

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 91139/16

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Applicant

and

THE OFFICE OF THE PUBLIC PROTECTOR

First Respondent

THE PUBLIC PROTECTOR

Second Respondent

ECONOMIC FREEDOM FIGHTERS

Third Respondent

THE UNITED DEMOCRATIC MOVEMENT

Fourth Respondent

THE CONGRESS OF THE PEOPLE

Fifth Respondent

THE DEMOCRATIC ALLIANCE

Sixth Respondent

MABEL PETRONELLA MENTOR

Seventh Respondent

COUNCIL FOR THE ADVANCEMENT
OF THE SOUTH AFRICAN CONSTITUTION

Eighth Respondent

PUBLIC PROTECTOR'S ANSWERING AFFIDAVIT

I, the undersigned,

BUSISIWE MKHWEBANE

do hereby make oath and say:



- 1 I am the Public Protector, appointed in terms of section 1A of the Public Protector Act 23 of 1994.
- 2 The contents of this affidavit fall within my personal knowledge except where otherwise indicated by the context, and are to the best of my belief both true and correct. Where I make legal submissions I do so on the advice of the Public Protector's legal representatives.
- 3 The President seeks to review and set aside paragraph 8.4 of the Public Protector's State of Capture Report ("the Report"). The Public Protector opposes the President's application.
- 4 I do not deal ad seriatim with each of the allegations in the founding affidavit in the sequence in which they are made. Instead, I explain thematically the grounds on which the Public Protector opposes the application, before dealing ad seriatim with only those allegations requiring a particular response.
- 5 Many of the allegations contained in the President's affidavits are legal argument that do not require a factual response. I deny the correctness of the legal arguments relied on by the President. My legal representatives will advance full argument on those issues at the appropriate time.
- 6 The President advances three primary categories of challenge to the remedial action:

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- 6.1 First, that the remedial action is *ultra vires* the Public Protector's powers, and constitutes an unlawful constraint on the discretionary powers of the President;
 - 6.2 Second, that it is not permissible for the Public Protector to delegate her investigative function to the commission of inquiry;
 - 6.3 Third, there is no reason for the creation of a commission, and the Public Protector is required by law to conduct the investigation herself.
- 7 I oppose the application on the following grounds:
- 7.1 It is urgent and in the public interest that allegations of state capture and the evidence set out in the Report be fully investigated and determined.
 - 7.2 The President has publicly expressed his support for the establishment of a commission. Given that he agrees that a commission is necessary, the only debate appears to be about whether the law requires that the President retain ultimate control over the commission's functioning.
 - 7.3 The President seeks to retain control over various aspects of the commission's functioning. However, because the allegations in the report implicate him personally and financially, it is not permissible for him to do so.
 - 7.4 Due to a lack of resources it is not possible for the office of the Public Protector to finalise its investigation of the subject matter of the Report. The only possible effective remedial action in the circumstances is the appointment of a properly resourced commission of inquiry.



- 7.5 In these circumstances, the President's power to appoint a commission of inquiry should be construed as a power coupled with a duty.
- 7.6 I accordingly submit that, in the unusual circumstances of this matter, the remedial action contained in the Report is constitutionally permissible.
- 7.7 Alternatively, if this Court sets aside the remedial action, it would be just and equitable in the circumstances to remit the matter to the Public Protector subject to an order requiring the President to ensure that the Office of the Public Protector is provided with sufficient resources to conduct the investigation.
- 7.8 If this Court is not inclined to grant such an order as part of its just and equitable remedial discretion, the Public Protector has brought a conditional counter application, seeking an order requiring the President, as head of the National Executive, to make sufficient funds available to the Public Protector to conduct the second phase of the investigation.
- 8 In the remainder of this affidavit I address the following issues in turn:
- 8.1 The content of the Report and the remedial action.
- 8.2 The President's public support for the establishment of a commission.
- 8.3 The President's conflict of interest in dealing with the remedial action.
- 8.4 The Public Protector's lack of resources to conduct the second phase of the investigation.



