

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

VUYANI NGALWANA

Requester

In re: Request for Evidence

FORMAL REQUEST IN TERMS OF RULE 9.1

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A. INTRODUCTION

1. My name is Vuyani Ngalwana. I am an adult senior legal practitioner of sound mind, practising as a member of the Bar, the Pan African Bar Association of South Africa, with chambers at 1st Floor, 82 Maude Street, Sandton. I have occasionally acted as a Judge of the High Court of South Africa and the Labour Court since 2009, and continue to avail myself from time to time when requested by the Judge-President of the Gauteng High Court.
2. I am currently acting as a Judge of the High Court of South Africa, North Gauteng, Pretoria.
3. I have Chaired the General Council of the Bar of South Africa and have been a member of the inaugural Legal Practice Council from which I voluntarily resigned in order to pursue what I consider to be more pressing challenges in this country.
4. I am also a Fellow of the Africa Leadership Initiative and Fellow of the Aspen Global Leadership Network. I take Leadership seriously and subscribe to the shrill impatient call of Leadership, “**If not me, then who?**”. It is this call that I answer when I see what I consider a Leadership vacuum characterised by the most obvious questions of accountability not being asked at the right forum.
5. I confirm that I am not, and have never been, a member of any political party, although I have openly divulged the political parties for which I have voted in the past. I currently have no political affiliation to any political party or a section or faction within any political party. My loyalty lies with the Constitution and not natural persons. I make this request in good faith, with a clear conscience and in the free exercise of my right as a South African

citizen as I believe it to be in the national interest for someone to make it. I do so because, in my assessment, the country is going to ruin while organs of state established to protect and promote the Constitution fail to ask critical questions of people who seem protected from scrutiny and who have much to answer for.

B. PURPOSE OF THE REQUEST

6. This is a request in terms of Rule 9.1 of the RULES GOVERNING PROCEEDINGS OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE (“the State of Capture Commission” or “the Commission”).

7. The Rule reads as follows:

“If **any person** considers that a particular witness should be called to give oral evidence, a written request to this effect should be made to the Commission and shall include the reasons for the request and the likely value of the evidence of such witness. Such witness may be called at the discretion of the Chairperson.”

(emphasis supplied)

8. My request is that **the Deputy Presidents** during the period that has been dubbed by some as “**9 wasted years**” (9 May 2009 to 14 February 2018) should be invited by the Chairperson of the State of Capture Commission to give oral evidence before the Commission and be questioned on their evidence in terms of Rule 3.2 in order to ascertain the truthfulness of their evidence. Rule 3.2 says:

“A member of the Commission’s Legal Team may put questions to a witness whose evidence is presented to the Commission by the Commission’s Legal Team including questions aimed at assisting the Commission in assessing the truthfulness of the evidence of a witness. Subject to the directions of the Chairperson, the Commission’s Legal Team may ask leading questions.”

9. Ideally, the entire cabinet of those years should have been questioned by the Commission on their role in the alleged corruption of those years. That has not been done. I make this request now because, while I had hoped it would have done so by now, it seems fairly certain that the Commission has no intention of calling all members of Pres Zuma's cabinet to shed light on matters of alleged "state capture". I appreciate that the Commission has limited time to complete its work by 31 March 2021 and that it may not be feasible to obtain the evidence of all these persons and assess it in time before the final report of the Commission is due for submission to the President who, ironically, is one of those persons who should be questioned. But that, with respect, is of the Commission's own doing by the choices it has made as regards which witnesses to invite, leaving out persons who are, in my submission, clearly relevant witnesses capable of shedding light on alleged "state capture" during their time in Pres Zuma's cabinet and senior official positions in organs of state.
10. As an acting Judge, I have undertaken to uphold and protect the Constitution of the Republic of South Africa. That undertaking is not confined to my work on the bench but extends to my contribution as an active citizen to the strengthening of our constitutional democracy. It is to that end that I make this solemn request and in the promotion of participatory democracy.

