IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No.: 31418/22

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
AFRICAN NATIONAL CONGRESS	First Respondent
AFRICAN NATIONAL CONGRESS DEPLOYMENT COMMITTEE AND THREE OTHERS	Second to Fifth Respondents

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THIRD RESPONDENT'S ANSWERING AFFIDAVIT

TABLE OF CONTENTS

PURPOSE AND STRUCTURE OF THIS AFFIDAVIT 4
PRELIMINARY POINTS 5
Ripeness 5
Locus standi 6
Vagueness 6
Non-joinder 7
STATE CAPTURE COMMISSION 8
Work of the State Capture Commission 8
State Capture Commission findings and recommendations 10
Efforts to curtail improper interference in public service appointments 15
State Capture Commission did not find that I misled it 20
Independence of the Judiciary 23
NATURE OF THE CD POLICY 24
History of the CD Policy 24
Global approach to political public service 27
DA'S EXAMPLES ARE NOT RELEVANT TO CD POLICY 29
CD POLICY SPEAKS TO SUBJECTS NOT IMPUGNED IN THIS APPLICATION 32
CD POLICY IS NOT INCONSISTENT WITH THE CONSTITUTION OR THE PUBLIC SERVICE ACT 33
Failure to plead the constitutional rights allegedly violated 33
Constitutionally-compliant reading of the CD Policy 36
CD Policy is not inconsistent with the Public Service Act 38
PUBLIC SERVICE ACT IS NOT UNCONSTITUTIONAL 40
CONCLUSION 41
SEQUENTIAL PARAGRAPH RESONSES TO MR STEENHUISEN'S AFFIDAVIT 41

P.T.M

I, the undersigned,

MATAMELA CYRIL RAMAPHOSA

do hereby state under oath that:

1. I am the President of the Republic of South Africa. I am the head of state and the head of the National Executive in terms of section 83(a) of the Constitution of the Republic of South Africa, 1996 ("**Constitution**").

2. I am cited in this application as the third respondent in my capacity as the President of the Republic of South Africa and as the executive authority of the Republic in terms of section 85 of the Constitution. I therefore depose to this affidavit in that capacity.

3. It should be noted however, that the subject matter of this application is a policy of the African National Congress ("**ANC**"), a political party in which I am President. I have not been cited in my capacity as the President of the ANC. Where I describe the purpose of the ANC's Cadre Deployment Policy I do so as the head of the executive of an ANC government. The Policy is essentially transformation driven. As the head of the executive I am committed to advancing the values of transformation, integrity and skills within our public service.

4. The contents of this affidavit are to the best of my knowledge and belief both true and correct and fall within my own personal knowledge unless the context indicates otherwise.

P.T.M

5. Where I make legal submissions I do so on the advice of my legal representatives whose advice I believe to be correct.

PURPOSE AND STRUCTURE OF THIS AFFIDAVIT

6. I have read the affidavit deposed to by Mr John Steenhuisen on behalf of the Democratic Alliance ("**DA**") in support of an application in which the latter seeks an order, amongst others, declaring the ANC's Cadre Deployment Policy ("**CD Policy**") invalid. I have also read the supporting affidavit by Mr Leon Amos Schrieber. I oppose the DA's application. This affidavit sets out the basis for such opposition.

7. On 15 July 2022 the State Attorney, Mr Melton Mahloko addressed a letter to the DA's attorneys of record in which he requested an extension to 29 July 2022 to file this answering affidavit. The DA did not respond to that request. I am instructed that such silence can be taken to be acquiescence to the same. Mr Mahloko's letter is attached as "**MCR1**".

8. In what follows I address the following issues in turn:

   8.1. First, the DA's case is a non-starter due to ripeness, standing, vagueness and non-joinder issues;

   8.2. Second, the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("**State Capture Commission**") does not recommend the relief sought in this application i.e. the revocation of the CD Policy. It does issue findings critiquing the CD Policy but ultimately recommends the

P.T.M

establishment of a committee to facilitate public hearings for the appointment of candidates to certain managerial positions;

8.3. Third, the history and nature of the CD Policy and that cadre deployment is not unique to South Africa or indeed the ANC;

8.4. Fourth, the examples cited by the DA are not an exercise of the CD Policy, are not relevant to this application and do not support the relief sought by the DA;

8.5. Fifth, the CD Policy is not inconsistent with the Constitution or the Public Service Act 103 of 1994; and

8.6. Finally, the sequential paragraph response to the DA's founding affidavit.

PRELIMINARY POINTS

Ripeness

9. In terms of the decision of this Division of the High Court delivered on 13 December 2017, the President is required to submit a copy of the State Capture Commission Report to Parliament along with an indication of the President's intention regarding the implementation of the same. The order of this Court dated 13 December 2017 is attached as "**MCR2**".

10. In terms of another order of this Division delivered on 28 February 2022 the President is required to do so within four months of the delivery of the final part of the State Capture Commission Report. This Court's order of 28 February 2022 is attached as "**MCR3**".

R.T.M

11. I accordingly have until around 22 October 2022 to consider the recommendations in the State Capture Commission Report and make a determination as to my intention regarding their implementation. Until expression is given to such implementation, this application cannot be said to be ripe i.e. it is simply not ready for adjudication by this Court.

Locus standi

12. I am advised that the Constitution and policies of a voluntary association are treated by the court as an agreement amongst the members of the voluntary association as well as an agreement between the members of the voluntary association and the voluntary association itself. The same is true of the CD Policy: it is an agreement between the members of the ANC.

13. Axiomatically, the DA is not a member of the ANC. It accordingly does not have the standing to invalidate the agreement between the ANC and its members or amongst the members.

Vagueness

14. The DA's application is vague in at least three respects:

    14.1. It fails to identify the exact provisions of the CD Policy that are alleged to violate the Constitution,

    14.2. It fails to identify rights in the Bill of Rights infringed by the CD Policy,

P.T.M

14.3. It fails to set out facts of appointments to public administration that are both a result of the implementation of the CD Policy and which subvert identified provisions of the Constitution.

15. The examples of public appointments cited by the DA are based on speculation of the application of the CD Policy and the intervention of the Cadre Deployment Committee ("**CD Committee**"). As the ANC affidavit shows, the conclusions arrived at by the DA are not supported by the facts. Even some of the best policies and laws were subverted during the period of state capture.

16. This vagueness in turn renders this application incapable of proper adjudication because it denies the Court information it requires to determine not only whether the CD Policy is unconstitutional but also what remedy would be just and equitable to cure the supposed unconstitutionality.

17. In addition, the DA's vague and abstract application also causes prejudice to the respondents as it does not enable us to know what case to meet.

18. The vagueness permeates all of the prayers claimed by the DA.

Non-joinder

19. The DA makes use of a number of anecdotes to suggest that the CD Policy is fundamentally flawed.

20. The DA cites examples without joining the relevant parties who may be in a position to answer. The DA impugns:

P.T.M

20.1. PRASA[1] but fails to join it or the Minister of Transport so that they might respond to the allegations made concerning the relevance or otherwise of the CD Policy;

20.2. Transnet[2] and Eskom[3] but fails to join it or the Minister of Public Enterprises so they might respond to the allegations made concerning the relevance or otherwise of the CD Policy;

20.3. SARS[4] but fails to join it or the Minister of Finance so they might respond to the allegations made concerning the relevance or otherwise of the CD Policy.

21. It is from these leaps of logic that the DA surmises that the CD Policy is unconstitutional and ought to be declared invalid. Without a word from those impugned the Court is not placed in a position where it can determine the validity of the DA's analysis or make a decision concerning the constitutionality of the CD Policy.

STATE CAPTURE COMMISSION

Work of the State Capture Commission

22. The DA's case emanates from the work of the State Capture Commission. The State Capture Commission was established in January 2018. It was established by the former President in accordance with his powers under section 84(2)(f) of

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1 DA FA, p002-37, para 85.
2 DA FA, p002-33, para 74.
3 DA FA, p002-34, para 80.
4 DA FA, p002-39 para 92.

the Constitution, 1996 and the Commissions Act 8 of 1947 ("**Commissions Act**"). The proclamation establishing the State Capture Commission is attached as "**MCR4**".

23. The State Capture Commission conducted its inquiry for about four years (and sat for over 400 days). Between December 2021 and June 2022, it handed over a report which comprised of 6 parts. Each with between one and four volumes spanning close to 6000 pages (and a total of 17 volumes).[5]

24. The work of the State Capture Commission has been invaluable. It has resulted in the public airing of how state capture and corruption came to take place at alarming levels over a number of years, from about 2009. Transnet, Denel and Eskom were among the entities for which evidence was gathered from over 300 witnesses.

25. I appeared before the State Capture Commission voluntarily in order to provide oral testimony on two occasions: firstly, in my capacity as the President and former Deputy President of the ANC in April 2021 and secondly, in my capacity as President of the Republic and former Deputy President of the Republic in August 2021.

26. The CD Policy was among the issues on which evidence was given.

P.T.M

[5] The State Capture Commission may be accessed here: https://www.statecapture.org.za/site/information/reports.

State Capture Commission findings and recommendations

27. The State Capture Commission delivered its final list of recommendations to me in June 2022. It dedicated Volume 2 in Part VI to my evidence and the "Role of the ANC and Parliamentary Oversight". The first and relevant pages of the report are attached as "**MCR5**".

28. The State Capture Commission stated that:

> *"His [The President's] own analyses, as well as those of the party, detailed above, clearly show that the cadre deployment process can be abused to facilitate corruption and possibly State Capture."*[6] (Emphasis added.)

29. It then quoted me as saying:

> *"Let us accept, Chairperson, that some of those deployments were done in a particular era and in a particular way and right know [sic] as we look at that past state we were able to look at it and say we actually need to do things differently."*[7] (Emphasis added.)

30. To which the State Capture Commission added:

> *"This statement implies that certain deployments under the previous regime were done in a way which enabled the appointments of corrupt individuals."*[8] (Emphasis added.)

And,

> *"The ANC's deployment policy itself identifies that the process can be abused. It notes that 'the potential for NEC members to have political or other interests in the*

6 State Capture Commission Report: Part VI Vol 2, p172, para 432.
7 State Capture Commission Report: Part VI Vol 2, p172, para 434.
8 State Capture Commission Report: Part VI Vol 2, p172, para 435.

P.T.M

deployment of particular cadres to particular positions cannot be ruled out.' "[9] (Emphasis added.)

31. Repeatedly, therefore the State Capture Commission spoke of the possible (not certain) use of the CD Policy for improper goals. The State Capture Commission did not find that the CD Policy is always used for nefarious purposes. It also did not find that all appointments made using the CD Policy were corrupt, for corrupt reasons or of corrupt persons. Instead, what it said was:

> *"It may be that many politically motivated appointments in fact occurred independently of the Deployment Committee. The party has indeed made much of its struggles with factions and divisions."*[10] (Emphasis added.)

32. Therefore, the CD Policy may have been utilised for ill-purposes. But, the converse is also true: it may have been avoided for ill-purposes. Any policy, no matter how well-intentioned, could be used for ill-gains.

33. The State Capture Commission ultimately made the following finding:

> *"What is said above makes it clear that within the current constitutional and statutory framework it is unlawful and unconstitutional for a President of this country and any Minister, Deputy Minister or Director-General or other government official, including those in parastatals, to take into account recommendations of the ANC Deployment Committee or any deployment committee or any similar committee of any other political party in deciding who should be appointed to a position in the public service or in organs of state or parastatals."*[11]

34. Part VI, Volume 2 did not contain any recommendations on the CD Policy. Rather, the State Capture Commission delivered Part VI, Volume 4 titled 'All the

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9 State Capture Commission Report: Part VI Vol 2, p242, para 618.
10 State Capture Commission Report: Part VI Vol 2, p245, para 627.
11 State Capture Commission Report: Part VI Vol 2, p253 to 254, para 657.

P.T.M

Recommendations'. The first and relevant pages of the report are attached as "**MCR6**". As to the governance of SOEs the State Capture Commission Report reads:

> *"243. Although the File documents envisage the formalization of the appointment processes including a limited form of public involvement (the public may be invited to identify candidates) the Nomination and Selection of candidates remain firmly controlled by the relevant Government Minister. It is difficult to see why the proposed system will be any better placed to deal with state capture than it was before. There are no effective mechanisms which would prevent cronyism and cadre deployment from continuing to dominate appointment to the Boards and to senior executive officers.*
>
> *244. The recommendations of the Commission, it is submitted, must insist on a truly independent and transparent process free from political manipulations so that the ultimate appointment made by a Minister is genuinely the result of a merit-based selection process."*[12]

35. It is clear from a reading of these paragraphs that they do not constitute recommendations from the State Capture Commission but instead submissions made to the Commission on what should be contained in its recommendations.

36. Ultimately, the State Capture Commission did not recommend that the CD Policy be revoked or that the nomination and selection of candidates be removed from the control of Government Ministers. Instead, it recommended the establishment of a Standing Appointment and Oversight Committee:

> *"In the circumstances the Commission recommends the establishment of a Standing Appointment and Oversight Committee tasked to ensure, by way of a public hearing, that any person nominated for Board appointment or as the Chief Executive Officer, Chief Financial Officer, or Chief Procurement Officer of an SOE*

12 State Capture Commission Report: Part VI Vol 4, p180, paras 243 to 244.

P.T.M

meets the professional, reputational and eligibility requirements for such a position. The Committee will also investigate and act upon any complaints received concerning the misconduct of any Board member or senior executive in the discharge of his or her duties."[13]

37. It also did not accept the submission that Ministers be absolved of their authority to appoint office-bearers in SOEs and recommended instead that the Standing Appointment and Oversight Committee —

> *"recommend to the shareholder Minister concerned the names of at least one but not more than three of the best qualified candidates suitable for appointment for every vacancy on the Board or senior executive post".*[14]

38. The recommended sphere of responsibility for the proposed Standing Appointment and Oversight Committee does not appear from the State Capture Commission Report to extend to non-SOE appointments.

39. At the risk of over-emphasising the point, the State Capture Commission did not recommend that the ANC do away with the CD Policy. It also did not recommend that ANC members not suggest to qualified persons that they apply for these positions or recommend that the Minister be prohibited from consulting with other members of the ANC prior to filling the vacancy.

40. It appears that the DA would have liked that the State Capture Commission recommend that the CD Policy be revoked. This much is clear from one of the

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13 State Capture Commission Report: Part VI Vol 4, p181, para 245.
14 State Capture Commission Report: Part VI Vol 4, p182, para 247.5.2.

questions the DA suggested be posed to me by the Evidence Leaders of the State Capture Commission:

> *"Do you believe that the outlawing of cadre deployment and the bolstering of the separation between party and state would be an important element of preventing state capture and corruption in the future?"*[15]

41. This application therefore seems to be an attempt by the DA to achieve through this Court what the State Capture Commission did not and could not afford it — outlawing the CD Policy.

42. In conclusion, the State Capture Commission did not find that all appointments made utilising the CD Policy were a function of state capture or corruption. The State Capture Commission also did not find that all questionable appointments were made utilising the CD Policy or with the involvement of the CD Committee. In some cases, state capture took place as a result of the abuse of the policy rather than its implementation. As demonstrated below, the abuse of the CD Policy is already being addressed.

43. In any event, the DA application seeks to pre-empt the proper process afforded to me in the context of presidential commissions on inquiry. The State Capture Commission made its recommendations to me. Its recommendations are not binding. They are aimed at assisting me, as President, to address the issues that were at the heart of the inquiry. I take the findings and recommendations of the State Capture Commission very seriously and ought to be afforded the (court-ordered) opportunity to consider them all with a view to making a determination

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15 DA FA, annexure "FA3", p002-82, para 24.

as to implementation. As I illustrate in further detail below, I am entitled to a period of four months after receipt of the full report (i.e. until 22 October 2022) to consider the report including its recommendations and thereafter express my intention regarding the implementation thereof to Parliament. That period has not yet elapsed. I am taking heed of all the recommendations by the State Capture Commission, including that related to the need for a transparent, capable and ethical public administration.

44. This application seeks to leap-frog the process already set by this Court i.e. it seeks to by-pass my presidential powers to consider the State Capture Commission's findings and recommendations.

Efforts to curtail improper interference in public service appointments

45. Since I assumed the office of President in February 2018, government has embarked on several measure to improve public administration, including to address the problem of improper interference, from whatever quarter, in public service appointments.

46. These include measures to end state capture, to rebuild damaged institutions and to foster a culture of ethical public service and accountability. In the main the measures were aimed at changing the way in which the Cabinet works, to diminish if not extinguish working in silos, strengthening institutions that had been crippled or 'captured', starting with changes in leadership of these institutions, pursuing a long standing project of changing the way in which SOEs were managed and overseen by Government as shareholder, and making relevant

P.T.M

necessary policy decisions, including enacting legislation, to address shortcomings or reinforce oversight where needed.

47. First, I have signed performance agreements with every member of Cabinet, which agreements have been published on the government website. These agreements make clear what is expected of each Minister and on what basis I will judge their performance. As a consequence of the conclusion of these performance agreements, every Minister knows what is expected of them, and every Minister knows what his or her colleague is working on. No-one works in isolation. The more transparency and coordination, the better the governance of our state.

48. Second, government has made progress toward professionalising the public service.

    48.1. The exercise of professionalising the public service is aimed at ensuring that the public service is shorn of political partisanship and that the most qualified individuals enter its ranks. As stated in my second State of the Nation Address of 2019:

> *"We are committed to building an ethical State in which there is no place for corruption, patronage, rent-seeking and plundering of public money. We want a corps of skilled and professional public servants of the highest moral standards — and dedicated to the public service."*[16]

[16] Available here: https://www.gov.za/speeches/2SONA2019.

P.T.M

48.2. The National Development Plan ("**NDP**") deals specifically with the need to build a capable and developmental state.[17] Considerable work is being done to ensure better performance of government structures. The NDP emphasises the need for *"well-run and effectively coordinated state institutions with skilled public servants who are committed to the public good and capable of delivering consistently high-quality services, while prioritising the nation's developmental objectives."* The NDP outlines what needs to be done to achieve this, which is in summary:

48.2.1. Stabilising the political-administrative interface by building *"professional public service that serves government, but is sufficiently autonomous to be insulated from political patronage. This requires a clearer separation between the roles of the political principal and the administrative head."*

48.2.2. Making the public service and local government administration careers of choice.

48.2.3. Developing technical and specialist professional skills.

48.2.4. Strengthening delegation, accountability and oversight — this includes promoting *"greater and more consistent delegation supported by systems of support and oversight"*, making *"it easier for citizens to hold public servants and politicians accountable, particularly for the quality of service delivery"*,

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17 Available here: https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf.

and ensuring *"effective oversight of government through parliamentary processes."*

48.2.5. Improving interdepartmental coordination.

48.2.6. Taking a proactive approach to improving relations between national, provincial and local government.

48.2.7. Strengthening local government.

48.2.8. Clarifying the governance of SOEs — *"the major SOEs need clear public interest mandates and straightforward governance structures that enable them to balance and reconcile their economic and social objectives."*

48.3. Late in 2020 the draft national implementation framework towards the professionalisation of the public service was approved by Cabinet for public consultation and public hearings were held in this regard. The final framework towards the professionalisation of the public service will be tabled before Cabinet within the next month.

49. The professionalisation of the public service will serve to inhibit the appointment of persons who are not qualified for the jobs they are given. This should help, for example, to reduce incompetence in government departments or municipalities. It will also limit opportunities for patronage. Last but not least, it will ensure people employed by the state are not indebted to certain interests for their jobs, thereby

P. T. M

making them less likely participants in state capture. Steps have already been taken to make the appointment of key office-bearers more transparent.

50. Third, in September 2021, the Department of Public Enterprises gave a presentation to the NCOP Public Enterprises and Communication on 'Measures taken to improve oversight over State-Owned Companies (SOCs)'. In it, the DPE stated that the Department of Public Service and Administration was in the process of developing and implementing a standardised approach to the appointment of SOC Boards. The presentation is attached as "**MCR7**".

51. Fourth, in May 2022, the Minister of Public Enterprises gave a budget vote speech. In it he stated that the Presidential SOE Council has recommended that government adopt a centralised shareholder model for its key commercial state-owned companies. This is aimed at separating the State's ownership functions from its policy-making and regulatory functions, minimise the scope for political interference, introduce greater professionalism and manage state assets in a way that protects shareholder value. As part of this, preparatory work has begun for the establishment of a state-owned holding company to house strategic SOEs and to exercise coordinated shareholder oversight. The speech is attached as "**MCR8**".

52. Finally, steps have already been taken to be more transparent in appointment processes. As an example, once the Constitutional Court determined that Mr Shaun Abrahams had not been lawfully appointed as National Director of Public Prosecutions ("**NDPP**"), a public and transparent process was undertaken to identify a new **NDPP**. This was done in an effort to help South Africans regain

P.T.M

confidence in the institution. As such, they would be able to see who the candidates were, follow the interviews of each candidate, and see how the final choice was made. The appointment of Ms Shamila Batohi as NDPP was, as a result, embraced and welcomed by all, and faith that she would right the NPA ship started growing from that moment. Other examples are provided in my affidavit to the State Capture Commission in my capacity as ANC President which is attached as "**MCR15**".[18]

53. This is all to say that steps have already been taken to minimise and ultimately prevent undue interference in the appointment of public servants. These changes circumscribe the scope for abuse without doing away with the CD Policy which, as I demonstrate below, is important in democratic societies.

State Capture Commission did not find that I misled it

54. The DA states that I misled the State Capture Commission.

> *"26. At the outset, however, it is important to highlight that the President and Minister Mantashe repeatedly emphasised at the Commission that the Cadre Deployment Committee merely "recommends" candidates, and that it does not dictate to Ministers and other officials, who to appoint. This was done in a bid to sanitise the policy and create the impression that it is not at odds with the Constitution.*
>
> *27. It is now clear that this evidence was <u>false and misleading</u>. The minutes of the Cadre Deployment Committee between 11 May 2018 and 17 May 2021 demonstrate that the Cadre Deployment Committee does not merely recommend, it appoints."*[19]

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18 President of the Republic of South Africa Affidavit, chapter VII, para 162 *et seq.*

19 DA FA, p002-16, paras 26 and 27.

55. My evidence was neither false nor misleading. I invite Mr Steenhuisen to retract the accusation made against me.

56. There are simply different interpretations for the recommendation function of the CD Committee. This is demonstrated by the interaction between myself and Mr Pretorius during my oral evidence before the State Capture Commission on 28 April 2021. Mr Pretorius said:

> *"In fairness to those who have given the evidence and in fairness to yourself, Mr President. I need to put to you certain passages from the evidence that have told the Chair of the hard interpretation of deployment. In other words, that it goes much further than recommendation.*
>
> *And then I would like to put to you, certainly of your own statement, which quite frankly highlights the problems that you face or have faced and do face. The evidence of Lynne Brown in relation to SOE boards, more than one, was to the following effect:*
>
> > *'It must be borne in mind that all appointments to the boards of state-owned entities must also be approved by the African National Congress Deployment Committee where after it gets approved by Cabinet...'*
>
> *That was her clear and unequivocal evidence. Do you have any comment?*
>
> *PRESIDENT RAMAPHOSA: [No audible reply]*
>
> *ADV PRETORIUS SC: And this was in the period 2014 to 2015, at least."*[20]

57. To which I responded:

> *"Yes, that is where the <u>interpretation of this recommendation</u> process would come in. And that is why I referred to the role of the minister because the minister as the executive or it plays a critical role because it is the minister who, in the first instance, knows and realises that the board's tenure has come to an end. I need to replenish the members of the board and these are the skills that are needed. I*

[20] Transcript of 28 April 2021, p112 line 7 to p113 line 24.

