

LEGAL TEAM OPENING ADDRESS

Commission of Inquiry into State Capture

A. PURPOSE OF OPENING ADDRESS

1. To explain to the Chair how the evidence leaders understand their mandate; their role in the work of the Commission; and how they have planned and will plan to lead evidence before the Commission.
2. To ensure that at the outset, we establish a mode of operation that communicates clearly and completely to the public (an important constituency): what this Commission is investigating; the evidence that it will present; and the issues it will traverse.

B. THE LEGAL FRAMEWORK

3. The Constitution provides that the President is responsible for appointing Commissions of Inquiry. This Commission has been appointed by the President to investigate allegations of State Capture, corruption and fraud in the public sector, including organs of state.
4. We are governed by the provisions of the Commissions Act, 1947.
5. This Act confers certain powers on the Commission.
6. The Terms of Reference which bind the Commission set out in more detail the matters which this Commission is obliged to investigate. I will deal with the Terms of Reference in detail in due course.
7. Regulations have also been promulgated. These govern the proceedings of the Commission. They also give the Commission certain powers, for example, to search premises and seize documents on the authority of a warrant issued by a judge.

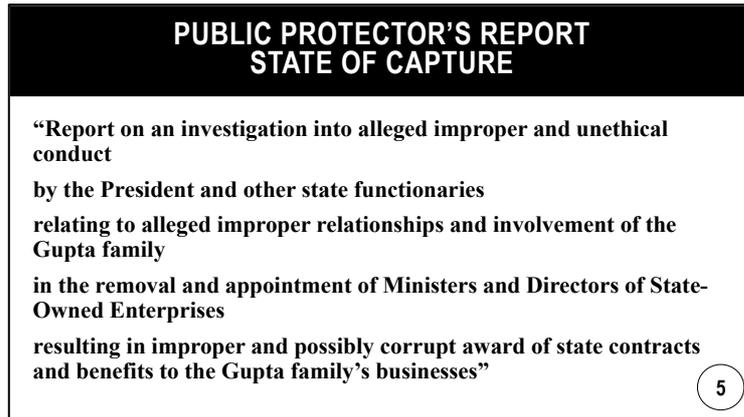
8. The Commission has also issued its own rules. These govern the proceedings of the Commission.
9. In terms of all these instruments, our hearings will be held in public; in appropriate circumstances hearings may be held in camera; arrangements have also been made for evidence to be transcribed and placed on the Commission website.
10. In addition, the evidence to be led is the product of the work of the investigations team and the legal team. However, the public has been invited to contribute to the work of the Commission and that invitation still stands.
11. We note that Term of Reference item 3 reads: “All organs of State will be required to cooperate fully with the Commission.”
12. The role of the legal team has been and is:
 - 12.1. To provide legal support to the Commission, particularly in setting up the Commission;
 - 12.2. To present the evidence, obtained and prepared by the investigation team, to the Chair;
 - 12.3. To assist the Chair in directing investigations, and by compiling research and making submissions on findings and recommendations.

C. THE PUBLIC PROTECTOR REPORT

13. This Commission has its origins in an investigation conducted and a report issued by the former Public Protector.
14. The report is entitled *State of Capture*.

Its title page reads:

“Report on an investigation into 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-Owned Enterprises
resulting in improper and possibly corrupt award of state contracts and benefits to the
Gupta family’s businesses”



15. The Public Protector made certain findings but did not complete her investigation. That is now the task of this Commission. But the Terms of Reference of the Commission have widened the scope of the investigation materially.

D. THE SCOPE OF THE INVESTIGATION

16. So what, broadly speaking, is the scope of our investigation?
17. More than one communication already made to the Commission raise the issue of the time period to be covered by the Commission. In particular, the question has arisen: how far back does this Commission go? That question has not been fully and finally answered by the Commission (and, in particular, by the Chair) and it will obviously consider submissions in this regard.
18. The first approach to this issue, of course, is that the text of the Terms of Reference dictate what factual occurrences this Commission is required to deal with. These events will have occurred within a fixed time period.

19. There are more general issues raised by the Terms of Reference that are not restricted to a particular time period. For example: those Terms of Reference that require the Commission to investigate the nature and extent of corruption in state entities and at all levels of government.
20. It is self-evident that the very essence of the 1996 Constitution was to bring to an end a political system that had indeed been “captured” by a government acting in the interests of a privileged minority at the expense of a disempowered, marginalised and impoverished majority.
21. Our Terms of Reference direct us, at least in the first instance, to a different period and to, at least arguably, answer a different question. That is, has the State again, to a larger or lesser degree, been “captured”; has it been possible, once again, to distort and manipulate State Entities in such a manner and to such a degree to serve the interests of a privileged few? And what is significant about this question being asked now, in 2018, is how, if this did occur, could it occur in a constitutional democracy post 1996?
22. In other words, the broader question signified by our Terms of Reference read as a whole may be asked: Has the democratic project envisaged by our Constitution been derailed? If so, can it be put back on track, and how?
23. It bears emphasis that State Capture is not just about corruption. It is not even just about widespread corruption. Corruption may be part of State Capture but it is more than that. State Capture, at least in theory, would concern a network of relationships, both inside and outside government, whose objective is to ensure the repurposing of government departments, officials and State Owned Entities for private gain.
24. In essence, the legal team will submit that the Commission should ask the following questions:

- 24.1. Is what occurred (within the Terms of Reference) a series of random and disconnected acts, or was it an organized and comprehensive manifestation of State Capture?
- 24.2. Did what occurred concern not only acts of corruption but also a deliberate weakening of constitutional government and a repurposing of constitutional state structures?
- 24.3. In other words, was there a deliberate attempt to weaken democratic processes and to shift political decision-making away from constitutional bodies?
- 24.4. Did what occurred involve a systematic undermining of the country's laws and principles?
- 24.5. Did this happen at the hands of a network of alliances between persons and entities both inside and outside the State?
- 24.6. And did what occurred, if found to have existed or to exist still, have as its goal the diversion of state funds and resources into private hands?
- 24.7. If so, what is the impact of all that on the constitutional goals such as development, empowerment, service delivery, transformation and redressing the inequalities of the past?
25. The legal team will submit that the Commission should investigate circumstances where the allocation and distribution of state resources is:
 - 25.1. Determined by a network of persons outside and inside government (acting contrary to Constitutional and legal norms); and
 - 25.2. Directed, not in terms of our laws and policies, but for the private financial gain of members of that network; and

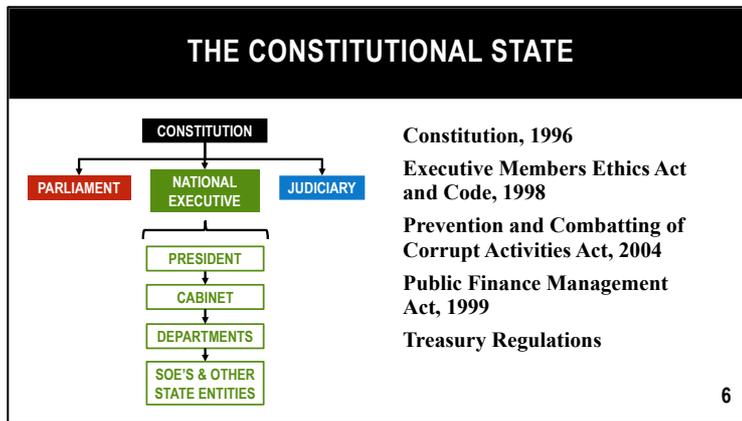
- 25.3. Facilitated by a deliberate effort to weaken key state institutions.
26. A question that we may have to address is whether the existing legal framework, in fact, permitted a redirection of resources from state entities and State Owned Entities into private hands, in the manner found to have occurred. Put differently, the question may be asked: to what extent was the redirection of state funds and resources found to have occurred, allowed by prevailing laws and policies?

E. THE APPROACH TO EVIDENCE

27. It is necessary to pause a moment.
28. This investigation can assume no facts. Any findings it makes will be based on evidence.
29. The scope of the evidence will be determined by the Terms of Reference.
30. Where the Commission is asked to interrogate an issue, the legal team will not presume a particular outcome. Witnesses may have different, even contradictory, versions in relation to a particular factual allegation or set of facts. It is our function to explore all material and relevant versions.
31. This inquiry is required to ask questions and to find answers. The Deputy Chief Justice, when addressing the public for the first time, outlined these, in broad terms, as follows:
- 31.1. Did State Capture ever exist in South Africa in the period covered by our Terms of Reference?
- 31.2. Does State Capture still exist within South Africa? and
- 31.3. If so, how can it be eradicated through policies and measures put in place to ensure that it does not recur, or at least ensure that the risk of it recurring is minimized?
32. It bears emphasis that the answers to all these questions, general and specific, lie within the powers and duties of the Chair. It is the duty of the investigation team to find the

evidence. The legal team's duties are to present the evidence and make submissions. As yet, no substantive findings have been made.

F. THE CONSTITUTIONAL STATE



33. In the approach we adopt, we will refer to the Constitutional State and then question whether its institutions and laws have been undermined or manipulated.

34. We see the Constitutional State in two aspects:

34.1. The offices and institutions relevant to our inquiry; and

34.2. The backbone of laws, policies and ethics that support that structure.

35. **SLIDE 6:** There are a number of points to be made in relation to this slide:

35.1. The evidence will recognize that there are three branches of government: Parliament; the National Executive, including the President and Cabinet; and the judiciary.

35.2. Each branch of government has an association with issues of alleged State Capture.

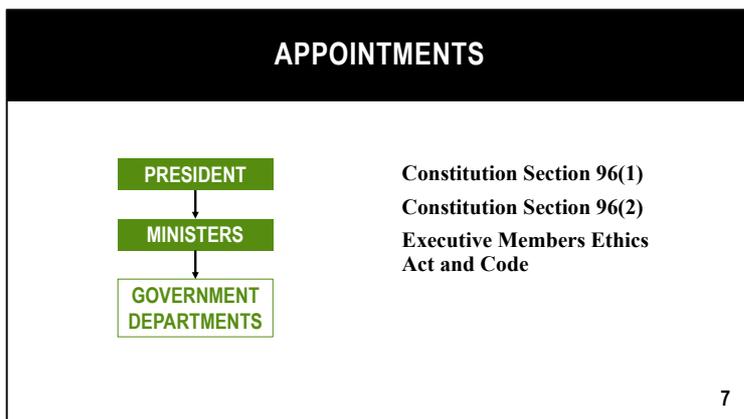
35.3. Parliament has conducted its own investigations into allegations of State Capture. For example: various committees have been investigating allegations relating to financial mismanagement and governance at Eskom. The Department of Home

Affairs; the Department of Mineral Resources; the South African Broadcasting Corporation (SABC); the Passenger Rail Agency of South Africa (PRASA); and others have also been the subjects of investigations. Many of the issues investigated are related to allegations of State Capture.