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- 8.5 The exceptional circumstances which, in my submission, render the remedial action contained in the report lawful and justifiable.
- 8.6 Appropriate remedy.
- 8.7 Conditional counter-application.
- 8.8 Ad seriatim response to the President's affidavits.
- 8.9 Prayer.

THE CONTENT OF THE REPORT

- 9 The Public Protector signed the Report on 14 October 2016. On 2 November 2016, the Public Protector released the Report in accordance with an order of the Pretoria seat of the Gauteng Division of the High Court.
- 10 The Public Protector issued the Report in terms of section 182(1)(b) of the Constitution, section 3(1) of the Executive Members Ethics Act 82 of 1998 ("Ethics Act") and section 8(1) of the Public Protector Act 23 of 1994.¹
- 11 The Report is the result of the Public Protector's investigation into complaints of alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of ministers and directors of state

¹ Report, Executive Summary, page 4, para (i).

Handwritten signature and initials, possibly 'E' and 'B3', located at the bottom of the page.

owned entities resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses.²

12 I do not summarise the contents of the Report in detail. The following features are relevant for the purposes of this application:

12.1 The Report does not contain findings of fact. Instead it sets out the evidence that the Public Protector gathered during her investigation.

12.2 One reason why the Report does not contain factual findings is that the Public Protector was unable to interview all the relevant parties before concluding the Report. The Public Protector states, for example, that there are relevant persons that she has yet to interview.³

12.3 Although she makes no conclusive findings of fact, the Public Protector makes a number of observations regarding the President's conduct.⁴ The observations are stated in the language of *prima facie* or provisional findings. The Public Protector says that aspects of the President's conduct are "worrying";⁵ that if the evidence she has received is accurate, then the President may have breached the provisions of various statutes;⁶ and that the failure to take steps in regard to various allegations is "a source of concern."⁷

² Report, Executive Summary, page 4, para (ii).

³ For example, Fana Hlongwane and Duduzane Zuma (p104); Minister Zwane (p125).

⁴ Report p343ff, para 7.

⁵ Report p343, para 7.1.

⁶ Report p344-345, para 7.2.

⁷ Report p345, para 7.3.

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12.4 The Report states that the investigation has been "*divided into two phases*" in order "*to accommodate the time and resource limitations by addressing the pressing questions threatening to erode public trust in the Executive and SOEs while mapping the process for the second and final phase of the investigation.*"⁸

12.5 For example, the Report says that the issue of whether any state functionary or any other person acted unlawfully, improperly or corruptly in connection with exchange of gifts in relation to Gupta-linked companies or persons "*will be attended to further in the next phase of the investigation.*"⁹

12.6 This envisages that the commission will continue and finalise the investigation into the matters in respect of which the Report makes provisional findings.

12.7 The issues that have been expressly reserved for the next phase of the investigation are:

12.7.1 "*Whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with exchange of gifts in relation to Gupta linked companies or persons.*"¹⁰

⁸ Report pp11-12.

⁹ Report p351 para 7.10.

¹⁰ Report at 23.



- 12.7.2 *"The investigation into Transnet will however form part of the next phase of the investigation."*¹¹
- 12.7.3 *"I have decided to investigate contracts concluded between Denel and VR Laser Services as referenced in the above media article. The investigation into Denel will however form part of the next phase of the investigation."*¹²
- 12.7.4 *"I have decided to investigate the contract awarded by SAA to the New Age newspaper for circulation to its customers. The investigation into SAA will however form part of the next phase of the investigation."*¹³
- 12.7.5 *"I have decided to investigate any contract(s) awarded to the New Age newspaper and/or TNA Media by the SABC. The investigation into SABC will however form part of the next phase of the investigation."*¹⁴
- 12.7.6 *"The conduct of the Bank of Baroda in relation to the purchase of all shares in OCH by Tegeta and the rehabilitation fund has not been evaluated. This aspect will form part of the next phase of the investigation."*¹⁵

¹¹ Report at 59.

¹² Report at 66.

¹³ Report at 67.

¹⁴ Report at 68.

¹⁵ Report at 337.