C. REASONS FOR THE REQUEST AND VALUE OF THE EVIDENCE

11. Much has been reported in the media about the excesses of the Zuma administration which, as already pointed out, ran from 9 May 2009 when he was sworn in as President of the Republic of South Africa, until his ignominious resignation on Valentine's Day in 2018.
12. Among many reported acts of alleged corruption during the Zuma administration are:

- 12.1 The 2016 Nkandla scandal which reportedly cost the taxpayer close to R250 million in relation to which National Treasury calculated the security upgrade costs as amounting to over R230 million and the amount that President Zuma was required to pay back as amounting to a mere R7.8 million. Who made these calculations? How did they arrive at this amount? What are these specific security upgrades that cost over R230 million? What are the details of the procurement of service providers and who made the decision to award which contract to whom at the Department of Public Works? Who approved the funding at National Treasury?
- 12.2 Many State-Owned Enterprises are, by government's own account, a financial and governance shambles and are, according to media reports, riddled with corruption involving tenders of considerable amounts of money. Much of this is in the public domain having been reported in the media over many years. According to a minute released by The Presidency on 25 August 2016, Mr Cyril Ramaphosa (then Deputy-President) was appointed Chair of Pres Zuma's Inter-Ministerial Committee ("IMC") which was **"responsible for overseeing the stabilisation and reform of state-owned entities"**. This minute can be accessed at <http://www.thepresidency.gov.za/content/presidential-soe-coordinating-council-arises-presidential-soe-review-committee-and-not-new>. Surely, the President should now be called by the Commission to account for his role in the decimation of state-owned entities, particularly on what his interventions were to **"stabilise and reform"** these entities during his tenure as Chair of Pres Zuma's IMC on state-owned enterprises, and where, in his assessment, the failures and successes of his efforts lie.
- 12.3 SCOPA has allegedly been probing the National Treasury Integrated Financial Management System (IFMS) project that has reportedly cost over R1 billion. The Director-General, Mr Mogajane, reportedly told SCOPA that, **"basic financial management processes were**

thrown out the door” and blamed the loss on **“major mistakes”**. The President also issued a proclamation instructing the SIU to do a probe. A Billion Rand cannot just disappear and everybody moves on as **“major mistakes”** were made. That money must have gone to people and businesses. Who are they? Why them? What benefit did National Treasury derive for that money?

12.4 There have been allegations of people being appointed to state owned enterprises’ board positions, and others being awarded contracts of considerable value, allegedly as a result of their financial contributions to the President’s election campaign in December 2017. Are these allegations true or false? Will a bare denial of these allegations suffice for the Commission? Documents that could possibly serve as evidence of contributors to the President’s election campaign remain sealed from public scrutiny by court order. I am informed that a court challenge to that decision has been mounted and that papers have already been prepared. But does the Commission not require that evidence in order to satisfy itself that there is no truth in these troubling allegations?

12.5 I also refer herewith a complaint in relation to Eskom that I referred to the Public Protector on 5 June 2020 but which I suspect that office may not have the financial resources to investigate since its budget has reportedly been reduced significantly. I ask that the Commission invites the Eskom Chief Executive, its entire board and the Ministers of Public Enterprises, Minister of Minerals and Energy, the President and other officials who, as reflected in the complaint, may shed light on the issues raised therein, to answer to the questions that arise in that complaint. The only aspect in that complaint with which the Commission need not trouble itself is the application to court to have the directors declared delinquent, although the Commission has the power to recommend that such application (which is in fact action proceedings) be brought.

