



**THE ZONDO COMMISSION and CRIMINAL PROSECUTION: A MARRIAGE MADE IN HEAVEN, or a CONSTITUTIONAL CRISIS WAITING TO HAPPEN?**

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### Introduction

1. On 28 July 2020 a proclamation<sup>2</sup> was gazetted<sup>3</sup> by the Office of the Presidency. The proclamation is an amendment to regulation 11 of the Regulations of the Commission of Inquiry into State Capture, Corruption and Fraud in the Public Sector (the Zondo Commission).

2. The amending part of the proclamation states:

***“Amendment of regulation 11 of the Regulations***

*Regulation 11 is hereby amended by the insertion of the following after subregulation (5):*

*“(5) Subregulation (1), (2) and (3) shall not apply to the sharing of information, record or documents with any State law enforcement agency.*

*(6) Notwithstanding the provisions of this regulation, any employee of the Commission shall not, after the Commission has concluded its work-*

*(a) be precluded from being employed or appointed on a consultancy basis by any State law enforcement agency; and*

*(b) after being so employed or appointed be precluded from using or disclosing information, records or documents obtained by him or her during the*

*course of his or her employment by the Commission.*

*(7) This regulation does not derogate from the statutory powers and duties of any State law enforcement agency and the Commission.”*

3. In my view, this amendment to Regulation 11 of the Zondo Commission has serious implications for the administration of justice, which makes one wonder whether the authorities in fact paused to think about these before it was promulgated.

4. The first problem is that the amendment subverts the age-old rule or principle that information made available to a commission of inquiry may not be used in another forum to criminally charge a witness in such a commission. Furthermore, it undermines a witness’s right to remain silent in instances where their evidence may incriminate them. By testifying at the Zondo Commission, it would seem that the effect of this amendment is that witnesses forgo their Constitutional right to remain silent in a subsequent criminal case because evidence already gathered at the Zondo Commission may now be used against them. Usually, such evidence is not automatically admissible in subsequent criminal proceedings, as now seems to be the effect of this amendment.

5. Secondly, the effect of the amendment pre-emptly the Commission’s report by making it possible to recommend prosecutions or collaborate in prosecutions based on evidence emanating from the Commission even before the Commission has concluded its proceedings and made such recommendations. Some of that evidence may not even have been tested because the implicated parties may not yet have been given the opportunity to question witnesses

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<sup>2</sup> 24 of 2020.

<sup>3</sup> GG number 43563.

who have implicated them. For example, the Minister of Public Enterprises has implicated the former Commissioner of the South African Revenue Service, and others, in one or other form of criminal conduct. With less than 7 months of the Commission's life left, the Minister is yet to be questioned on the allegations he made, and the former SARS Commissioner is yet to test the Minister's allegations. To use those same allegations against people implicated by the Minister in a subsequent criminal trial without affording them the right to cross examine the Minister seems rather unfair and a gross violation of numerous constitutional rights of those he has implicated, including the right to human dignity, equality, privacy, association, trade, occupation and profession, fair labour practices, access to courts.

6. Thirdly, this amendment facilitates retirement from the Commission or resignations by Commission employees into employment by State law enforcement agencies, either on a permanent or consultancy basis. This smacks of underhandedness or subversion of the rule or principle that employees of a commission of inquiry may not divulge information or evidence that they obtained during the course of their employment by a commission.
7. The amendment states that sub-regulations (1), (2) and (3) will not apply to the sharing of information with any state law agency. In turn, regulation 11(1) states that every person employed in the execution of the functions of the Commission shall help to preserve secrecy with regard to any matter or information that may come to his or her knowledge in the performance of his or her duties in connection with the said functions.
8. Regulation 11(1) further requires and prescribes an oath that must be taken by every person assisting the Commission besides the Chairperson.

9. Regulation 11(2) prohibits communication by any person to any other person any matter or information which may have come to his or her knowledge in connection with the inquiry, or allow or permit any other person to have access to any records of the Commission, except in so far as it is necessary in the performance of his or her duties in connection with the functions of the Commission or by order of a competent court.
10. Furthermore, regulation 11(3) prohibits the dissemination of any documents submitted to the Commission – or publication of contents or portions thereof – without the permission of the Chairperson.<sup>4</sup> Lastly, regulation 11(3) also prohibits the perusal or interception of any documentation or statements destined for submission to the Chairperson while such documentation or statements are being taken to the Chairperson.<sup>5</sup>

### **Implications of the amendment**

11. The effect of the amendment to regulation 11 is that none of the prohibitions regarding dissemination, secrecy, communication of information obtained by employees of the Commission apply when such information is shared with state law enforcement agencies. This means that when employees of the Commission share information obtained as a result of being employed by the Commission with state law enforcement agencies, after the Commission has concluded its work, they will not be committing an offence.<sup>6</sup>
12. An additional provision of the amendment is that once the Commission concludes its work, its employees will not be precluded from being employed or appointed on a consultancy basis by any state law enforcement agency.