P.T.O

need or we need accounting skills, corporate governance skills, financial skills, you name it, environmental and so forth and we need to have a gender balance.

So it beholds on the minister and I deal with this, you know, on an ongoing basis even now as President. It beholds on the minister to then come forward and say: I need to replenish the six members on the board.

And what she will often have to do or be encountered with is. Have you sourced, have you worked out a list, a list of names that should be preferred? And the minister's task is to do precisely that and having done that, a wise minister would then say: I have got like 18 names and I need six or 12 names. They would then put that forward and say to the Deployment Committee – and then the Deployment Committee would say – and quite often a pamphlet is set out or an advert for people to apply.

And quite often you get many applications and I actually appreciate that because it basically means you are opening up quite a number of these positions to South Africans who can play a role in enhancing governance in some of our state-owned enterprises. And it is the minister who must then summarise all that, bring together a summarised list or preferred list or summarise and then put it forward as a near or shortlist.

And once that has happened, the Deployment Committee would say: Well, we would recommend the following. And sometimes they need six and there is 18, they would recommend: Why do you not go forward with 12 and then let us see what the selection in government then comes up with. And that is where I would say maybe Lynne Brown then says this got to be approved.

But I will, as the former Chair of the Deployment Committee, will be able to say clear emphatically that it is that recommendation process. And as you can hear, it goes through a number of processes and this may be confusing and this may even create doubt in people's minds but that is the actual process as it unfolds and as it happens. And in the end, Cabinet – even with Cabinet – Cabinet then will then be presented with say maybe a near final list.

But Cabinet then finally, Chairperson, deliberates on each of the names where Cabinet has a role in deciding because of legislation for that entity. It deliberates on that and some names fall off at Cabinet level and some on those lists are sent back to the minister or Cabinet says: Take this back. We are not about to approve this.

P.T.M

And the ministers pull out their hair and be frustrated but that is the rigorous role that is involved in the selection of those people. And may I add deployment committee level, I know of ministers who have been there three times or more just to get a list recommended.

So it is not as easy as that where you just have a list which is underpinned by nefarious intensions, just approved, it is quite vigorous and I have known and I have seen ministers coming out of that type of process just pulling the sweat off their foreheads because it means they have achieved something. It is not an easy process."[21]

58. The first and relevant pages of the transcript are attached as "**MCR9**".

59. It follows that what may be viewed by some as more than a recommendation is simply a function of the rigor of the implementation of the CD Policy for good reason. However, the fact that I have an interpretation different from that held by the DA does not mean that I expressed a falsehood or misled the State Capture Commission.

60. Finally, that the CD Committee minutes may express themselves in a way that suggests to the DA that the Committee plays a more interventionist role in appointments does not mean that it, in fact, does. The CD Committee is entitled to express its wishes and frustrations as it likes.

Independence of the Judiciary

61. The State Capture Commission made the following observation:

> *"408.10 I noted that there was a concern that factionalism and other such issues would be carried into the judiciary. He asked the President to clarify whether this meeting was an exception, or if the Deployment Committee*

[21] Transcript of 28 April 2021, p113, line 3 to p115 line 20.

P.T.M

did in fact involve itself in judicial appointments. President Ramaphosa suggested that this should be viewed in a 'positive light' as the ANC was dedicated to transforming the judiciary. Although judicial officers should not have a relationship with the ANC, the governing body must play a role in transforming the judiciary.

408.11 This concession does contradict President Ramaphosa's and Mr Mantashe's earlier statements that the Committee does not consider judicial appointments and only encourages candidates to apply."

62. It is incumbent on me to clarify this point. There was no contradiction in my testimony. Like a number of other parties represented in the national legislature, the ANC has delegates who participate in the Judicial Service Commission ("**JSC**"). In their role at the JSC, they follow the commands of section 174(2) of the Constitution to *"reflect broadly the racial and gender composition of South Africa"*. The CD Policy makes no express reference to judicial deployment. It is not relevant to judicial deployment and the CD Committee plays no role in such deployment. It expresses its views on candidates. Such views are aired in the JSC interviews with the candidates by ANC delegates. Other political party delegates will have their own views. Ultimately it is the JSC as a whole, chaired by the Chief Justice, that deliberates and makes recommendations for appointment.

NATURE OF THE CD POLICY

History of the CD Policy

63. In my affidavit submitted to the State Capture Commission I set out in detail the history of the CD Policy, the purpose of the Policy, and the evolving nature of the

Policy. I do not intend to repeat the contents of that affidavit here. I annex it as "**MCR10**".

64. The nature and purpose of the Policy is also set out in the answering affidavit filed on behalf of the ANC.[22]

65. For the purposes of this affidavit I wish to highlight a few aspects:

65.1. The CD Policy stems from a period when the ANC was preparing to govern. Developing a cadre of competent leaders who are competent and who understand the transformational project under a democratic Constitution is essential.

65.2. During the tenure of South Africa's first democratically elected president — Mr Nelson Mandela — many state institutions were re-energised to give effect to the post-apartheid order to fit in with the new spirit of reconciliation and inclusivity but also embody new ideological directions.

65.3. The CD Policy serves a dual purpose. On the one hand, it ensures that state institutions reflect the demographics of our country, but most importantly that they include persons that embrace the new constitutional dispensation. On the other it ensures that persons most 'fit-for-purpose' are appointed whenever critical positions have been identified.

65.4. The CD Policy applies to senior positions in government such as Directors-General and Deputy Directors-General as well as leadership

RTM

22 See generally, ANC AA, p004-19, para 44 *et seq.*

in critical institutions including the private sector. It does not apply to Cabinet because as President, I have the constitutional prerogative to appoint members of Cabinet. While inputs and opinions may be sought by the President in making these appointments, these are not matters that would serve before a CD Committee. It also does not apply to public representatives in the various legislative and executive bodies for which there are specific selection processes in place.

65.5. The CD Committee essentially operates like a recommendation committee. The CD Committee does not decide who should take up specific positions. Rather it discusses who should be encouraged to apply for positions and makes recommendations to the persons making the appointments. The CD Committee may furthermore provide guidance to ministers on critical appointments

65.6. The CD Policy is not static. It evolves to address shortcomings within it as and when such shortcomings are identified. For instance, during its 53rd National Conference, the ANC decided that it needed to monitor performance of those persons who had been deployed to various positions. This meant making sure that people were performing at the level required of them. The resolutions of the 53rd National Conference are attached as "**MCR11**".

65.7. The ANC's 54th National Conference went further and determined that continual development would be required to ensure there was no sense of complacency among persons developed and trained to take the lead

P.T.M

in critical institutions. The resolutions of the 54th National Conference are attached as "**MCR12**".

Global approach to political public service

66. The DA would have the Court believe that there is something inherently improper about the recommendation for deployment of persons by the ANC to the public service. It relies on a few anecdotes to suggest that the CD Policy is inconsistent with the Constitution and/or the Public Service Act and deployment should never take place under any circumstances.

67. However, the deployment of persons by political bodies to serve in the administration is not only a common feature of democracies around the world, it is essential for the proper functioning of a democracy.

68. In 2007 the Organisation for Economic Cooperation and Development commissioned a study on this very subject which resulted in a report titled 'Study on the Political Involvement in Senior Staffing and on the Delineation of Responsibilities Between Ministers and Senior Civil Servants' ("**OECD Report**") which is attached as "**MCR13**".

69. The OECD is an international organisation of about 38 member states mainly in the Global North. South Africa, together with three of its fellow BRICS countries, is a partner of the OECD. The OECD aims to develop evidence-based international standards and find solutions to a range of social, economic and environmental challenges.

P.T.M

70. The authors of the OECD Report drew on an empirical examination of a number of different national systems around the world including Belgium, Denmark, France, Italy, Korea, Mexico, New Zealand, Poland, Sweden, the United Kingdom, the United States and South Africa.

> "*The report highlights that political involvement in administration is essential for the proper functioning of a democracy. Without this an incoming political administration would find itself unable to change policy direction. However public services need protection against being misused for partisan purposes, they need technical capacity which survives changes of government, and they need protection against being used to impair the capacity of future governments to govern.*"[23] (Emphasis added.)

71. The OECD Report states that:

> *"In sum, the study suggests that more political influence in staffing matters may work well, if there are other checks and balances overseeing functional responsibilities, and may be essential if the alternative is very weak political traction on the public service."*[24] (Emphasis added.)

72. As I demonstrate below, the very purpose of the CD Policy is to ensure that the public service is aligned to the constitutional objective of transformation. This policy direction would become weakened had the CD Policy not been put in place. The CD Policy is therefore consistent with international trends around the world and ought not to be viewed as inherently improper or unconstitutional. Indeed, as I pointed out in my affidavit to the State Capture Commission, the DA

P.S.M

23 OECD Report, p5.
24 OECD Report, p33.

itself has "*a process of vetting candidates for employment in DA-led municipalities*".[25]

73. The CD Policy is also a function of a political party operating within the constitutional framework of a proportionally representative democracy that the ANC deploy persons to these bodies.

74. A party running for the elections at various levels will do so on the basis of a manifesto and policies. The electorate will vote for a particular party based on that manifesto. The electorate expects that if a particular party gains the majority vote in the elections, it will action the contents of its election manifesto. It is therefore imperative that persons placed in leadership positions are able to action the will of the people as demonstrated by their election at the ballot box.

75. What is important is that candidates that have the support of a political party also have the requisite skills, training and commitment to ethical public service that is required by section 195 of the Constitution.

DA'S EXAMPLES ARE NOT RELEVANT TO CD POLICY

76. The DA states that the State Capture Commission Report set out how cadre deployment resulted in the capture of critical state institutions and lists a number of examples of this.

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25 Public Protector "Allegations of a breach of the Executive Ethics Code by the Member of the Executive Council responsible for Local Government, Environmental Affairs and Development Planning of the Western Cape Provincial Government, Mr A Bredell", Report Number 23 of 2020/21 attached as "**MCR16**", para 5.1.17.

76.1. The first is the appointment of Siyabonga Gama at Transnet. Notably, the DA does not even assert that the CD Policy was the reason for Mr Gama's appointment or that the CD Committee recommended him for such appointment. The DA could not do so because Mr Gama was not recommended or approached by the CD Committee.[26]

76.2. With regard to Messrs Singh and Molefe's appointments, as the ANC states in its affidavit, neither of their candidatures went through the CD Committee.[27]

76.3. With regard to Mr Lucky Montana, again the DA does not even allege that Mr Montana was deployed by the ANC. In fact, the DA merely speculates that this is the case saying that Mr Montana *"is widely believed to have been deployed"*.[28]

76.4. And again, the DA's reference to Mr Tom Moyane[29] does not illustrate that he was deployed by means of the CD Policy. In fact, the DA does not even suggest that he was. It simply quotes a passage of the State Capture Report that states that some CEOs and board of directors of SoEs had been approved through the national deployment committee. The fact is that there was no application of the CD Policy at all in Mr Moyane's appointment.

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26 ANC AA, p00451, para 137.1.
27 ANC AA, p004-51, para 137.2.
28 DA FA, p002-37, para 85.
29 DA FA, p002-38, para 88 *et seq.*

77. The DA begins its narrative on 'cadre deployment as a conduit for state capture' by stating that the examples it highlights relate to cadre deployment.[30] However, the examples it goes on to give do not demonstrate the use of the CD Policy or the involvement of the CD Committee. In fact, when setting out the narrative relevant to Mr Gama, Mr Montana and Mr Moyane, the DA does not even state or assert that these persons were appointed through the CD Policy or with the involvement of the CD Committee. It simply speculates that this is the case.

78. The DA attaches to its affidavit an affidavit deposed to by Mr Leon Amos Schreiber, a member of the National Assembly for the Democratic Alliance. Mr Schreiber attaches to his affidavit a notice which he complains is evidence of *"all of the harm set out by the DA in its application"*.[31] With respect, like a number of the other examples used by the DA in this application, this affidavit and its attached notice is irrelevant.

79. Firstly, the DA does not present any evidence whatsoever demonstrating that the persons called to the meeting have been subjected to the CD Policy or the regional CD committee. There is simply no evidence that this notice relates to the CD Policy in any way.

80. Secondly, the CD Policy does not state that people who have been deployed may be summoned to meetings by the ANC, must ensure that they attend meetings when they have been summoned by the ANC, and may be held responsible for other people's failure to attend meetings.

P.T.M

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30 DA FA, p002-32, para 73.
31 Schrieber Affidavit, p002-414, para 15.

81. And thirdly, the DA does not cite those mentioned in the meeting nor seek a declarator from this Court that such invitations are unlawful or unconstitutional. For that reason, this affidavit should be disregarded.

82. I submit that declarations of constitutional invalidity cannot be made based on mere speculation. It would be impermissible for the Court to declare the CD Policy unconstitutional based on speculations by the DA not supported by any facts whatsoever. These conjectures by the DA demonstrate not only that it has not made out a case for the relief it seeks, but that it itself, cannot state under oath that the CD Policy was the reason for the appointment of the relevant persons and the reason for the capture of the relevant institutions.

CD POLICY SPEAKS TO SUBJECTS NOT IMPUGNED IN THIS APPLICATION

83. It appears from the DA's affidavit that its concerns with the CD Policy relates to deployment and not training, monitoring, or consultations and discussions that also form part of the CD Policy. However, the DA seeks an order from the Court that declares the entire CD Policy inconsistent with the Constitution.

84. The CD Policy concerns deployment in some respects but also speaks to other issues as well. For instance:

84.1. Clause 25 calls for the development of a human resource development strategy:

> *"A comprehensive human resource development strategy must be developed particularly targeting youth and women leadership, including the mapping of possible career paths and the*

advancement of transformation of gender relations."[32] (Emphasis added.)

84.2. Clause 39 speaks to the relationship between constitutional structures of the ANC and government executives and states that:

> *"While the relationship between these two structures is often best worked out in practice and convention, some guidelines are necessary to help guide the organisation. We need to ensure an understanding, in theory and practice, that government implements the mandate of the organisation and is accountable to the political structures as well as to the public based on the electoral platform of the Movement."*[33] (Emphasis added.)

85. The DA has not made out a case that any of the deployment provisions of the CD Policy are unconstitutional, let alone a case of unconstitutionality of the CD Policy in its entirety.

CD POLICY IS NOT INCONSISTENT WITH THE CONSTITUTION OR THE PUBLIC SERVICE ACT

Failure to plead the constitutional rights allegedly violated

86. Under the 'Preliminary Points' heading, I set out the extent to which the DA's application was vague and prejudicial to the respondents. However, in addition to being vague, the DA's application is also simply sparse.

P.T.M

[32] DA FA, annexure "FA2", p002-66, clause 25.
[33] DA FA, annexure "FA2", p002-68, clause 39.

87. The DA appears to place reliance on sections 7 and 8 of the Constitution in order to found a cause of action against the respondents.

88. Section 7 provides, amongst other things, that the Bill of Rights is the cornerstone of our democracy and section 8 provides that the Bill of Rights is binding on both natural and juristic persons – what is commonly referred to as 'horizontal application'.

89. But the DA does not allege the violation of any justiciable human right. What it does instead, is state that:

> *"133. Section 7 of the Constitution requires the State to adopt measures that promote the Constitution and the rights in the Bill of Rights. As the Constitutional Court has held in Glenister, this means that the State must adopt positive measures that 'prevent and root out corruption and cognate corrupt practices'.*
>
> *134. Section 7 therefore demands that the provisions of the PSA sufficiently root out corruption by removing any possibility for the influence of the ANC's cadre deployment policy on appointments in the public administration."*[34]

90. There are three fundamental problems with the DA's approach to its constitutional challenge:

    90.1. Firstly, it is incorrect. I am advised that the Constitutional Court has cautioned litigators bringing constitutional challenges to be specific in the averments they make concerning the provisions violated. Without doing so, no proper constitutional challenge can be said to have been brought.

P.T.M

[34] DA FA, p002-57, paras 133 and 134.

90.2. Secondly, the very provisions relied upon by the DA make clear that they buttress (or lay the foundation) for justiciable rights. In other words, the very provisions upon which the DA relies (sections 7 and 8) demand that they assert other provisions. The DA fails to heed the command of those provisions.

90.3. Third, it constrains the Court which is required to conduct a multilayered inquiry when a constitutional challenge is brought including determining:

90.3.1. the parameters of the right;

90.3.2. whether the law or conduct complained of interfere with such right;

90.3.3. the internal qualifiers of the right;

90.3.4. whether the law or conduct complained of fall within the limits of the internal qualifiers;

90.3.5. whether the limitation is justifiable.

91. What the DA does is place reliance on sections 195 and 197 of the Constitution, but it cannot rely on these sections to make out a case against a voluntary organisation against whom relief is sought. In any event, as I show below, the CD Policy can be read in a manner consistent with these provisions.

P.T.M

Constitutionally-compliant reading of the CD Policy

92. I am advised that before any Court engages in an analysis on the extent to which an impugned instrument violates a provision of the Constitution, it first enquires whether that instrument may be read in a manner that is consistent with the Constitution.

93. In the event that the CD Policy may be subjected to the DA's constitutional challenge, I submit that it ought to and can be read in a manner that is consistent with the Constitution. The CD Policy is consistent with the Constitution as it contains provisions which, like the Constitution, are:

    93.1. Transformational in intent. Section 1(b) of the Constitution states that this nation is founded on the value of non-racialism and non-sexism and section 9(2) permits measures designed to protect or advance persons disadvantaged by unfair discrimination.

    93.2. Aimed at realising the full potential of human beings as illustrated by section 195(1)(h) of the Constitution.

    93.3. Designed to facilitate accountability and transparency and openness as set out in the founding provisions of the Constitution.

94. Like the Constitution, the objectives of the CD Policy and its provisions are transformational. For example, Clause 4 of the CD Policy reads:

> "*Strategic deployment of ANC cadres played an important role in the ANC taking control of the post-liberation state. The ANC's deployment committees on national and regional levels played a crucial role in* <u>*state transformation*</u>*, contributing to*

P.T.M

reasonable success in deracialising the public service. This also helped ensure that bureaucratic sabotage by reactionary forces intent on undermining the democratic order would be minimised."[35] (Emphasis added.)

95. The CD Policy is also driven by service-delivery. It provides, in relevant part:

> *"Our cadres deployed in whatever centre should take with them the qualities and attributes that we hold dear as a Movement. This includes putting service to the people, an ethic of work and selflessness, respect for the senior structures and cadres of the Movement, responsiveness to the needs of the people and a collective approach to matters.*
>
> *In our deployment we should consciously strive to dispel the notion that we have become a Movement and a leadership which is distanced from the people whom we have served in our long struggle for liberation. We must be true to our tradition of putting the interests of our people and our country first."*[36] (Emphasis added.)

96. It is accordingly consistent with section 195 of the Constitution.

97. The CD Policy does not support or demand the appointment of persons who are not qualified for positions. That would be counterproductive. It iterates the importance of qualification, skill and expertise numerous times:

98. At the very beginning it states that:

> *"In 1994 the ANC recommended the deployment of suitably qualified personnel into structures of government at all levels . . ."*[37] (Emphasis added.)

99. It also provides that:

P.T.M

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35 DA FA, annexure "FA2", p002-60, clause 4.
36 DA FA, annexure "FA2", p002-68, clauses 36 and 37.
37 DA FA, annexure "FA2", p002-60, clause 2.

"Focus should not only be on academic or professional expertise but should also take into account skills and expertise in doing constituency work and working with the masses on the ground." (Emphasis added.)

And,

"The deployment strategy will ensure that the Movement deploys its cadres in accordance with their knowledge, skills, ability and experience."[38] (Emphasis added.)

100. The CD Policy itself provides that it should not be utilised for ill-gains:

"Some of the situations and practices to avoid would be . . . [a]llowing political structures to constantly interfere in the running of government and seeking to replace Executive structures of government".[39]

101. In addition, in many respects, the CD Policy, contains qualifiers and checks and balances that ensure that those objectives are realised in a balanced and reasoned manner. I reiterate that the CD Policy is not a static document.

102. Most importantly, the CD Policy does not, and cannot, override legislative requirements for the appointment of public servants.

CD Policy is not inconsistent with the Public Service Act

103. The CD Policy is merely an internal policy of a voluntary association. It need not comply with the Public Service Act. Were the Policy to be abused in a manner that results in the appointment of public servants in direct violation of the Public Service Act, the provisions of the Act prevail. Any government conduct that is in

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38 DA FA, annexure "FA2", p002-73, clause 53.
39 DA FA, annexure "FA2", p002-70, clause 43.1.

violation of the Act may be set aside. There is no legal basis upon which the honourable Court can order that an internal policy of a voluntary organisation is invalid on the basis that it does not comply with a statute. The relief sought is therefore misguided. I am advised that legal submissions in this regard will be advanced in written argument.

104. For the sake of completeness, however, I address the crux of the DA's challenge to the CD Policy as it relates to the Public Service Act. The DA suggests that the CD Policy is inconsistent with the Public Service Act for two reasons: (*a*) it usurps the ability of Ministers to exercise executive function in terms of section 9; and (*b*) it undermines the criteria for appointment set out in sections 10 and 11 of the Public Service Act.[40]

105. Both of these allegations are without basis.

106. Firstly, there is no provision in the CD Policy that usurps the abilities of Ministers to exercise executive function. The DA does not point to any provision of the CD Policy which does so. This is because there is none.

107. What the DA's true gripe relates to some instances where it appears to the DA that Minister's executive authority was usurped. The DA ought to have brought a case to review the appointments made in those cases instead of challenging the CD Policy for something it does not do.