13. These are just some of the serious questions that the Zuma cabinet, or at least senior cabinet members, ought to be called to answer. There are numerous others that have been reported in the public media, the latest being an interview with former PRASA Chief Executive, Mr Montana, on YouTube channel #TheInsightFactor. In it, Mr Montana details allegations of corruption at PRASA, an organ of state, and implicates senior members of the current cabinet and a senior board member at PRASA. He says he has submitted a detailed statement to the Commission. In my view, it is the duty of this Commission to investigate these serious allegations and establish their truth or falsity. I ask that the Commission considers the detailed statement that Mr Montana says he has provided to the Commission, as well as Mr Montana's serious allegations in that interview which is in the public domain and easily accessible on YouTube channel at <https://youtu.be/Rdbc0u15u4g?t=4>.
14. The Commission's Terms of Reference that are triggered by these questions are those that enjoin the Commission to inquire into, make findings, report on and make recommendations concerning

“whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOE's or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state.”¹

and

“the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities and organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary or any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.”²

¹ ToR 1.4

² ToR 1.9

15. My emphasis is simply to indicate that the Terms of Reference are wider than just President Zuma, the Gupta family and those portrayed as being associated with them. The Terms of Reference enjoin the Commission to probe also persons who were part of President Zuma's cabinet and public officials (such as Directors-General).

16. I thus request that the Commission invite the following persons in terms of Rule 9.1 to answer questions, under oath or solemn affirmation, about their role in relation to matters that fall within the Terms of Reference cited above:
 - 16.1 President Cyril Ramaphosa (who was Deputy President to President Zuma from 26 May 2014 until 14 February 2018);
 - 16.2 President Kgalema Montlanthe (who was Deputy President to President Zuma during the period 2009 to 2014);
 - 16.3 Mr Pravin Gordhan (who was Minister of Finance in President Zuma's cabinet from 2009 to 2014 and 2015 to 2017 and is directly implicated by Mr Montana in conduct that falls squarely within this Commission's Terms of Reference);
 - 16.4 Mr Lungisa Fuzile (National Treasury Director-General during the period May 2011 to May 2017);
 - 16.5 Mr Dondo Mogajane (who has been senior executive at National Treasury for many years, took over as Director-General in May 2017, and seems knowledgeable about the IFMS National Treasury project, judging by the fact that he was chosen to address SCOPA on it.);
 - 16.6 The entire Eskom board of directors including its Chief Executive;
 - 16.7 Any other cabinet member, public official or employee of the State Owned Enterprises that the Chair considers has a case to answer or

may add value to the determination of these issues. In this category falls people like Mr Brian Molefe, former Transnet and Eskom chief executive, and Mr Koko Matshela, former Acting Eskom chief executive, both of whom have been implicated in all sorts of alleged wrongdoing in media reports, but whom the Commission, inexplicably, seems reluctant to call to be questioned and give full accounts about their role, and that of others, in alleged corrupt activities. If these allegations are true, the Commission must make findings and recommendations about them. If they are not true, then the Commission's principal and the country as a whole, deserves to know and the true culprits of the rot at Transnet and Eskom unmasked.

17. Also in the public domain are allegations about matters that fall squarely within the Commission's Terms of Reference implicating senior cabinet members and senior government officials in the fisheries department. In this regard, I refer the Commission to the very serious allegations made by a former Deputy Director-General in the Fisheries department who, on her account, has been hounded out of the department for pointing out the very conduct that the Commission is investigating but seems studiously to avoid calling her and the persons she implicates to give evidence and be questioned. Her evidence is available at <https://youtu.be/imyJRFAW0Nw> and <https://youtu.be/H2206K9YpJM>. It is chilling.
18. It ought to be a matter of serious concern to the Commission – and a matter it must wish to probe as part of its Terms of Reference – for the country to be tittering on the brink of economic collapse as a result of what has been termed “9 wasted years” but senior cabinet members and senior public officials of that period are not called to account for their own role.

D. CONCLUSION

19. In my respectful submission the issues I have now placed before the Commission require its most serious, and relatively urgent, attention.

Without clarity on these issues South Africans with the good of the country at heart cannot move forward with a clear conscience that corruption is a thing of the past, and that the serving President is free from the influences of big business.

20. Should the Chair decide not to acquiesce in my request, I ask that written reasons for that decision be provided within a reasonable time of that decision being made so that I can consider my options, and ultimately included in the final report that the Chair will present to the President so that if the matter should become litigious, time and effort of procuring reasons is saved and an expeditious determination of any review application is facilitated.

V NGALWANA SC
Chambers, Sandton
24 November 2020