



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG, PRETORIA

JUDGMENT

Case No: 94785/2019

In the matter between:

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

APPLICANT

And

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
PUBLIC PROTECTOR
ECONOMIC FREEDOM FIGHTERS
UNITED DEMOCRATIC MOVEMENT
CONGRESS OF THE PEOPLE
DEMOCRATIC ALLIANCE
VYTJIE MENTOR
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH
AFRICAN CONSTITUTION**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT**

Neutral citation: *The Chairperson of the Judicial Commission of Inquiry into State Capture v President of the Republic of South Africa* (94785/2019) [2020] ZAGP (24 February 2020)

Coram: Hughes J

Heard: 11 February 2020

Delivered: 24 February 2020

Summary: Procedure – the requirements necessary when seeking an extension in terms of rule 27(1) of the Uniform Rules of Court – in the case where a prescribed period is set out in a court order.

ORDER

1. This matter is urgent and, to the extent necessary, dispensing with the ordinary forms and notices.
2. The period of 180 days referred to in paragraph 4.3 of this Court's order in the matter of *President of South Africa v Office of the Public Protector and Others* 2018 (2) SA 100 (GP) – being the period for the Commission of Inquiry appointed by the President of the Republic of South Africa pursuant to that order, to complete its work and present its report with findings and recommendations to the President, which period has subsequently been extended by orders of this Court is further extended – by a period of thirteen months from 1 March 2020 to 31 March 2021. This is the final extension.
3. Insofar as may be necessary, the first Respondent, the President of the Republic of South Africa, is directed to take such steps as are necessary to give effect to the order referred to in paragraph 2 hereof, including the amendment of paragraph 6 of Proclamation 3 of 2018 (published in Government Gazette No. 41403 of 25 January 2018), to reflect the extended period referred to therein.
4. Each party is to pay their own costs.

JUDGMENT

Hughes J

Background

[1] On 17 December 2017 this court granted an order that the President of the Republic of South Africa establish a judicial commission of inquiry to investigate issues as recorded by the investigations of the Public Protector and recorded in her State Capture report. In terms of section 84 of the Constitution the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (the Commission) was thus established. The Commission was tasked to complete all its work within 180 days. The applicant, the Deputy Chief Justice of the Republic of South Africa was appointed as Chairperson of the Commission.

[2] The initial lifespan of the Commission of 180 days was insufficient and the applicant sought an extension to complete the work of the Commission on 23 July 2018, which was granted on 2 October 2018. The period of extension spanned over twenty-four months from March 2018 to February 2020. The applicant now seeks a further extension, even though the Commission has done extensive work since March 2018, 'it has not completed its work and will not have completed it by the end of February 2020.'¹ In this urgent application the extension sought is for a period of ten months, that is, from the end of February 2020 to 31 December 2020.

[3] The order sought by the applicant in the notice of motion is as follows:

- (1) Permitting this matter to be heard as one of urgency and, to the extent necessary, dispensing with the ordinary forms and notices.
- (2) Extending the period of 180 days referred to in paragraph 4.3 of this Court's order in the matter of *President of South Africa v Office of the Public Protector and others*

¹ Para 7 of the Founding Affidavit.

2018 (2) SA 100 (GP) – being the period for the Commission of Inquiry appointed by the President to the Republic of South Africa pursuant to that order, to complete its work and present its report with findings and recommendations to the President, which period has subsequently been extended by order of this Court – by a further period of ten months from 1 March 2020 to 31 December 2020, or such other periods as may be determined by this Court.

- (3) Insofar as may be necessary, directing the First Respondent, the President of the Republic of South Africa, to take such steps as are necessary to give effect to the order referred to in paragraph 2 hereof, including the amendment of paragraph 6 of Proclamation 3 of 2018 (published in Government Gazette No. 41403 of 2018), to reflect the extended period referred to therein.
- (4) Ordering those Respondents who oppose this application to pay the costs hereof, jointly and severally, the one paying the other to be absolved.
- (5) Granting further or alternative relief.'

[4] The respondents are as set out above and I hasten to add that no opposition was filed by any of the respondents. However, the first, second and eighth respondents filed notices to abide the court's decision. The second (Public Protector) and eighth respondents (Council for the advancement of the South African Constitution (CASAC), filed affidavits setting out the basis upon which they were prepared to abide this court's decision. Both did not contest the issue of this application being urgent. Even so, I must be satisfied that the matter warrants an audience in the urgent court.