108. Secondly, there is nothing in the Public Service Act that denies Ministers the right they have to consult with their colleagues in cabinet prior to making

P.J.M

40 DA FA, p002-56, paras 130.1 and 130.2.

appointments. Considering the views of others without fettering one's own discretion is not unlawful.

109. Finally, section 11(1) of the Public Service Act requires that appointments have due regard to equality and the other democratic values and principles enshrined in the Constitution. This is consistent with what the CD Policy aims to do: to capacitate the public service with persons who would advance the transformational project.

PUBLIC SERVICE ACT IS NOT UNCONSTITUTIONAL

110. The DA seeks an order declaring that Chapter IV of the Public Service Act is unconstitutional as it does not insulate public sector appointments from the CD Policy. First, I am advised that that is not a legal basis for a declarator of constitutional invalidity. The DA is required to assert which provisions of the Constitution are violated by the legislative provisions. Second, assuming that the DA's constitutional concern is about the independence of the public service, it does not allege that the Public Service Act is unconstitutional because it does not provide for an independent public service. It merely states that the Act is unconstitutional because it does not protect against *the ANC's Cadre Deployment Policy.*

111. The DA seeks to rely on *Glenister v President of the Republic of South Africa and Others.*[41] I am advised that reliance on *Glenister* is misguided at the level of fact and law. As I have shown, the conclusion that 'cadre deployment is a corrupt

P.T.M

[41] 2011 (3) SA 347 (CC).

practice' is not supported by any facts in the DA's founding affidavit. On this shaky basis, the DA makes a leap of logic by stating that the government is constitutionally obliged to root out corruption by insulating public sector appointments from the CD Policy. Then the next leap - that the constitutionally mandated manner of doing this is through the Public Service Act. In doing so, the DA does not even consider the recommendation by the State Capture Commission for the establishment of a Standing Appointment and Oversight Committee.

112. The difficulty that the DA faces is that is has brought an abstract challenge. It further bases its challenge on speculation and irrelevant facts. I am advised that the Constitutional Court has repeatedly held that constitutional challenges are intended to solve live disputes and not abstract challenges. There is currently no live dispute between the parties concerning the application of the CD Policy.

CONCLUSION

113. In the circumstances, the DA has not made out a case for the relief it seeks. I ask that this application be dismissed with costs, including those occasioned by the employment of two counsel, one of whom is senior counsel.

SEQUENTIAL PARAGRAPH RESONSES TO MR STEENHUISEN'S AFFIDAVIT

114. Ad paras 1 to 5

114.1. Save to deny that the contents of Mr Steenhuisen's affidavit are true and correct, the contents of these paragraphs are noted.

P.T.M

115. Ad paras 6 and 7

115.1. The contents of these paragraphs are denied.

115.2. As I stated during my testimony before the State Capture Commission there are occasions when persons are deployed who are not members of the ANC.

> *"So the minister will then say we have shortlisted a number of people and in the short listing these are people who have been shortlisted. Some of them may not even be ANC members, some of them may well be ANC members and what is then looked at by the deployment committee is to say we really need someone with experience.*
>
> *For instance, if it is a railway entity of railways and who has been well-trained and well-prepared and all that, and having done that, the deployment committee could well say well, in our view so and so fits the bill. It could be an ANC person, it could be an [sic] non-ANC person, completely unattached to the ANC, that we believe that this person can do the work."*[42] (Emphasis added.)

116. Ad paras 8 to 11

116.1. The contents of this paragraph are denied.

116.2. I reiterate that the DA has not demonstrated that the CD Policy itself has incapacitated state institutions.

P.T.M

[42] Transcript of 28 April 2021, p42, lines 4 to 15.

117. Ad para 11.1 to 12.7

117.1. The contents of these paragraphs are noted.

117.2. However, it is denied that the DA has made out a case for the relief it seeks.

118. Ad para 13

118.1. The contents of this paragraph are denied.

118.2. The DA does not have *locus standi* to bring this application.

119. Ad paras 14 to 19

119.1. The contents of these paragraphs are noted.

119.2. It is highlighted however, that the application is defective for failing to cite the Minister responsible for the SoEs that have been impugned by the DA.

119.3. The DA does not set out how the CD Policy undermines the rule of law.

120. Ad paras 20 and 21

120.1. The contents of these paragraphs are noted.

120.2. They demonstrate that this is an attempt by the DA to obtain the Court's support for its campaign.

P.T.M

121. Ad para 22

121.1. The contents of this paragraph are denied.

121.2. There is no factual basis for the assertion of favouritism.

122. Ad paras 23 and 24

122.1. For reasons set out elsewhere in this affidavit (paragraphs 54 to 60), the contents of these paragraphs are denied.

123. Ad para 25

123.1. The contents of this paragraph are noted.

124. Ad paras 26 to 27

124.1. The contents of these paragraphs are denied.

124.2. I did not express a falsehood or mislead the Court and maintain that the CD Policy envisages recommendations (through discussions and consultations) and not appointments.

125. Ad paras 28 and 30

125.1. The contents of these paragraphs are noted.

126. Ad para 32

126.1. The contents of these paragraphs are denied.

127. Ad para 31

127.1. The contents of these paragraphs are noted.

127.2. The minutes were disclosed to the State Capture Commission in an effort to aid it in its inquiry into state capture.

128. Ad para 32

128.1. The contents of this paragraph and any impropriety they attempt to suggest is denied.

128.2. The letter by the ANC to the State Capture Commission explained that the minutes for the period from December 2012 to December 2017 simply could not be found. The letter is attached as "**MCR14**". I can confirm that I instructed officials to conduct a search for the minutes for the period December 2013 to 2018 in order to place them before the State Capture Commission. I confirm that the minutes could not be located.

129. Ad para 33

129.1. The contents of this paragraph are denied.

129.2. The State Capture Commission's findings appear in six parts. Its findings demonstrate that state capture, not the CD Policy, has eroded state institutions.

129.3. The DA has not supplemented its affidavit.

130. Ad para 34 to 39

130.1. The contents of these paragraphs are admitted.

131. Ad para 40

131.1. While the CD Policy does not make use of the term recommendation, it repeatedly calls on members to discuss deployment, for instance:

131.1.1. Clause 6.2.1 instructs CD Committees to discuss the deployment of comrades.[43]

131.1.2. Clause 15 reads:

> "*Our general approach should be that all strategic deployments should as far as possible be subjected to collective discussions by various structures of the movement.*"[44]

132. Ad paras 41 and 42

132.1. I persist with the contention that the CD Committee only makes recommendations.

R.T.M

[43] DA FA, annexure "FA2", p002-61, clause 6.2.1.
[44] DA FA, annexure "FA2", p002-64, clause 15.

132.2. As Ms Hogan stated before the State Capture Commission, the weaknesses lie in the abuse of the CD Policy where the CD Committee is captured.

133. Ad paras 43 to 43.3

133.1. I have had regard to the minutes of the CD Committee attached to the DA's founding affidavit as "FA9". The ANC has provided a response to the minutes in its answering affidavit.[45]

133.2. I note that the minutes attached are from 22 February 2019 and 17 May 2021 (both days inclusive). I was elected President of the Republic in February 2018 and President of the ANC in December 2017. Because the President is not a member of the CD Committee, I was not a member of the CD Committee. I do not have any personal knowledge of the contents of these minutes.

133.3. I cannot vouch for the authenticity of the minutes nor confirm that they correctly reflect the decisions taken at the respective meetings. That notwithstanding, the minutes do not constitute sufficient evidence that appointments were on the instruction of the CD Committee.

134. Ad paras 45

134.1. The contents of these paragraphs are denied.

P.T.M

[45] ANC AA, p004-40, para 106 and p004-58, para 168.

134.2. I have already stated that it is not only members of the ANC who are recommended.

135. Ad paras 46 to 48

135.1. The contents of these paragraphs are denied.

135.2. Even the most innocuous and well-intentioned policies can be abused for nefarious purposes. Despite its transformational intent and constitutionally compliant framework, the CD Policy was abused.

135.3. It should however be noted that for most of the instances cited in the Commission Report, state capture took place outside of the CD Policy regime.

136. Ad paras 49 to 58

136.1. The contents of these paragraphs are denied.

136.2. Mr Gama was not a subject of the CD Policy. This evidence is accordingly irrelevant to this issue before this Court.

137. Ad paras 59 to 63

137.1. The contents of these paragraphs are noted.

137.2. Mr Mantashe was not cited as a party to these proceedings.

138. Ad paras 64 to 69

138.1. The contents of these paragraphs are denied.

138.2. I stated that the CD Policy cannot be faulted in principle but there are weaknesses in its implementation:

> *"Cadre deployment cannot be faltered in principle. It is a common feature of democratic practise around the world and I think it properly describe [sic] and is not diluted to various other intents and forms.*
>
> *It is a useful process used by governing parties around the world to make sure that the mandate that they had been given by the populous is carried out but we could concede that there are weaknesses in this practical implementation that make the case for greater clarity both within the political parties and the state."*[46]

139. Ad para 70

139.1. When read in full, it is clear that this was a proposition put forward by Mr Pretorius based on Ms Brown's testimony to which there is no audible reply from me.

> *"ADV PRETORIUS SC: In fairness to those who have given the evidence and in fairness to yourself, Mr President. I need to put to you certain passages from the evidence that have told the Chair of the hard interpretation of deployment. In other words, that it goes much further than recommendation.*
>
> *And then I would like to put to you, certainly of your own statement, which quite frankly highlights the problems that you face or have faced and do face. The evidence of Lynne Brown in relation to SOE boards, more than one, was to the following effect:*

46 Transcript of 28 April 2021, pp 27 to 28, lines 19 to 3.

"It must be borne in mind that all appointments to the boards of state-owned entities must also be approved by the African National Congress Deployment Committee where after it gets approved by Cabinet..."

That was her clear and unequivocal evidence. Do you have any comment?

PRESIDENT RAMAPHOSA: [No audible reply]"[47]

139.2. I have repeatedly stated that the CD Committee makes recommendations. Below is an extract of an interaction between Mr Pretorius and I that is similar to that set out above:

ADVOCATE PRETORIUS SC: . . . . On the one hand there has been evidence that the policy goes far beyond mere recommendation and in fact is a policy implemented on the instruction and mandate of the deployment committee. That is one view and there is certain evidence in regard to that. Whether that is 20 exceptional or the rule, maybe we can deal with in due course when we come to detail.

The other view, which is reflected in your statement and other statements, Mr President, is that the deployment committee goes no further than make recommendations and abides by the formal selection processes that take place for example in the public service.

Those are the two extreme views and whether either is correct or not, Chair will have to consider and decide. Or it may be that neither is correct as a general rule and that there is quite a large grey area between. What would your comment be?

PRESIDENT RAMAPHOSA: The deployment committee, as I said in my statement-in-chief, should really be seen as committee that

P.T.M

[47] Transcript of 28 April 2021, p112, lines 7 to 25.

recommends, the recommendation 10 committee and having been the Chair of the deployment committee as Deputy President, the process that really gets underway is as follows, and maybe I am simplifying it."[48]

140. Ad paras 71 and 72

140.1. I maintain that anything that goes beyond recommendation is not compliant with the CD Policy.

141. Ad paras 73 to 78

141.1. On the basis of speculation, the DA attributes the appointment of Mr Gama to the CD Policy. To the contrary, as the affidavit of Mr Mashatile for the ANC makes plain, Mr Gama's appointment was not recommended or approved in terms of the CD Policy or by the Deployment Committee.

142. Ad paras 79 to 84

142.1. As with Mr Gama, the DA speculates that the CD Policy is to blame for the appointments of Messrs Molefe and Singh to the Eskom Board. Mr Mashatile corrects the misperception that Mr Singh's candidature served before the Deployment Committee. It did not.

142.2. Mr Molefe was recommended by the Board of Eskom. He had the requisite skills, qualifications and experience.

48 Transcript of 28 April 2021, p40 line 16 to p41 line 13.

143. Ad paras 85 to 87

143.1. I note that the DA takes issue with the appointment of Mr Montana but does not suggest that the CD Policy or the CD Committee had anything to do with Mr Montana's appointment.

144. Ad paras 88 to 92

144.1. Again, the DA does not provide any evidence that Mr Moyane's appointment was the result of the CD Policy or the CD Committee.

144.2. Mr Mashatile has confirmed that the CD Committee did not recommend Mr Moyane for the position of Commissioner of SARS.

145. Ad para 93

145.1. The contents of this paragraph are denied.

145.2. The State Capture Commission did not make mention of the CD Policy or CD Committee when narrating the history of Ms Myeni or Mr Motsoeneng's appointments.

146. Ad para 94

146.1. The contents of this paragraph are denied.

146.2. The DA has not presented any facts in support of its contention.

146.3. All those issues herein are attributable to state capture, not the CD Policy.

147. Ad para 95 to 103

147.1. With regards to judicial appointments, it should be noted that all political parties will have a preference. Political parties have a seat at the JSC – in terms of the Constitution. The involvement of political parties in the judicial appointment process is expressly mandated by the Constitution. Ultimately it is up to the JSC to conduct the selection process and recommend appointments to the judiciary.

148. Ad para 104 to 104.4

148.1. The contents of these paragraphs are noted.

148.2. The DA has not demonstrated that it is entitled to the relief it seeks.

149. Ad para 105 to 111

149.1. For reasons set out at paragraphs 86 to 91 above, the contents of these paragraphs are denied.

150. Ad paras 112 to 114

150.1. For reasons set out at paragraphs 92 to 102 above, the contents of these paragraphs are denied.

P.T.M

150.2. The CD Policy is consistent with sections 195 and 197 of the Constitution.

151. Ad para 115

151.1. I have demonstrated in paragraphs 52 above that steps have already been taken to ensure transparency in the appointment processes.

152. Ad paras 116 to 120

152.1. The contents of these paragraphs are denied.

152.2. I have explained in the affidavit before the State Capture Commission which is attached as "**MCR10**" and in paragraphs 65 to 73 that the CD Policy attempts to strike a balance between meeting the will of the electorate and effective public service. There is nothing inherently problematic with this approach.

152.3. I note the reference to Constitutional Principle 30. The Constitutional Principles guided the Constitutional Assembly in its drafting of the final Constitution. The Constitutional Principles are not justiciable.

153. Ad paras 121 to 124

153.1. For reasons set out at paragraph 65.5 above, the contents of these paragraphs are denied.

154. Ad paras 125 to 128

154.1. To the extent that these paragraphs correctly quote or paraphrase the Public Service Act, their contents are admitted.

155. Ad paras 129 to 131

155.1. The contents of these paragraphs are denied.

155.2. In any event, the CD Policy is consistent with the Public Service Act.

156. Ad paras 132 to 135

156.1. For reasons already set out at paragraphs 86 to 74 herein, the contents of these paragraphs are denied.

157. Ad paras 136

157.1. The contents of these paragraphs are denied.

WHEREFORE, I pray that the application be dismissed with costs including the costs occasioned by the employment of two counsel, one of whom is senior counsel.

DEPONENT

P.TM

The Deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn to before me at JOHANNESBURG on this the 28 day of JULY 2022, the regulations contained in Government Notice No.R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

Lt Col
Majola MAJOLA

COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
PRESIDENTIAL PROTECTION SERVICE
2022 -07- 2 8
PRESIDENTIAL PROTECTION SERVICE
SOUTH AFRICA POLICE SERVICE

Name: PRIMROSE THANDERA MAJOLA

Title: LT COLONEL (SAPS)

Address: 03 TROYE STREET
PRETORIA
0001

I verify that the above statement was taken by me and that the deponent has acknowledged that he / she knows and understands the contents of this statement. This statement was sworn to / affirmed before me and the deponent's signature / mark was placed thereon in my presence.

at MASREC on 28 JULY 2022 at

Majola Lt Col MAJOLA
(SIGNATURE) COMMISSIONER OF OATHS

PRIMROSE THANDERA MAJOLA
FULL FIRST NAMES AND SURNAME IN BLOCK LETTERS

03 TROYE STREET
BUSINESS ADDRESS (STREET ADDRESS)

PRETORIA 0001

Lt COLONEL
RANK

S A POLICE SERVICE

P.T.M

MLR1

Office of the State Attorney
Pretoria

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Fax/Faks: (012) 309 1649/50

14 July 2022

Enquires: M.M MAHLOKO
Email: MeMahloko@justice.gov.za

My ref: **2254/2022/Z55**
Your Ref: R NYAMA/MD/HM001045

MINDE SCHAPIRO & SMITH INC

Dear E. Jonker

DEMOCRATIC ALLIANCE// THE GOVERNMENT OF THE REPUBLIC AND OTHERS

1. The above matter refers
2. Kindly note that we act on behalf of the Fourth, Fifth and Sixth Respondents (our clients) in the above matter.
3. It is common cause that our clients served their notices of opposition on the 23rd of June 2022 and had until Friday the 15th of July 2022 to file our answering affidavits.
4. Unfortunately due to our office's lengthy procurement processes, we were only able to finalize the appointment of Counsels on Thursday the 14th of July 2022.
5. It is as a result of the above that we hereby request indulgence to file our clients' opposing papers by end of business on Friday the 29th of July 2022.
6. Hope the above is in order.

P.T.O

Kind regards.

M.M MAHLOKO (ASSISTANT STATE ATTORNEY) [signed]

081 787 6363

FOR: STATE ATTORNEY (PRETORIA)

P.T.M

ORDER

[191] In the premises, the following order is made:

1. The application is dismissed.

2. It is declared that the remedial action in the Public Protector's Report, No 6 of 2016/17 dated 14 October 2016 and entitled "*State of Capture*" (the Report), is binding.

3. The President is directed to appoint a commission of inquiry within 30 days, headed by a Judge solely selected by the Chief Justice who shall provide one name to the President.

4. The President shall take all steps, do all things and sign all documents which are necessary to give effect to the remedial action. Without limiting the generality of the aforegoing, the President shall ensure that –

4.1 the Judge who is to head the commission of inquiry is given the power to appoint his/her own staff and to investigate all the issues using the record of the Public Protector's investigation and the State of Capture Report, No 6 of 2016/17 as a starting point;

4.2 the commission of inquiry is to be given powers of evidence collection that are no less than that of the Public Protector;

4.3 the commission of inquiry is to complete its task and present its report with findings and recommendations to the President within 180 days. The President shall submit a copy with an indication of his/her intentions

P.T.M

regarding the implementation to Parliament within 14 days of releasing the Report;

4.4 the commission of inquiry is adequately resourced by the National Treasury.

5. The Public Protector shall deliver a copy of this order to the President and to the Chief Justice within five days of the grant of this order.

6. The costs of this application are to be paid by the President, in his personal capacity, on the scale as between attorney and client, including the costs consequent upon the employment of two counsel. The costs are to include the costs of the second respondent's conditional counter-application.

P. Tom

MCR3

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Before the Honourable Justice DS Fourie

On this the 23rd day of February 2022

Via Microsoft Teams

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
Private Bag X67, Pretoria 0001
2022 -02- 28
GD-PRET-016
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case No.: 9842/2022

In the matter between:

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

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
PUBLIC PROTECTOR	Second Respondent
ECONOMIC FREEDOM FIGHTERS	Third Respondent
UNITED DEMOCRATIC MOVEMENT	Fourth Respondent
CONGRESS OF THE PEOPLE	Fifth Respondent
DEMOCRATIC ALLIANCE	Sixth Respondent
VYTJIE MENTOR	Seventh Respondent
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	Eight Respondent

---

FIRST RESPONDENT'S COUNTER-APPLICATION
~~DRAFT~~ ORDER

Having read the papers, heard counsel and considered the matter, it is ordered that:

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P.T.M

1. Paragraph 1 of the order dated 28 December 2021 in the counter-application under case number 64071/2021, is varied by substituting it the order in paragraph 2 below.

2. The time for performance by the President, set by paragraph 4.3 of this Court's order of 13 December 2017 - *In President of South Africa v The Office of the Public Protector* 2018 (2) SA 100 (GP) – is extended to four (4) months after receipt of the complete Report from the applicant.

3. There is no order as to costs.

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
Private Bag X67, Pretoria 0001
2022 -02- 28
GD-PRET-016
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

BY ORDER OF THE COURT

REGISTRAR

Prepared by: RN Sekgobela

For First Respondent

Office of the State Attorney

P.T.O

MCR4

Government Gazette
Staatskoerant

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REPUBLIEK VAN SUID AFRIKA

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Contents

No.		Gazette No.	Page No.
	PROCLAMATIONS • PROKLAMASIES		
3	Section 84(2)(f) of the Constitution of the Republic of South Africa: Judicial Commission of Inquiry into State Capture, Corruption and Fraud in the Public Sector	41403	4
3	Artikel 84(2)(f) van die Grondwet van die Republiek van Suid-Afrika: Regterlike Kommissie van Ondersoek in Staatskaping, Korrupsie en Bedrog in die Openbare Sektor	41403	9

P.T.M

PROCLAMATIONS • PROKLAMASIES

PROCLAMATION NO. 3 OF 2018

by the

President of the Republic of South Africa

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

In terms of section 84(2)(f) of the Constitution of the Republic of South Africa of 1996, I hereby appoint a Commission of Inquiry to investigate allegations of state capture, corruption and fraud in the Public Sector including organs of state with the terms of reference in the Schedule attached hereto and appoint Honourable Mr Justice Raymond Mnyamezeli Mlungisi Zondo, Deputy Chief Justice of the Republic of South Africa, as its Chairperson.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria on this the 23rd day of January Two Thousand and Eighteen.

President

By Order of the President-in-Cabinet:

Minister of the Cabinet

P.T.M

SCHEDULE

TERMS OF REFERENCE

OF THE

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

A Judicial Commission of Inquiry ("the Commission") is hereby appointed in terms of Section 84(2)(f) of the Constitution of the Republic of South Africa, 1996. The Commission is appointed to investigate matters of public and national interest concerning allegations of state capture, corruption, and fraud.

1. The Commission shall inquire into, make findings, report on and make recommendations concerning the following, guided by the Public Protector's state of capture report, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016: -

   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. In particular,

P.T.M

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;

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;

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 unauthorised 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;

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;

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.

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;

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;

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;

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

P. Tom

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;

2. These Terms of Reference may be added to, varied or amended from time to time.

3. All organs of State will be required to cooperate fully with the Commission.

4. The Commissions Act, 1947 (Act No. 8 of 1947) shall apply to the Commission, subject to such amendments and exemptions as may be specified by proclamation from time to time.

5. The Commission shall submit its report and recommendations to the President within 180 days of the commencement of the Commission.

