaNtuli removed from Nkandla as a suspect and given "protection and maintenance" by the SSA until the investigation was finalised. In light of MaNtuli's recent media interviews, she describes this period as a detention where none of her constitutional rights were observed or respected. The so-called "protection" desisted when MaNtuli sought the intervention of her own legal counsel.

CG VAN SCHANKE
CAP. AIN
0530690-G

6.49. The Project Tin Roof team entailed approximately 40 persons, drawn from different directorates within the SSA as well as externally, in the following fields: administration, investigations, vetting, polygraph testing, surveillance, counter espionage, toxicology, and physical security. It is alleged that investigations were conducted and some arrests were even effected, but the main perpetrator is alleged to have fled the country. It should be noted, however, that the Project Veza investigation team has not found any SSA documentary evidence supporting these assertions. A criminal case was opened at Nkandla but the then National Director of Public Prosecutions, Mr Shaun Abrahams, did not act on the case. There was no indication as to why the SAPS or SANDF had not conducted these investigations.

6.50. Like the establishment of the Toxicology Unit, Project Tin Roof entailed an overreach of the SSA's duly authorised mandate. The SSA does not have powers to detain and, in doing so, the CDSO violated the civil rights of a citizen under the pretext of "*national interest*" and without having to account for its actions.

6.51. Monthly withdrawals of approximately R800 000 were made under Project Tin Roof. Operational expenditure, including the leasing and maintenance of safe houses, the provision of security services and leasing of high-end motor vehicles for surveillance. Internally, Felicity and Lilly appear to have used Project Tin Roof as a front for renting further safe houses, hiring VIP protectors and conducting renovations and maintenance on the leased properties. Preliminary investigations and simple profiling have revealed irregularities with the registration numbers provided on invoices, including PSIRA registration numbers in the case of security companies, suggesting that payments were made to fictitious entities.

Project Academia

6.52. In 2015, Murray, a former SSA member, was recruited by Minister Mahlobo to mitigate and resolve the "*Fees Must Fall*"

CG VAN SCHANKE
CAPTAIN
0530690-6

protests which had erupted across universities in South Africa. The immediate aim of Project Academia was to neutralise the "*Fees Must Fall*" protests but the mandate extended to developing short-term mitigation strategies and long-term solutions to prevent the recurrence of these protests.

6.53. Mirriam was appointed by Darryl to be the project manager, working closely with Murray. Both Murray and Darryl attended intelligence training overseas. According to Mirriam, Project Academia was allocated R700 000 per month, with a significant portion handed over to Murray. Other expenses included the payment of fees for student leaders and the funding of t-shirts, food, transport and other activities for the Congress of South African Students. Further details about Project Academia are set out in an SSA report marked as **"Annexure P"** in **file 1** of the SSA Bundle.

Operation eThekwini[6]

6.54. Towards the end of October 2014, Ambassador Dlomo and his relative, Thula, launched a counter-intelligence operation in Durban to address the "*mushrooming of political instability within the ruling ANC in eThekwini that could have a provincial and possible a national impact*". More particularly, Operation eThekwini related to the factional contest between Ms Zandile Gumede and Mr James Nxumalo ahead of the ANC Regional Conference held in March 2015. The focus of the interventions concerned the personal security of Ms Gumede and the prevention of violence in the run-up to the Regional Conference.

6.55. The support of Ms Gumede was in the form of political advice, security services, resources for political mobilisation and promotional activities, intelligence alerts on possible violence or assassination plots, and the monitoring of foreign intelligence services that displayed an interest in the

[6] The information for this analysis of Operation eThekwini is based on an affidavit supplied to the Project Veza investigation team by an SSA member.

CG VAN SCHANKE
CAPTAIN
C530690-6

regional politics of the ANC. The operational co-ordinator, Thula, headed a group of about 13 operatives on the ground. Full-time personal security was provided to Ms Gumede and the hired cars utilised for the operation included one armoured vehicle. The expenditure for Operation eThekwini averaged between R700 000 and R900 000 a month during the period from November 2014 to March 2015.

Project Wave

6.56. As noted earlier, Project Wave was established at the same time as Project Construção and Project Mayibuye in January 2015, and was based on the same template, written by Frank, and approved by the same individuals. The submission for the establishment of Project Wave is contained in **file 2** of the SSA Bundle and marked as "**Annexure W0**".

6.57. The stated aim of Project Wave was "*to penetrate and establish operational ground within identified continental, regional and global territories, utilizing deep cover members*", with an intended commencement date of 1 March 2015. However, Frank explained in his interview with our investigation team that this initial plan bore no resemblance to the activities later carried out under Project Wave, which related to the media. While the spending of funds started soon after the establishment of the project, it was only a year later that a group of co-workers was recruited and trained. Frank contends that this recruitment was ad hoc, and admitted that he included his daughter in response to Ambassador Dlomo's invitation to "*bring people*".

6.58. A progress report dated 26 November 2016 provides further insight into the operational activities of Project Wave. This progress report is contained in **file 2** of the SSA Bundle and is marked as "**Annexure W9**". Under "*achievements*", it is reported that "*Project Wave has been able to confirm many of the allegations levelled against the involvement of foreign*

CG VAN SCHANKE
CAPTAIN
2530690-6

intelligence agencies in the planned destabilization of the democratic rule in South Africa. It has also been confirmed through the said investigation the involvement of senior cabinet members and various senior leaders in the ruling African National Congress (ANC) who are colluding in a conspiracy to effect regime change in South Africa." Under "*challenges*", it is reported, *inter alia*, that "*[o]ne area of interest (media houses) has proved to be one of the most difficult to penetrate for two reasons, either the remuneration demands were higher tha[n] what the operatives could offer or the targeted media house was equal on a security alert, hence immune to approach or [to] be recruited*".

6.59. R24 million was allocated to Project Wave in the 2015/16 financial year, and the same amount again in the 2016/17 financial year. One of the largest payments under Project Wave was for the amount of R20 million in respect of an invoice raised by Apricot, purportedly for services rendered. These records are contained in **file 2** of the SSA Bundle and is marked "**Annexure W8**". This includes two invoices for R10 million each raised by Apricot and proof of payment via EFT on 25 January 2017.

6.60. Based on the Temporary Advances ("**TAs**") located during our investigations, a total of R48 million was paid under Project Wave, which includes this R20 million payment to Apricot. It should be noted that numerous payments and documents are missing from the financial records available.

OPERATIONS WITHIN THE OFFICE OF THE DG

7.

7.1. In August 2013, Ambassador Sonto Kudjoe was appointed as the new DG for the SSA and following the national election in May 2014,

DG VAN SCHANKE
CAPTAIN
C530690-6

Mr David Mahlobo was appointed as the Minister of State Security. In the period that followed, the Office of the DG became involved in covert operations purported to be the "President's projects", allegedly pursuant to a directive from Minister Mahlobo. This is reflected in the notable increase in operational expenditure in the Office of the DG, which was mainly attributed to these covert projects.