12.7.7 "Whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with exchange of gifts in relation to Gupta linked companies or persons."¹⁶

13 The Report concludes with the remedial action taken by the Public Protector.¹⁷

The following aspects of the remedial action are relevant:

13.1 The Public Protector says that it was not possible to investigate all of the issues before her, due to a lack of resources:

*"The investigation has proven that the extent of issues it needs to traverse and resources necessary to execute it is incapable of being executed fully by the Public Protector. This was foreshadowed at the commencement of the investigation when the Public Protector wrote to government requesting for resources for a special investigation similar to a commission of inquiry overseen by the Public Protector. This investigation has been hamstrung by the late release which caused the investigation to commence later than planned. The situation was compounded by the inadequacy of the allocated funds (R1.5 Million)."*¹⁸

13.2 The Public Protector refers to the fact that the President has the constitutional power to appoint judicial commissions of enquiry, and alludes to a potential conflict of interest that would arise were he to consider doing so himself.¹⁹

13.3 The Public Protector requires the President to appoint, within 30 days, a commission of enquiry, headed by a judge selected by the Chief Justice.²⁰

¹⁶ Report at 337 and 351.

¹⁷ Report p353ff, para 8.

¹⁸ Report p353, para 8.2.

¹⁹ Report p353, para 8.3.

²⁰ Report p353, para 8.4.

13.4 The Public Protector then sets out certain requirements for the conduct of the commission:

13.4.1 The National Treasury is to ensure that the commission is adequately resourced.²¹

13.4.2 The judge appointed to head the commission must be given the power to appoint his or her own staff.²²

13.4.3 The judge must be given the power to "*investigate all the issues using the record of this investigation and the report as a starting point*".²³

13.4.4 The commission is to be given powers of evidence collection that are no less than those of the Public Protector.²⁴

13.4.5 The commission is to complete its task and present its report with findings and recommendations to the President within 180 days.²⁵

13.4.6 The President is to submit a copy with an indication of his implementation of the commission's recommendations to Parliament within 14 days of releasing the report.²⁶

²¹ Report p354, para 8.5.

²² Report p354, para 8.6.

²³ Report p354, para 8.6.

²⁴ Report p354, para 8.7.

²⁵ Report p354, para 8.8.

²⁶ Report p354, para 8.8.



- 13.5 The Public Protector will monitor the implementation of the remedial action.²⁷
- 14 The remedial action therefore binds the President in two distinct respects:
- 14.1 First, it requires him to establish a commission.
- 14.2 Second, it constrains the manner in which he may do so and the operation of the commission (by prescribing a mechanism for the appointment of a judge, requiring that the commission be adequately funded by Treasury, requiring the conferral of investigatory powers on the commission, stipulating that the commission report within a stipulated time, etc.).
- 15 It is vital that the very serious allegations and evidence recorded in the Report are fully investigated. There is a pressing public interest in the allegations of state capture contained in the State of Capture Report. Every day the media reveal further allegations, many of which are cause for serious concern and causes loss of public confidence in the country's future, including by international investors.
- 16 It is in the public interest that the truth of these allegations be swiftly investigated and tested, urgently. The public interest is harmed by continuing allegations of state capture without an appropriate investigation being instituted, as directed by the Public Protector.

²⁷ Report p355, para 9.1.



- 17 I emphasise that the remedial action in no way infringes on the independence of the judiciary. Judges are frequently appointed to sit on commissions of inquiry. The only unusual aspect of this matter is that the remedial action requires the Chief Justice, rather than the President, to appoint the Judge. This is simply a procedural mechanism designed to address the President's personal conflict of interest. It does not impact on judicial independence.

IT IS COMMON CAUSE THAT A COMMISSION IS REQUIRED

- 18 The President and the African National Congress parliamentary caucus have publicly stated, on several occasions, that they support the appointment of a judicial commission of inquiry into the allegations of state capture.
- 19 The President, the ANC parliamentary caucus and the government therefore unequivocally accept that there must be a judicial commission of inquiry into the evidence contained in the State of Capture Report.
- 20 The only dispute relates to whether it is constitutionally appropriate for the remedial action to impose requirements on the appointment and operation of the commission.