6. Regulations shall be made, after consultations with the presiding judge, in terms of the Commissions Act, 1947 and shall apply to the Commission in order to enable the Commission to conduct its work meaningfully and effectively and to facilitate the gathering of evidence by conferring on the Commission powers as necessary, including the power to enter and search premises, secure the attendance of witnesses and compel the production of documents.

7. The Commission shall where appropriate, refer any matter for prosecution, further investigation or the convening of a separate enquiry to the appropriate

P.T.O

law enforcement agency, government department or regulator regarding the conduct of a certain person/s.

8. Regulations contemplated above shall also make provision for the resourcing and employment of staff of the Commission.

PROKLAMASIE NO. 3 VAN 2018

deur die

President van die Republiek van Suid-Afrika

GEREGTERLIKE KOMMISSIE VAN ONDERSOEK TEN EINDE ONDERSOEK NA BEWERINGS VAN STAATSKAPING, KORRUPSIE EN BEDROG IN DIE OPENBARE SEKTOR MET INBEGRIP VAN STAATSORGANE, IN TE STEL

1. Ingevolve artikel 84(2)(f) van die Grondwet van die Republiek van Suid-Afrika, 1996 stel ek hierby 'n Kommissie van Ondersoek aan ten einde ondersoek in te stel na bewerings van staatskaping, korrupsie en bedrog in die Openbare Sektor, met inbegrip van staatsorgane, met die opdrag in die Bylae en stel ek hierby die Agbare Regter Raymon Mnyamezeli Mlungisi Zondo as Voorsitter, aan.

Gegee onder my Hand en die Seël van die Republiek van Suid-Afrika te Pretoria op hierdie 23ste dag van Januarie 2018.

President

By Las van die President-in-Kabinet:

Minister van die Kabinet

P. Tom

BYLAE

OPDRAG VAN DIE

GEREGTERLIKE KOMMISSIE VAN ONDERSOEK TEN EINDE ONDERSOEK NA BEWERINGS VAN STAATSKAPING, KORRUPSIE EN BEDROG IN DIE OPENBARE SEKTOR, MET INBGERIP VAN STAATSORGANE, IN TE STEL

'n Geregterlike Kommissie van Ondersoek ("die Kommissie") word hierby ingevolge artikel 84(2)(f) van die Grondwet van die Republiek van Suid-Afrika, 1996, aangestel. Die Kommissie word aangestel ten einde aangeleenthede van openbare en nasionale belang met betrekking tot bewerings van staatskaping, korrupsie en bedrog, te ondersoek.

1. Die Kommissie moet ondersoek instel na, bevindings maak, verslag doen oor en aanbevelings maak met betrekking tot die volgende, met inagneming van die Openbare Beskermer se verslag oor staatskaping, die Grondwet, toepaslike wetgewing, beleid en riglyne, sowel as die bevel van die Noord-Gauteng Hoë Hof van 14 Desember 2017 onder Saak Nr. 91139/2016: -

1.1 of, en die mate waartoe en deur wie, pogings aangewend was deur enige vorm van aansporing of vir enige voordeel van watter aard ookal, om lede van die Nasionale Uitvoerende Gesag (met inbegrip van Adjunk-ministers), ampsdraers en/of funksionarisse wat in diens is, of enige ampsdraers van enige staatsentiteit of staatsorgaan of direkteure van die rade van Staatsbeheerde Ondernemings, te beïnvloed. Die

P.T.O

Kommissie moet in besonder die geloofwaardigheid van bewerings ondersoek dat voormalige Adjunk-minister van Finansies, mnr Mcebisi Jonas, en me Mentor Kabinetsposisies deur die Gupta-familie aangebied was;

1.2 of die President enige rol gespeel het in die beweerde aanbod van Kabinetsposisies aan mnr Mcebisi Jonas en me Mentor deur die Gupta-familie, soos beweer;

1.3 of die aanstelling van enige lid van die Nasionale Uitvoerende Gesag, funksionaris en/of ampsdraer aan die Gupta-familie of aan enige ander ongemagtigde persoon geopenbaar is voordat sodanige aanstellings formeel gemaak of bekendgemaak is, en indien wel,

of die President of enige ander lid van die Nasionale Uitvoerende Gesag vir sodanige gedrag verantwoordelik is;

1.4 of die President of enige lid van die huidige or voormalige lede van sy Nasionale Uitvoerende Gesag (met inbegrip van Adjunk-ministers) of enige openbare beampte of werknemer van enige Staatsbeheerde Ondernemings die Grondwet of enige toepaslike gedragskode of wetgewing oortree of geskend het deur die onwettige toekenning van tenders deur Staatsbeheerde Ondernemings of enige staatsorgaan te fasiliteer, tot voordeel van die Gupta-familie of enige ander familie,

P.T.O.

individu of korporatiewe entiteit wat besigheid met die regering of enige staatsorgaan, doen;

1.5 die aard en omvang van korrupsie, indien enige, in die toekenning van kontrakte, en tenders aan maatskappye, besigheidsentiteite of organisasies deur openbare entiteite wat kragtens Bylae 2 van die Wet op Openbare Finansiële Bestuur, 1999 (Wet No. 1 van 1999), soos gewysig, gelys is.

1.6 of daar enige onreëlmatighede, onbehoorlike verryking, korrupsie of onbehoorlike beïnvloeding was by die toekenning van kontrakte, myniisensies, regeringsadvertering in die *New Age* koerant en enige ander regeringsdienste in die besigheidshandelinge van die Gupta-familie met Staatsdepartemente en Staatsbeheerde Ondernemings;

1.7 of enige lid van die Nasionale Uitvoerende Gesag, met inbegrip van Adjunk-ministers, onwettiglik of op 'n korrupte of onbehoorlike wyse in die sluiting van die bankgeriewe vir Gupta maatskappye, ingegryp het;

1.8 of enige adviseurs in die Ministerie van Finansies sonder die nakoming van behoorlike prosedures aangestel is, en in besonder of, en soos beweer in die klagte aan die Openbare Beskermer, twee senior adviseurs wat deur Minister Des van Rooyen .by die Nasionale Tesourie aangestel is, aldus sonder die nakoming van behoorlike prosedures aangestel is;

P.T.O

1.9 die aard en omvang van korrupsie, indien enige, by die toekenning van kontrakte en tenders aan maatskappye, besigheidsentiteite of organisasies deur Staatsdepartemente, agentskappe en entiteite, en in besonder of enige lid van die Nasionale Uitvoerende Gesag (met inbegrip van die President), openbare beampte, funksionaris of enige staatsorgaan die toekenning van tenders beïnvloed het ten einde hulself, hulle families of entiteite waarby hulle 'n persoonlike belang gehad het, te bevoordeel;

2. Hierdie Opdrag kan, van tyd tot tyd, aangevul, verander of gewysig word.

3. Alle Staatsorgane moet ten volle met die Kommissie saamwerk.

4. Die Kommissiewet, 1947 (Wet No. 8 van 1947) is op die Kommissie van toepassing, behoudens sodanige wysigings en vrystellings as wat, van tyd tot tyd, deur proklamasie gespesifiseer mag word.

5. Die Kommissie moet sy verslag en aanbevelings binne 180 dae vanaf die aanvang die Kommissie, aan die President voorlê.

6. Regulasies moet, na oorleg met die voorsittende regter, ingevolge die Kommissiewet, 1947 gemaak word, wat op die Kommissie van toepassing is, ten einde die Kommissie in staat te stel om sy werk behoorlik en effektief te kan doen en om die insamel van getuienis te vergemaklik deur om op die Kommissie die bevoegdhede op te lê as wat nodig mag wees, met inbegrip

P.T.M

van die bevoegdheid om persele te betree en deursoek, die bywoning van getuies te verseker en die voorlegging van dokumente te vereis.

7. Die Kommissie moet, waar toepaslik, enige aangeleentheid vir vervolging, verdere ondersoek of vir die byeenroeping van 'n afsonderlike ondersoek, verwys, na die toepaslike wetstoepassingsagenskap, Staatsdepartement of reguleerder met betrekking tot die gedrag van 'n sekere persoon of persone.

8. Bogemelde regulasies moet ook vir hulpmiddele en die indiensneming van personeel van die Kommissie voorsiening maak.

P.T.M

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Siraj Rizvi (012) 748-6380 (Siraj.Rizvi@gpw.gov.za)

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MCR5

Judicial Commission of Inquiry into State Capture Report: Part VI

Vol. 2: State Capture Established, President Ramaphosa's Evidence and the Role of the ANC and Parliamentary Oversight

This is the report of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including organs of State, also known to the public and the media as the Zondo Commission.

Chairperson: Justice RMM Zondo
Chief Justice of the Republic of South Africa

Report of the Judicial Commission of Inquiry into State Capture: Part VI: Vol. 2

9 780620 981187

Committee itself. This illustrates a situation where the minister makes a recommendation to the Committee, who has the final say in approving or rejecting a candidate. If the process is merely one of recommendation, Ministers would not need to return three times or more to get a list recommended.

418. This is also clear in the Deployment Committee records (2017 onwards), which were carefully reviewed Commission. The following trends were observed in the minutes:[360]

418.1. While the language is consistent in part with the Committee making recommendations, in other part the language is peremptory.

418.2. The Ministers make recommendations to the Deployment Committee and seek permission to appoint their chosen candidates, which the Committee "approves" or sends back for "refinement".

418.3. Ministers have been taken to task by the Deployment Committee for presenting their choices as final and irrevocable, or presenting names to Cabinet which were not approved by the Committee.

418.4. The Committee insists that even before posts are advertised that the Deployment Committee should be notified.

419. It therefore appears that the Committee does not always merely make recommendations but in fact often instructs appointing authorities on who to appoint.

420. This analysis was put to President Ramaphosa. He insisted that cadre deployment is "safe" as the Committee has no formal power to appoint, and appointments are still

[360] Transcript of Day 427, 14–16.

R Tim

432. His own analyses, as well as those of the party, detailed above, clearly show that the cadre deployment process *can* be abused to facilitate corruption and possibly State Capture.

433. While President Ramaphosa has admitted that deployment has, on occasion, failed to ensure that deployees are fit for purpose', he did not directly engage on the question of whether, in fact, the deployment process facilitated State Capture. The fact remains that the Commission has heard substantial evidence indicating that multiple appointments were made to key positions in order to facilitate State Capture. These appointments were all made by the National Executive, who (except for the President in some cases) were, as members of the ANC, bound to the party's deployment policy.

434. President Ramaphosa was asked about the appointments of specific individuals who have been implicated in corruption and State Capture at the Commission, and whether these individuals were 'deployed'. He responded:

> "**PRESIDENT RAMAPHOSA:** Let us accept, Chairperson, that some of those deployments were done in a particular era and in a particular way and right know as we look at that past state we were able to look at it and say we actually need to do things differently."[374]

435. This statement implies that certain deployments under the previous regime were done in a way which enabled the appointments of corrupt individuals.

436. He went on to say that the Deployment Committee "would not have dealt with a whole lot of those" appointments during his chairmanship.[375] There were some cases where

[374] Transcript of Day 384, 100.

[375] Transcript of Day 384, 100.

P.T.M

618. The ANC's deployment policy itself identifies that the process can be abused. It notes that "the potential for NEC members to have political or other interests in the deployment of particular cadres to particular positions cannot be ruled out".[553] President Ramaphosa agreed that this section of the deployment policy, which details a number of ongoing problems concerning cadre deployment, is correct:

> "The ANC's range of national and regional deployment committees ebbed and flowed over time as the movement battled intra organisation positioning, optimisation of state governance, factionalism, careerism and opportunism, desperation for employment and the organisational dilemmas of having to act against corrupt comrades."554

619. The danger of political influence in appointments is perhaps best articulated in the ANC's 'Eye of a Needle' document from 2001:

> "Because leadership in structures of the ANC affords opportunities to assume positions of authority in government, some individuals then compete for ANC leadership positions in order to get into government. Many such members view positions in government as a source of material riches for themselves. Thus resources, prestige and authority of government positions become the driving force in competition for leadership positions in the ANC.
>
> Government positions also go hand-in-hand with the possibility to issue contracts to commercial companies. Some of these companies identify ANC members that they can promote in ANC structures and into government, so that they can get contracts by hook or by crook.
>
> Positions in government also mean the possibility to appoint individuals in all kinds of capacities. As such, some members make promises to friends, that once elected and ensconced in government, they would return the favour. Cliques and factions then emerge within the movement, around personal loyalties driven by corrupt intentions. Members become voting fodder to serve individuals' self-interest."555

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553 BBB1-MCR-ANC-130 para 49

554 Transcript of Day 384, 69–71.

555 BBB2-MCR-ANC-ADDITIONAL-378 f.

P.T.M

"fit for purpose." The policy also aims to ensure that "fit for purpose" individuals with the proper experience and expertise are appointed into the civil service.[561]

627. It may be that many politically motivated appointments in fact occurred independently of the Deployment Committee. The party has indeed made much of its struggles with factions and divisions.

628. Lastly, the ANC has acknowledged that it has been, for an extended period of time, beset by problems including patronage, factionalism and corruption. The ability to position individuals in strategic positions in the state is a substantially powerful one. It would be naïve to think that these systemic problems would not spill over into the deployment process.

629. The evidence has demonstrated that state capture has been facilitated by the appointment of pliant individuals to powerful positions in state entities. The essential danger remains that appointment processes which are conducted behind closed doors and outside of the Constitutionally and legally stipulated processes are open to abuse.

> "If external bodies, a party structure or otherwise, control a politician, then they can control appointments within that politician's authority. The essential mechanism of 'state capture', where administrative decisions regarding procurement and other matters are effectively externalised into undemocratically-constituted and opaque fora, thus comes into view. Resources that are by this mechanism extracted from the state are used, in part, to purchase, by patronage, the mass political support necessary to win elections and retain power."[562]

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[561] Transcript of Day 384, 94–97.

[562] Brunette, R. (2020). Position Paper on Appointment and Removal in the Public Service and Municipalities. Position Papers on State Reform. Public Affairs Research Institute.

P.T.M.

"(4) If the post of municipal manager becomes vacant, the municipal council must-

(a) advertise the post nationally to attract a pool of candidates nationwide; and

(b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.

(5) The municipal council must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements."

653. Section 56 of the MSA deals with the appointment of managers directly accountable to municipal managers. It contains provisions that replicate those outlined above in relation to the appointment of municipal managers.

654. The findings made above in relation to the PSA are equally applicable to the provisions of the MSA. In short, a recommendation by the Deployment Committee would fall outside the scope of legitimate selection criteria (unless expressly prescribed as a requirement).

655. Turning finally to the provisions of the LRA, section 186(2) defines an "unfair labour practice" as including:

"(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee"..

656. If a government official were to make an appointment regulated by the PSA or MSA based on the recommendation of the ANC Deployment Committee, which would be an impermissible consideration, and pass over an internal candidate for promotion on this basis, this would be actionable as an unfair labour practice.

657. What is said above makes it clear that within the current constitutional and statutory framework it is unlawful and unconstitutional for a President of this country and any Minister, Deputy Minister or Director-General or other government official, including

P.T.M

those in parastatals, to take into account recommendations of the ANC Deployment Committee or any deployment committee or any similar committee of any other political party in deciding who should be appointed to a position in the public service or in organs of state or parastatals

President Ramaphosa's evidence: undue weight will be attached to recommendations

658. Reverting to the evidence of President Ramaphosa, the composition of the Deployment Committee (set out in paragraph 27 of his affidavit) exacerbates concerns about the legality of the Deployment Policy.

659. The Deployment Committee is of high status within the structures of the ANC. It is a committee that is chaired by the second-in-command in the ANC, the ANC's Deputy President. That is the second highest ranking office-bearer or official of the organisation. That is somebody who, in the absence of the President in the country, is the boss of all the Ministers. That is somebody that every ANC Minister is entitled and justified to think unless something very unexpected happens, will be the next President of the ANC. In the period of about 28 years since 1994 except for one, every one of those who occupied the position of Deputy President of the ANC ultimately became President of the ANC.[563]

660. The significance of the fact that the Deployment Committee is chaired by the Deputy President of the ANC, and this is the second point, is that it naturally will make it very difficult for any cabinet Minister – not to speak of the Deputy Minister or Director-General particularly who is an ANC member to go against a position taken by a Committee headed by the Deputy President of the organisation. To deviate from such a position

[563] The only exception is Mr Motlanthe. Although he became the President of the country for a brief period from September 2008 to May 2009, he never became President of the ANC. He was a candidate for the President of the ANC at its elective conference in Mangaung in December 2012 but lost to Mr Jacob Zuma.

P.T.M

MCR6

udicial Commission of Inquiry into State Capture Report: Part VI

Vol. 4: All the Recommendations

This is the report of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including organs of state, also known to the public and the media as the Zondo Commission

Chairperson: Justice RMM Zondo
Chief Justice of the Republic of South Africa

Report of the Judicial Commission of Inquiry into State Capture Part VI, Vol. 4

as a conduit between the Guptas and government, particularly his father, Mr JG Zuma. In several cases, Mr D Zuma was present when bribes were offered to individuals at the Guptas' Saxonwold residence."

242. It is recommended that the law enforcement agencies conduct investigations whether Mr D Zuma has not committed any offence by facilitating acts of corruption or by facilitating bribes or by failing to report corruption that may have been committed in his presence by Mr Tony Gupta when he offered a bribe to Mr Mcebisi Jonas, Mr Mxolisi Dukwana and Mr Vusi Kona

GOVERNANCE OF SOEs

Evaluation of the File contents from the point of view of the Commission

243. Although the File documents envisage the formalisation of the appointment processes including a limited form of public involvement (the public may be invited to identify candidates) the Nomination and Selection of candidates remain firmly controlled by the relevant Government Minister. It is difficult to see why the proposed system will be any better placed to deal with state capture than it was before. There are no effective mechanisms which would prevent cronyism and cadre deployment from continuing to dominate appointment to the Boards and to senior executive officers.

244. The recommendations of the Commission, it is submitted, must insist on a truly independent and transparent process free from political manipulations so that the ultimate appointment made by a Minister is genuinely the result of a merit-based selection process.

P.T.M

247.4. to appoint an Adjudicator having the powers and functions set out in 15 and 16 below.

247.5. The powers and functions of the Standing Appointment and Oversight Committee are:

247.5.1. to invite, receive and assess by way of a transparent and public process nominations for appropriately qualified and experienced persons of high integrity willing to accept appointment to fill any vacancy on the Board of a State-Owned enterprise or in a senior executive post;

247.5.2. to recommend to the shareholder Minister concerned the names of at least one but not more than three of the best qualified candidates suitable for appointment for every vacancy on the Board or senior executive post;

247.5.3. to follow the procedures set out in 15 below;

247.5.4. to publish a Code of Conduct which will be binding on Board members and senior executives;

247.5.5. to receive and investigate complaints relating to any misconduct alleged against a Board member or person holding a senior executive post and to pronounce on the merit of the complaint and the steps which should be taken to deal with it.

248. The relevant shareholder Minister shall, upon receipt of any nominations from the Committee either:

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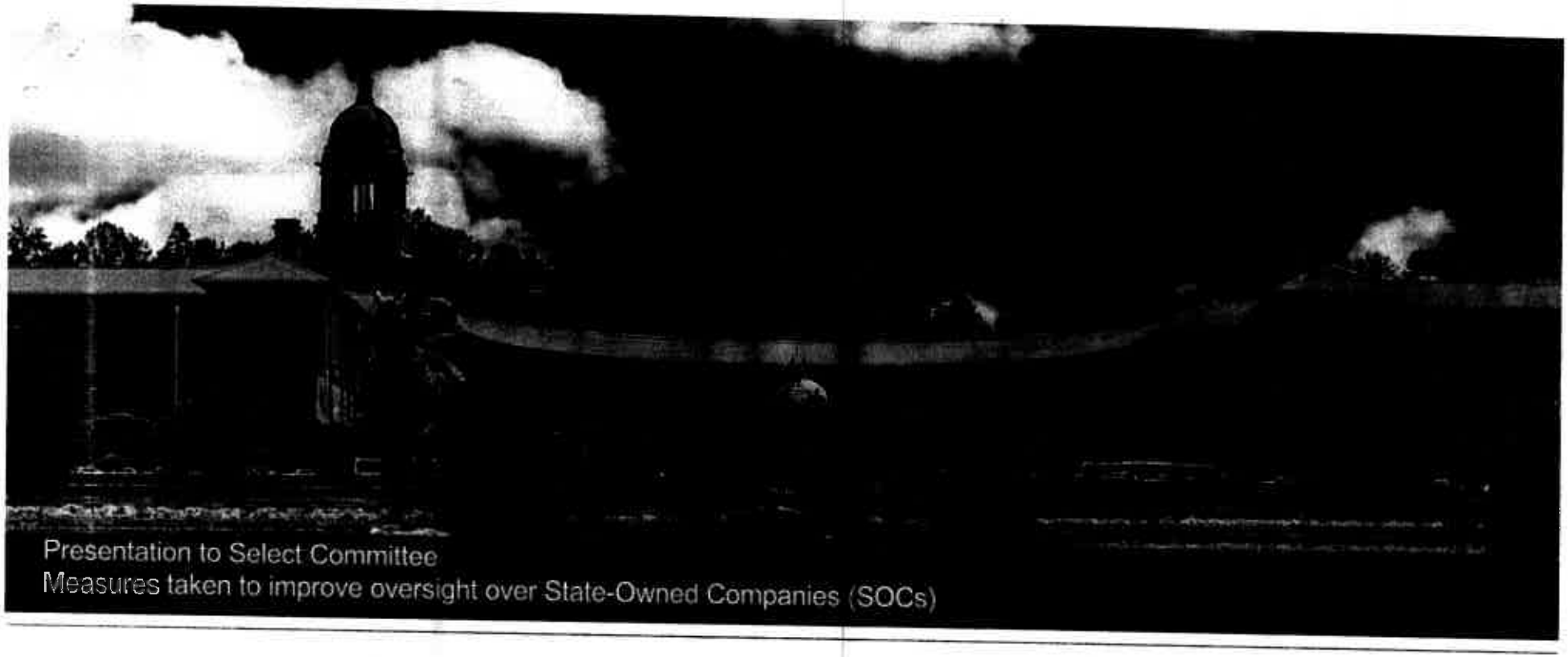


Presentation to Select Committee

Measures taken to improve oversight over State-Owned Companies (SOCs)

TRANSNET

Eskom

SAFCOL

ALEXKOR

sa express

DENEL

SOUTH AFRICAN AIRWAYS

P.T.O

By 2030, SA needs to be serviced by a set of efficient, financially sound and well-governed SOEs that address the country's developmental objectives in areas where the executive arm of government or private enterprise are unable to do so effectively.