7.2. During his tenure as Minister of State Security, Mr Mahlobo became directly involved in operational matters. He instructed and approved the utilisation of retained earnings to fund CDSO projects, including projects he was personally involved in. His involvement even extended to the handling of cash used in these operations, with deliveries of large cash amounts in the region of R4.5 million per month being made by various CDSO officials to the Minister's office and/or residence.

7.3. Helen, who was appointed as the Office Manager in the DG's office from January 2014, withdrew Temporary Advances ("**TAs**") for operational expenses related to these "*President's projects*". Helen retained her role as Office Manager after Mr Fraser re-joined the SSA as DG in September 2016.

7.4. Mr Fraser formally closed down the CDSO shortly after assuming office. However, SSA financial systems, documents, and witness accounts indicate that the Office of the DG continued to run many of the operations and projects which have been found to be irregular. By way of example, a Temporary Advance for R2 million was requested by Helen under Project Mayibuye and approved by Mr Fraser as late as September 2017. This TA is contained in **file 2** and is marked as "**Annexure M24**". Helen's TA records reflect that approximately R242 million was taken or paid by her in the period from February 2014 to March 2018, allegedly for operations that were run from the Office of the DG. The electronic TA records reflecting the aforementioned withdrawals are contained in a schedule in **file 2** of the SSA Bundle and is marked as "**Annexure RH1**".

CG VAN SCHANKE
CAPTAIN
0530690-6

7.5. It is also significant that no attempt was made to investigate and charge Ambassador Dlomo for the irregular and unlawful operations undertaken by the CDSO under his leadership. Moreover, our preliminary investigations indicate that the operations run from the Office of the DG extended well beyond merely the continuation of some CDSO projects. As DG, Mr Fraser brought back into the SSA individuals who had been implicated in the PAN investigation, including Philani and Garth. Some of these individuals proceeded to play key roles in the new operational activities run out of the DG's office under Mr Fraser's management.

7.6. The expansion of operational activities run from the Office of the DG is reflected in the budgetary allocations. During Mr Fraser's tenure, the budget for the Office of the DG increased from approximately R42 million in the 2016/2017 financial year to approximately R303 million in the 2017/2018 financial year. It is striking that roughly 74% (amounting to R225 million) of the total expenditure in the 2017/18 financial year was used for covert operational expenditure, while 15% was spent on contract expenditure and the remaining 5% on travel and subsistence. This concentration of SSA funds in the Office of the DG during the 2017/18 financial year came at the expense of legitimate operational structures, and SSA Provincial Offices in particular.

7.7. The documents relating to these projects run out of the Office of the DG were not put onto the SSA Document Management System ("**DMS**"). Similarly, the purported intelligence products were not channelled into Intelligence Management ("**IM**"), which is the repository of all information of the SSA. It is a gross dereliction of duty for the DG to completely disregard the very policies, prescripts, and directives that he is responsible for enforcing as the Accounting Officer and Head of Department.

7.8. In the absence of details on the operational activities undertaken in respect of these projects, the deliberate circumventing of SSA systems by

CG VAN SCHANKE
CAPTAIN
0530690-6

the Office of DG suggests that these projects were either in breach of the SSA's mandate and/or the Constitution, or were special purpose vehicles created to facilitate the looting of state coffers. There can be no justifiable reason for the Office of the DG to run operations and especially operations of the deep-cover type.

7.9. Notwithstanding the general lack of documentary records during this period, some of these ongoing operational activities are reflected in a performance review, dated 24 February 2017, which was submitted to Mr Fraser by one of the "*CDSO Co-Worker Deployment Teams*".[7] This report is contained in **file 1** of the SSA Bundle and is marked as "**Annexure Q**". The model for deploying these "*co-workers*" is described as a form of force multiplication using an "*abridged and adapted 'principle agent network philosophy' to ensure plausible deniability and cover for access, action and status*". Reviewing the period 1 January 2016 to 24 February 2017, the report recounts that this deployment year had been "*exceptional in terms of operational successes achieved*". The "*achievements*" reported include the following:

7.9.1. ANC January 8 Statement (Rustenburg, January 2016): Three countering operations were initiated "*to impede the distribution of CR17 regalia, impede [the] transportation system of dissident groups from GP and ensured the cancellation of the President's visit to Marikana after [an] incorrect threat assessment was provided by local and SAPS collection agents*".

7.9.2. SONA (Western Cape, February 2016): "*The co-workers were able to infiltrate and penetrate the leadership structure of the ZMF movement*" so that, despite the initial indications of 5000 protesters embarking on Parliament, only approximately 50 ZMF supporters attended the march due to "*efficient and effective countering actions and the dissemination of*

[7] This report is referred to as the "boast" report by the High Level Review Panel on the SSA.

CG VAN SCHANKE
CAPTAIN
0530690-6

'disinformation' to supporters of ZMF". This success was "*directly attributed to the efforts of the co-workers of the CDSO*". In a countering operation, "*[t]he CDSO team was directly tasked by the Minister of State Security to 'activate' the Sesikhona agents to ensure a presence within the City of Cape Town during the SONA. This was done to great success*".

7.9.3. ANC manifesto launch (Port Elizabeth, March 2016 to April 2016): "*The scattered deployment of co-workers to high risk areas, and the internal negotiations with people of interest resulted in dissident groups not being transported to the event, thereby ensuring no disruptions. The co-workers also initiated a media campaign to provide positive media feedback through the placement of youths of various ethnic groups in photographic vision of media personnel, thereby promoting social cohesion. These images became a massive social trend and resulted in positive reporting.*"

7.9.4. SONA Questions and Answers / Budget Speech (February 2017): The intelligence collected by co-workers in relation to this event targeted several groups:

7.9.4.1. the infiltration of "*all Western Cape universities and student activist groups on social networks*";

7.9.4.2. the infiltration and penetration of "*political groups affiliated to active and passive opposition groups that threatened to disrupt the key events*";

7.9.4.3. the infiltration and penetration of the "*new federation*" – NUMSA, FAWU and other affiliated trade unions – had minimal support after co-workers neutralised these unions' "*promise of jobs*" to young people if they attended the march, by disseminating countering information to affected youths; and

CG VAN SCHANKE
CAPTAIN
C530690-6

7.9.4.4. the penetration and active monitoring of NGOs including South Africa First, Right to Know, SAVESA, CASAC and Green Peace.

7.10. It goes without saying that the above operations fell outside the intelligence mandate of the SSA, engaging in activities that improperly sought to influence protest movements, activist groups, trade unions, civil society and internal party politics.