35.4. The judiciary has dealt with many cases involving allegations of State Capture in carrying out its tasks of interpreting and applying the law and imposing it on the executive and other state institutions. These decisions bind this Commission.¹

36. Our Terms of Reference focus, to a large degree, on the executive branch of government. As the legal team understands the Terms of Reference, they mandate the Commission to investigate mainly the capture of and corruption in government institutions and State Owned Entities. Thus, the focus of the legal team will be on executive government and State Owned Entities, and not, at least in the first instance, the legislature or the judiciary. Our Terms of Reference do not take us there. Of course, this approach is subject to any finding or ruling of the Chair.

G. MINISTERIAL APPOINTMENTS AND DISMISSALS



37. In terms of the Constitution, the President appoints and dismisses ministers. (S91(2))

¹ See, for example: *President of the Republic of South Africa v Office of the Public Protector and Others*, 2018 (2) SA 100 (GP)

38. In doing so the President is bound by, at least, S96 of the Constitution read with the Executive Members Ethics Act and the Code.

Section 96: (1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not—

(a) undertake any other paid work;

(b) 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; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person

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8

Ethics Code: the Ethics Code requires that the President and the Cabinet must always behave in the best interests of good governance, with integrity, in good faith, loyally, and never in a way that is inconsistent with their position.

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9

39. The Public Protector, in her report, highlighted aspects of the Code in relation to Cabinet appointments.
40. The Commission’s Terms of Reference deal with Cabinet appointments (and related dismissals) directly.

Term of Reference 1.1: “...In particular, the commission must investigate the veracity of allegations that former Deputy Minister of Finance, Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family”.

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<p>10</p>

Term of Reference 1.2: “whether the President had any role in the alleged offers of Cabinet positions to Mr Mcebisi Jonas and Ms Mentor by the Gupta family as alleged”.

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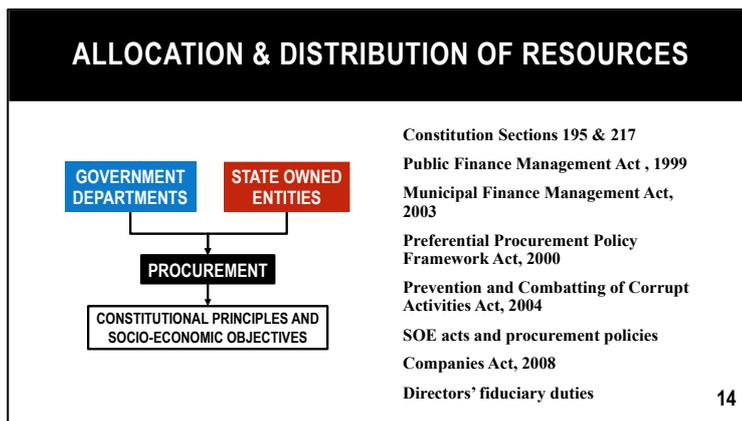
Term of Reference 1.3: “whether the appointment of any member of the National Executive, functionary and/or office bearer was disclosed to the Gupta family or any other unauthorized person before such appointments were formally made and/or announced, and if so, whether the President or any member of the National Executive is responsible for such conduct”.

TERM OF REFERENCE 1.3
<p>“whether the appointment of any member of the National Executive, functionary and/or office bearer was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and /or announced, and if so, whether the President of any member of the National Executive is responsible for such conduct;”</p>
12

41. The legal team will seek to lead evidence in regard to the following:
 - 41.1. Whether the alleged offers of Cabinet posts were, in fact, made;
 - 41.2. If so, whether the former President indeed acted unlawfully and improperly in relation to the appointment of members of Cabinet; and
 - 41.3. Whether third parties (for example, the Gupta family) played an unlawful or improper role in Cabinet appointments; and, if so, whether the former President was aware thereof.
42. If proven, the legal team will investigate further to what extent this conduct constitutes a violation of the provisions of the Constitution.
43. In relation to these particular Terms of Reference, the legal team will also ask what further consequences ministerial dismissals and appointments might have had. For example: how this might have effected board and executive appointments at State Owned Entities; what effect this might have had on governance at State Owned Entities and other

state entities; and how procurement practices might have been affected. Put differently, were certain ministerial dismissals and appointments intended to further alleged State Capture, and did they have this effect?

H. ALLOCATION AND DISTRIBUTION OF RESOURCES



CONSTITUTIONAL PRINCIPLES

“One of the underlying values of the Constitution is to address and correct the imbalances of the past, to create a moral, just and equitable dispensation.
 So, in the new democratic order, the state is regarded as the custodian of resources and income, and must ensure ... that these resources are channelled in such a way as to address socio-economic needs and social inequalities.”

Labuschagne, Pieter. "Patronage, state capture and oligopolistic monopoly in South Africa: the slide from a weak to a dysfunctional state?." *Acta Academica* 49, no. 2 (2017): 51-67.

15

44. When dealing with the allocation of resources and expenditure of state funds, members of the National Executive, public officials (including State Owned Entity board members) and State and State Owned Entity employees are all bound by the Constitution and legislation. Some examples appear on the screen.

Section 195: (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.

- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

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16

Section 217: (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for— (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

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(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

17

45. The Terms of Reference require the Commission to investigate the following:

TERM OF REFERENCE 1.1
<p>“whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and/or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOE’s. ...”</p>
18

46. **Term of Reference 1.1:** “whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and/or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOE’s”.