2021 SONA PRONOUNCEMENTS

Presidential State-Owned Council

- To support our reform process, the Presidential State Owned Enterprises Council has outlined a clear set of reforms that will enable these vital public companies to fulfil their mandate for growth and development.

- Overarching legislation for state-owned companies will be tabled in Cabinet this financial year and Parliament in the next the financial year.

- A centralised SOE model is being implemented this financial year, which will ensure a standardised governance, financial management and operational performance framework for all SOEs.

- The mandates of all SOEs are being re-evaluated to ensure that they are responsive to the country's needs and the implementation of the National Development Plan.

P.T.O

Executive Summary

Purpose	• Inform on the progress made by the Government in stabilizing SOEs • Identifying and recommending ownership model for SOEs • Proposing a governance structure • Sustainable Funding model for SOEs • Process to establishment of "New" Asset Management State-Owned Company • Case Studies of immediate opportunities available to the Government
Mandate of PSEC	• The **Presidential State-Owned Enterprises Council (PSEC) to provide support to the government's intent to reposition state-owned enterprises as effective instruments of economic transformation and development** • **Mandate includes strengthening the framework governing SOEs including the introduction of an overarching Act governing SOEs and the determination of an appropriate Shareholder Ownership Model** • **SOE-specific interventions are implemented to stabilise companies through the strengthening of their governance, addressing their immediate liquidity challenges and implementing agreed turnaround strategies** • **The Council mandate will extend to a review of the role and mandate of SOEs to ensure a positive socio-economic contribution and alignment to the national development agenda** • **Review SOE corporate plans to ensure alignment to government priorities and to ensure appropriate systems are in place to monitor implementation of such plans, as well as the operational and financial performance of SOEs** • **Review business models, capital structure and sources of financing for SOEs and will monitor and mitigate risks** • **The Department of Public Enterprises (DPE) will serve as Secretariat for the Council** as the department is the **shareholder representative for government, with oversight responsibility for SOEs**
Challenges identified	**Extracts from Presidential Review Committee on State-Owned Entities (PRC on SOEs):** •**South Africa has no common agenda for and understanding of SOEs** •**There are no commonly agreed strategic sectors and priorities. In addition to the absence of a consolidated national repository for all SOEs** •**The governance, ownership policy, and oversight systems are inadequate** •**The quality of the board and executives' recruitment is inadequate** •**There is no clarity on the role of the executive authority (Shareholder Representative Minister), Board of Directors, and the Chief Executive in the governance and operational management of SOEs** •**Many SOEs currently require a massive injection of capital and finance policies require close reexamination .** •**Funding models for social and economic development mandates of SOEs are blurred and confusing, leading in some instances to undercapitalization**

Executive Summary

Establishment of Restructuring and Stabilisation Unit	• The challenges identified in the PRC on SOEs indicate the broader SOE portfolio is not steady state or stabilised due to internal and external requirements
	• Experience from SAA Business Rescue Process identified the need for a dedicated team within Government to implement the required restructuring as crisis facing SOEs demand significant amount of management time
	• To address the challenges identified by PRC on SOEs, an independent and discrete team needs to be established with the focus on:
	  • Stabilisation of SOEs
	  • Repositioning the SOEs to be commercially competitive
	  • Management of the turnaround process
	• Reporting directly to PSEC, Minister of DPE (as Secretariat of PSEC) and Presidency
	• Duration will be for the time required to restructure and reposition the SOE portfolio

Introduction of SEPs	• The Restructuring and Stabilisation Unit will enable SEPs the following:
	  • Stable platform for SEPs to enter and take the SOEs to the next level
	  • Increase market attractiveness of portfolio
	  • Identify assets ready for SEP entrants

Divestment	"New" Asset Management State-Owned Company will enable: •Identify assets classified as non-core and facilitate the disposal process to prevent value erosion •Innovative solutions to disposal and stimulating the economy
Recommendation	The established of a "New" Asset Management State-Owned Company to act as a 100% state-owned investment management company with the mandate to: •Transforming economies, •Growing middle income populations, •Deepening comparative advantages, and •Emerging champions.

Objectives of "New" Asset Management State-Owned Company

Profile	• "New" Asset Management State-Owned Company is an investment company headquartered in South Africa • Asset Management SOE will be an active investor and shareholder that aims to deliver sustainable value over the long term for its stakeholders • Asset Management SOE is 100%-owned by the South African Government through the Department of Public Enterprises or the Presidency. Long term strategy is to have the SOE reporting directly to The Presidency
Long-term objectives	• Sizable and well diversified portfolio of quality assets • Consistent record of prudent investment and active asset rotation • Robust cash flow adequacy overtime • Track record of net cash at the parent level • Obtaining a strong support from the South African government
Long-term strategy	• Sees its portfolio evolution as a mid- to long-term process • Likely to retain its holdings in certain South African SOEs • Enter new markets or new industries gradually, with initial investments remaining modest as it builds up its cross border and new industry expertise • A significant portion of investments is likely to remain in mature economies • The company will maintain its strong financial discipline and sound professional management of any new investment
Disciplined management and investment strategy	Similar to Temasek, the Asset Management SOE's investment strategy focuses on four investment themes: • Transforming economies, • Growing middle income populations, • Deepening comparative advantages, and • Emerging champions
Investment Portfolio	Phase 1: Reprioritisation and configuration of SOC •Energy Complex – Eskom, Central Energy Fund, NECSA •Transportation and Logistics Complex – Transnet, PRASA and SANRAL •Water Complex – Water Boards and TCTA •Mining Complex – Alexkor and AEMFC •Defense Complex – Armscor and Denel •ICT Complex – Telkom, BBI, Sentech, SABC, SAPO, SITA •Aviation Complex – ACSA, ATNS and SAA •Pharmaceuticals Complex – NewCo •Property Complex – NewCo •Agriculture/Agro Complex – OBP, SAFCOL and Newco (Land Distribution)

P.T.O

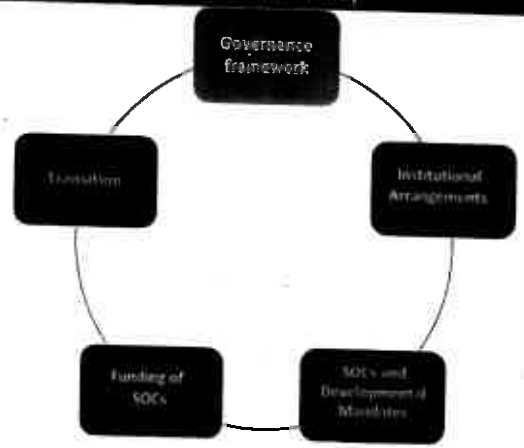
Government Decisions On The Future Role of SOCs

Rationale for State Ownership

- **Foster credibility and trust in the State as an Owner:**
- **Externally – in relation to the public at large, the SOCs' Customers, Domestic and Foreign Creditors and Partners and**
- **Internally - in relation to Parliament and Public Administration, as well as SOC Employees and Management;**
- **Separate Government's Role as Shareholder, Policymaker and Regulator;**
- **Strengthen the Ownership Function of the State and create a strong Institution responsible for improving SOC Corporate Governance, Performance and Developmental contribution of the SOCs;**
- **Improve Company Performance through good corporate governance by setting explicit goals, injecting Private Sector business disciplines and empowering their Boards and Management to monitor performance and increase accountability;**
- **Reduce fiscal risks and costs to the Government budget associated with SOCs; and**
- **Promulgate legislation to implement the shareholder policy and an overarching SOC status**
- **The recommendations are clustered into four main categories**

1. **SOE Strategy;**
2. **Enabling environment for SOEs;**
3. **Performance of SOEs; and**
4. **Capacity of the state and its SOEs.**

Focus of the Policy



The policy is divided into 5 sections:

1.The Governance framework: focuses on the SOCs Boards, their role and relationship with the Shareholder Representative

2.Institutional Arrangements: Focuses on the structure of the oversight function and the role of different institutions within the oversight model

3.SOCs and Developmental Mandates: This focuses on defining developmental mandates and how they are financed

4.Funding of SOCs: Focuses on how traditional funding sources of SOCs could be augmented

5.Transition: Focuses on how we need to transition into a new model

Government Decisions On The Future Role of SOCs

Governing Party Resolutions (Nasrec December

To reignite: Economic Growth. Active steps to achieve accelerated economic growth include:

- Uniting government, labour, business and communities in an investment pact;
- Isolating and routing out corrupt elements in the public and private sectors;
- Stabilising the governance and finances of State Owned Companies (SOC) and ensuring that SOC's play a developmental role
- To operationalise the broad socio-economic development plans of Government.
- Firm action is required to improve the governance and performance of SOC's by ensuring the appointment of skilled staff and qualified board members and protecting public institutions from improper interference
- Ensuring a measured and balanced path of macroeconomic management;

Key Themes On SOCs From The State Of The Nation (Sona)

- Reviewing of operating model
- Ensure SOC are in sound financial position sound leadership and governance
- Confront corruption
- Better co-ordination and oversight of government's role as shareholder
- SOC to fulfil their economic and developmental mandate

Processes to Support Reorganisation of SOEs

Implementation of the Cabinet Lekgotla Resolution has 12 and interdepartmental structures to support it established

	Resolution	Status	Lead Department
1.	Develop the overarching shareholder policy defining the criteria for state ownership		DPE
2.	Determine the appropriate shareholder ownership model		DPE
3.	Establish an Inter-Ministerial Committee comprising of DPE, NT, DOE, DOT and DTPS to promote prioritisation, alignment and coordination across focus SOCs to achieve government's objectives to be led by the Deputy President		Presidency
4.	Establish Inter-Departmental Forum to support the IMC		NT/DPE
5.	Support the proposal to separate the function of Shareholder, Policy- Maker and Regulator across SOCs where applicable		DPE
6.	Develop and implement standardised approach to the appointment of SOC Boards		DPSA
7.	Develop a robust private sector participation (PSP) framework		NT
8.	Develop the framework for the disposal of non strategic assets to fund critical SOCs with the first list submitted to the Inter-Ministerial Committee by June 2015		NT
9.	Separation of the developmental and commercial mandates		NT
10.	Training and skills development to be part of developmental mandates		NT
11.	IMC to reconsider proposals to empower boards		DPSA/DPE
12.	Linking of remuneration to SOC performance		DPE

Completed | No progress | In progress

Current Shareholder Oversight Tools

- **Companies Act**
  - Sets out the general framework for the governance of all public and private companies
  - Prescribes rights and responsibilities of shareholders and boards (e.g. fiduciary duties)
- **PFMA and Treasury Regulations**
  - Prescribes processes, roles and responsibilities for strategic planning; reporting; auditing; issuance of guarantees; regulation of borrowings and major transactions; and sanctioning for financial misconduct
  - Establishes additional fiduciary duties and responsibilities of Boards
- **Laws establishing the SOEs**
  - Generally set out the broad mandate of the SOE and prescribe processes; roles and responsibilities for the appointment and dismissal of board members
- **King Code on Corporate governance and Protocol on Corporate Governance in the public sector**
  - Set out best practice corporate governance guidelines
- **DPE Guidelines**
  - CEO Appointment Guidelines, Quarterly Reporting Guidelines, Transaction Guidelines.
- **Other laws and regulations**
  - Sector laws and policies

P.T.O

Current Shareholder Oversight Guidelines

- **Appointment guidelines for CEOs and CFOs:** the boards are responsible for the recruitment and appointment of CEOs and CFOs as per the guidelines which are further emphasised in the MOIs. The Department will then make a final decision on the appointment of executive directors.
  - The intention is to set out clear roles for the Board and the Shareholder in giving effect to Government's reserved ownership and control rights as contemplated in the PFMA.
- **Board Appointment Process:** the draft methodology set out steps to review Boards and fill vacancies.
  - The DPSA Guide for the appointment of persons to Boards is under review and will be presented to the PSEC soon.
  - Enhancing the guide must address ethical behaviour at the top. Meritocracy and culture of courageous leaders who can act decisively and swiftly to root out fraud, corruption and mismanagement

P.T.O

Current Shareholder Oversight Guidelines

- The review of the **Guide for the Remuneration and Incentives of SOC Executive Directors, Prescribed Officers and Non-Executive Directors** which sets out principles for remuneration of Non-Executive and Executive Directors.
  - The intention of the review is to ensure that a method of calculating guaranteed pay and incentives are state linked and not private sector linked.
  - The Department has undertake a survey of approx. 60 SOEs at national, provincial and local government level. Survey results have been shared with the Economic Cluster DGs and feedback is expected to assist in the review.
  - The focus is on commercial SOEs and the review seeks to strike a balance between public sector salary scales and competitive private sector benchmarks while ensuring that public sector principles of remuneration are aligned.
  - Internal discussions as well as discussions with Ministers of Finance and DPSA must be held to ensure greater alignment.

Current Shareholder Oversight Guidelines

- **Risk and Integrity Framework** introduces stringent background checks for SOC employees and prohibits SOC officials from doing business with the SOC.
  - Designed to standardise integrity assessment of SOCs officials and companies doing business with SOCs through stringent background checks.
  - Prohibits SOC officials from doing business with their employer
  - Introduces reforms designed to enhance and integrate risk and performance in SOCs, including standardised reporting requirements to the department.
  - Provides for greater management of conflict of interest

International Approaches To Exercising Ownership Function

public enterprises
Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

Country	Overall Model	Comments on Ownership Model	Name of Institution(s) exercising ownership function(s)	Government's and ownership entity's high-level involvement in the objective setting process	Existence of state holding company?
China	Centralised / Centralised *with exceptions*	• Other state managing authorities exist at various levels of government. The Ministry of Finance still has a role in overseeing financial SOEs.	• The State-owned Assets Supervision and Administration Commission of the State Council (SASAC) has been established to exercise the ownership function.	• Objectives are formulated by the State Counsel and communicated to the SASAC. The SASAC prepares annual investment plans for SOEs.	•No
Egypt		•Hybrid state holding company model – there are several state-owned holding companies functioning in different sectors.	• Ministry of Investment exercises ownership stake over approximately 150 SOEs; non-trivial portfolio of SOEs held by central state holding companies under Ministry of Investment.	•Objectives are developed by Ministry of Investment which oversees state holding companies.	•Yes
Finland		•8 ministries have SOEs under management including Ministry of Finance, Ministry of Employment and Economy, Ministry of Transport and Communications.	• Ownership Steering Department in Prime Minister's Office is responsible for preparation and implementation of the state ownership policy. • There are also 2 state holding companies to manage the state's interests in companies. These report to the Prime Minister's Office.	•Objectives can be set by the Ownership Steering Department in consultation with line-ministries as required.	•Yes
France			• Agence des Participations de l'Etat (APE) is the government body which exercises the ownership of strategic SOEs. It reports to Ministry of Economy and Finance.	•The performance goals of SOEs are established with consideration of the government policies. By law, each SOE must develop medium and long-term management goals and then submit them to Ministry of Economy & Finance and the related line ministries.	•No

International Approaches To Exercising The Ownership Function

public enterprises
Department: Public Enterprises
REPUBLIC OF SOUTH AFRICA

Country	Overall Model	Comments on Ownership Model	Name of institution(s) exercising ownership function(s)	Government's and ownership entity's high-level involvement in the objective setting process	Existence of state holding company?
Hungary	Centralised / Centralised *with exceptions*		• The Hungarian National Asset Management Inc., state-owned company limited by shares is in charge of the management of state assets, as well as other institutions designated by law or ministerial order. It reports to Ministry of National Development.	•Hungarian National Asset Management Inc. communicates annual planning principles, approved by the Minister of National Development.	•Yes
Slovenia		• There is state holding company, by the Ministry of Infrastructure retains responsibilities over electricity companies.	• Slovenian Sovereign Holding (SSH) is an independent joint-stock holding company owned by the state.	• The objectives are calibrated to certain sector policy but coordinated on cross-government level. Agreed objectives are published on the SSH website.	•Yes
Sweden			•The Division for State-Owned Enterprises	• Objectives are developed by the Division for State- Owned Enterprises and Division for Corporate Governance and Analysis in coordination with SOEs.	•No
Brazil	Dual		• The state ownership function is carried out by (i) the Department of Coordination and Corporate Governance of State Enterprises (DEST) within the Ministry of Planning and Budget and Management and (ii) the Ministry of Finance. This is done in coordination with line ministries.	•Objectives for individual SOEs are developed by line-ministries. DEST establishes corporate governance guidelines and remuneration, and approves bylaws and capital injections.	•No

Source: OECD (2018) Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices.

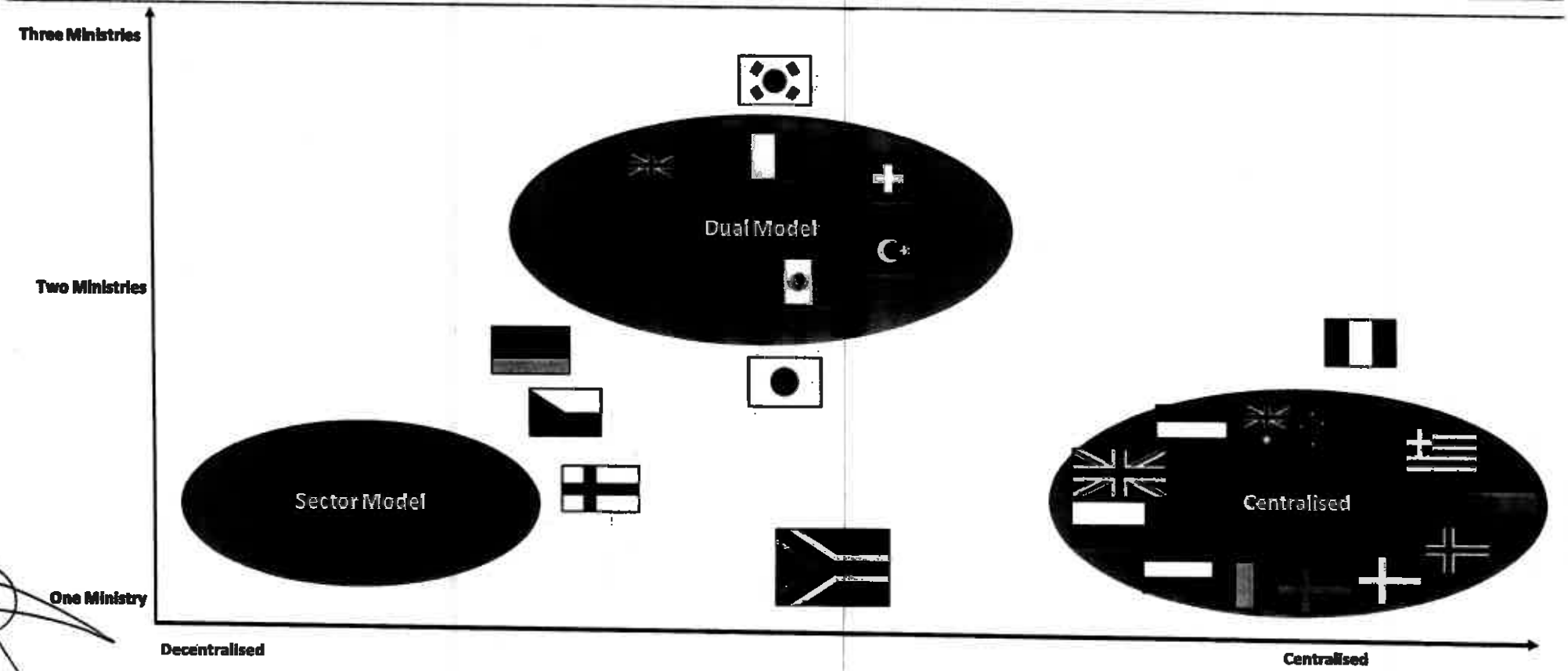
International Approaches To Exercising The Ownership Function

public enterprises
Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

Country	Overall Model	Comments on Ownership Model	Name of Institution(s) exercising ownership function(s)	Government's and ownership entity's high-level involvement in the objective setting process	Existence of state holding company?
India	Coordinating agency		•The Indian Department of Public Enterprises acts as the "nodal" agency for all SOEs.	• SOEs' vision, mission and long/short term objectives are developed by line-ministry and in a "consultative manner" with SOEs, keeping in view the overall policy direction of the government. • The Department formulates all policies pertaining to performance improvement and evaluation, financial accounting, personnel management and related areas.	•No
Argentina	Decentralised		•Line ministers perform most of the ownership functions in majority-owned SOEs.	• The objectives of every SOE is defined in its own statue. The majority of SOEs have adopted commercial law and are required to operate in practice as a private company.	•No
Kenya		• The Presidency establishes state corporation which are then assigned to respective Line Ministries.	• Different line ministries perform the ownership functions in majority-owned SOEs.	• Line Ministries set out the objectives for SOEs. All state-owned companies follow State Corporations Act.	•No

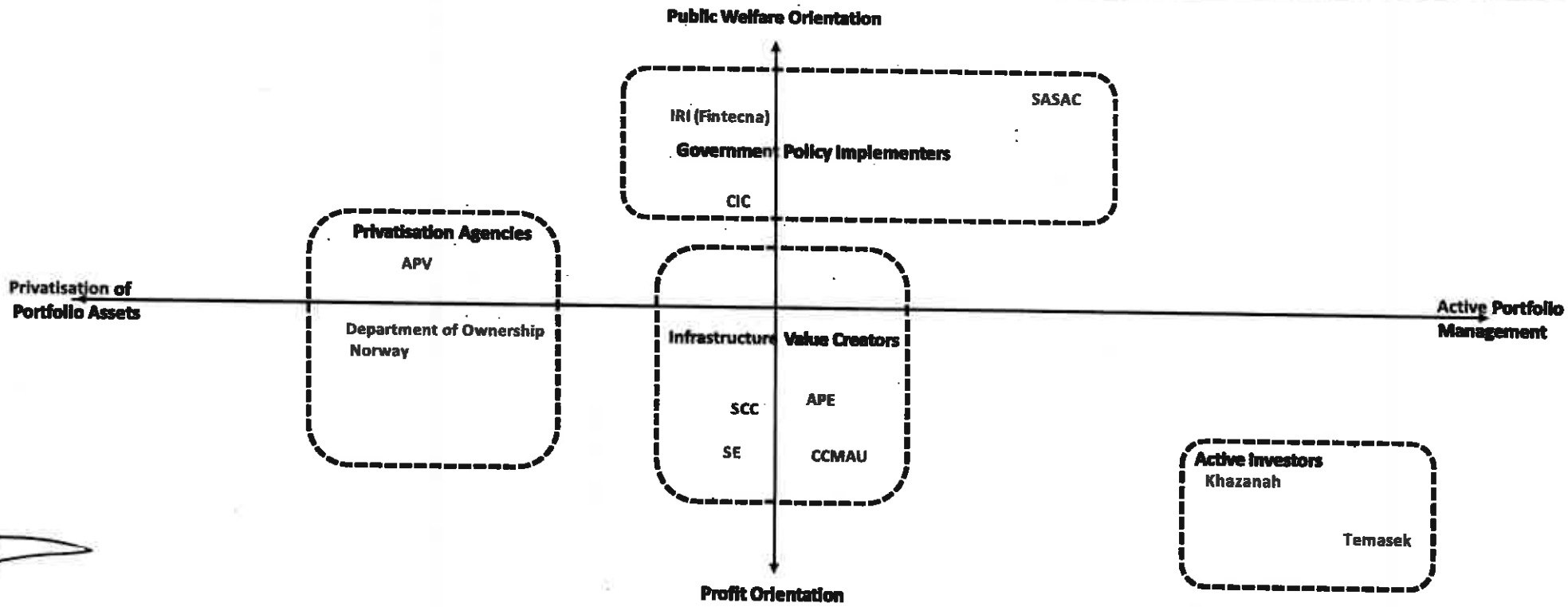
Source: OECD (2018) Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices.