7.11. There are indications that operational activities run from the Office of the DG may have related to the ANC National Elective Conference held at Nasrec in December 2017. Witness reports place SSA members in the vicinity of the Nasrec conference, including former CDSO "*co-workers*" and members of the newly configured Cover Support Unit and other operational structures. During this period, the Office Manager in the Office of the DG, Helen, withdrew R19 million from the SSA on 15 December 2017, as reflected in "**Annexure RH3**" in **file 2** of the SSA Bundle. This matter is the subject of ongoing investigation by the Project Veza team.

THE BREACH OF GOVERNANCE AND FINANCIAL CONTROLS

8.

8.1. An important focus of the Project Veza investigation has been the non-compliance of SSA members with legislation, policy prescripts, and operational and financial directives that govern the Agency. In the creation and operation of a parallel intelligence structure, the secrecy surrounding deep cover operations was used as the pretext for accessing funds. However, the SSA, like other government departments has defined financial prescripts that govern its expenditure.

CG VAN SCHANKE
CAPTAIN
C530690-6

8.2. Preliminary analysis indicates that there has been gross non-compliance with Operational and Financial Directives, especially in the establishment and management of covert projects and the creation of Special Purpose Vehicles to siphon funds. These financial irregularities resulted in approximately R1.5 billion being taken from state coffers and expended both domestically and abroad during the period 2012-2018 under the guise of covert operations. The funds, taken under the guise of covert operations, emanated from the Treasury allocated budget as well as retained funds as regulated in terms of the Secret Services Act 56 of 1978.

8.3. These sustained patterns of financial irregularities and corrupt practices were exacerbated by inadequate and ineffective consequence management. The financial directorate, in particular, failed to check abuses of power and state resources by both political heads and executive managers. The failure of internal controls contributed to the erosion of the organisational culture of the SSA and the weakening of governance structures during the period 2012-2018.

Irregular outsourcing of the SSA's counter-intelligence mandate

8.4. The SSA prescripts do not permit the use of external entities to perform functions of the SSA in covert operations. In any event, all expenditure to operatives should be fully accounted for in terms of the prescripts. In both cases, and in relation to what is set out below, prescripts were not followed.

8.5. In December 2014, Ambassador Dlomo illegally signed contracts on behalf of the SSA with several companies. These companies were integral to facilitating the illicit financial flows in CDSO projects and operations.

8.6. On 14 December 2014, a contract was concluded between the SSA (signed by Ambassador Dlomo) and Remix. A

CG VAN SCHANKE
CAPTAIN
0530690-6

copy of this contract is contained in **file 1** of the SSA Bundle and is marked as "**Annexure J**". Remix was used as a front company for disbursing SSA funds to Dr Mokwena, a non-SSA member who conducted CDSO operations through her company Kelp. Remix made payments of expenses incurred by Kelp. In this regard, Dr Mokwena received R1.8 million per month over a period of years which was withdrawn through Temporary Advances (TAs) by various CDSO members. In addition, the director of Remix, Kelly, has indicated that Dr Mokwena and her business associate Xulu, who was on a contract with the SSA, were issued with bank cards granting them access to the Remix business account.

8.7. On 19 December 2014, a contract was concluded between the SSA (signed by Ambassador Dlomo) and a Mozambican company called Squash. A copy of this contract is contained in **file 1** of the SSA Bundle and is marked as "**Annexure H**". Squash is allegedly owned by a Mozambican national called Sean, a friend of Frank who was the project manager for a number of CDSO operations. Frank admitted to the investigation team that he introduced Sean to Ambassador Dlomo and that the company called Squash was set up after this introduction. The existence of the company could not be verified. Invoices from Squash were addressed to Frank and he signed an agreement extending the contract until 31 March 2017, without having the necessary Delegation of Authority to do so in terms of the MPD. During our investigations, 19 invoices submitted by Squash were found, totalling approximately R46 million.

8.8. On 10 December 2014, a contract was concluded between the SSA (signed by Ambassador Dlomo) and Napa. A copy of this contract is contained in **file 1** of the SSA Bundle and is marked as "**Annexure G**". Frank also

admitted to facilitating the introduction between Ambassador Dlomo and

CG VAN SCHANKE
CAPTAIN
C530690-6

the owner of Napa, Clint. The contract with Napa uses the same template as the contract with Squash. Similarly, on the same day that the Squash's contract was extended, Frank also signed on behalf of the SSA for the extension of the contract with Napa until 31 March 2017, without having the necessary Delegation of Authority to do so in terms of the MPD. During our investigations, 25 invoices were found to have been submitted in the name of Napa, totalling R76.88 million.

8.9. On 14 December 2014, a contract was entered into between the SSA (signed by Ambassador Dlomo) and Kale. A copy of this contract is contained in **file 1** of the SSA Bundle and is marked as "**Annexure I**". After several CDSO projects were established in January 2015, invoices for services rendered were issued to Kale and used to draw cash for numerous unlawful operations. During our investigations, we located three invoices issued by Kale and signed by Frank, totalling R12 million.

Weak financial controls and a culture of complicity

8.10. These covert companies were registered in the names of individuals who had full control of these entities with no oversight. There was accordingly a high risk of mismanagement of these facilities, and the subsequent loss of and an inability to account for state assets. If proper reconciliations or audits are not undertaken by the CFO, the potential for corruption, fraud and theft is high. In addition, there is no Standard Operating Procedure ("**SOP**") for procurement in the covert space and there is no oversight for procurement above R500 000. As a result, the risk of fraud and/or theft of state funds is increased.

8.11. It therefore cannot be overemphasised that the covert operational space within the SSA relies on the integrity of people and systems to ensure that the area of greatest secrecy is managed with the greatest care. The

CC VAN SCHAANE
CAPTAIN
0530698-6

Constitution provides for the refusal to obey a manifestly illegal order, which includes an unlawful order to act in breach of financial prescripts. There are also practical mechanisms within the intelligence architecture to address these circumstances.

8.12. Rather than mitigating the risks of financial irregularities in the covert space, however, the DGs, CFOs and other senior managers in the Agency facilitated the funding of unlawful intelligence operations as aforementioned. The CFOs in particular have emerged in our investigation as key role-players who facilitated gross financial mismanagement and abandoned their fiduciary duties under the Public Finance Management Act 1 of 1999 ("**PFMA**"). By failing to implement internal control measures, they facilitated the escalation of unauthorized, irregular, fruitless, and wasteful expenditure, as well as fraud, in contravention of section 38 and section 50 of the PFMA.

8.13. There are numerous examples where senior management tried to cover themselves by including disparaging remarks on requests for the approval of funds, but nonetheless recommended the submissions. On several occasions, the former Acting CFO, Raymond, recommended that a submission be approved but attempted to abdicate her responsibility by writing next to her signature, "*Recommended on strength of compliance with OD*". In another instance, a senior member of management recommended a submission with multimillion-rand implications but wrote, "*as per the instruction of the Minister*". These comments indicate that the persons involved knowingly approved financial irregularities and attempted to conceal their complicity in a culture of impunity.