46.1. Term of Reference 1.1 is at the heart of allegations of State Capture. It requires the Commission to investigate whether (at least in the first instance) outside third parties, that is persons who do not form part of government and are not accountable as government, attempted to influence improperly: members of the National Executive; office bearers and employees of state institutions and organs of state; and State Owned Entity directors and executives, presumably for unlawful gain.

46.2. Of course, carefully read, it is not only outside third parties who might be guilty of conduct referred to in 1.1. Conceivably one member of government may also improperly influence another member of government.

TERM OF REFERENCE 1.4

“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;”

19

47. **Term of Reference 1.4:** “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 SOEs 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”.

47.1. This Term of Reference focuses on the unlawful diversion of state resources and finances away from their intended beneficiaries and objectives and to individuals and companies who have no lawful right thereto: in other words, for private and illicit gain. [See footnote]²

47.2. Under this head, the legal team will ask that the Commission investigates, amongst other things, State Owned Entities, their procurement practices and in particular a number of alleged illicit transactions. [See footnote]³

47.3. The legal team will submit that the Commission should, when dealing with State Owned Entities, examine contracts allegedly unlawfully induced and executed for

² The legal team will submit that the Commission should investigate who the intended beneficiaries were of any unlawful award of tenders. Amongst these beneficiaries might be the Gupta family and their associates. Organisations such as Trillian and Regiments may also have been involved. The legal team will also submit that the Commission should investigate whether persons inside the State or persons related to them could be included amongst those beneficiaries. It may be that the purpose of distributing financial benefits was not only financial gain, but also to maintain power and influence.

³ For example, there are allegations that at Eskom, there was a deliberate effort to favour the Gupta family in the awarding of coal supply concessions; at Transnet, there are allegations that locomotive supply contracts were also inappropriately awarded after bribes were paid to Gupta-related parties; and at Denel it is alleged that inappropriate joint ventures were being set up that would have resulted in significant profits from arms supply contracts being diverted, unjustifiably, to Gupta-related companies.

private and illicit gain, also at a collective level. The Commission might examine the timing of these contracts, their frequency and size, the manner in which they were concluded, and, in particular, the persons and entities involved and the relationships between them: this in order to determine whether these contracts themselves were or are part of State Capture.

47.4. In this particular aspect of its investigation, the legal team will submit to the Commission that it might ask whether the incidents and extent of corruption shown were directly or indirectly linked to Cabinet appointments, appointments of boards of State Owned Entities, appointments of State Owned Entity executives, and appointments of procurement officials. The legal team will request the Commission to investigate whether any undue influence has been exerted for unlawful gain. This will again be covered by Term of Reference 1.1.

47.5. The legal team will ask that the Commission also investigate entities other than State Owned Entities where the same patterns emerge and will ask whether similar conclusions can feasibly be drawn about State Capture. For example: the Free State Department of Agriculture is alleged to have made unjustified payments for the Estina Dairy Farm project, where the actual beneficiaries may have been Gupta-related companies.

I. ILLICIT GOVERNMENT BENEFITS

TERM OF REFERENCE 1.6

“whether there were any irregularities, undue enrichment, corruption and undue influence

in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services

in the business dealings of the Gupta family with government departments and SOE’s;”

20

48. **Term of Reference 1.6:** “whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOEs”.

48.1. Of course, unlawful tender procurement is not the only manner in which state resources and funds may be diverted for private and illicit gain. There are other means of misappropriation that the Commission will be asked to investigate. For example: the alleged diversion of the state advertising budget to the New Age Newspaper and ANN7; the corrupt or irregular awarding of government contracts, mining licenses and other government services, for example, airport landing rights or immigration facilities.

48.2. The Term of Reference dealing with these issues focuses solely on the Gupta family – unlike other terms of reference.

J. CLOSURE OF BANK FACILITIES

TERM OF REFERENCE 1.7
<p>“whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies;”</p>
21

49. **Term of Reference 1.7:** “whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies”.

49.1. Term of Reference 1.7 is a discrete Term of Reference. It requires the Commission to investigate whether the National Executive or any member thereof “unlawfully,

corruptly or improperly” intervened to prevent private banks from closing Gupta company bank accounts.

K. APPOINTMENT OF ADVISERS

TERM OF REFERENCE 1.8
<p>“whether any advisers in the Ministry of Finance were appointed without proper procedures.</p> <p>In particular, and as alleged in the complaint to the Public Protector, whether two senior advisers who were appointed by Minister Des Van Rooyen to the National Treasury were so appointed without following proper procedures;”</p> <p style="text-align: right;">22</p>

50. **Term of Reference 1.8:** “whether any advisers in the Ministry of Finance were appointed without proper procedures. In particular, and as alleged in the complaint to the Public Protector, whether two senior advisers who were appointed by Minister Des Van Rooyen to the National Treasury were so appointed without following proper procedures”.

50.1. This too is a relatively discrete Term of Reference. It deals with the appointment of advisers by Minister Des Van Rooyen, allegedly without following proper procedures. The appointment of advisers by a Minister rests entirely within that Minister’s discretion. The legal team will ask the Commission to investigate the following issues: What procedures needed to be followed? Were they followed? And, significantly, was Minister Van Rooyen even aware of their “appointments”?

51. It bears repetition that the legal team will, in all cases, request the Commission to investigate whether, to the extent proven, isolated incidents were or are part of a larger undertaking, with each part playing a deliberate and intended role.