VisionForSOCs – GlobalModels – Organisation and Evolution of Government Ownership



Source: OECD (2018) Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices.

Orientation of SOCs Government Policies

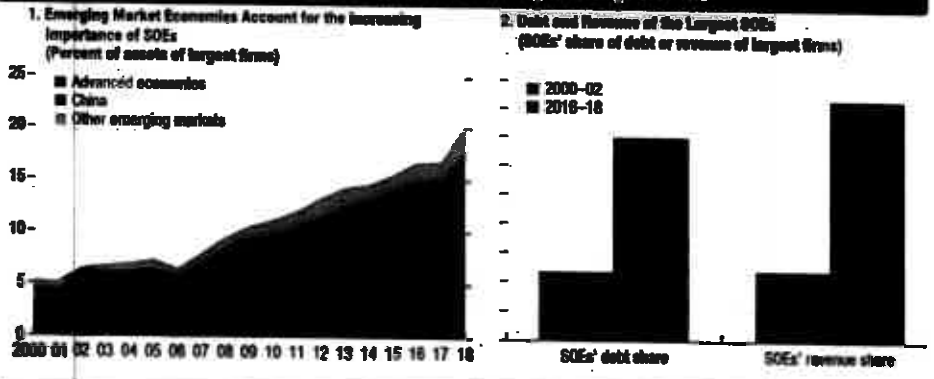


International Experience: SOCs as Global Players

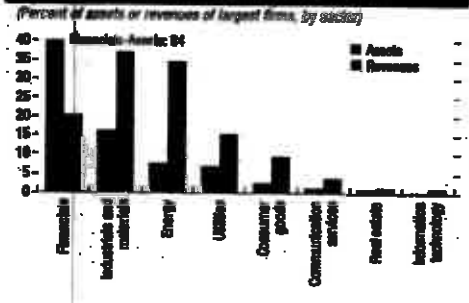
The Largest SOEs Have Become Global Players

- Over the past decade, the share of SOE assets among the world's 2,000 largest firms has doubled to 20 percent. At $45 trillion in 2018, these assets are equivalent to 50 percent of global GDP.
- An important factor has been the relatively high economic growth rate of emerging market economies and especially of China, where SOEs still play a large role in the domestic economy
- However, the balance sheet expansion also reflects international activities, for example, SOEs have accounted for 5–15 percent of annual cross-border acquisitions since 2008 (UNCTAD 2019). The same dynamics are behind the doubling of SOEs' share of debt and revenue of the world's largest firms sinceearly2000
- The debt of the largest SOEs is $7.4 trillion, compared with $1.4 trillion in 2000. SOEs have become big players in global corporate debt markets
- One-third of the entire emerging market sovereign hard currency debt tracked in the most widely followed emerging market sovereign bond index (October 2019 Global Financial Stability Report)
- Many SOEs are no longer wholly owned by the government. Among the largest SOEs in the world, almost 60 percent have a mix of public and private sector owners
- Today, many of the largest SOEs are also multinationals (state-owned multinational enterprises, or SOMNEs), several with mixed ownership
- A SOME is an SOE that controls assets of other entities in countries other than its home country. SOMNEs are spread around the world, but most originate in China, members of the European Union, India, Malaysia, Russia, South Africa, and the United Arab Emirates (UNCTAD 2019)
- In 2018, half of the top 10 (as measured by revenue) non-financial firms globally were SOMNEs. The list of the largest non-financial SOEs includes China National Petroleum, Volkswagen AG, Saudi Arabian Oil Company, and Russian firms Gazprom and Rosneft
- SOEs evolve into SOMNEs for various reasons - some desire to raise profitability, secure access to natural resources, or obtain technological knowledge

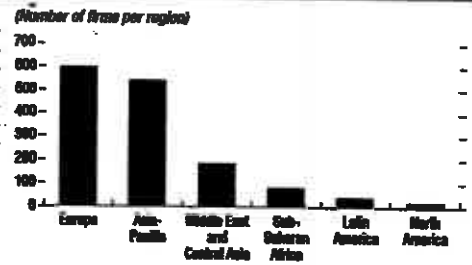
Share of Non-financial SOEs among the Largest Firms



SOEs' Share of Assets, by Sector



Multinational SOEs around the World



Source: International Monetary Fund:Chapter 3 - State-owned Enterprises: The Other Government (April 2020)

Sovereign Wealth Fund - Taxonomy
Illustrating the Differences Between Sovereign Investors

Economic Objectives	Specific Objectives	Description	Examples
Capital maximisation Building a risk adjusted capital base for the growth and preservation of national wealth	**Balancing intergenerational wealth**	• **Investing to create intergenerational equity** • **e.g. transforming non-renewable assets into diversified financial assets for future generations**	• **NBIM,** • **Kuwait Investment Authority**
	Funding future liabilities	• **Growing and preserving the real value of capital to meet future liabilities, such as contingent liabilities like pensions**	• **Australia Future Fund,** • **New Zealand Super Fund**
	Investing reserves	• **Investing excess reserves in potentially higher-yielding assets via financial strategies aiming at higher long-term returns, and reducing the negative carry costs of holding reserves**	• **China Investment Corporation** • **Korea Investment Corporation**
Stabilisation Macroeconomic management and economic smoothing	**Facilitating fiscal stability**	• **Using counter-cyclical fiscal tools to insulate the economy from internal and /or external shocks, e.g. changes in commodity prices to smooth consumption**	• **Chile Economic and Social** • **Stabilisation Fund**
	Stabilising the exchange rate	• **Using the fund's resources to balance large capital inflows and outflows in the short term (which may be caused by commodity price volatility) to prevent asset price bubbles and reduce price volatility**	• **Russia Reserve Fund**
		• **Using the fund to manage the amount of capital entering the domestic economy over the long run to ensure the exchange rate is maintained at a level that allows for other export activities, e.g. to prevent Dutch Disease**	• **Mexico Oil Income** • **Stabilisation Fund**
Economic development Investment to boost a country's long-term productivity	**Investing in hard infrastructure**	• **Domestic development in capital assets, including but not limited to transport, energy, water management and communications**	• **Nigeria Infrastructure Fund**
	Investing in social infrastructure	• **Domestic development in soft infrastructure: human capital and the institutions that cultivate it. This includes socio-economic projects such as education and health**	• **Mubadala Development** • **Company**
	Pursuing industrial policy	• **Creating a diversified economy in order to reduce dependency on one resource or source of funding.** • **Official, strategic efforts by governments to boost productivity in specific sectors**	• **Temasek,** • **BPI (France)**

Source: Source: (1) PwC Sovereign Investors 2020 report, 3 OECD Guidelines on Corporate Governance of State -owned Enterprises, 2005

Temasek
Sovereign Wealth Fund–Global Overview

Types of wealth funds[1]

Sovereign investor's characteristics

Source of funding	Commodity	Fundo Soberano de Angola	ADIA	ESSF (Chile)	bpifrance		TEMASEK	Non-Commodity
Entity Status	Central Bank Account	HONG KONG MONETARY AUTHORITY 香港金融管理局		Government Sponsored Agency	MONTANA BOARD OF INVESTMENTS		GIC	Independent Public Entity
Age	Recent	FMP FONDO MEXICANO DEL PETRÓLEO	Northwest Territories Heritage Fund		NPS	INVESTMENT COUNCIL		Established
Objective	Capital Maximization	KIC Korea Investment Corporation	National Financial Stabilization Fund	Macro Economic Stability			MUBADALA	Economic Development

Top 10 wealth funds (by total assets)[2]

Rank	Sovereign wealth fund	Total assets (USD)	Type	Region
1	Norway Government Pension Fund Global	1,108,700	Sovereign wealth fund	Europe
2	China Investment Corporation	1,045,715	Sovereign wealth fund	Asia
3	Abu Dhabi Investment Authority	579,621	Sovereign wealth fund	Middle East
4	Kuwait Investment Authority	533,650	Sovereign wealth fund	Middle East
5	Hong Kong Monetary Authority Investment Portfolio	528,054	Sovereign wealth fund	Asia
6	GIC Private Limited	453,200	Sovereign wealth fund	Asia
7	Temasek Holdings	417,351	Sovereign wealth fund	Asia
8	Public Investment Fund	390,000	Sovereign wealth fund	Middle East
9	National Council for Social Security Fund	324,996	Sovereign wealth fund	Asia
10	Investment Corporation of Dubai	305,233	Sovereign wealth fund	Middle East

Source: Source: (1) PwC Sovereign Investors 2020 report, (2) Sovereign Wealth Fund Institute

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Temasek – Overview

Company Overview

- Temasek Holdings Limited is a sovereign wealth fund of the Government of Singapore specializing in growth capital, restructuring, and divestiture transactions
- Founded in 1974 and is based in Singapore, Singapore with additional offices in Asia, Europe, South America, and North America
- SGD (Singaporean Dollar) 308 bn assets under management as at 31 March 2020
- The fund is AAA rated by Moody's and S&P
- 14% Return on investments since inception
- Investment philosophy is underpinned by 4 investment themes:
  - Transforming Economies
  - Growing Middle Income Populations
  - Deepening Comparative Advantages
  - Emerging Champions
  - The firm also invests in private equity and debt funds, such as buyout and growth capital funds, mezzanine funds, debt funds, technology venture capital funds, and life sciences venture capital funds.

Financial Overview

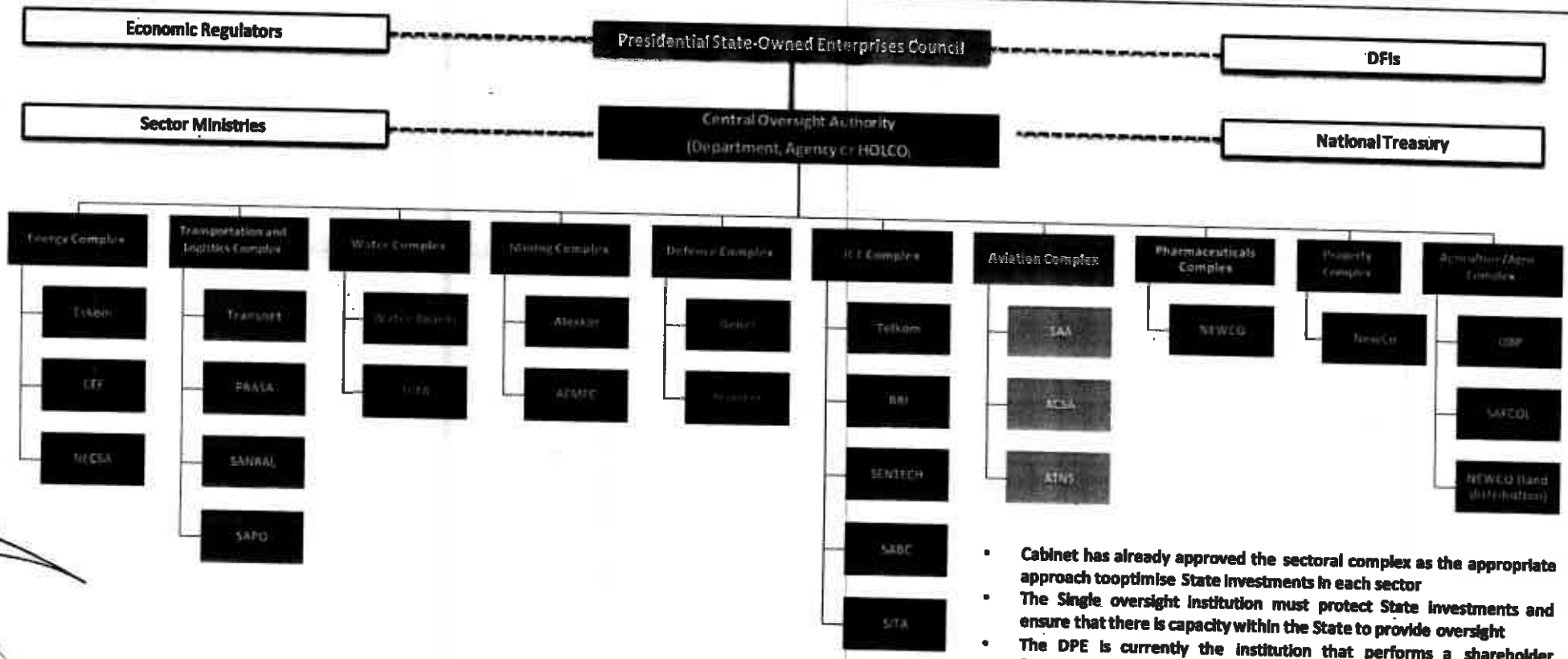
SGD ' Billion	Mar 12	Mar 13	Mar 14	Mar 15	Mar 16	Mar 17	Mar 18	Mar 19
Total Revenue	83.5	94.3	92.4	101.6	101.5	97.0	107.4	114.6
Growth Over Prior Year	0.0%	12.9%	(2.0%)	10.0%	(0.1%)	(4.4%)	10.8%	6.7%
Gross Profit	27.2	29.8	28.7	31.2	28.2	28.4	32.7	29.6
Margin %	32.6%	31.6%	31.1%	30.7%	27.8%	29.3%	30.4%	25.8%
EBITDA	20.5	22.7	21.9	23.5	22.8	23.3	27.3	24.8
Margin %	24.5%	24.1%	23.7%	23.1%	22.5%	24.0%	25.4%	21.6%
EBIT	13.6	15.9	15.1	16.6	15.8	16.3	20.6	17.8
Margin %	16.3%	16.9%	16.3%	16.3%	15.6%	16.8%	19.2%	15.5%
Net Income	10.7	10.7	10.9	14.5	8.4	14.2	21.7	11.8
Margin %	12.8%	11.3%	11.8%	14.3%	8.3%	14.6%	20.2%	10.3%

Source: Company Website

How Singaporeans Benefit From Long Term Investment Returns

	Edusave	• Started in 1993 to help maximise opportunities for Singaporean students in government and government-aided schools.
	TechSkills Accelerator	• Set up to develop more ICT professionals through the reskilling or upskilling of individuals.
	CPF Medisave Top-ups	• Part of the Pioneer Generation Package to help older Singaporeans pay for medical care
	GST Vouchers	• Cash benefits, CPF top-ups and U-Save rebates for utilities to assist lower income households.
	Community Silver Trust	• Supports voluntary welfare organisations that provide long term health and social care.
	SG Bonus	• One-time cash benefit ranging from S$100 to S$300 given to all Singaporeans aged 21 and above.
	Special Employment Credit Fund	• Supports employers in hiring older Singaporean workers.
	National Productivity Fund	• Supports employers in hiring older Singaporean workers.

SA Government Proposed Governance Structure



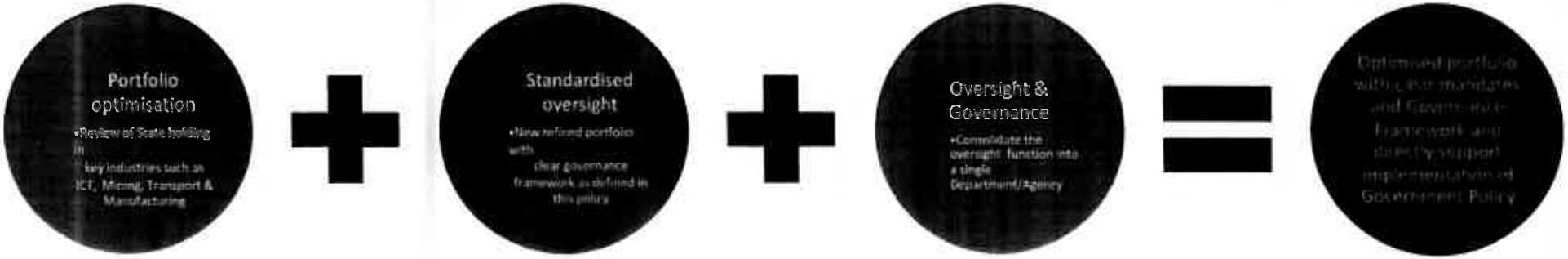
- Cabinet has already approved the sectoral complex as the appropriate approach tooptimise State investments in each sector
- The Single oversight institution must protect State investments and ensure that there is capacity within the State to provide oversight
- The DPE is currently the institution that performs a shareholder function solely

SOE Council Overview

Where We Are Taking The SOE Council

- The organisation and structure of the shareholder function that seeks to increase accountability as well as the coordination mechanisms to improve alignment between policy aspirations and operations of SOCs
- List of strategic sectors that Government must focus on todrive the transformation of the South Africaneconomy
- Framework to determine the relevance of SOCs in the development process and aspirations
- Standardisation of the partnership between Government, through SOCs, and the private sector to support the realisation of the Developmental State aspirations
- Strengthening the capacity of the State throughimproving performance of the SOCs and creating a capable, professional and responsive public service
- Define the role of economic regulatorsand DFIs to support the proposed shareholder model

Transition to a New SOC Council



- Since 1994, the Government's Portfolio of Strategic or large SOCs has not changed. However, during this period Government privatised some SOCs e.g. Telkom & Iscor
- Some of the SOCs were completely phased-out and their assets disposed off to private players e.g. Aventura
- The disposal process did not strengthen Government's capacityand in some instance createdimplementation challengese.g. rollout of broadband infrastructure
- There is a need to optmise State'sinvestments into the economy taking into account developmental requirements

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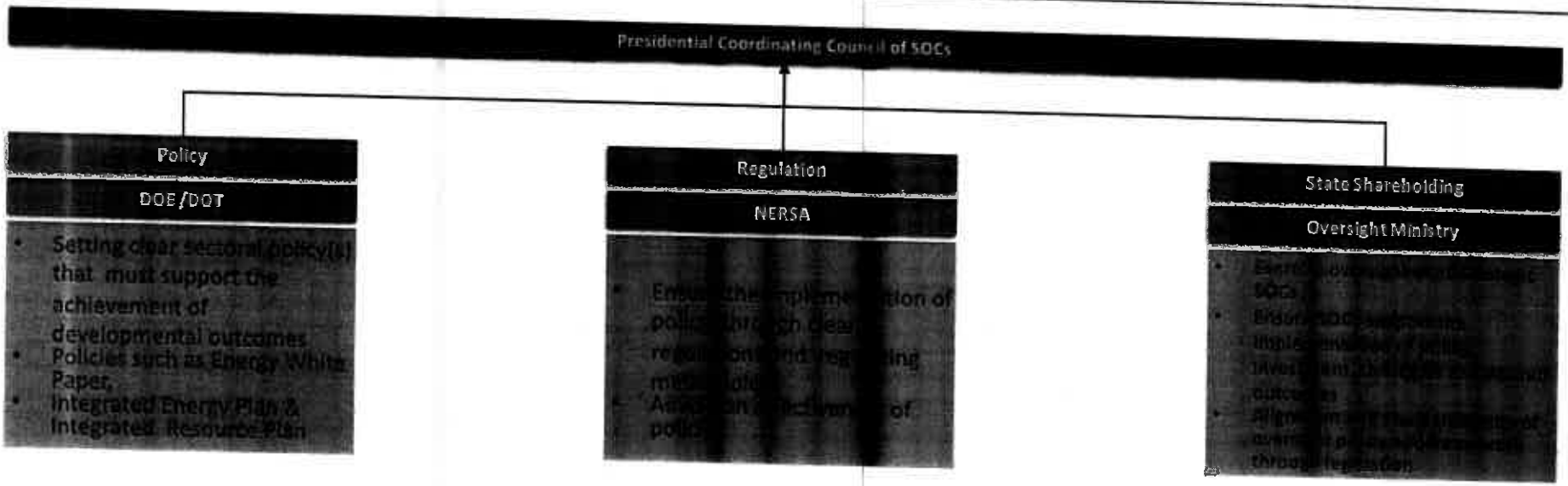
SOE Council – Separation of Functions



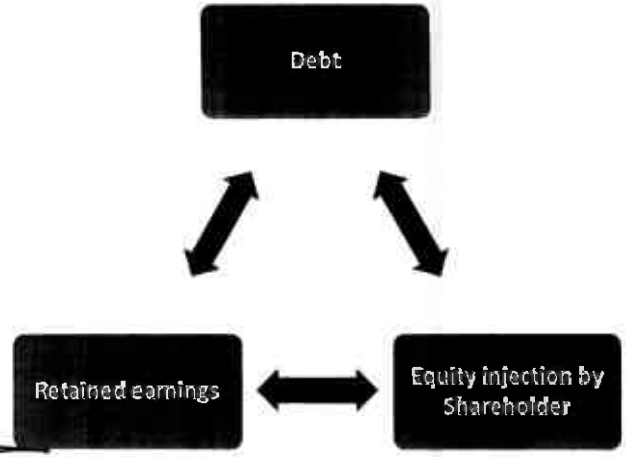
- The separation of functions ensures that the different functions are executed by specialist institutions
- More sectors where SOCs operate has seen the introduction of the private sector
- Every sectoral complex will operate within a certainfiscal framework.