THE PRESIDENT IS PERSONALLY IMPLICATED IN THE REPORT

- 21 Section 96 of the Constitution prohibits the President from exposing himself to the risk of a conflict between his official responsibilities and private interests. It provides that Members of Cabinet "*may not act in any way that is inconsistent*



with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests".

- 22 The President's official responsibility to determine whether or not to appoint a commission of inquiry into the issues raised in the Report is in conflict with his personal interests, as he is personally implicated in the report.
- 23 This is clear from the following:
- 23.1 The complaints forming the basis of the investigation directly implicated the President.
- 23.2 All seven issues concerning the alleged breach of the Ethics Act identified as relevant for investigation directly implicated the President.
- 23.3 The investigative process itself was conducted on the basis of the President being conflicted.
- 23.4 The Public Protector sent the President a section 7(9) notice.
- 23.5 The Public Protector observed on numerous grounds that the President may have violated his obligations to avoid a conflict of interest under section 2.3 of the Executive Ethics Code.
- 23.6 The Public Protector observed on numerous grounds that the President may not have acted in line with his duty of professional ethics under section 195 of the Constitution.



- 23.7 The Public Protector observed that the President may not have acted in line with his duty to not act when faced with a conflict of interest under section 96 of the Constitution.
- 24 Section 96 of the Constitution accordingly precludes the President from determining, in his own discretion, whether to establish a commission, and from retaining control over the commission, as he has a direct personal and/or financial interest in the outcome of the commission.

THE PUBLIC PROTECTOR LACKS THE RESOURCES TO CONTINUE THE INVESTIGATION

- 25 The Report gives the following reasons for the Public Protector's conclusion that only a commission of inquiry can get to the bottom of the matters forming the subject of the investigation:
- 25.1 The investigation, being conducted pursuant to section 3 of the Ethics Act, is by nature a high-priority one.²⁸
- 25.2 The preliminary investigation alone required additional resources of R1.5 million so that it could be "[handled] like a Commission of Inquiry".²⁹
- 25.3 The scope of the investigation warranted it being divided into two phases, of which only the first features in the Report.³⁰

²⁸ Report at p 9.

²⁹ Report at p 9.

³⁰ Report at p 12.



- 25.4 The investigation has proven that the extent of issues it needs to traverse and resources necessary to execute it are incapable of being executed fully by the Public Protector.³¹
- 25.5 The commission's mandate to "*complete its task and to present the report with findings and recommendations to the President within 180 days*"³² is in line with the investigative framework set out in section 3 of the Ethics Act.
- 26 In essence, the Report states that it is not possible for the office of the Public Protector to finalise the investigation due to a lack of resources. The facts set out below demonstrate that this remains the case.
- 27 The Good Governance and Integrity Unit ("GGI") is a unit within the Office of the Public Protector which specifically deals with matters involving conduct failure, maladministration and corruption in State affairs.
- 27.1 Currently, GGI is composed of 8 Senior Investigators who are investigating more than 288 complex cases involving conduct failure, maladministration and corruption in State affairs. On average, each investigator carries 36 cases for investigation.
- 27.2 The appropriate normal case load per investigator would be between 5 and 7 cases at any given time, but not more than 10. As a result of the

³¹ Report at p 24.

³² Report at 25.

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aforesaid capacity constraints, it takes an average of between two (2) to four (4) years for an Investigator to finalise an investigation of a compliant.

- 27.3 It is accordingly clear that the Public Protector's existing staff members are over-stretched in dealing with their existing case load. There is simply no capacity to conduct an investigation of the scale that would be required.
- 27.4 For the Public Protector to carry-out an investigation into the allegations of state of capture, and having taken into consideration number of so-called Gupta leaks emails, I estimate that I will need the following resources:

STAFF COSTS	SALARY LEVEL	NO. OF PERSONNEL	TOTAL SALARY COSTS (2017/18 & 2018/19)
Chief Investigators	LP 10	2	2017/2018: R2 304 966 2018/2019: R2 459 399
Senior Investigator	Level 12	6	2017/2018: R4 675 770 2018/2019: R4 989 047
Researchers	Level 9	2	2017/2018: R916 654 2018/2019: R978 069
Report drafters	Level 9	2	2017/2018: R916 654 2018/2019: R978 069
Quality assures	Level 9	2	2017/2018: R916 654 2018/2019: R978 069
Admin Assistant	Level 6	2	2017/2018: R502 949 2018/2019: R536 646
Total		16	R21 152 944.00