L: THE NATURE AND EXTENT OF CORRUPTION

TERM OF REFERENCE 1.5
<p>“the <u>nature and extent</u> of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended;” [Own emphasis]</p>
23

52. **Term of Reference 1.5:** “the *nature and extent* of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended”.
(Own emphasis)

52.1. This Term of Reference deviates somewhat from the strict State Capture theme.

52.2. If one goes back to the heading of the Terms of Reference, one reads that the Commission is required to investigate “State Capture, Corruption and Fraud”. So, the legal team will submit that the Commission is required to deal with corruption and fraud not necessarily constituting State Capture.

52.3. The requirement here, on the understanding of the legal team, is not to investigate only or even all specified and individual acts of corruption, but rather their cumulative “nature and extent”.

52.4. This Term of Reference is wide. It requires investigation into the award of tenders by public entities listed under Schedule 2 of the Public Finance Management Act. There are some 21 of these public entities.

SCHEDULE 2 INSTITUTIONS					
Air Traffic and Navigation Services Company	Airports Company of South Africa	Alexkor	Armaments Corporation of South Africa	Broadband Infrastructure Company	Central Energy Fund
DENEL	Development Bank of Southern Africa	ESKOM	Independent Development Trust	Industrial Development Corporation of South Africa	Land and Agricultural Development Bank of South Africa
South African Airways	South African Broadcasting Corporation	South African Express	South African Forestry Company	South African Nuclear Energy Corporation	South African Post Office
	Telkom SA Limited	Trans-Caledon Tunnel	Transnet Limited		

24

TERM OF REFERENCE 1.9
<p>“the <u>nature and extent</u> of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest;”</p> <p>[Own emphasis]</p>

25

53. **Term of Reference 1.9:** “the *nature and extent* of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest”. (Own emphasis)

53.1. The first part of this Term of Reference is worded in the same way as the first part of Term of Reference 1.5.

53.2. Similar considerations to the application of Term of Reference 1.5 apply to Term of Reference 1.9.

53.3. But in this case, it is submitted that the Commission is directed to investigate contracts and tenders awarded by:

1. Government Departments;
2. Government Agencies; and
3. Government Entities.

53.4. This list would include Government Departments at all levels: that is, National, Provincial and Municipal.

53.5. The introductory portion of this Term of Reference is followed by a clause which specifies that the corrupt award of tenders was intended to benefit members of the National Executive, public officials or “functionaries” of any organ of state. This qualification does not appear in Term of Reference 1.5.

54. As far as Terms of Reference 1.5 and 1.9 are concerned, the legal team will submit to the Chair that a thorough analysis of the nature and extent of corruption in public entities and at all levels of government should be investigated. This will no doubt involve expert research and analysis of such a nature that will enable the Chair of the Commission to formulate recommendations for remedial action. The legal team may, in this regard, submit to the Commission that it might need to draw on existing expert research. The legal team will also, where necessary, suggest to the Commission that it initiate its own investigations into public entities and government entities in order to better understand what made some organisations or parts of organisations more vulnerable to corruption than others: What structures and processes have proved better able than others to withstand the corrosive effects of corruption? Are there some general lessons to be learnt that can inform a wider project of government renewal?

M. THE ESSENCE OF CONSTITUTIONAL DEMOCRACY AND ITS POTENTIAL BREACH

55. The essence of a representative democracy and, in particular, a constitutional democracy such as ours, is that the people entrust to the lawmakers, the executive and judiciary, the responsibility to act in their best interests – and, in particular, they should be held accountable if they fail to do so.
56. In summary: “The essence of representative government is that the elected government acts in the interests of those it governs. Essential to that relationship is that officials can be held accountable when they fail to act according to this obligation. And in particular they can be called to account if they act fraudulently and corruptly.”⁴
57. The ability of the populace to hold an elected government accountable depends, at least in large measure, upon them being properly informed and on them receiving proper and accurate information. It also depends on people being held criminally accountable for unlawful acts.
58. Part of what this Commission will be asked to examine is whether there were attempts to take control of the public narrative and discourse and, if so, whether this was a manifestation of State Capture in South Africa. What was the role of the New Age newspaper or Bell Pottinger? Did the State support the New Age newspaper and, if so, why? To the extent that such support is shown, the further question is: Was this simply to allow individuals and private entities access to state funds? Or was it to do with the control of the public narrative? Or both?
59. Very importantly, have wrongdoers been held to account both within and outside of government? To the extent that the Commission may find that they have not been held to account, further questions can be asked. Is this inefficiency, the result of some other

⁴ Pieter Labuschagne (2017), “Patronage, State Capture and oligopolistic monopoly in South Africa: The slide from a weak to a dysfunctional state?” in *Acta Academia* 49(2), p. 17.

cause, or is it also a manifestation of State Capture? The question arises, will it be necessary to call our government and law enforcement agencies to account?

N. GENERAL

60. It is to be noted that these Terms of Reference may be “added to, varied or amended from time to time”. That is the prerogative of the President.. The legal team may well make submissions to the Chair in this regard, when and to the extent necessary.

O. FINDINGS, REPORT AND RECOMMENDATIONS

FINDINGS, REPORT AND RECOMMENDATIONS TERM OF REFERENCE 1
<p>“The Commission shall inquire into, make findings, report on and make recommendations ...”</p>
<p>26</p>

FINDINGS, REPORT AND RECOMMENDATIONS TERM OF REFERENCE 7
<p>“The Commission shall where appropriate, refer any matter for prosecution, further investigation or the convening of a separate enquiry to the appropriate law enforcement agency, government department or regulator regarding the conduct of a certain person/s.”</p>
<p>27</p>

61. It is clearly too early to state with any certainty what the investigations will produce, the detail and extent of the evidence that will be led, and, therefore, what submissions the legal team will make to the Chair.