8.14. Financial controls were also weakened by restricting the access of financial officers to Operational Directives regulating the financial management of operational work, such as OD.04 and OD.09. This resulted in an inability to monitor compliance with ODs with regard to the remuneration of agents or contacts, resulting in a higher risk of fraud and/or theft. It is also of concern that financial officers were required to

C VAN SCHALKWYK
CAPTAIN
0530690-6

sign non-disclosure forms, despite holding Top Secret Security Clearances and taking the Oath of Secrecy required for all intelligence officers. This was a purported control measure taken by the then Acting CFO, Raymond, to prevent information leakages.

8.15. An insufficient segregation of duties within certain control processes allowed for users with dual roles and transaction codes (not in line with their job description) to facilitate irregular transactions. This was attributed to a lack of capacity in Chief Directorate Finance, which was said to necessitate the unfettered access. Furthermore, the system roles were not linked to Standard Operating Procedures and staff appeared to have inadequate knowledge and compliance with SSA policies. Despite attempts by some managers within this area to upskill and capacitate the existing staff with the requisite skills, the CFOs did not support these endeavours.

Financial irregularities and the use of cash

8.16. The investigation found that weaknesses in the internal control environment allowed for state funds to be accessed with impunity. Funds supposedly used for projects were withdrawn irregularly:

8.16.1. In most instances, funds were withdrawn without the necessary authorisations or authorisation at the correct level as required by the MPD;

8.16.2. Built-in financial controls were deliberately deactivated to enable access to funds;

8.16.3. No specificity was provided as to the nature of expenses, in breach of financial prescripts;

8.16.4. Budget controllers were deliberately excluded in the approval of the disbursement of funds; and

JG VAN SCHALKE
CAPTAIN
0530690-6

8.16.5. Some submissions were made on the basis of suspected falsification of signatures.

8.17. A particular concern arising out of our investigation is the cash-based approach adopted by the SSA, coupled with a negligible audit trail, which has left the Agency susceptible to illicit financial flows and possible money laundering. By way of example, a receipt dated 12 June 2017 indicates that €2 082 600.00 was signed for without any details of the recipient reflected in the records relating to this cash disbursement. The records pertaining to this withdrawal reflect that the funds were withdrawn by Helen, which was approved by Mr Arthur Fraser. These records are contained in **file 2** of the SSA Bundle, marked as "**Annexure RH2**". This matter is still under investigation.

8.18. The CDSO was reportedly permitted by the CFO to process submissions for withdrawals of cash. This not only enabled complicit CDSO members to run a parallel finance system, but also created opportunities for duplicate payments. Furthermore, Lilly who was responsible for CDSO finance and assets was provided with an alias and granted powers to order cash from SBV, whereas CDSO members simultaneously withdrew large cash amounts from the SSA Headquarters.

8.19. There was a lack of implementation of SOPs and in some instances a deliberate breaching of SOPs by the CFOs in order to achieve ends that were irregular. In the Banking and Cash Management area, the CFO would give verbal instructions to order cash and allow for members of the CDSO and the Office of the DG to withdraw secondary TAs, despite the members having failed to settle the first, as well as extending standing advances without proper reconciliation.

8.20. This conduct resulted in monthly cash-flow shortages and the re-direction of SSA retained funds for infrastructure development to covert operational work, for which no proper accounting was done. In relation to the CDSO, budgets were approved (and revised to increase) without Annual Performance Plans ("**APPs**") being present. This was enabled by the

CG VAN SCHANKE
CAPTAIN
0530690-6

deactivation of the "*funds availability check*" that is inbuilt within the system to ensure controls. This, axiomatically, meant less funds were available for legitimate SSA projects.

8.21. In addition, Budget Management Committee ("**BMC**") meetings were not regularly convened and the decisions of the BMCs that did take place were not implemented. There was gross non-compliance with the planning, budgeting, and reporting cycle. In one instance, permission and approval of additional funding of R100 million for the SSA was given by National Treasury to the former Acting CFO, Raymond, and the former DG, Mr Fraser, without the knowledge of the BMC and outside Medium Term Expenditure Framework processes. These funds, in addition to budgets for SSA Provincial Offices, were directed to the Office of the DG.

Resuscitation of PAN: Cover Support Unit irregularities

8.22. As part of the 2011 restructuring approved by Minister Cwele, the Cover Support Unit had been relocated from Domestic Operations to Counter Intelligence (under Ambassador Dlomo's control). In terms of a further restructuring effective from 1 April 2017 as part of the Strategic Development Plan: Vision 2035, the Cover Support Unit was established in the Office of the DG.

8.23. During Mr Fraser's tenure as DG, there were irregularities in the management of the Cover Support Unit that suggest an intention to resuscitate the operating model that was used in the implementation of the PAN programme between 2007 and 2010, which had been found irregular and unlawful. In particular, similar irregularities relating to the renting of safe houses that occurred during PAN were uncovered during our recent Project Veza investigations.

8.24. In one instance, approximately seven safe houses were purportedly leased by the Cover Support Unit. However, these properties were leased without the necessary approvals and leased in a manner that was

CG VAN SCHANKE
CAPTAIN
0530090-6

detrimental to the SSA. Members of the SSA entered into facilitation agreements with Mr Lawrence McMaster, who was the son of another member of the SSA, Mary where Mr McMaster received a monthly facilitation fee for contracts relating to the lease. Mary was working under the authority of Jack and Philani, who entered into the said lease contracts with knowledge of the above-mentioned conflict of interest.

8.25. This practice had been prevalent during the PAN programme, and the same persons who were implicated at that time are again implicated in its revival under Mr Fraser's leadership, namely Philani and Mary. A further example of the irregularities relating to the Cover Support Unit during this period concerns the alleged authorisation by Mr Fraser, on 6 September 2017, for the purchase of a minimum 80% shares in seven companies and/or the purchase of these companies in their entirety. However, it is alleged that there was no CFO approval for these purchases, and similarly no indication of how much would be budgeted for this venture. This matter is still under investigation.

PARALLEL AND IRREGULAR VETTING PROCESSES

9.

The importance of vetting

9.1. Vetting refers to the process of verification and investigative procedures relating to the determination of the security competency of members, prospective members, and contract employees so as to:

CC VAN SCHANKE
CAPTAIN
0530690-6

9.1.1. determine the level of access a member or contract employee of the Agency may receive with regards to classified information and/or restricted premises;

9.1.2. minimise the risk of compromising the integrity of classified information and material;

9.1.3. protect the Agency against foreign and hostile intelligence operations, subversive acts and the intrusion by criminal elements; and

9.1.4. determine their integrity, reliability and loyalty to the Agency in safeguarding its assets, the interests of the Republic of South Africa and its Constitution.