[5] The applicant submits that only at the end of the public hearings on 6 December 2019 was he able to ascertain what work was still required and the estimated duration it would take to do so. He further submits that, if the Commission's work is halted abruptly, this will result in a 'nugatory' of the work already conducted. Taking the foresaid into account I view this matter as urgent. I am also mindful that the investigations, testimony and work of Commission is of national importance and the completion thereof is a matter of urgency.

The case of the Applicant

[6] This application is in terms of rule 27(1) of the Uniform Rules of Court.² The applicant contends that even though the Commission has conducted hearings and heard extensive testimony since 20 August 2018, the work of the Commission is not complete and would not be complete by end of February 2020, which was the previous extension granted. To this end, the applicant seeks a further extension of ten months³ (1 March 2020 to 31 December 2020) 'to complete its work and present its report with findings and recommendations to the President'.⁴

[7] The applicant sets out what work has been done and I do not deem it necessary to list the work already done by the Commission. What is pointed out by the applicant is that from August 2018 to December 2019 no fewer than 154 witnesses had testified before the Commission and this is indicative of the enormity of the work already done by the Commission. He explains that the outstanding work yet to be conducted by the Commission is as follows:

- (a) Phase II in respect of evidence from the state owned entities (SOE's) i.e. Eskom, SAA, SABC, Denel, SA Express, Transnet;
- (b) With regards to PRASA, Phase I needs to commence as no evidence has been led;
- (c) A further 15 witnesses need to give evidence in the Free State Province alleged irregularities and corruption cases in government projects and tenders and likewise in the department of the Free State Provincial Government;
- (d) The Commission needs to determine whether there was any failure by Parliament to properly perform its oversight obligations;
- (e) Investigations needs to be conducted as regards the extent that the law enforcement entities such as the National Prosecution Authority (NPA), the Directorate for Priority Crime Investigation (HAWKS) or the Special Investigation Unit (SIU) they may have also been 'captured'.

² Rule 27(1)

Extension of time and Removal and condonation

- (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by the rules or by an order of court or fixed by a n order extending or abridging any time for doing any act or taking any steps in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

³ Prayer 2 of the Notice of Motion.

⁴ *ibid.*

[8] The applicant opines that two spheres of corruption and fraud exist, the one being in terms of the Public Protector's remedial action, which he equates to corruption and fraud under state capture. On the other hand, there is corruption and fraud which falls under the court order of 17 December 2017. The latter, the applicant compares to general corruption and fraud unconnected to state capture, which falls outside the scope of that contemplated by the Public Protector's remedial action. The applicant contends that the general corruption and fraud 'may well have to be referred to another forum or agency for investigation or further investigation'.⁵

[9] The applicant was at pains to point out that taking into account the work that still needed to be done by the Commission, if the Commission sought to comply with its mandate and investigate 20 national offices, 80 provincial departments, 20 SOE's and 200 municipalities, it would 'need more than two years – probably not less than four years' to complete its mandate. Having said the aforesaid he still submits that there are sufficient grounds to justify an extension of ten months.⁶ Critically, he acknowledges that he should thus be asking for a much longer extension than the ten months that he seeks.⁷

[10] He explains that he only seeks ten months because he may request of the first respondent to amend the terms of reference in so far as they relate to issues that fall outside those contemplated by the Public Protector's remedial action. This request would be in line with paragraph 2 of the Terms of Reference of the Judicial Commission of Inquiry into the Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State.⁸ If his request is granted by the first respondent he would be able to complete the Commission's work in the additional period of ten months, so he submits.

⁵ Para 47 of the Founding Affidavit.

⁶ Para 41 of the Founding Affidavit.

⁷ Para 42 of the Founding Affidavit.

⁸ Para 2 reads:

'These Terms of Reference may be added to, varied or amended from time to time.'

[11] The alternative, proposal to complete the work of the Commission in the ten months, is to invoke paragraph 7 of the terms of reference, which permits 'the Commission to refer any matter for prosecution, further investigation or the convening of a separate enquiry to appropriate law enforcement agencies, government department or regulator regarding the conduct of certain person/s'. The Commission would then be relieved of some of the work load.