62. But what can be stated with a reasonable degree of certainty, is that the legal team's submissions, in regard to the findings, report and recommendations that the Chair might make, will address the following questions:
- 62.1. Did State Capture exist?
 - 62.2. Does it still exist?
 - 62.3. How can it be dealt with?
 - 62.4. Has the evidence shown a series of isolated or disconnected occurrences? or
 - 62.5. Has it shown an organized and comprehensive plan that could be labelled State Capture that has informed all or some of these occurrences?
 - 62.6. Has the full extent of any plan of State Capture and its implementation been proven?
 - 62.7. To the extent that harm has been done to the State, to government, to State Entities and State Owned Entities, can that harm be remedied? If so, how?
 - 62.8. What can be done both in the short term and long term to prevent a recurrence of what was found to have occurred and the effects it had? Is prosecution of offenders enough? Or is more required? Should consideration be given to legislative amendments? To policy review? To restructuring and reorganisation in public entities and their governance? Do the provisions regulating procurement need overhaul? Or is it the persons rather than the processes that are at fault? If the processes are not at fault, how can compliance nevertheless be ensured?
63. In regard to accountability, our criminal law deals with wrongdoing mainly through the prosecution of individual criminal wrongdoers. However, wrongdoers, if found to act in concert, may also be called to account as a collective.

64. The Chair will no doubt, in the future, consider reference for prosecutions, further investigations or separate enquiries. These may include the power to recommend the use of Section 204 of the Criminal Procedure Act in appropriate circumstances. **[See footnote]⁵**
65. At the stage that factual evidence is complete the legal team may be asked by the Chair to lead expert evidence on recommendations, or it may lead such evidence on its own initiative.

P. REPORTS IN THE PUBLIC DOMAIN

66. This presentation will be made by Advocate Norman.
67. A summary of the content of these documents and the basis of their admission will be dealt with by Advocate Norman.
68. The reports may be admitted for what they are and dealt with in evidence, particularly to the extent that evidence is necessary to deal with any controversy.
69. Over the past few years there have been a number of reports and studies into State Capture. These include the Public Protector's report; Parliamentary Committee reports; reports commissioned by Treasury; reports commissioned by State Owned Entities; and others.
70. The Commission may be asked to have some regard for those reports but the legal team will not, without further evidence, hold them out as being correct.

5 204 Incriminating evidence by witness for prosecution (1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor-

(a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness-

(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

71. The legal team may propose that the Commission should not undertake work which will be a repetition of work already done, particularly where there is little or no controversy in relation to facts found and conclusions drawn.
72. But where there is controversy or possible controversy, the legal team, together with the investigation team, will inevitably have to do its own investigative work and, thereafter, the Commission will be asked to make its own findings.

Q. EXPERT EVIDENCE

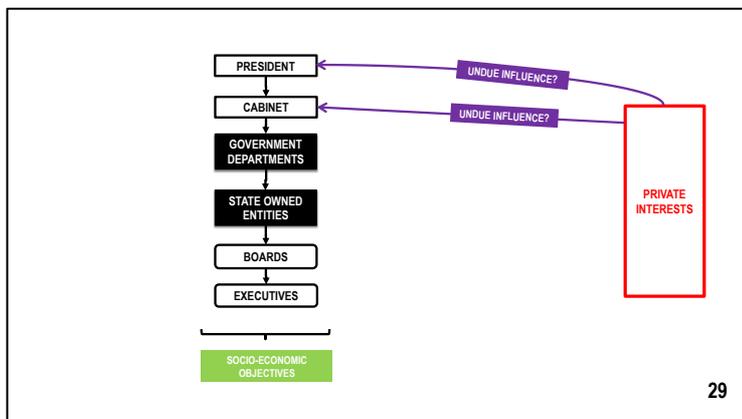
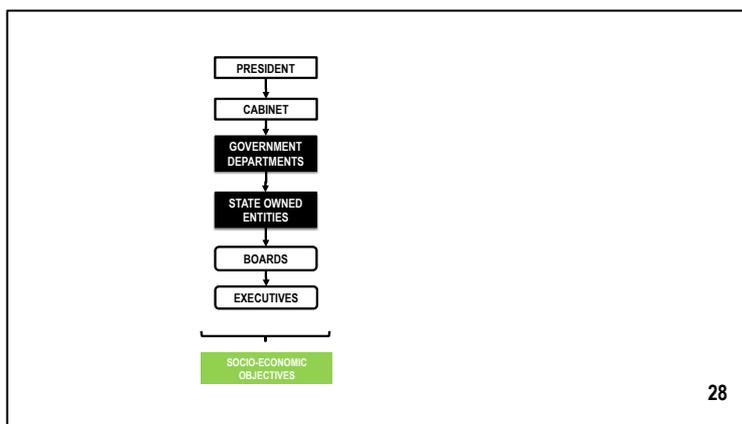
73. State Capture is not a concept or practice unique to South Africa.
74. As will be explained in the evidence of experts, the phenomenon has manifested in the past in many other countries. It has manifested too in countries which may be described as democracies in transition.
75. Experts will deal with these phenomena. A particular expert may be called more than once. More than one expert may be called to deal with the various aspects of the Commission's work.
76. The fact that reference will be made to State Capture in other democracies, particularly those in transition, is not to diminish its significance in South Africa. On the contrary we may learn from a comparative analysis. Its prevalence and the apparent ease with which it appears in other democracies may sharpen our own vigilance in South Africa. We will also be assisted by the experience of other countries who have had to deal with State Capture, their successes and failures.