9.2. Vetting is a deliberate coordinated effort within the SSA environment, governed by the Intelligence Services Act 65 of 2002, the Minimum Information Security Standards ("**MISS**") 2003, the National Strategic Intelligence Act 39 of 1994, the Promotion of Access to Information Act 2 of 2000, the Protection of Information Act 84 of 1982 as well as Standard Operating Procedures and directives, to ensure that all vetting is conducted in accordance with these prescripts.

9.3. In terms of legislation and regulations, the decision to issue clearance certificates resides with DG of the SSA who may delegate this authority. In the SSA, the delegation of authority lies with Provincial Managers and, notably, the General Manager: Internal Security and General Manager: Vetting and Security Advising. These two General Managers are responsible for internal vetting and external vetting respectively. While the General Managers responsible for vetting and security advising are required to report to the Deputy-Director responsible for Counter Intelligence, the onus of the delegation lies with the General Managers and Provincial Managers.

The risks posed by irregular vetting

CG VAN SCHANKE
CAPTAIN
C530090-6

9.4. I deal below with the abuse of vetting structures which enabled "*co-workers*" to be deployed by the CDSO without having been subject to the formal vetting processes of the SSA. Before setting out the details of the parallel vetting structure that was created to bypass official processes, I will briefly mention the risks posed by irregular vetting.

9.5. The issuing of clearance certificates, which is the end product of the vetting function, provides an assurance to the recipients (organs of state) that the concerned individual is security competent. The issuing of certificates and in effect the vetting process is sacrosanct and falls squarely within the mandate of the SSA as a first line measure in delivering on its counter-intelligence mandate.

9.6. As a result of the establishment of a parallel vetting structure, as detailed below, the checks and balances built into the SSA system were over-ridden, allowing for persons who were not security competent to gain access to organs of state, sensitive information and positions of power or influence.

9.7. To appreciate the impact of such conduct on the Agency, it is necessary to reflect on some of the conduct that these "*cleared*" individuals were subsequently involved with:

9.7.1. The running of illegal counter-intelligence operations that were in contravention of the Constitution, the Intelligence Services Act and the Agency's Operational Directives;

9.7.2. Receiving millions of rand in cash from members of CDSO for a number of years, thus perpetuating fraud, theft of SSA funds and resultant illicit financial flows;

9.7.3. Receiving caches of SSA firearms and ammunition, including automatic rifles, which remain unaccounted for. These firearms were signed out of the SSA armoury by CDSO members and handed over to individuals considered cleared by the parallel vetting outfit; and

CG VAN SCHANKE
CAPTAIN
0530690-6

9.7.4. The parallel para-military training of SSA CDSO and so-called co-workers using SSA firearms. The SSA armoury was provided neither with proof of these individuals' (trainers) nor the trainees' firearm competence certificates.

9.8. While this weakened the SSA's first line of defence, it also potentially enabled the infiltration of other departments in the security cluster, including the SAPS Presidential Protection Unit, by individuals that were trained and "*vetted*" in this manner and thus in possession of invalid security clearance certificates. In addition, the process undertaken by the parallel vetting structure was in itself flawed and constituted a very weak check on security competence.

9.9. Apart from the risk posed to counter intelligence measures, this parallel vetting structure poses a risk to the reputation and integrity of the legitimate SSA vetting process. By way of example, the SAA executives who allegedly refused to be vetted may opportunistically point to the lack of integrity of the SSA system as a defence to their refusal. In the public domain, the activities of the parallel vetting structure will be difficult to distinguish from the legitimate SSA processes.

Parallel vetting structure

9.10. The Project Veza investigation has uncovered evidence of a parallel vetting structure that operated within the Office of the Deputy Director-General: Counter Intelligence during the period 2013-2018. Based on our interviews with witnesses and implicated persons as well as our review of the relevant vetting files, it appears that this parallel structure vetted selected individuals and issued them with purported SSA clearance certificates. Not only did this practice bypass official SSA vetting channels, but the vetting processes followed by this parallel structure were irregular and weak.

GG VAN SCHANKE
CAPTAIN
0530690-8

9.11. The structure was set up in October 2013 when vetting officers, including polygraph personnel and evaluators, were seconded into the Office of the DDG Counter Intelligence by Ambassador Dlomo. The correspondence informing these members that they were being seconded into Ambassador Dlomo's office did not indicate any particular purpose for the formation of this new structure beyond providing assistance to his office and the offices of the Director: Domestic Branch and the Minister of State Security.

9.12. The team leader at the centre of this parallel vetting structure was Mandy, who worked as a vetting officer for another company before joining the Agency as an internal vetting officer. Her team consisted of five vetting officers or evaluators and two polygraph examiners. Notwithstanding the fact that Mandy is a seasoned vetting officer, the processes of her team failed to follow even the basic tenets of vetting.

9.13. As the team leader, Mandy was responsible for administering the vetting files generated by the structure operating out of this parallel structure. According to the declaration made by the Chief Directorate: Vetting and Security Advising ("**CDVA**"), they received these vetting files in about April 2019 although Mandy contends that she had handed over these files in late 2018. This discrepancy aside, it is clear that Mandy had been in possession of these vetting files since 2013, operating outside the official CDVA channels.

9.14. On perusal on these vetting files, the investigation team noted the following:

9.14.1. Approximately 162 files were submitted to the CDVA but this is unlikely to be the complete set as additional files have come to the investigation team's attention through other sources;

9.14.2. 53 files were complete while 109 files contain incomplete documentation;

CG VAN SCHANKE
CAPTAIN
C530690-6

9.14.3. 53 cases indicated no deception on the polygraph while 103 files did not contain any polygraph results;

9.14.4. 53 clearance certificates were found, of which 3 had no vetting investigation reports or supporting documents for the issuance of such certificates, while it should be noted that the absence of clearance certificates in other files does not indicate that these individuals were not cleared;

9.14.5. 6 files had significant responses of which 5 appear to have received clearances; and

9.14.6. 86 files had no vetting evaluator.

9.15. In addition, several flaws were noted regarding the process of file completion, demonstrating limited or no adherence to vetting SOPs:

9.15.1. On some occasions, more than one vetting officer worked on a single file (such as different interviewers for the subject and referees) in breach of regular vetting processes aimed at enabling a single vetting officer to obtain a complete picture of the subject; while on other occasions, vetting officers performed more than one function per file (such as both interviewing a subject and evaluating the file) thereby compromising the objectivity of the evaluation.

9.15.2. In some instances, vetting questionnaires were used for references and are poorly responded to with either vague or blank answers, with the handwriting on these questionnaires apparently the same.