[12] It will be remiss of me if I did not point out that even though the applicant contends that there are alternatives to lighten the Commission's load, he persists that 'should it turn out that some more time is required than the 10 months, I will make another application to this Honourable Court for an extension'.⁹ This extra time above the extension of ten months sought is purely for the sake of completing the report to be submitted to the first respondent and he anticipates that an extra three months would be required.

[13] In view of the fact of that the Commission is tasked to investigate two types of corruption and fraud as explained above. The applicant submits that there are two ways that the Commission could approach its work going forward after February 2020. If both types of corruption and fraud are dealt with by the Commission, that is, general corruption and that within the remedial action of the Public Protector, it would then take the three to four years he speaks of above to complete the work of the Commission. The other option favoured by the applicant requires doing both, that requested by the Public Protector's remedial action and any other issues which fall outside the remedial action, but within the terms of reference of the Commission, which the applicant considers appropriate to be dealt with by the Commission. The applicant submits that this could be achieved if he approaches the first respondent to amend the terms of reference or in terms of paragraph 7 refer those issues which he considers appropriate to law enforcement agencies or recommend that they be the subject of another inquiry. The applicant warrants that this will ensure completion of the work of the Commission within the ten months, and if required a further three months to complete the report.¹⁰

⁹ Para 45 of the Founding Affidavit.

¹⁰ Para 50 of the Founding Affidavit.

The case of the Public Protector

[14] As alluded to above both the Public Protector and CASAC were the only respondents who sought to abide this court's decision with stipulations. The Public Protector conceded that she supported the main thrust of the application, however she requested that a prescribed minimal period be granted for the extension. She went further to request that 'the President, Chairperson and Public Protector must be ordered or otherwise encouraged to produce a broad framework for the redefinition of the scope and timelines for the Commission'.¹¹

[15] The reasoning advanced by the Public Protector for the stipulation sought was that it would be a disaster if the Commission was allowed to run for another four to five years as intimated by the applicant. The Public Protector contends that since the Commission commenced it has failed to achieved its intended outcome, at a cost of billions of Rands in the process.

[16] The Public Protector was at pains to point out that the undue delays to finalise the Commission's work is due to its failure to give effect to the introduction to paragraph 1 of the terms of reference which states:

'The Commission shall inquire into, make findings, report on and make recommendations concerning the following, guided by the Public Protector's state capture report, the Constitution, relevant legislation, policies and guidelines as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016.' [Not my Emphasis, that of the Public Protector]

The case of CASAC

[17] CASAC proposed that an extension of thirteen months be granted instead of ten months. CASAC reasoned that the thirteen months would be inclusive of the three months that the applicant had proposed he would require to complete his report. However, CASAC required that this be endorsed a final extension, as they argued that

¹¹ Para 15 of the Public Protector's Answering Affidavit.

this is what was sought by the applicant in its founding affidavit and prayer 2 of the notice of motion – 'to complete its work and present its report with findings and recommendations to the President'. The addition of three months extending the period to thirteen months ending 31 March 2021, was in line with the submissions made by the applicant in his founding affidavit at paragraph 45.

Analysis

[18] As stated above this application for an extension of time prescribed by an order of this court is in terms of rule 27(1) of the Uniformed Rules of Court and as there is no agreement between the parties, this court may upon application on notice and on good cause shown, grant an extension. Which extension would allow a party to act or take any further steps in connection with any proceedings of any nature whatsoever upon whatever terms the court seem meet.¹²

[19] There is no dispute that the extension ought to be granted. However, a common stipulation for the granting of such extension permeates from both the Public Protector and CASAC, and that is, that it be the last extension. I am mindful of the fact that I have a wide discretion¹³ to determine if the applicant has shown good cause for the extension sought and that this discretion must take cognisance of the merits of the matter seen as a whole.¹⁴

[20] As set out in the applicant's notice of motion, and the case made out for the relief sought in the founding affidavit, it is apparent to me that the applicant has made out a case for the extension 'to complete its (the Commission's) work and present its report with findings and recommendations to the President'.¹⁵ In addition, there is also the likelihood of a further extension of three months being sought, to complete the Commission's report. I am cognisant of the fact that the applicant sees it most likely that he would return to court to seek a further three months.