R. EVIDENCE ON PROCUREMENT

77. The legal team (Advocates Gcabashe and Norman) will seek to lead the evidence of the Acting Chief Procurement Officer of National Treasury. The purpose of this evidence will be to place before the Commission matters relating to procurement prescripts and policy. Procurement prescripts and policy are, it is submitted, central to the

Commission’s Terms of Reference. Some of the questions which the legal team will seek to deal with are: Is the procurement framework comprehensive and adequate? Is it possible to manage the existing system in such a way as to prevent abuse? Has State Capture been enabled or permitted by weaknesses in the procurement framework? Simply put it, is it the people or the policies – or both? How best are any shortcomings in the procurement framework and its management addressed?

S. MINISTERIAL INTERFERENCE



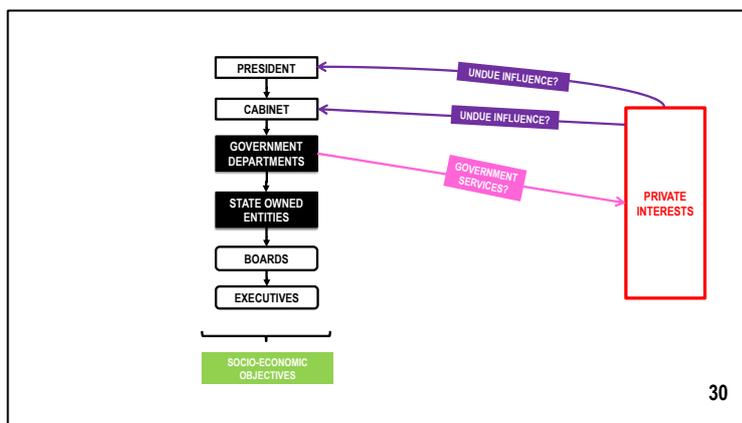
78. The legal team will commence leading evidence on the issues raised in items 1.1, 1.2 and 1.3 of the Terms of Reference. The witnesses will be lead by myself, Advocate Mokoena, and Advocate Sello. The witnesses to be called will be Ms Vytjie Mentor, Mr Mcebisi Jonas, Minister Nene, Minister Gordhan and others.

79. What should be noted is that this evidence will not necessarily be entirely consistent. Our mandate is not to prove a particular version of events. It is expressly to “investigate the

veracity” (or truth) of allegations relating to Mr Jonas and Ms Mentor. The resolution of disputes of fact falls within the province of the Chairperson.

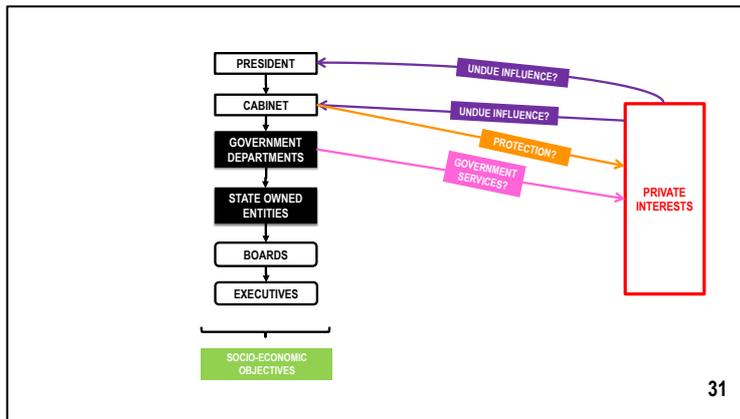
80. The legal team is also of the view that appointments cannot be properly interrogated and understood without having regard to their preceding dismissals and the circumstances in which these took place. These matters will be covered in the evidence.

T. GOVERNMENT SERVICES



81. Item 1.6 of the Terms of Reference covers a range of issues. The team leading evidence under this head is led by Advocate Maleka and includes Advocate Hofmeyr.
82. Amongst the issues to be dealt with in evidence is the alleged attempted and actual appropriation of the government advertising budget for the benefit of the New Age newspaper and the ANN7 television channel.
83. The legal team will also seek to present evidence of a witness from the Government Communication Information System. That witness will testify about: the value structure of the institution from its inception to date; the procurement processes within the institution; and how those values and processes were allegedly undermined when the institution fell under the jurisdiction of Minister Muthambi.