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<sup>4</sup> Regulation 11(3)(a).

<sup>5</sup> Regulation 11(3)(b).

<sup>6</sup> See regulation 12(2)(ii) of the original regulations which states that contravention of regulation 11 is an offence worthy of imprisonment or fine.

13. When that former employee of the Commission is employed or appointed as a consultant by a state law enforcement agency, s/he will not be precluded from sharing with that state law enforcement agency information, documents or records obtained during employment at the Commission. Seen in one way, this is a crucial development in so far as enabling state law enforcement agencies to adequately fight fraud and corruption utilising evidence that is already available instead of reinventing the wheel. Viewed in another way, the amendment is an unconstitutional subversion of the rule governing commissions of inquiry, that is, that witnesses can testify freely and openly without the fear of their evidence being used against them in subsequent criminal proceedings.
14. If this rule can be so glibly dispensed with, then there is a risk that commissions of inquiry will see very few implicated persons coming forward to volunteer information for fear of self-incrimination. The primary purpose of commissions of inquiry – fact finding – will therefore be lost. What then is left of commissions of inquiry as a tool to unearth information that lies buried beneath the wall of silence occasioned by fear of criminal prosecution?
15. Lastly, this amendment creates the potential for maximum benefit to be derived from the existence of the Zondo Commission. This is so because – through the employees of the Commission being subsequently employed by law enforcement agencies – law enforcement agencies will be able to follow up on leads of corruption and fraud based on information established but not followed through by the Commission. While this may be seen as laudable, it undermines the principle of the right to remain silent in the manner set out above and corrupts the rule that evidence before one forum is no evidence before another.
16. This has been made clear already by the Head of the NPA's Investigative Directorate who said,
- "[b]y and large, we don't want information gathered by the Zondo commission, we have powers to gather that information ourselves. What we wanted from the Zondo commission is to share information and ideas about lines of enquiry that will be unproductive, and we shouldn't pursue. . . . So, it's really a sharing of understanding of the problem, us sharing our strategy and saying, 'Do you think we are on the right track? Do you think we are wasting our time? Are there other areas we should pursue?'"*<sup>7</sup>
17. The NPA further believes that the amendment will help them speed up prosecutions by giving them "access to more people, skills capabilities and a free exchange of information." This reasoning for achieving the amendment may be considered disingenuous by some. Whereas the state law enforcement agencies have the powers to gather the information now before the Zondo Commission, they had failed to do so and now want to subvert the Commission rules in order to violate the right to remain silent in criminal proceedings that they would institute. It is not for them to weigh the evidence before the Commission before it does so itself and make its recommendations.
18. Neither the Commissions Act<sup>8</sup>, Regulations of the Zondo Commission, Rules of the Commission nor the Terms of Reference of

<sup>7</sup><https://www.news24.com/news24/southafrica/news/zondo-commissions-amended-regulation-will-speed-up-prosecutions-hermione-cronje-20200729>

<sup>8</sup> 8 of 1947.

the Commission define what an employee of the Commission is.

19. However, the Labour Relations Act<sup>9</sup> (LRA) and the Basic Conditions of Employment Act<sup>10</sup> (BCEA) define what an “employee” is. They both define an “employee” as:

- “(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and  
(b) any other person who in any manner assists in carrying on or conducting the business of an employer.”

20. On this broad definition of “employee” by the LRA and BCEA one can deduce who an employee of the Commission is. Take for instance paragraph (b) that provides that any person who **assists** in carrying on or **conducting a business** of an employer is an employee. The business of the Zondo Commission is to **“investigate matters of public and national interest concerning allegations of state capture, corruption, and fraud.”**<sup>11</sup> Therefore, investigators of the Zondo Commission are employees of the Commission because they are involved in the **“business”** of the Commission.

21. Furthermore, posit the example of the secretary of the Commission. The initial regulations define the secretary as **“a person appointed by the Chairperson who, under the direction of the Chairperson, assists the Commission in the performance of its functions.”**

22. Because the secretary assists the Commission in the performance of its functions, the secretary can be regarded as an employee of the Commission because he or she **“assists in carrying on or**

**conducting the business of an employer.”**

23. **“Employed”** and **“employment”** have a corresponding meaning as **“employee”** in both the LRA and BCEA.

24. As mentioned above regulation 11(1) requires every person **“employed”** in the execution of the functions of the Commission to help preserve secrecy with regard to any matter or information that may come to his or her knowledge in the performance of his or her duties in connection with the said functions. To give effect to this sub-regulation, employees of the Commission are made to take an oath of fidelity or secrecy before commencing with their duties.

