

To: Advocate Busisiwe Mkhwebane, Public Protector
From: Rt. Rev. Malusi Mpumlwana, SACC General Secretary
Date: January 15, 2018
Subject: **On the Judicial Commission of Enquiry into State Capture**
CC: Heads of Member Churches

Dear Advocate Mkhwebane,

The South African Council of Churches has noted the January 10, 2018 statement by the Public Protector, on the appointment by the President of the Republic, of the Judicial Commission of Enquiry into State Capture. This, of course, being in accordance with the remedial action prescribed in Section 8.4 of the Public Protector's October 14, 2016 State of Capture Report.

In your official statement Ma'am, you make at least three recommendations to the President of the Republic, as cited below. We write in the first instance to establish the status of the recommendations - i.e., whether this official statement amounts to an official directive in keeping with your role in monitoring "the implementation of the remedial action", as prescribed in section 9.1 of the State of Capture Report.

The three recommendations we refer to are a call to the President to ensure that:

1. "the Terms of Reference (ToR) for the Commission of Inquiry are not limited to the issues investigated or identified in the State of Capture report"; and
2. "are broad enough to include the capture of all state institutions and SOEs, so that the ability of the Commission to uncover the full extent of State Capture in South Africa is not constrained in any manner."
3. "the Deputy Chief Justice has power to expand the issues to be investigated, should any relevant evidence of state capture be brought to him during the inquiry."

We enquire in order to have a clear appreciation of the intended legal status of these recommendations in the execution of the Public Protector's statutory role.

We note further that the Public Protector is offering to draft the terms of reference for the President. It seems evident to us, that the Public Protector is offering to make good on her proposed adjustments to the terms of reference; the adjustments whose status we are seeking to establish. The Public Protector will know that the South African Council of Churches has, through its Unburdening Panel process, come to gather a fairly extensive familiarity with the matters of State Capture. While we would wish to keep an open mind about the intentions of the Office of the Public Protector, we do seek your clarity so as to consider if we may need to act in protection of the public interests in regard to the urgent matter of State Capture. We would



however not wish to lightly temper with the Public Protector's statutory role, unless the situation warranted it.

We note Madam, that in paragraph (iii) of the Executive Summary of the State of Capture Report, the Public Protector specifically said:

“The Public Protector **received three complaints** in connection with the alleged improper and unethical conduct relating to the appointments of Cabinet Ministers, Directors and award of state contracts and other benefits to the Gupta linked companies.”

We highlight **in bold**, the reference above, to the specificity of the three complaints that occasioned this investigation and report. We fail to understand how the Public Protector proposes a move of terms of reference of a Judicial Enquiry designed to address a specific investigation and report, to a prospect of “expand(ing) the issues (that are yet) to be investigated”. That, we fear Madam, might become an open ended “mission creep” that will effectively blunt the purpose of the remedial action as prescribed.

Our concern Madam Public Protector, stems from our understanding and firm belief that the reason that the remedial action of your office as Public Protector, required this Judicial Commission of Enquiry, was solely to conclude on the specific matters that had been initiated. We do not believe that the purpose was to generally address any matters that might arise post the report in regard to the State, relevant and important as these might be in the governance of the State.

The Public Protector explains her recommendations as a way “to avoid any further allegations of state capture being lodged with the Office of the Public Protector”. Why would further complaints be avoided? That, as we understand, is the very purpose of the Office of the Public Protector. It is perfectly to be expected therefore, that the Public Protector will continue to receive complaints. When these come, the Public Protector has the the professional discretion to decide to investigate them or not; but we would not expect new matters to be tagged along other prior projects that have their specificity in remedial action.

Yet on a secondary basis Ma'am, the Public Protector's kind offer to help draft the terms of reference for the President raises an interesting point. For it may not be, or seem to be fair to expect the President to draft terms of reference to further an investigation into matters of possible impropriety in his office, even as paragraph (ii) of the Executive Summary of the Public Protector's Report says:

“This report relates to an 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 Owned Entities (SOEs) resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses". (Our emphasis in bold)

In these circumstances it makes sense for the President to be assisted, exactly in the spirit of the doctrine of conflict of interest. This, however, may not have been raised by the legal institutions. As Public Protector and monitor of the remedial action, you may well be the competent Officer to assist with the terms of reference that are in keeping with the purpose of the Judicial Commission of Enquiry as proposed by the Public Protector's Report.

But Ma'am, we would worry if your understanding is that the terms of reference could be expanded to fit whatever might yet come, as your public statement has suggested. That is why we seek your clarification of the status of your call to the President on the terms of reference. Your prompt advice on this matter will be much appreciated as it informs us and the public whose Protector your office is, if they can look to you to support this urgent enquiry as is intended in the remedial action; for indeed, it was to have been initiated within 30 days of October 16, 2016.

In summary Madam Public Protector, we seek your clarification on the intended legal status of the Public Protector's call to the President to expand and nuance the terms of reference as cited in the Public Protector's public statement. Should we regard it as a potentially binding addendum to the remedial action already given by the Office of the Public Protector in the October 16, 2016 report?

Kindly also be advised that we also intend to write to the Chair of the Judicial Commission of Enquiry into State Capture, Deputy Chief Justice Raymond Zondo, to solicit his understanding of the status of the Public Protector's recommendations on the terms of reference, in the light of the writ of the primary remedial action that occasioned the Judicial Commission of Enquiry he has been appointed to chair.

Bishop Malusi Mpumlwana
General Secretary, SACC