U. CLOSURE OF GUPTA AND GUPTA RELATED COMPANIES' BANK ACCOUNTS

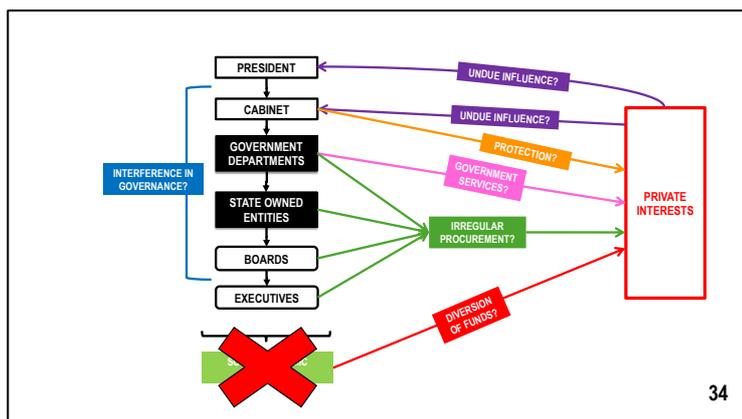
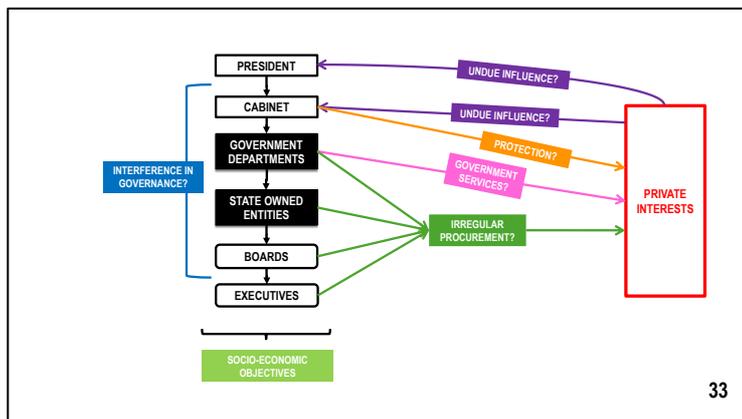
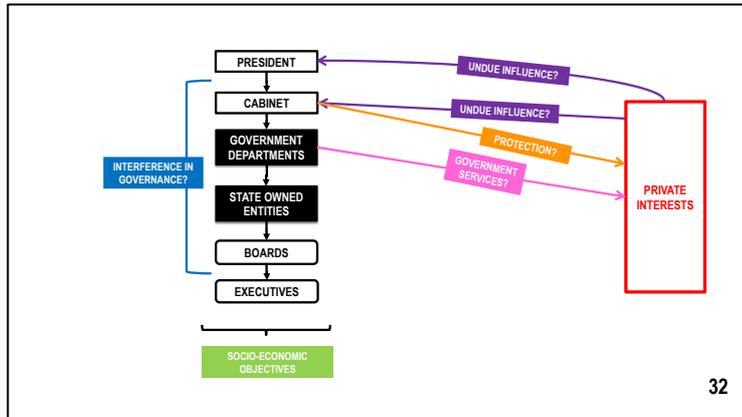


84. Advocate Mokoena and others will lead evidence in relation to the issues raised in item 1.7 of the Terms of Reference. The question we are required to answer is whether any Minister or Deputy Minister acted “unlawfully, corruptly or improperly” in intervening when several banks closed or sought to close the bank accounts of the Guptas or Gupta related companies.

V. PHASE TWO

85. Phase Two of the Commission’s work will enable the Commission to benefit directly from the investigative work of the investigations team recently appointed under Terence Nombembe. There are a number of State Owned Entities whose affairs the Terms of Reference require (in the submission of the legal team) the Commission to investigate and lead evidence on. These include Eskom (Advocate Maleka); Transnet (Advocate Pretorius); Denel (Advocate Gcabashe); SAA (Advocate Hofmeyr); the SABC (Advocate Norman); the Public Investment Corporation (Advocate Buthelezi); and others.
86. The Free State Vrede Dairy Farm (Estina) issue will also be dealt with (Advocate Gcabashe), together with certain other issues in provinces and municipalities.

87. Many of the issues relating to, for example, the State Owned Entities are already in the public domain. We will, of course, not ignore this information, but the investigations will no doubt not be limited to information at present in the public domain.



88. The matters to be investigated might include, but are not limited to: alleged undue interference in appointment of State Owned Entity boards and executives; alleged breaches of standards of corporate governance; and alleged irregular procurement

practices. To the extent that procurement irregularities have resulted in financial loss or prejudice, the legal team will seek to present to the Commission evidence related to the extent of that loss and the extent to which the socio-economic objectives enjoined by the constitution have been undermined or simply not met.

89. As far as recommendations are concerned, the legal team will consider submissions to the Chair in regard to ensuring proper corporate governance and, in particular, recommendations relating to procurement management.

W. PHASE THREE

90. I have already dealt with the requirements placed upon the Commission by Terms of Reference 1.5 and 1.9. As already stated, in the view of the legal team, there is a clear need to rely on detailed research and commentary.
91. As already stated, the Commission will of course conduct its own research and investigations into corruption generally in Schedule 2 institutions and at all levels of government.
92. But, in our view, the reliance on research conducted, or to be conducted, outside the commission cannot be underestimated.
93. In the view of the legal team, the Commission will, in addition, no doubt require expert assistance in regard to recommendations in dealing with the findings that might be made in relation to corruption generally.

X. CONCLUSION

94. It may appear, from what I have said thus far, that the work of the Commission is intended only to uncover alleged wrongdoing on the part of persons within government and persons outside of government, and to ensure that they are called to account for their alleged deeds.

95. But to regard the work of the Commission in this light would be to ignore at least one of its more important aims.
96. In the leading publication on public inquiries,⁶ the learned authors highlight a major purpose of a public inquiry as being to restore public trust and confidence in government.
97. To the extent that this Commission shows that this country has been beset by the phenomenon of “State Capture”, the obvious demand on the Commission is to recommend what needs to be done to address such a finding.
98. Experts on State Capture that we have consulted tell us that South Africa is exceptional amongst postcolonial democracies in the manner in which the (international) phenomenon of State Capture has been responded to, has been and is being investigated and dealt with. If in continuing this work viable solutions can be examined and proposed in its recommendations, this Commission can play a positive role not only for South Africa, but internationally as well.

⁶ Beer QC, J. (2011). *Public inquiries*. Oxford University Press.