- 27.5 The above estimate is based on the staff working full time on the State of Capture investigation, which is estimated to take between 12 (twelve) to 24 (twenty four) months to complete.
- 27.6 Over and above personnel resources, the Public Protector would require additional funding for specialised expert services such as forensic and audit investigations. I estimate that the funding required for this services is an amount of R10 000 000.00 (Ten Million Rand). The total financial resources required is an amount of R31 152 944 (Thirty One Million One Hundred and Fifty Two Thousand Nine Hundred and Forty Four Rand).
- 28 The same resource constraints would have prevented an effective investigation by any person to whom the Public Protector might have attempted to delegate the investigation in terms of section 3(b)(i) of the Public Protector Act.

AN EXCEPTIONAL CASE

- 29 I accept that it will almost always be impermissible for the Public Protector to require the President to appoint a commission of inquiry, or to determine the mode of operation of a judicial commission of inquiry.
- 30 However, given two facts, this is an exceptional situation. Those facts are that:
- 30.1 First, due to the resource constraints faced by the Public Protector and the scale of the inquiry, the only effective remedial action in the circumstances is a properly funded commission of inquiry.



- 30.2 Second, the President is personally implicated in the allegations before the Public Protector and is therefore precluded from exercising his power to appoint a commission.
- 31 As a result, I am advised that there is an apparent conflict between:
- 31.1 The Public Protector's constitutional power, in terms of section 182(1)(c) of the Constitution, to take appropriate remedial action to remedy state misconduct (and the remedial action she has taken in this matter); and
- 31.2 The President's exclusive constitutional power, in terms of section 84(2)(f) of the Constitution, to appoint a commission of inquiry.
- 32 I submit that this apparent conflict may be resolved by interpretation. I submit that this is a matter in which the President's discretion to appoint a commission of inquiry should be construed as a power coupled with a duty.
- 32.1 As the President is precluded from acting due to his conflict of interest, and the only genuinely effective remedial action is the appointment of a judicial commission of inquiry by the President, then the Constitution requires him to appoint a commission in accordance with the remedial action, in the narrow and extraordinary circumstances of this case.
- 32.2 Any other interpretation would mean that there is no possibility of the Public Protector issuing remedial action that is appropriate and effective, in the sense of being capable of addressing apparent breaches of the Constitution.



- 32.3 This would render section 182(1)(c) nugatory in the circumstances of this case. It would also be inconsistent with the supremacy of the Constitution and the rule of law.
- 32.4 By publicly acknowledging the necessity of a commission of enquiry, the President has effectively conceded that his power to appoint a commission is, in these circumstances, coupled with a duty.
- 33 I submit that the extraordinary circumstances of this case do not permit the result that the President seeks, namely the setting aside without more of the remedial action contained in the Report.
- 34 That would amount to an endorsement of the result that our Constitution provides no effective remedy to address the very serious allegations and evidence of state capture contained in the Report. This would be inconsistent with the rule of law and the principle of accountability.
- 35 The Constitution demands that the apparent conflict between the Public Protector's constitutional duty to take effective and appropriate remedial action and the President's exclusive power to appoint a commission of inquiry, be interpreted in a manner which lends it efficacy. The alternative, namely of state capture being an issue too large to be covered by the broad remedial powers of the Public Protector, is inconsistent with the clear purpose of the Public Protector's powers and the constitutional provisions aimed at ensuring the President's exercise of his exclusive powers is not influenced by personal considerations.



36 I accordingly pray that the application be dismissed.

APPROPRIATE REMEDY

37 In the alternative, if this Court sets aside paragraph 8.4 of the remedial action, it is empowered to grant a remedy that is just and equitable in terms of section 172 of the Constitution.