Proposed Funding Plan For SOEs

Overview

- The Government should develop a consolidated funding model for commercial SOEs and DFIs;
- The Government should develop and adopt a policy shift towards a greater mix of debt finance and equity finance;
- Private Sector Participation (PSP) in partnering with SOEs should be encouraged and expanded;
- A funding model for the funding of public infrastructure based on a distinction between economic and social infrastructure must be developed;

SOCs Funding Sources



Options for SOCs

- The Government should turn select SOEs into national world-class state commercial (industrial and economic) flagships;
- Government should address the issue of non-financially viable commercial SOEs;
- The Government should actively promote a common national understanding and commitment to a developmental state vision;
- The Government should build its capacity to develop and implement an overarching strategy for SOEs;
- Most of the SOCs are funded through 3 options i.e. retained earnings, equity injection and debt
- To sustain and expand current levels of investments, SOCs require some form of funding
- However, the current sources of funding have been fully exploited and other options need to be explored
- The PSP framework must be guided by the following principles:
- Provide additional funding to execute new economic viable infrastructure projects
- Does not result in significant increases in the price of goods and services
- Balanced risk sharing – the private sector must assume risk and the use of guarantees is discouraged

Potential Bidder Universe of Funders and SEPs

Private Equity

ETHOS, RMB CORVEST, actis, SAVANT, kth, Blackstone, MEDU CAPITAL, ARC, agile, KKR, CVC, ATHENA CAPITAL, IMPIO CAPITAL, african phoenix, senatiacapital, EQT, TPG, SPHERE, The Carlyle Group, APOLLO, metier, TANA, PHATRA, Ala Capital, BainCapital

Operating Partners

multiply, Lufthansa, American Airlines, DELTA, Discovery Vitality, WFS, QATAR AIRWAYS, Emirates, Ethiopian, TURKISH AIRLINES, imperial logistics, Kenya Airways, DHL, BRITISH AIRWAYS, AIR FRANCE, rewards

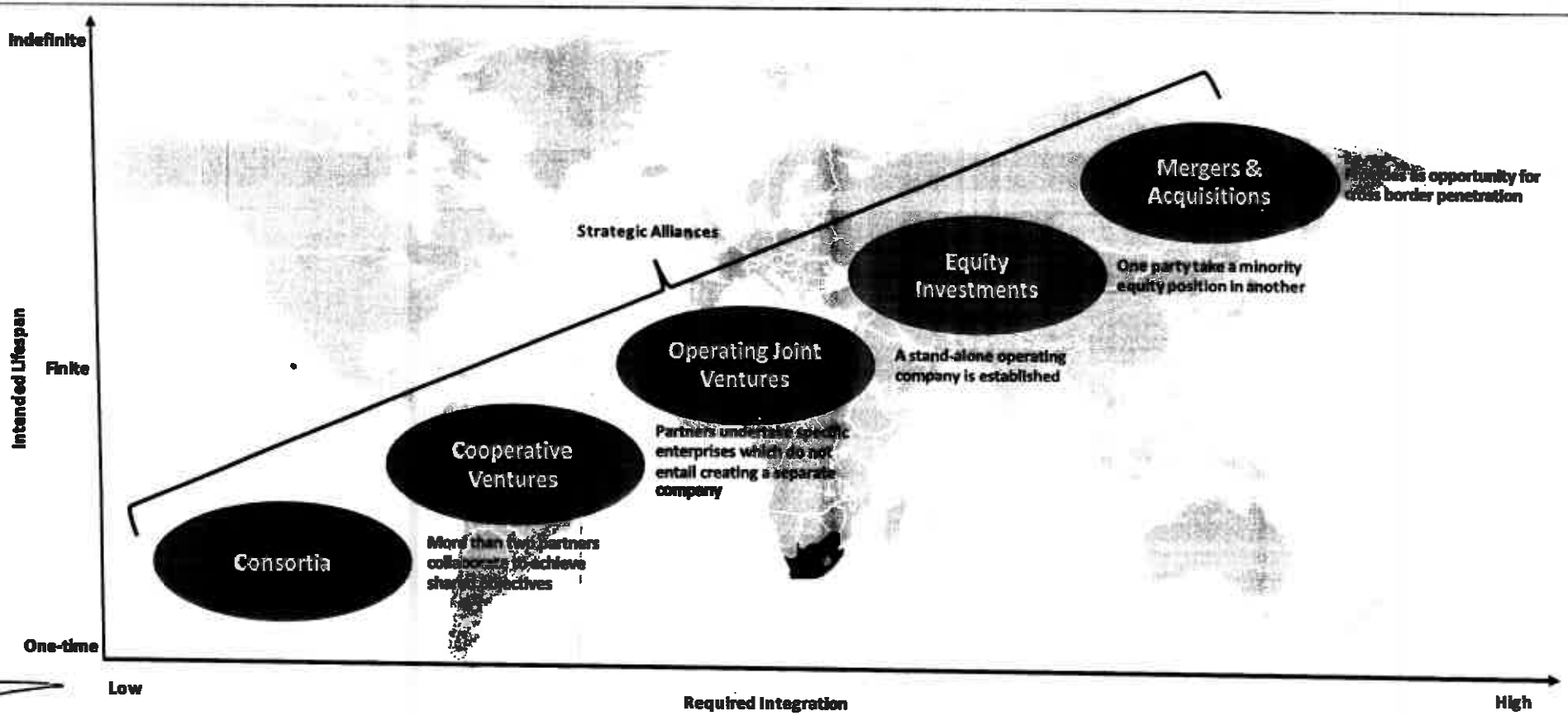
Impact Investors

IDC, DPI, GAIA, THE WORLD BANK, DBSA, sadc, OPEN SOCIETY FOUNDATIONS, UNCDF, BAMBOO CAPITAL PARTNERS, FAIRFAX FINANCIAL HOLDINGS LIMITED, IFC, LEAPFROG, New Development Bank

Institutional Investors and Finance Providers

GIIN, Eskom Pension and Provident Fund, LITM Willis Towers Watson, Ninety One, TRANSNET, TDB, MULTIPLY GROUP, Investec, ALEXANDER FORBES INVESTMENTS, sasfin, BNDES, OLDMUTUAL, momentum investments, STANLIB, Sanlam

Strategic Alliances Structure Considerations



Source: PricewaterhouseCoopers LLP

Examples Of Partnership Models

public enterprises
Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

Category	Ownership of Capital Assets	Responsibility of Investment	Assumption of Risk	Length of contract (years)	Typical Sectors
Supply and Management Contract	Public	Public	Public	1 to 3	Supply of non-core elements e.g. labour, raw materials
		Public / Private	Public / Private	3 to 5	Transport, Water
Lease/ Franchise	Public	Public	Public / Private	3 to 5	
				5 to 20	Water
Concessions	Public / Private	Public / Private	Public / Private	3 to 10	Transport
				15 to 30	
Private Ownership of assets and Private Funding Initiative	Private	Private	Private	Indefinite	Energy Telecoms
	Public / Private	Private	Public / Private	10 to 20	Social Infrastructure

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Legal and Governance Review

Sound Leadership and Governance

- Appointments of new boards
- Appointment of strong executive directors
- Credibility of appointment methodology
- Consequence management (including criminal prosecution)
- Appoint members who have the requisite integrity, experience and competence
- Ensure succession planning by appointing members who can learn from the experienced appointees, with a particular bias for black females

Confront Corruption

- Limit role of the Board in procurement processes
- Ensure that forensic investigation reports are acted on
- Strengthen SOC internal audit and enterprise risk management with independence and capability
- Appoint an independent and credible organization to handle whistleblowing for instances where SOC employees, suppliers or customers would want to safely report instances of malfeasance
- Establish a DPE centralized depository of forensic investigation reports

Better co-ordination and oversight of Government's role as Shareholder

- Review of Schedule 2 entities as per cabinet approved complexes (mandate & relevance)
- Streamline SOC business to emphasise focus on core mandate in order to support the development of the state
- Co-ordinate activities of IMC on reforms
- Implementation of the DPSA Guidelines on Appointment of Boards and Executive Management;
- Implementation of Executive remuneration guidelines across government

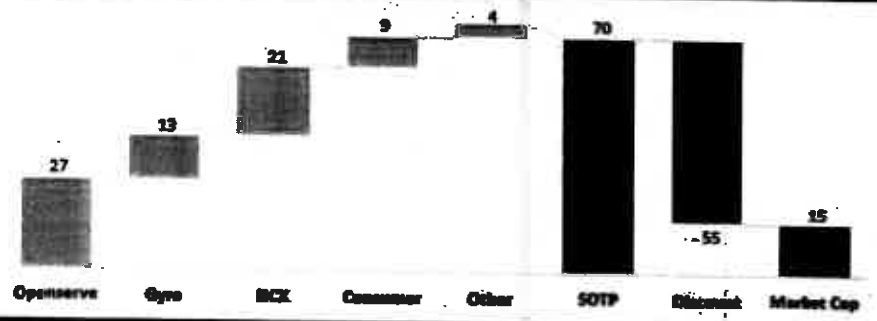
PSM

Case Study: Telkom Value Unlock

Value Unlock Programme

- **Underpinned by valuation, strategic imperatives, andcapitalallocation**
- **Telkom Valuation:** is not a reflection of its intrinsic value and it is trading at a telco multiple, yet its portfolio of businesses consists of IT, masts and towers and infrastructure businesses which are valued at higher multiples than telcos globally.
- **Valuation Conundrum:** Businesses with diverse operations are usually valued at Telco Trading multiples
- **Purpose:** Seeks to realise value for shareholders.

Sum of Parts Valuation (R'bn)



GYRO (Property Company) Value Unlock Opportunity

- **Separate our property and masts and towers portfolio to increase management focus and unlock value for the group continues to be successful**
- **Gyro contributed positively to the group, driven by our masts and towers portfolio, as the demand for external leases increases**
- **List GYRO as a REIT to attract capital and realise value**

Source: Telkom 2020 Corporate Presentation and 2019 Capital Markets Day

Value Unlock Rationale

Valuation gap	Strategic imperatives	Capital allocation
•Trading at telco multiple •Sum of the parts not recognized •Underlying infraco assets not recognized	• Scale • Capability • Growth	• Limited capital • Generate capital

GYRO (Property Company) – Investment Case

- **Unique business model:** TowerCos have a proven and scalable business model which has translated into extraordinary shareholder returns of >100% over the past 5 years
- **High quality assets**
  - **High quality tower portfolio of ~3,650 sites with a tenancy ratio of 1.32x, and is well positioned to capture future demand**
  - **Build-to-suit pipeline from anchor tenants**
- **Organic growth opportunities:** SA expected to show strong demand for towers (12,000 towers over the next 10 years), driven by attractive telecom fundamentals, increasing data consumption and the introduction of new technologies such as 5G
- **Inorganic growth opportunities:** Inorganic opportunities for growth in South Africa and emerging markets given that a large portion of towers are still MNO-captive
- **Robust majority shareholder:** Backed by Telkom SoC, a strong shareholder committed to Gyro Towers expansion strategy

Replication to Other SOEs

- **Department of Public Works and SOE Property Portfolio:** Opportunity to realise value through the sale, development and commercialization of portfolio

Case Study: South Africa – Telkom SOC Ltd

01 Background

- ✓ Telkom was incorporated on 30 September 1991 under the Department of Posts and Telecommunications (Government)
- ✓ On May 1997, 30% equity interest in Telkom was sold to Thintana Communications as part of its policy to liberalize the telecommunications market in South Africa
- ✓ On March 30, 2001, the Government sold another 3% equity interest in Telkom from its holdings to Ucingo Investments, to a consortium of black empowerment investors, leaving the Government with 67% equity interest in Telkom

02 Privatisation Route

- ✓ Telkom listed its shares on the Johannesburg Stock Exchange (JSE) and New York Stock Exchange (NYSE) on 4 March 2003
- ✓ Telkom had a market capitalization of R12.4bn (11 September 2020)
- ✓ At the time of listing, the Government sold 25% interest and retained 42%
- ✓ At the listing date, Telkom Group had businesses in mobile (50% of Vodacom), fixed-line (100% of Telkom SA)
- ✓ When Telkom listed, the JSE granted extraordinary rights to the Government for a period of eight years. Rights included the appointment of the chairman and six of the directors to the Telkom board

Telkom

03 Special Rights to Significant Shareholders

- ✓ **Directors:** owns at least 25%, it has the right to appoint five directors, including two executive directors
- ✓ **Agreement between Significant Shareholders:** the Government and Thintana agree that, for so long as both of them are significant shareholders, they will meet before any general meetings of ordinary shareholders and attempt to reach consensus on voting in respect to their respective shareholding of every item that is on the agenda for the relevant meeting

04 Telkom Today

- ✓ Strengthened governance
- ✓ Strong board – 100% Independent Board Members
- ✓ Strong management team
- ✓ Internal governance structures strengthened
- ✓ Key stakeholder relationship reset
- ✓ New operating model – fully separated Business Model established

Source: Telkom Listing Prospectus, Telkom Investment Case 2020, S&P Capital IQ

Conclusion

Concessions Overview

- In terms of the SA SOE Council, given the international models, it is clear that China's SOEs are driving not only the Chinese economy, but they are driving the global economy as indicated in the global SOEs as a percentage of global 500 graph above.
- There are good lessons to be extrapolated and adopted to the SA SOE council in that the Shareholder needs to have a clear long term vision, strategy to inform that a sound capital structure framework is created for the SOE that they own, thus ensuring that shareholder value is created.
- This clear direction will enable the SOEs to deliver shareholder commercial and developmental objectives, as well as ensuring that not only narrow profit seeking motive is realized but imperfect market allocation (or market failure) is corrected (i.e. combination of SASAC, Temasek and Sovereign Wealth Fund Models).
- The clear direction and delineation of roles will result in the SA SOE Council realizing its objective
- The SOE and Government will not repeat the unfortunate mistakes of the past and be able to realise the long-term objective of addressing the challenging issues facing SA of unemployment, inequality and poverty alleviation. This speaks directly to the critical and strategic role SOE needs to play in making this vision a reality.

End state

Department
Set maximum risk tolerance

Board
Risk appetite, risk strategy, risk policy

CEO, Risk Committee and Compliance Committee
Risk culture, Procedures, Processes, Limits

Risk Management Process
Identification, measurement, management, report and monitoring

End

P.T.O

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Minister Pravin Gordhan: Public Enterprises Dept Budget Vote 2022/23

Budget Vote Speech 2022 Speech by Minister Pravin Gordhan, MP

Time to Rebuild, Better, Together A People Centred Approach

Chairperson,
Honourable Members,
~~Chairpersons and CEOs of SOE Boards,~~
Ladies and Gentlemen

I have the honour to present the Budget Vote for the Department of Public Enterprises for the 2022/23 financial year.

We do so in a complex economic, social, and political world in which:

- Geopolitical tensions and war prevail and have resulted in the shocking rise in energy prices (oil, gas, and now renewables), as well as a rise in food prices and other costs of living.
- Huge economic stresses have emerged in many parts of the globe: rising inflation, increasing interest rates, risk of stagflation, and even recession.
- A battle between a multilateral/ multipolar vision of the global order is systematically contested by a unilateral / unipolar vision and actions that pursue this vision.
- The impact of the Covid pandemic leading to a reordering of productive capacity and its location, as well as the disruption of global supply chain.
- The impact of climate change has hastened global efforts to transition to a net zero carbon resilient economy that is just and fair.
- Gross inequality in most parts of the world, is matched only by the extraordinary greed and rapaciousness of elites across the world.
- Fake news, bots, populist narratives, bullying now seek to intimidate and mislead desperate people into wrong political choices.

These factors greatly impact South Africa, its economy, and its people. This compounds the many challenges we have in South Africa: unemployment, low growth, erratic investment, poverty and inequality. We have been through heartrending tragedies in the recent past: state capture, the July unrest, the pandemic, floods earlier this year in KZN, and now the impact of war

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elsewhere in the world.

In all of this, ours is the responsibility to ensure progress, redress, recovery from the damage caused and unite the progressive forces and people in a joint effort to rebuild, recover, and reinvent SOEs. This is central to government's Economic Reconstruction and Recovery Plan (ERRP).
The DPE has the mandate to oversee this process in some of the important SOEs. We must, therefore, seize the many opportunities we have and overcome the challenges left to us by our past, to:

- Enhance the governance and integrity in SOEs and not only at the level of the Board, but in all other levels;
- Introduce a new ownership model with the guidance of the Presidential SOC Council;
- Implement the structural reforms needed in the network industries;
- To take account of, and implement the recommendations of the Zondo Commission;
- Relentlessly focus on operational improvements and efficiency;
- Improve the financial resilience;
- Reinvent their business models and strategies to take account of global developments and national imperatives;
- Constantly build the professionalism and competence of managers and staff;
- Contribute actively to economic transformation and the creation of new opportunities;
- Cooperate with workers to lead and embrace the substantial changes needed to ensure the sustainability of SOEs;
- Create a collaborative partnership with customers and stakeholders to arrive at mutually beneficial outcomes;
- Encourage public – private partnerships that mobilise the necessary resources and skills to advance the SOE programs; and to
- Actively combat corruption and disruption, whether from within SOEs or from counter-revolutionary quarters / criminals outside SOEs. In this latter context, this morning I heard that the Hendrina power station has been subjected to another act of sabotage. Only insiders could have carried out this crime.

A people centered approach

It is appropriate to ask: Why do we do all this? Who benefits?

Because the acts of the greedy, the corrupt, the bully, the counter-revolutionary set back our progress as a democracy and stop us from becoming a caring nation. While they sit back to enjoy their spoils, the damage they cause is borne by our communities – by workers, by small businesses, by the unemployed and youth.

Now is the time for all of us to join the ranks of those who want to build a better future and better institutions and not just point fingers among us.
Now is the time to care for the hungry, the marginalized, those in despair.
Nothing can destroy the might of an organized people driven by a clear vision and who take their destiny into their own hands and change the course of history.
Strong, organized communities are fundamental to the security of our country's infrastructure. We must have a sense of national pride in our electricity, rail, water, and other infrastructure assets and protect them from being broken.

Build partnerships
Working in partnership with all stakeholders is vital in a period of transformation and change:

- Communities are impacting by loadshedding, illegal connections, and the energy transition. They must be informed and participate in shaping the future.

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- Workers both in SOEs and industry play a crucial role, and are impacted by changes in technology and other processes. We must build constructive partnerships that enable us to recover and rebuild SOEs. Most importantly
- they must be in the frontline of protecting our infrastructure against criminals and detect any sabotage.
- PRIVATE SECTOR partnerships will take various forms – from joint investments, to solving challenges, to proactive collaboration. In respect of the latter: Minister Patel and I have agreed, that in view of energy and logistics being vital to the success of our industrialisation efforts, we will launch a forum in which industrialists in key sectors together with Eskom, Transnet and other entities, will enhance collaboration, advance planning, and problem solving. This will enable a better climate for investment and job creation. We are both making this announcement in our respective budget votes which are taking place now.

The Zondo Commission

Judge Zondo finds that the evidence presented to him revealed that the systemic corruption that collapsed governance in these institutions was led by certain board members and senior executives. These people need to be held accountable.

The Report confirmed state capture tentacles were deeply rooted in Transnet, Eskom, Denel, and SAA, unfortunately overseen by the DPE.

The Department has moved swiftly to ensure the SOES reporting to it:

- Open criminal cases with the law enforcement authorities;
- Pursue civil recoveries to claw back billions of rands;
- Refer cases to the registrar of companies so that former directors of SOEs found guilty are prohibited from ever again serving as company directors;
- Blacklist companies on the Central Supplier database to prevent them from accessing state procurement opportunities; And
- Refer cases to professional bodies for enquiries to ensure perpetrators of state capture are prohibited from practicing in their respective disciplines.

We must do these things so that the people responsible can be made accountable, and so that we never again allow our institutions to be destroyed,

I applaud the bravery of whistle-blowers who put their lives at risk to expose the rot of state capture. They must be protected and celebrated for their courage.

The Shareholder Mandate

The following are some of the plans that will be implemented in this financial year by the SOEs in the DPE portfolio.

ESKOM

Eskom's generation is not under-performing with the Energy Availability Factor languishing at 58% YTD, as opposed to the target of 75% set out in the IRP 19.

The reasons for the poor performance are well known.

Generation Performance

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Eskom is taking urgent steps to improve the performance of Generation. Daily production and oversight meetings are held to hold power station management accountable for performance. An operations excellence initiative is also in place which to identify the major causes of underperformance and to make improvements. At selected power stations war rooms will be set up to ensure that production challenges get tackled in a systematic way.

A skills mentoring programme using highly experienced power station managers has been launched. This team will be deployed to power stations where load losses are particularly severe.

Neglected and poor maintenance

Because past neglect of maintenance is not easily overcome. Contractors are held accountable for direct improvement in the EAF as a result of the work undertaken.

Upgrade skills & training: A lack of engineering and technical skills and experience in Eskom remains a significant challenge. These are pre-requisites for a major industrial operation like Eskom. Eskom has introduced a new training programme at its Academy of Learning to upgrade skills.

Lack of generation capacity: Eskom estimates it needs 4 – 6 GW of additional capacity immediately if it is to properly maintain its power stations. This will allow it to take units off-line for repair while maintaining a supply of electricity.

Bid Windows 5 and 6, as well as the RMIPPP, will, at best, deliver an effective 3,000MW which alone will not create the buffer needed.

The President's announcement of the lifting of licensing restrictions on own generation to 100MW will undoubtedly assist the position. However, red-tape is holding up the development of these projects.

Recently, Eskom has opened up land it owns in Mpumalanga for long term leases to renewable energy developers.

Poor coal quality, which is often caused by syndicated coal delivery is causing major damage to plants. Eskom is seeking collaboration with the coal mining industry to solve this problem.

Sabotage continues to be a problem. For example, Eskom yesterday announced it had discovered cut cables and tubes which caused a breakdown at Tutuka power station.

Corrupt procurement: several syndicates are involved in delivery of coal, oil, and other supplies, including spares. Measures are being taken to identify the insiders enabling syndicates to gain access. Measures are also being taken to eliminate overpricing and other malpractices.

Eskom's financial stabilization

Eskom has been able to achieve a significant improvement in its EBITDA for the 2022 financial year with early indications (pre-audit finalisation) showing an improvement of over 85% compared to the 2021 financial results.

This is driven by:

- the general recovery in energy consumption after the initial hard lockdown due to the COVID-19 pandemic;
- revenue improvement supported by the NERSA's standard tariff increase of 15.06%; and
- cost control saving of about 99.5% of the R20 billion target for the year.

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Eskom has achieved savings of over R50 billion since inception of the program in the 2019/2020 financial year.

A further reduction in debt to R396 billion (from R401 billion) was also achieved.

However, Eskom's liquidity issues relate specific areas which need urgent attention:

- A lack of cost-reflective tariffs;
- Non-payment by municipalities;
- Widespread electricity theft and non-payment;
- Infrastructure vandalization and theft.