9.15.3. The investigation diaries (records of the vetting investigation) were poorly updated or outstanding, making it difficult to trace the timeline and raising questions about the validity of the file and the integrity of its process.

CG VAN SCHANKE
CAPTAIN
0530690-6

9.15.4. Pertinent documents are missing in certain files, such as investigation reports, polygraph reports, and clearance certificates.

9.15.5. Where polygraph reports are included, the score sheets (chart analysis methodology) from the polygraph examiner are often missing which means the polygraph evaluator is not in a position to make a proper determination.

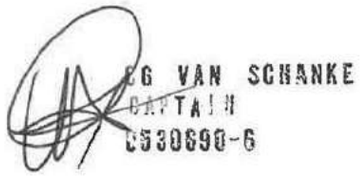
9.15.6. The polygraph system was not linked to the SSA system, which allows for a supervisor to monitor the work of the polygraph examiner.

9.15.7. None of the vetting files were loaded onto the SSA's official vetting record system as prescribed by SOPs.

9.16. Finally, the following discrepancies were noted in respect of the clearance certificates issued in terms of the parallel vetting process:

9.16.1. According to official SSA vetting processes, the Chief Directorate: Vetting and Security Advising ("**CDVA**") is responsible for vetting external individuals while the Chief Directorate: Internal Security ("**CDIS**") is responsible for internal vetting. However, the vetting certificates issued by Mandy's team were neither that of the CDIS nor the CDVA but rather appeared to be a combination of both templates

9.16.2. While the General Manager of the CDIS and the General Manager of the CDVA are duly delegated to sign clearance certificates issued by their respective divisions, the clearance certificates issued by the parallel structure were signed by the Deputy Director-General: Counter Intelligence for whom there is no delegation of authority authorising him to sign vetting certificates.



9.16.3. Official SSA clearance certificates are printed on security paper and imbibed with the SSA logo, with the number issued being recorded on the SSA system, but the clearance certificates issued by the parallel structure do not conform to this practice.

9.17. The vast majority of the individuals who were "*vetted*" by Mandy's team were the CDSO's so-called "*co-workers*". Thus the individuals who formed the basis of the human capacity of the overall parallel intelligence structure established by Ambassador Dlomo were improperly and inadequately vetted outside official SSA channels. These co-workers were given funds, firearms and access to sensitive information, and many were promised permanent employment in the SSA.

9.18. It is of concern that that the parallel vetting system fell under Ambassador Dlomo's control when, according to witness reports, he was also responsible for identifying most of the individuals who were recruited into the co-worker system. This signifies a potential conflict of interest as Ambassador Dlomo would have had a vested interest in the security clearance of his recruits. A further abuse of Ambassador Dlomo's vetting structure, Ambassador Bheki Langa was granted security clearance through this illegal parallel process. Thus although Ambassador Langa was appointed as the Director of the Domestic Branch, his security clearance was signed off by his subordinate, Ambassador Dlomo, in a process that likely compromised his ability to exercise effective oversight over the CDSO.

9.19. Moreover, Ambassador Dlomo was himself never vetted by the SSA Chief Directorate: Internal Security ("**CDIS**") when he joined the SSA as General Manager of Special Operations. While his appointment without a security clearance was in itself irregular, when attempts were made by the unit to vet him, he indicated that he was already being vetted, leading to the ceasing of the internal security processes. Notwithstanding the absence of a file amongst the parallel vetting documents, it is suspected that he utilised the unit he controlled to undertake his vetting, thus effectively

PG VAN SCHANKE
CAPTAIN
[illegible]

granting himself a "Top Secret" security clearance certificate. It is highly likely that this clearance was accepted when he was posted as an Ambassador in Japan.

The vetting of Mr Arthur Fraser[8]

9.20. During our investigation into the parallel vetting structure, the Project Veza team discovered the vetting file of Mr Fraser which preceded his appointment as DG in September 2016. A preliminary perusal revealed striking irregularities which warranted further investigation. While Mr Fraser was not vetted through the parallel structure described above, his vetting also circumvented prescribed channels and followed a flawed process.

9.21. The mandate of vetting prospective and existing SSA members lies with Chief Directorate: Internal Security ("**CDIS**"). Thus Mr Fraser's vetting should have been conducted by CDIS. In terms of the Internal Security Directive on vetting (ISD.02), the General Manager responsible for internal vetting has an onus to ensure that "*the investigation be of sufficient scope necessary to resolve the specific adverse or derogatory information or inconsistency in question, so that a determination can be made as to whether the applicant's continued utilisation in activities requiring a security clearance is consistent with the interest of national security*".

9.22. However, Mr Fraser's entire vetting process was conducted by the Chief Directorate: Vetting and Security Advising ("**CDVA**"), which is primarily mandated to vet external individuals (non-SSA members) in other government departments. This irregular use of the external vetting capacity meant that the SSA officials responsible for Mr Fraser's vetting were members who had been involved in the PAN programme, namely Philani and Wendy. As the Acting General Manager: Vetting and Security Advising, Philani had delegated

[8] The documentation relating to Mr Fraser's vetting has been supplied to the Commission under summons.

authority to issue clearance certificates for external vetting. It appears that Philani and his secretary, Wendy, commanded Mr Fraser's vetting process from initiation to completion, with little or no regard to vetting prescripts. It should also be noted that both Philani and Ambassador Langa, who signed the clearance certificate, had been vetted by the parallel structure described earlier.

9.23. The entire vetting process was completed in less than three days, with non-compliance and poor vetting practices being condoned on the basis of the purported urgency of Mr Fraser's vetting. While expedient vetting of Executives is not in itself irregular, the process and duration of Mr Fraser's vetting raises concerns. All witness accounts confirm that the file was actioned by the SSA on 3 September 2016 and completed on 6 September 2016. This is an inexplicably short period given that Mr Fraser was only appointed on 26 September 2016. Indeed, the fact that an additional two or three days would have provided an opportunity for proper interviews, investigations, polygraph examinations and evaluations, casts doubt on the purported urgency of Mr Fraser's vetting. In any event, ISD.02 makes provision for temporary eligibility for security access based on a justified need for the performance of duties prior to the completion of the vetting investigation.

9.24. More importantly, the integrity of the vetting process is called into question by the following irregularities and anomalies:

9.24.1. The Z204 vetting form, on the legal basis of which vetting proceeds, was incomplete and not properly signed under oath by Mr Fraser as it was only certified by a commissioner of oaths (notably, Philani) on 6 September 2016.

9.24.2. The vetting fieldwork officer opened and closed the file on one day (4 September 2016) without having sight of the Z204 form or time to conduct, pre-interview screening and record checks.

CG VAN SCHALKE
CAPTAIN
0330690-6

9.24.3. While a minimum of three references are required for secret and top secret clearances, only two referees were interviewed for Mr Fraser's vetting, one of whom, Jonathan, was recruited by the vetting officer as he was aware of the close relationship between Mr Fraser and his first-listed referee, Mr Manala Manzini.