¹² Herbstein & Van Winsen *The Civil Practice of the High Court of South Africa* 5th Edition at page 722.

¹³ *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 358A; *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 216H-217D.

¹⁴ *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307C-308A.

¹⁵ Prayer 2 of the Notice of Motion.

[21] It is trite that the exercise of my discretion must be judicious and take into account whether the interest of justice would be served by the granting of the extension sought.¹⁶ The extension sought is not contested and a case has been made out, however there is also a further extension of three months inferred. In my view, a case has been made out for the ten months, and an anticipated case has been advanced for a further three-month extension to complete the report.

[22] Counsel for the applicant did not take issue with the suggestion from CASAC of an extension of thirteen months. However, did take issue with the fact that the Public Prosecutor and CASAC sought that this extension ought to be endorsed as a final extension.

[23] In my view, there can be no bar in granting the applicant an extension of thirteen months at this stage taking into account the time that has lapsed since the commencement of the Commission's work and the previous extension already granted to the Commission to complete its work and present its report with findings and recommendations to the President. Thus the extension of thirteen months is appropriate in the circumstances (1March 2020 - 31 March 2021).

[24] Regarding the remainder of the relief proposed, as regards this being a final extension. I am mindful of the fact that it is in the interest of justice that there ought to be finality with the work of the Commission, encompassing findings and recommendations to act upon as a matter of urgency. I am further wary of the original intention of the Public Protector's state capture report and this court's order for the Commission to submit its report and recommendations to the President within 180 days. There has already been an extension of twenty-four months from March 2018 to February 2020. In my view, further extensions would not be warranted on the applicant's version as set out in his founding affidavit and prayer 2 of his notice of motion. The interest of justice dictates that finality be attained with findings, recommendations and a report of the Commission. The Commission owes this to the nation as the work of the Commission is of national interest.

¹⁶ *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at 43G-44A and the case there referred.

[25] Is the applicant and/or Commission prejudiced in anyway if an extension of thirteen months is granted as being a final extension? I do not believe so as the period granted in respect of the extension was the case made out by the applicant in his papers. If the applicant anticipated a longer period, he would have sought same. In addition, the applicant has already advanced various ways to curtail and limit the scope and terms of reference of the Commission. There would thus be no prejudice endured by the applicant nor the Commission. Therefore, an extension from 1 March 2020 to 31 March 2021 to allow the Commission to complete its work and present a complete report with findings and recommendations to the President is duly granted.

[26] This court has the inherent power to regulate its own processes in the interest of justice.¹⁷ This is precisely one of those occasions that dictates that in order to attain justice, finality ought to be reached as this court is at liberty to prescribe any terms it seem meet in the interest of justice.

[27] I do not find it necessary to deal with the second part of relief sought by the Public Protector as I am of the view that this relief is not competent, as it seeks to repeat the work of the Commission, which is already well on its way, amongst others, and seeks to redefine the scope and timeline already set for the Commission.

Costs

[28] As there was no opposition by both the Public Protector and CASAC the appropriate order in respect of costs, is that each party pay their own costs.

¹⁷ Section 173 of the Constitution of the Republic of South Africa.

[29] Consequently, the following order is made:

1. This matter is urgent and, to the extent necessary, dispensing with the ordinary forms and notices.
2. The period of 180 days referred to in paragraph 4.3 of this Court's order in the matter of *President of South Africa v Office of the Public Protector and Others* 2018 (2) SA 100 (GP) – being the period for the Commission of Inquiry appointed by the President of the Republic of South Africa pursuant to that order, to complete its work and present its report with findings and recommendations to the President, which period has subsequently been extended by orders of this Court is further extended – by a period of thirteen months from 1 March 2020 to 31 March 2021. This is the final extension.
3. Insofar as may be necessary, the first Respondent, the President of the Republic of South Africa, is directed to take such steps as are necessary to give effect to the order referred to in paragraph 2 hereof, including the amendment of paragraph 6 of Proclamation 3 of 2018 (published in Government Gazette No. 41403 of 25 January 2018), to reflect the extended period referred to therein.
4. Each party to pay their own costs.



W Hughes
Judge of the High Court, Gauteng Division

APPEARANCES:

For the Applicant:

Adv. P Kennedy SC

For the 8th Respondent:

Adv. M le Roux