25. The secretary and the investigators are among the people who take the oath of secrecy. Again, according to regulation 11(1), the oath of secrecy must be taken by those that are **“employed”** in the execution of the functions of the Commission. That the investigators and the secretary, among others, take the oath of secrecy means that they are employees at the Commission.

26. Despite those definitions of an **“employee”**, the investigators are mostly members of the legal profession and are engaged or employed in the discharge of the functions of the Commission differently from ordinary employees. The Commission’s attorneys of record function in terms of a mandate given to them by the Commission and counsel are briefed by the attorneys. It is arguable that both attorneys and counsel who are briefed are not employees as defined. Should any of them transition from the Commission to employment by a State law enforcement Agency it is arguable that they may not do what the amended regulation 11 provides as it only applies to employees of the Commission. They certainly have not taken

<sup>9</sup> 66 of 1995 section 213.

<sup>10</sup> 75 of 1997.

<sup>11</sup> Proclamation 3 of 2018 GG number 41403. (Terms of Reference of the Commission).

leave of absence from the Legal Practice Council (which regulates the conduct of legal practitioners) or their respective bars in order to take up employment with the Commission. On the other hand, it is conceivable that the Secretary to the Commission, its spokesperson and other administrative staff have entered into, and signed contracts of employment with the Commission. These can be described as employees.

27. Lastly, regulation 11(2), as stated above, proscribes any person communicating to any other person any matter or information which may have come to his or her knowledge in connection with the inquiry, or allow or permit any other person to have access to any records of the Commission. The sub-regulation then creates two exceptions to this proscription. The first is when it is necessary to communicate such information in the performance of one's duties in connection with the functions of the Commission. The second is by order of a competent court.
28. The amendment to the Regulations now means that law enforcement agencies do not first have to obtain a court order for them to obtain information from a former employee of the Commission.

## Conclusion

29. The amendment of the Regulations has not done away with the general rule that an employee cannot disclose information that s/he acquired during his/her work in certain environments. It has simply created an exception to that rule. The exception is that information obtained by an employee of the Commission during his/her employment at the Commission can be shared but **only** with state law enforcement agencies.
30. For every other employee of the Commission who does not subsequently get employed or appointed on a consultancy basis by a state law enforcement agency, the general bar imposed by regulation 11(1), (2) and (3) remains: they cannot share information obtained during their time at the Commission save when there is a court order requiring them to do so.
31. Employees of the Commission that are more likely to be useful to state law enforcement agencies subsequent to the conclusion of the Commission are investigators of the Commission. This is because they are the ones who might have encountered information that could be useful to law enforcement agencies. This is particularly so because some of the information or leads uncovered by the investigators might not have been made public or evidence on such information or leads might not have been led at the Commission. The law enforcement agency should be in a position to pick up such a lead and follow it on by doing more investigations.
32. The administration staff of the Commission which is under the Secretariat, such as finance, IT, researchers are less likely to be useful to law enforcement agencies post the Commission because they deal more with the auxiliary functions of the Commission.
33. The paradox of the amendment to Rule 11 is that the primary persons who it is intended to prohibit from divulging information are now given the green light to undermine the hitherto existing law. Administrative staff are the least concern when it comes to who can effectively utilise information obtained during their employment by a commission to misuse it, such as in disseminating scandalous information or undermining their defence in subsequent criminal proceedings that may arise. This amendment stands to be challenged if and when it is put into effect during the course of the Commission or after its conclusion.

34. This subversion of the law could sound the death knell for commissions of inquiry. No witness, no matter how slightly tainted, would volunteer to testify before a commission and if subpoenaed to appear, will be an unwilling or reluctant witness. This would totally be understandable if their testimony would expose them to self-incrimination.
35. A further irony is that an estimated R700 million has been spent on the Commission to do the work that State law enforcement agencies either failed to do or lacked the capacity to do. This money should have been used to engage the services of private investigators such as the Commission did and enabled these agencies to discharge their duties and functions. This is what the NPA does regularly when prosecutors are briefed from private practice to help with their prosecutions. Now that the inefficiency of the Zondo Commission has been exposed, a short cut has been implemented in order to bring about prosecutions before it even finishes its work and the rules and principles governing the relationship between Commissions and law enforcement agencies have been glibly flouted.
36. It will be interesting to see what happens when next the Zondo Commission subpoenas a witness who refuses to testify for fear of self-incrimination at the Zondo Commission while the NPA is still considering bringing criminal charges against that witness but has not yet criminally charged the witness. In such a scenario – given that the amendment to regulation 11 now permits reliance by the NPA for criminal prosecution purposes on information gathered from proceedings at the Zondo Commission without more – would compelling the witness to testify at the Zondo Commission not be a violation of the witness's right against self-incrimination, even before s/he has formally been charged with a criminal offence? I submit that it would.