38 I submit that the just and equitable remedy in these circumstances would be to remit the matter to the Public Protector subject to an order requiring the President, as the head of the national executive, to ensure that the Public Protector has sufficient resources to conduct the second phase of the investigation.

39 Such an order would ensure that the allegations contained in the Report can be fully investigated by the office of the Public Protector.

CONDITIONAL COUNTER-APPLICATION

40 The Public Protector has brought a conditional counter application, seeking an order requiring the President, as head of the National Executive, to make sufficient funds available to the Public Protector to conduct the second phase of the investigation.

41 The Public Protector seeks this relief only if:

41.1 The Court sets aside the remedial action;

41.2 The Court remits the investigation to the Public Protector; and

- 41.3 The Court declines to order, pursuant to its just and equitable remedial discretion in terms of section 172 of the Constitution, that the matter be remitted to the Public Protector subject to the President, in his capacity as head of the National Executive, and with the assistance of the National Treasury, to the extent necessary, ensuring that adequate resources are provided to the Public Protector.
- 42 The relief sought in the conditional counter application also seeks to create a mechanism to resolve any potential future dispute about the level of funding required to conduct the second stage of the investigation. I propose that the Public Protector submit a request for funding to the President, and that the President, with the assistance of the National Treasury to the extent necessary, should respond to the submission from the Public Protector within reasonable specified period. Thereafter, both parties should file a report with this Court about the outcome of this engagement. If the Public Protector and the President, in his capacity as head of the National Executive, are unable to reach agreement on the level of funding required, the parties will be permitted to approach this Court on these papers, duly supplemented, for appropriate relief.
- 43 I have already set out the basis for this relief above. It is, in summary that:
- 43.1 It would not be consistent with the rule of law or the Constitution for the remedial action to be set aside without more.
- 43.2 The second phase of the investigation must be conducted to get to the bottom of the serious allegations contained in the Report.



- 43.3 It is presently impossible for the Public Protector to conduct the second stage of the investigation due to a lack of resources.

AD SERIATIM RESPONSE TO THE FOUNDING PAPERS

Ad the founding affidavit

Ad paragraph 13.1

- 44 I note that the President acknowledges that he is fundamentally implicated in the complaints which started the investigation emanating in the Report. Those complaints related to his *"alleged role in the offering of ministerial positions to various individuals at the behest of members of the Gupta Family"*.

Ad paragraph 26

- 45 The President appears to contemplate a floodgate of persons requiring the President to establish commissions of inquiry if the remedial action contained in the report is not set aside. This is fanciful speculation. The present circumstances are extraordinarily exceptional. They have not presented themselves since the dawn of democracy in South Africa.
- 46 As I have already explained, it is not any person who is empowered to require the establishment of a Commission of Inquiry. The Public Protector is the only constitutional entity required and obliged to take appropriate remedial action to remedy State misconduct. Moreover, it is only in the narrow circumstances of this case (where the President is conflicted from acting himself and where the Public Protector lacks the resources to finalise the second phase of the



investigation) that the unusual remedial action is permissible.

47 There is accordingly no risk of an opening of floodgates.

Ad paragraphs 31 - 34

48 The President complains that only the Public Protector is empowered to investigate an alleged breach of the Ethics Act. He says that the remedial action violates section 3 of the Ethics Act by giving the judicial commission of inquiry the necessary jurisdiction to investigate on his conduct. This complaint is not well founded:

48.1 The President has misconstrued section 3(1) of the Ethics Act. It imposes a duty on the Public Protector to investigate an alleged breach of the code of ethics. But it does not preclude anyone – including a commission of inquiry – from investigating pursuant to the remedial action which follows the Public Protector's recommendation.

48.2 Section 3(4) of the Ethics Act gives the Public Protector all the powers that she has under the Public Protector Act when investigating a breach of the Ethics Act.

48.3 Those powers include the power to make effective remedial action and to delegate the further conduct of an investigation on to another person or organ of State.

48.4 The Public Protector's has all the powers reasonably necessary to give effect to her express powers in the Ethics Act. I submit that the power to make the remedial action in the unusual circumstances of this case is



implied in the powers conferred on the Public Protector in terms of the Ethics Act.