9.24.4. The file does not contain the actual results of the polygraph test or the polygraph chart that is produced, and the polygraph examiner indicated to the investigation team that she was instructed to leave all documentation with Philani.

9.24.5. The vetting evaluator was confined to Philani's office without being permitted access to his regular tools of trade and all documents required for the proper evaluation of the file. He indicated in his interview with the investigation team that, with the benefit of hindsight, he would recommend re-vetting of the subject.

9.24.6. There was a fraudulent criminal record check presented on file, with SAPS having subsequently confirmed that record checks on Mr Fraser were only conducted in 2010, 2012 and 2014, and that no check was conducted in 2016.

9.24.7. There was no South African Revenue Services ("**SARS**") clearance certificate.

9.24.8. There was no quality control of any vetting work undertaken.

9.24.9. The clearance certificate issued does not correlate with the electronic record on the SSA's Security Vetting Information System, which has none of Mr Fraser's details recorded or supporting documentation uploaded.

9.25. In short, the resort to the external vetting capacity under Philani's control appears to have served the purpose of

CG VAN SCHANKE
CAPTAIN
2330990-6

expediting and manipulating Mr Fraser's vetting process to secure a clearance certificate and thereby validate his appointment as DG irrespective of whether he was security competent or not. It is noteworthy that after Mr Fraser's appointment and his reconfiguration of the SSA under the SDP: Vision 2035, the individuals that were central to his vetting process received promotions: Phiłani was permanently appointed as General Manager of the CDVA, Wendy was transferred and promoted into the Office of the DG as Mr Fraser's Executive Secretary, and Jonathan ascended to the position of Deputy Director-General: Research and Analysis.

THE ILLEGAL USE OF SSA FIREARMS

10.

The regulatory regime governing the SSA's armoury

10.1. South Africa has a comprehensive firearms-control regulatory regime located in the Firearms Control Act 60 of 2000 ("**FCA**") and the Firearm Control Regulations. The FCA regulates the possession, safekeeping and usage of firearms in South Africa and appoints the Office of the SAPS National Commissioner as the designated authority and Registrar of Firearms. In line with this, various divisions within SAPS address complementary aspects relating to the compliance, licensing, and regulation of firearms.

10.2. The FCA and its associated Regulations also impose stringent requirements on dealers to keep records on all firearms and ammunition in stock, including firearms stored on behalf of competent licensees. In terms of Section 95 of the FCA, the SSA is declared as one of the Official Institutions permitted to store and keep firearms. The SSA thus derives

CG VAN SCHANKE
CAPTAIN
0530690-6

its Standard Operating Procedures relating to the management of firearms from the FCA.

10.3. This responsibility within the SSA resides with the Chief Directorate: Internal Security ("**CDIS**") whose mandate includes ensuring physical security, VIP protection, as well as asset management. The latter encompasses the management of an Armoury in compliance with the FCA to ensure full implementation of sufficient control measures including registering with SAPS.

10.4. The SSA, through the CDIS, in pursuance of ensuring sufficient security and control measures, implemented various steps including but not limited to the drafting and approval of Standard Operating Procedures ("**SOPs**") and firearm training material, the development of face recognition ID card firearm permits and other relevant documentation. This latter documentation includes official firearm requisition forms, annual firearm inspection and accountability forms for all SSA Provincial Offices and relevant units as well as firearm and ammunition transport documents.

10.5. Furthermore, the SOPs set out the guidelines for the application processes, issuing, possession, usage and storage of official firearms as well as for training in the use of these firearms. As such, these SOPs cover the complete spectrum of procedures, tasks and requisite workflow involved in the management of SSA firearms. The SSA has appointed competent armoury officials who are very well acquainted with the FCA and were actively involved in improving the physical security around firearms and in developing the SOPs.

10.6. Despite the existence of these controls, SSA firearms were abused by individuals and the CDSO for illegal purposes. Our investigations indicate a glaring nexus between, on the one hand, the flouting of SSA recruitment processes, the circumvention of vetting processes and parallel training initiatives and, on the other hand, the illegal access to SSA firearms that this parallel counter-intelligence structure obtained.

CG VAN SCHANKE
CAPTAIN
C5306090-6

The irregular access to SSA firearms

10.7. In late 2014 and early 2015, the CDSO began requesting firearms from the SSA Armoury. In total, 39 firearms were issued to the structure (represented by specific individuals) on the request of Ambassador Dlomo in his capacity as Deputy Director-General: Counter Intelligence. The 39 firearms comprised of 11 x R4 rifles; 10 x CZ75 pistols; 4 x Glock 17 pistols; 8 x Glock 19 pistols; 1 x Mossberg 12-gauge shotgun; 3 x BXP submachine guns; and 2 x Uzi submachine guns.

10.8. The requests for firearms by Ambassador Dlomo were made directly to the General Manager of CDIS, Johan, who facilitated the handing over of firearms to CDSO. This was often done without the necessary forms being filled in or assurances being given that the persons receiving the firearms were security competent to receive them. Where submissions with the necessary authority were provided, the documents contained little information on the actual purpose for which the firearms would be used.

10.9. Official firearm training sessions arranged by members of the Armoury were not attended by members of CDSO as scheduled. This was attributed to Ambassador Dlomo indicating that CDSO members were being trained externally by former SAPS members who were themselves co-workers. While this constituted a parallel firearm training process, SSA firearms were still utilised. Furthermore, the SSA armoury was not provided with proof of these trainers and trainees' firearm competence certificates before firearms were issued to be used in this training.

10.10. Johan breached legal prescripts by facilitating the handing over of firearms to CDSO members without the required safeguards, and on numerous occasions even personally oversaw the issuing of firearms from the armoury. Witness interviews indicate that this created an environment within the CDIS armoury section where they could not refuse irregular requests from CDSO members within the SSA due to the involvement of Johan as the General Manager.

CG VAN SCHANKE
CAPTAIN

10.11. Furthermore, Ambassador Dlomo as a member of the SSA Executive, and not a member of operations, did not have a justifiable reason to make these requests for firearms. To exacerbate matters, the CDSO is a covert operational arm of the SSA and, as such, generally takes necessary steps to avoid links to the SSA. It is therefore unclear why CDSO, if they were indeed conducting legitimate covert operations or training would be comfortable using firearms that were directly traceable to the SSA. As pointed out above, when proper requests were made to the CDIS, the motivations used for the accessing of the firearms were often vague, if proffered at all.