48.5 In any event, the remedial action does not breach section 3 of the Ethics Act. The remedial action constitutes the output of the Public Protector's investigation in terms of the Ethics Act.

48.6 Although it was not completed within the statutory time limit, the remedial action constitutes the only effective response to the complaint of an alleged breach of the Code of Ethics, given the scale of the inquiry and the lack of resources constraining the Public Protector's conduct of the investigation. I do not understand the President's argument to be that the failure to complete the investigation in terms of the Ethics Act vitiates the remedial action. Any such argument would be incorrect.

Ad paragraphs 36 and 37

49 I am advised and submit that the interpretation of the Public Protector Act, the Ethics Act and the Constitution advanced by the President is untenable. The President's interpretation has the result that in the circumstances of this case there can be no proper investigation and determination of the facts and allegations contained in the report.

50 For the reasons I have already explained, the only effective means of investigation is a properly resourced judicial Commission of Inquiry, which the President has publicly accepted is necessary. Far from doing violence to the provisions of the Public Protector Act, the remedial action gives effect to its primary purpose by ensuring that the allegations of state maladministration and



misconduct are addressed by effective remedial action.

Ad paragraph 41

51 I note that the President's grounds of review are aimed at ensuring that he retains control over the manner of appointment and mode of functioning of the Commission of Inquiry.

52 For the reasons already explained, this is not permissible due to his personal conflict of interest in respect of the allegations contained in the Report. I am advised and submit that the remedial action crafts the appropriate balance between mitigating the President's conflict of interest and the need to ensure effective relief for the maladministration referred to in the Report.

Ad paragraphs 42 - 49

53 In these paragraphs the President illustrates the reasons why he cannot be the one to determine whether to appoint the Commission or how it should function. Because he is personally implicated in the material to be investigated it is simply not appropriate for him to exercise the discretions he refers to in these sections to determine whether a Commission is necessary, to determine whether there is a matter of public interest that will require investigation, or to determine whether there is a matter of public interest requiring a Commission.

Ad paragraph 56

54 The President says that there are no cogent reasons as to why the investigation must be "outsourced" from the office of the Public Protector. This is incorrect. It is also entirely inconsistent with the President's public acknowledgment of the



necessity of a commission of inquiry. I do not concede that the remedial action requiring the institution of a commission of inquiry amounts to an outsourcing of the investigation. The Public Protector has already conducted an extensive investigation, using external investigators as provided for in terms of section 7(3)(b)(i) of the Public Protector Act. That investigation led the Public Protector to determine that the institution of a commission of inquiry constitutes the most appropriate remedial action in these circumstances. It was only competent for the Public Protector to take that remedial action after first having investigated the allegations, as she did.

- 55 The resource constraints I have already explained constitute a further reason for directing a commission of inquiry to conduct the further phase of the investigation.

Ad the supplementary affidavit

Ad paragraph 5.1

- 56 The President says that a finding of improper conduct which resulted in prejudice is a necessary condition of any remedial action. This is incorrect. Full legal argument in this regard will be advanced at the hearing of the matter.

Ad paragraph 5.2

- 57 The remedial action contained in the Report is the only appropriate and effective remedial action in the unusual circumstances of this matter.



Ad paragraphs 5.3 – 5.6

58 The Report speaks for itself. The reason for referring the second phase of the investigation to a commission of inquiry is as set out in the Report and in this affidavit, namely the lack of resources in the office of the Public Protector and that this constitutes the most appropriate remedial action in this context.

PRAYER

59 The Public Protector prays for the following relief:

59.1 In the first instance, the application should be dismissed.

59.2 Alternatively, if the Court sets aside the remedial action, it should remit the matter to the Public Protector subject to an order requiring the President, as the head of the National Executive, to ensure that the Public Protector has sufficient resources, as specified in paragraph 27.5 above, to conduct the second phase of the investigation.

59.3 Further alternatively, the Court should grant an order in terms of the conditional counter application.


BUSISIWE MKHWEBANE

Signed and sworn before me at PRETORIA this 17th day of August 2017 after the deponent declared that he/she is familiar with the contents of this statement and regards the prescribed oath as binding on his/her