The lack of controls over the use of SSA firearms

10.12. Witness accounts further indicate that these firearms were distributed to non-SSA members, termed "*co-workers*", who were irregularly recruited as agents by the CDSO and deployed to sensitive areas around the then President and Deputy President. These individuals were not vetted and contributed to the establishment of parallel intelligence structures reporting to Ambassador Thulani Dlomo. One such incident related to the issuing of a firearm to the late Thula (a cousin of Ambassador Dlomo and the late Luanda, a member of the SSA), who posted a picture of the SSA permit on his Facebook page following an apparent fall-out with Ambassador Dlomo. Thula was never in the employ of the SSA.

10.13. Despite the existence of SOPs for the movement and storage of firearms, no controls were implemented insofar as CDSO was involved. In one particular case, in January 2015, Johan authorised a CDSO member who does not have a firearm competency certificate to collect a cache of 15 firearms without taking the necessary precautions for their transportation and safekeeping. In another instance, firearms were kept in a hotel room unsecured, with five firearms subsequently going missing. While two of these were returned to the SSA by Ambassador Dlomo in

CG VAN SCHANKE
CAPTAIN
C530090-6

November 2019, three remain unaccounted for. The CDSO member who accessed the firearms failed to report these missing firearms to the SAPS.

10.14. There are also indications that, in September 2014, armoury officials were instructed by Ambassador Dlomo, through Johan, to transport firearms including four R4 rifles and six pistols to a foreign country for unclear reasons. These were reportedly flown in the Presidential Aircraft. This coincided with a coup d'état in that country. Though the firearms were reportedly not utilised in that foreign country, CDSO members were seen there in the presence of Ambassador Dlomo. It is concerning that SSA firearms were flown in the Presidential Aircraft to a volatile area.

10.15. The above incidents demonstrate Johan's gross dereliction of his duty as the General Manager of the CDIS, and a failure to adherence to the policies and directives that he himself had compiled. The irregular access to, and use of, SSA firearms not only exposed the Agency and the Justice, Crime Prevention and Security cluster to infiltration by individuals unaccountable within official SSA structures, but also exposed the President and the Deputy President to risks posed by their being protected by individuals who were not security competent.

Missing firearms

10.16. The firearms issued to the CDSO remained unaccounted for during this period, without the SSA Armoury being able to conduct firearm inspections or ensure that permits were renewed, contrary to this being a requirement when firearms are issued. Numerous reports were submitted highlighting that CDSO was failing to comply with the firearm controls requirements.

10.17. In December 2016, the CDSO, under a new General Manager, Darryl, was requested to return all firearms, but only 21 firearms were returned. The 17 outstanding firearms included assault rifles, submachine guns and pistols. In addition, 1635 rounds of ammunition were issued to CDSO and to date only 755 rounds have been returned.

CG VAN SCHANKE
CAPTAIN
2530690-6

However, there are discrepancies with some of the ammunition returned, as these have never belonged to the SSA.

10.18. In April 2018, 11 firearms were recovered, sometimes placing members of the SSA armoury in danger. In one case, members were instructed to meet unknown individuals, who were in possession of SSA firearms, at the Durban airport. These individuals were armed and only released the firearms once they contacted Ambassador Dlomo, who was in Japan at the time, for permission. In November 2019, two more firearms were retrieved from Ambassador Dlomo. As at November 2020, four firearms remained unaccounted for. All recovered firearms have been submitted to the SAPS for ballistic testing to negate the possibility of their use in criminal activity. We are still awaiting the results of these tests.

10.19. The proliferation of illegal firearms is a major contributor to the discernibly high levels of serious, violent, syndicated, and organised crime which remain one of the key threats to the well-being and safety of South Africans, the authority of the state and national security. The development goals articulated in the National Development Plan ("**NDP**") Vision 2030 include ensuring that people living in South Africa feel safe at home, school and work, and enjoy community life free of fear. The high levels of serious and violent crime, of which illegal firearms form a major part, impede government's ability to ensure stability and security, which are pivotal in creating conditions conducive to economic development, prosperity as well as the well-being of the people.

10.20. Apart from the parallel vetting structure posing a risk to counter-intelligence measures, the issuing of SSA firearms to persons not competent to handle such, poses a risk to the reputation of SSA. It is of concern that non-SSA members whose security and firearm competence could not be ascertained were receiving caches of SSA firearms and ammunition, including automatic rifles which remain unaccounted for, with the assistance of Senior Management within the CDIS, CDSO and the Office of the Deputy Director of Counter-intelligence. This is likely to

CG VAN SCHANKE
CAPTAIN
0530690-6

contribute to a trust deficit between the people of South Africa and its intelligence outfit entrusted with the security of the State.

CONCLUSION

11.

11.1. The channelling of SSA funds out of legitimately established and authentic intelligences structures has led to a weakening of the SSA. "Normal" work, in most instances, did not continue as morale has lessened owing to the inadequacy of the tools left, witnessing the blatant disregard for the civilian intelligence structure and, more importantly, fundamental breaches of the Constitution. The partisan involvement of the security services in the political sphere goes against the values espoused in the intelligence community and reflected in the Constitution.

11.2. It is clear from our investigations thus far that this deliberate weakening of the State's protective security and risk management arm was done in order to enable the looting of state funds and to prevent detection and accountability within the Agency. Politically connected individuals used their access to state mechanisms in order to advance their own agendas – both financial and political. The deep cover resources of the SSA, built up in the first 15 years of our democracy as an integral part of the protecting national security, have been eroded.

11.3. The projects undertaken, if they are indeed authentic, raise serious concerns as to how and to what extent the Constitution was undermined. Yet irrespective of whether these projects were authentic and implemented, their very existence and stated aims are incompatible with the intelligence mandate of the SSA. The use of covert operational structures to conceal unlawful activity and bypass accountability enabled the greatest capture with the least scrutiny.

CG VAN SCHANKE
CAPTAIN
0536693-6

11.4. It is imperative that law enforcement agencies pursue the case opened by the SSA in April 2019 and that the recovery of cash and assets belonging to the state be prioritised. Stringent oversight of the intelligence community is required through the combined assurance of the Ministry, the Joint Standing Committee on Intelligence, the Office of the Inspector-General of Intelligence and the Auditor-General of South Africa. Finally, the integrity of the SSA's mandate must be protected from politicisation so that the pursuit of national security reflects the resolve of all 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.

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.

TERRENCE

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
[illegible]690-8

CG VAN SCHANKE
CAPTAIN
[illegible]-6

COMMISSIONER OF OATHS

FULL NAMES: Christoffel Gerhardus van Schanke

STREET ADDRESS: Serious Economic Offences Unit
83 Steve Biko Street, Arcadia, Pretoria

CAPACITY: Captain

AREA: Pretoria

SOUTH AFRICAN POLICE SERVICE
SERIOUS ECONOMIC OFFENCES UNIT
2020 -11- 30
ERNSTIGE EKONOMIESE MISDRYWE EENHEID
SUID-AFRIKAANSE POLISIEDIENS