Eskom's restructuring

The legal separation of the Transmission business has made good progress: key asset transfer agreements are signed, a legal entity registered; and engagements are under way with lenders for their consent to the unbundling.

However, enabling amendments to the Electricity Regulation Act, as well as a new Electricity Pricing Policy, need to be approved as a matter of urgency.

Climate Change and JET

Eskom's has a holistic approach to de-carbonization and environmental compliance as part of the country's Just Energy Transition strategy. This includes accelerating the shutdown of ageing and unreliable coal plants, and the roll out of new no and low carbon generation capacity, in a socially and environmentally responsible manner.

Transnet

Transnet is key to ensuring an efficient network industry which enables customers supply chains to be globally functional and for transport and logistics to act as a catalyst for economic growth.

Transnet is driving a portfolio of initiatives intended to address challenges to competitiveness of South Africa's value chains. These initiatives include the following efficiency improvements:

Transnet National Ports Authority (TNPA) plans to improve operations by refurbishing tug and pilot boats, acquiring a new helicopter for pilotage services, and 12 new tugs for the port system.

Transnet Port Terminal (TPT) will focus on three aspects: people, port equipment and processes to reach the desired port efficiencies.

The plans in place entail:

- Equipment operators able to operate more than one type of equipment;
- Replacing and refurbishing equipment;
- Reviewing incentive schemes; and
- Further improving workforce planning.

Transnet Pipelines (TPL) where pipeline tapping is just as detrimental as cable theft, as these incidents adversely affect the operations of the New Multi-Product Pipeline (NMPP), thus undermining TPL's ability to ensure fuel security. P a g e 11 | 19

Tapping also has a serious environmental impact requiring affected areas to be rehabilitated, often over several years. TPL

PGM

has the following measures in place to reduce incidents:

- Reducing incident response time,
- Implementing volume optimisation strategies in line with orders and demand, and
- Enhanced security measures to reduce fuel theft incidents and associated environmental rehabilitation costs.

Transnet's Successes

Transnet is implementing the following policy objectives across its operations in rail and ports:

- Approved branch line concession approved and fully operational;
- Recently announced the slots sales on the container and cape corridor for private sector participation (3rd party access on operations);
- Procurement of port equipment [i.e., straddle carriers, Rubber Tyred Gantry (RTG)]; and the
- Corporatisation of Transnet National Ports Authority (TNPA);
- Road to rail migration strategy (capacity) initiatives are being implemented across Transnet operating divisions to attract freight volumes. The focus is on the key corridor segments areas where Transnet will leverage its position.

The successes and developments of the corridor segment initiatives for noting in this regard, include:

- Automotive - The development of the pre-feasibility business case and RFI for Kaalfontein and 3 Auto Port Terminals are in progress. Manganese - A decision was taken to limit the expansion via the Port of Ngqura to 16Mtpa, via the Port of Saldanha to 6Mtpa and to accommodate growth beyond 22Mtpa in the Boegoebaai development.
- Energy - The Richards Bay natural gas import terminal initiative RFI closed on 14 April 2022, with an extension of 1 month as per request from respondents.
- Private Sector Participation (PSP) - Transnet is actively seeking collaboration with private sector partners, for example, by bringing in partners to Pier 2 in the Durban Container Terminal (DCT) and the Ngqura Container Terminal (NCT).
- Furthermore, Transnet has issued several requests for quotation for operations in ports and railways, to increase , capacity and partnerships for funding and operations.

Financial Performance

Preliminary results for the 2021/22 financial year have reflected a marked improvement since the previous year, when the COVID related lockdown was at its worst.

Lingering after-effects of the previous year's financial challenges remain.

Recoveries in revenues and significant cost savings during the recently ended financial year should enable Transnet to return to its previous position of solid financial sustainability in the near future.

SAA

SAA is on the threshold of concluding the acquisition of the strategic equity partner and concluding the transaction which will ensure the viability and survival of SAA. Certain regulatory processes are now progressing.

Arrangements are also in place to finally implement all the provisions of the Business Rescue Plan. Two key subsidiaries have also been restructured will be operating on a profitable basis in this financial year: SAA Technical and Airchefs. Mango is

P.T.M

undergoing the final stages of a business rescue process.

We reiterate that these processes have the approval of cabinet and have all been consistent with legal requirements. There have been deliberate efforts to undermine the effort to restructure and reposition a state asset and introduce a majority private sector partner.

We are particularly pleased that the company under an interim leadership at both board and executive management re-started flight operations in September 2021. The current routes include Cape Town, Durban, Lusaka, Harare, Accra, Lagos, Kinshasa and Mauritius.

The airline's launching focus on African regional routes has been greeted with much admiration and pride across the African continent. As the airline's management awaits working with the SEP, the development of the second phase of the re-start strategy is already under consideration, which is an expansion into additional regional routes and selected international cities.

The airline will be developing a medium to long-term strategy which will no doubt grow its market share locally and globally.

The priorities around SAA for the new fiscal year are: to ensure the successful conclusion of the SEP process; the injection of R3 billion of working capital by the SEP; and the consolidation of the state's preference shares and its "golden share".

SOE governance: A New Era

In the 2022 SONA, President Ramaphosa said that: "SOEs play a vital role in our economy.

From water and roads, to energy and ports, to defence and aviation, these strategic assets are necessary to keep our country running.

It is essential that we reverse their decline, and position them to contribute positively.

We have therefore embarked on several immediate measures to restore these companies to health, at the same time as we undertake far-reaching reforms that will make our SOEs more efficient, competitive, accountable and sustainable.

The Presidential SOE Council, which I appointed in 2020, has recommended that government adopt a centralised shareholder model for its key commercial state-owned companies. This would separate the State's ownership functions from its policy-making and regulatory functions, minimise the scope for political interference, introduce greater professionalism and manage state assets in a way that protects shareholder value.

As part of this, preparatory work has begun for the establishment of a state-owned holding company to house strategic SOEs and to exercise coordinated shareholder oversight.

To ensure that SOEs are effectively fulfilling their responsibilities, the Presidential SOE Council is preparing recommendations on SOEs to be retained, consolidated or disposed of.

Any recommendations would be subject to extensive consultation with all stakeholders."

Further progress will be made in implementing this injunction. A shareholder Bill will be introduced after cabinet approval; the necessary legal documents for the establishment of the holding company are in progress; and the necessary consultations will be concluded.

In addition, PSEC's work includes:

P.T.M

- investigating possible financial models;
- In-depth analysis and determination of SOEs that should be consolidated and those that should be disposed of;
- Repurposing those consolidated SOEs; and
- Development of criteria for SOEs that need crisis management.

Climate Change Resilience

While progress has been made in recapturing and repurposing of our SOEs, we must also realise that they operate in a changed environment where issues of climate change and the move to a low carbon economy is having an increasing sway on their operations.

The flood in Kwazulu-Natal is but one reminder of this new reality. In repurposing our SOEs, their critical role in mitigating the impact of climate change should also be recognised. P a g e 16 | 19

Economic transformation

SOCs are also important contributors to economic transformation and support for SMMEs, skills development, provision of internships and learnerships, and local procurement:

As at 31 March 2022, the SOEs collectively contributed the following towards skills development:

- There is a total learner pipeline of 2,715 trainees currently in the system registered in various programmes across SOEs.
- Of these, 1,621 are artisan trainees, 235 of which are funded through the National Skills Fund as a part of the SOEs programme of Optimising their training facilities; 623 are engineering trainees; 252 technician trainees and 956 trainees in sector specific training programmes.
- A total of 387 students have been supported with bursaries in the 2021/22 FY.
- Over and above these, a total of 334 completions were recorded for the financial year under review, with 107 placements into permanent positions.
- Empowering Designated Groups

To illustrate, between 2019 and 2021, ESKOM, Transnet and SAFCOL have supported designated groups:

- R185,72 billion was expended on Black Owned (BO) businesses,
- R78,07 billion on Black Women Owned (BWO),
- R13,69 billion on Black Youth Owned (BYO) companies, and
- R0,91 billion spent on companies owned by people with disabilities.

Furthermore, the concept of Gender Responsive Planning, Budgeting, Monitoring, Evaluation and Auditing (GRPBMEA) will be introduced.

Localisation

The Department has compacted all its SOEs to procure a minimum of 70% of their goods and services from local manufactures to assist with job creation, re-industrialisation of the economy and support the growth of manufacturing and other productive sectors of the economy.

PART C: 2022/ 23 – PROGRAMME OVERVIEW

Chairperson,

The Department has been allocated a budget of R23.9 billion in 2022/23 financial year. Of these funds, payments for financial assets account for 98.2 per cent (R23.6 billion) of the total expenditure over the period ahead. These include additional amounts of R21.9 billion for Eskom and R1.7 billion for South African Airways in 2022/23 financial year.

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Compensation of employees is the department's largest expenditure item, increasing at an average annual rate of 5.8 per cent, from R159 million in 2021/22 to R188.1 million in 2024.25. To ensure that this remains within the expenditure ceiling for compensation of employees over the medium term only critical posts will be filled.

PART D: CONCLUSION

In conclusion, I wish to emphasise that rebuilding a broken institution takes time, courage, bold leadership and single-minded determination. Reinventing strategy in the process of rebuilding requires a clear vision, a recognition of market and community volatility, new technology developments, awareness of the competitive environment and astute change management strategies.

The institutions we work with are vital to the recovery and reconstruction of our economy, as well as the wellbeing of millions of our people.

This must be a united national effort which advances the good and defends against the vile and corrupt intent of counterrevolutionaries and criminals.

We must extend our support to the leadership of SOEs, the tens of thousands of honest staff and the members of the boards who provide a national service in many instances.

I invite all of us, regardless of affiliation to join in this national effort. Surely, most of us want to rid SA of corruption wherever it might be; surely, we want to rid SA of inequality and poverty. Surely all of us want to create hope, jobs and skills for our youth and future generations?

I want to express my gratitude to the Deputy Minister, my chief of staff, and staff in the ministry for their support.

I also want to thank the Director General Mr Tlakhudi and the officials in the Department for their efforts during these difficult times.

The Boards and the CEOs of the SOEs should also be commended for their leadership that has been executed with integrity to guide our SOEs during these difficult times.

Finally, let me remind you of the words of President Ramaphosa in the SONA 2022 when he said we have faced many crises in our past, and overcome them in trying times, showing courage and resilience.

I quote:
"Now, we must do so again.
Let us forge a new consensus to confront a new reality, a consensus that unites us behind our shared determination to reform our economy and rebuild our institutions.
Let us get to work.
Let us rebuild our country.
And let us leave no one behind."

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P.Tim

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COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

28 APRIL 2021

DAY 384

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COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

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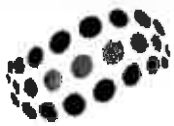

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through various mechanisms even if not always acknowledged as such by other political parties in our country and also in other countries.

In our view, cadre development has acquired such prominence in part because of the perspective that there should not be political interference in the selection of people who work in the public sector. However, international practise suggests a more nuanced approach to this matter.

10 For example, an OECD working paper on public governance published in 2007 written by a number of scholars including one called Martinsen, said that with specific reference to appointments of senior public service staff:

> "Political involvement in administration is essential for the proper functioning of a democracy.
>
> However, public services need protection against being misused for partisan purposes.
>
> 20 They need technical capacity which survives changes of government and they need protection against being used to impair the capacity of future government to govern."

In identifying suitable candidates for positions in public entities, the ANC does not seek to circumvent to

P.J.M

establish an often legally mandated processes for the appointment of individuals for these positions. Candidates are expected to submit their applications, meet the necessary requirements and be subjected to the normal processes of recruitment, selection, and appointment.

Even with these requirements, there are several instances where individuals appointed to positions may not have been fit for purpose or may not have had the necessary experience or qualifications and this much I am
10 prepared to accept.

The ANC's 54th National Conference recognised this problem and resolved that the married principal must apply in the deployment to senior appointment based on legislative prescripts and in line with minimum competency standards.

It is the ANC's view that the practise of cadre development should not be inconsistent with the principles of fairness, transparency and merit in the appointment of individuals to public entities. Cadre deployment cannot be
20 faltered in principle. It is a common feature of democratic practise around the world and I think it properly describe and is not diluted to various other intents and forms.

It is a useful process used by governing parties around the world to make sure that the mandate that they had been given by the populous is carried out but we could

P.T.M

concede that there are weaknesses in this practical implementation that make the case for greater clarity both within the political parties and the state.

Ultimately, political involvement in administration of the public service should be and must be circumscribed by legislation, by convention as well as by practice and we should do so to protect both political and administrative positions and to create certainty as to the division within political and administrative responsibilities. There are a number of governments around the world who utilise this very mechanism as outlined in the OECD.

The Commission also asked that I address the funding of political parties. Any successful multi-party democracy requires a diversity of functioning of political parties that are capable of articulating and representing the needs, the interest and the concerns of the electorate. For this, political parties require funding and in the absence of sufficient public funds for this purpose need to rely on donations from their own members, from supportive individuals, and yes indeed, from businesses.

Until adoption of the Political Party Funding Act which took effect on the 1st of April 2021, there were few, if any, specific restrictions on donations to political parties and no requirements on the reporting of donations, either publicly or to any particular authority. Like other parties,

P.T.M

the ANC relies on several sources of funding. Many Treasurer Generals who run their financial affairs of various political parties will testify that the running of political parties as the government increasingly costly, expensive, and requires a lot of funding.

These includes funds allocated to represented political parties which are administered by the IEC, membership subscriptions as well as levies that are levied on members who are deployed by the Parliament of various
10 places, fundraising initiatives, like, in the ANC's case, the Progressive Business Forum, funding dinners and other events, and donations from individuals and companies.

Despite the absence of any official policy on donations, there is an expectation based on the ANC's constitution, its principles and its values that the ANC would not knowingly accept monies that are a product of a criminal act, are offered in exchange for favours or are from a source known in illegal or unethical activities.

The ANC has long recognised the risk presented
20 by the lack of regulation with respect for political funding. The lack of transparency in donations to political parties increases the potential for corruption and the exercise of improper influence on political activity and government processes. It wants to address this problem that the ANC resolve at its 52nd National Conference that:

P. T.M

people of South Africa and admit its own mistakes and also set out the ways it seeks to correct much as sometimes, because it is a political movement, there will be contestation of some of the issues.

CHAIRPERSON: You may keep mic on, Mr President.

PRESIDENT RAMAPHOSA: Okay, I will do so.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: Then, Mr President, after certain introductory structural remarks concerning the ANC's structures and processes you deal with cadre development and deployment beginning at page 15 and in paragraph – well, perhaps I should presage that with a summary of the evidence – a very, very broad and perhaps superficial, but if it is superficial you will tell me, summary of the evidence in relation to cadre development and "cadre deployment".

On the one hand there has been evidence that the policy goes far beyond mere recommendation and in fact is a policy implemented on the instruction and mandate of the deployment committee. That is one view and there is certain evidence in regard to that. Whether that is exceptional or the rule, maybe we can deal with in due course when we come to detail.

The other view, which is reflected in your statement and other statements, Mr President, is that the deployment committee goes no further than make recommendations

P.T.M

and abides by the formal selection processes that take place for example in the public service.

Those are the two extreme views and whether either is correct or not, Chair will have to consider and decide. Or it may be that neither is correct as a general rule and that there is quite a large grey area between. What would your comment be?

PRESIDENT RAMAPHOSA: The deployment committee, as I said in my statement-in-chief, should really be seen as
10 committee that recommends, the recommendation committee and having been the Chair of the deployment committee as Deputy President, the process that really gets underway is as follows, and maybe I am simplifying it. The minister concerned, for instance when it comes to say state owned enterprises - or state entities, would come forward and say I need to appoint the CEO of one of the key state owned enterprises and in doing so, they will then have that post advertised, as they should in terms of the regulations and corporate governance and so forth and a
20 message will then be forwarded to yes, the ANC deployment committee, that there is a position that the minister will come to the deployment committee with to articulate what position they need to fill but then they will have triggered the process of – the formal process of filling that position. So the advert then goes out so that

P.T.M

whomsoever applies but then internally in the ANC people will then be encouraged to apply that there is a position, if you qualify, you could be one of those who are either shortlisted or whatever. So the minister will then say we have shortlisted a number of people and in the short listing these are people who have been shortlisted. Some of them may not even be ANC members, some of them may well be ANC members and what is then looked at by the deployment committee is to say we really need someone with experience.

For instance, if it is a railway entity of railways and who has been well-trained and well-prepared and all that, and having done that, the deployment committee could well say well, in our view so and so fits the bill. It could be an ANC person, it could be an non-ANC person, completely unattached to the ANC, that we believe that this person can do the work. And then it then goes off, it goes off to the selection – final selection process, that the minister then gets involved in with her colleagues in cabinet because an interviewing panel then is put up and if it is, for instance, a Director General, it happens in cabinet, if it is a state owned enterprise it happens in terms of company rules and what have you. So that then ensues.

And then at times, Chairperson, the desires of the deployment committee are not even fulfilled. They may

P.T.M

well have said we want so and so and it may not happen and we say that should be in terms of the prescripts of the law, corporate governance and the prescripts of the selection process in, for instance, in the public service.

So having chaired the deployment committee, I know that for a fact that in some cases the deployment committee wishes may not happen. So it is for that reason that I describe in the main a deployment committee as a recommendation committee. And it takes into account a
10 whole number of considerations. You could ask are some of them political? Yes. For key positions where we seek to advance the mandate of the governing party? Yes.

But where, for instance, the requirements and the experience of a candidate overrides that. We then say we rely on this person as an South African to execute the task.

ADV PRETORIUS SC: Whether it always happens that way or not we can explore in due course with some of the more detailed evidence that we have been given but I understand you to have said that the whole process does
20 require some form of statutory or other regulation and we can explore that issue as well in due course. But, for the moment, in paragraph 25 on page 15, your statement reads:

> "The policy of the ANC is aimed at ensuring that the person most fit for purpose is appointed whatever

P.Tim

CHAIRPERSON: H'm, h'm.

PRESIDENT RAMAPHOSA: And that is patronage and that is the crude diversion of what we want to see in the state.

CHAIRPERSON: H'm.

PRESIDENT RAMAPHOSA: Ja.

CHAIRPERSON: Mr Pretorius.

ADV PRETORIUS SC: Of course, there is the further self-perpetuating element to patronage that a patron receives
10 favours or even receive financial gain, becomes more powerful and then in a greater and more powerful position as a patron.

PRESIDENT RAMAPHOSA: Yes.

ADV PRETORIUS SC: Has this happened and if it has, how is it intended to be dealt with?

PRESIDENT RAMAPHOSA: Well, as we have said and which we have dealt with in the African National Congress. We recognise that this is behaviour that has ensued and in recognising it we have come to the conclusion that we
20 need to rid our organisation of patronage. And in some cases we even say certain members join other members rather than the ANC.

Those are practices that we want to get rid off so that we free everyone in the ANC to know that they can stand in their own name and right and be appointed to

P.T.M

positions in their own name and right. And how we do it is to inculpate this morality. And the renewal that we have been talking about is part of that process that there needs to be renewed morality in the ANC to enhance the integrity of the organisation. And without doing so, the renewal process falls flat on its face.

ADV PRETORIUS SC: In fairness to those who have given the evidence and in fairness to yourself, Mr President. I need to put to you certain passages from the evidence that have told the Chair of the hard interpretation of deployment. In other words, that it goes much further than recommendation.

And then I would like to put to you, certainly of your own statement, which quite frankly highlights the problems that you face or have faced and do face. The evidence of Lynne Brown in relation to SOE boards, more than one, was to the following effect:

> "It must be borne in mind that all appointments to the boards of state-owned entities must also be approved by the African National Congress Deployment Committee where after it gets approved by Cabinet..."

That was her clear and unequivocal evidence. Do you have any comment?

PRESIDENT RAMAPHOSA: [No audible reply]

P.T.M

ADV PRETORIUS SC: And this was in the period 2014 to 2015, at least.

PRESIDENT RAMAPHOSA: Yes, that is where the interpretation of this recommendation process would come in. And that is why I referred to the role of the minister because the minister as the executive or it plays a critical role because it is the minister who, in the first instance, knows and realises that the board's tenure has come to an end. I need to replenish the members of the board and these are the skills that are needed. I need or we need accounting skills, corporate governance skills, financial skills, you name it, environmental and so forth and we need to have a gender balance.

So it beholds on the minister and I deal with this, you know, on an ongoing basis even now as President. It beholds on the minister to then come forward and say: I need to replenish the six members on the board.

And what she will often have to do or be encountered with is. Have you sourced, have you worked out a list, a list of names that should be preferred? And the minister's task is to do precisely that and having done that, a wise minister would then say: I have got like 18 names and I need six or 12 names. They would then put that forward and say to the Deployment Committee – and

P.T.M

then the Deployment Committee would say – and quite often a pamphlet is set out or an advert for people to apply.

And quite often you get many applications and I actually appreciate that because it basically means you are opening up quite a number of these positions to South Africans who can play a role in enhancing governance in some of our state-owned enterprises. And it is the minister who must then summarise all that, bring together a
10 summarised list or preferred list or summarise and then put it forward as a near or shortlist.

And once that has happened, the Deployment Committee would say: Well, we would recommend the following. And sometimes they need six and there is 18, they would recommend: Why do you not go forward with 12 and then let us see what the selection in government then comes up with. And that is where I would say maybe Lynne Brown then says this got to be approved.

But I will, as the former Chair of the Deployment
20 Committee, will be able to say clear emphatically that it is that recommendation process. And as you can hear, it goes through a number of processes and this may be confusing and this may even create doubt in people's minds but that is the actual process as it unfolds and as it happens. And in the end, Cabinet – even with Cabinet –

P. Tim.

Cabinet then will then be presented with say maybe a near final list.

But Cabinet then finally, Chairperson, deliberates on each of the names where Cabinet has a role in deciding because of legislation for that entity. It deliberates on that and some names fall off at Cabinet level and some on those lists are sent back to the minister or Cabinet says: Take this back. We are not about to approve this.

10 And the ministers pull out their hair and be frustrated but that is the rigorous role that is involved in the selection of those people. And may I add deployment committee level, I know of ministers who have been there three times or more just to get a list recommended.

So it is not as easy as that where you just have a list which is underpinned by nefarious intensions, just approved, it is quite vigorous and I have known and I have seen ministers coming out of that type of process just pulling the sweat off their foreheads because it means they

20 have achieved something. It is not an easy process.

CHAIRPERSON: Of course, Mr President, now that we are touching on the boards and the role of the deployment committee on the appointment of boards of SOEs, when one looks at what has happened, as the evidence has revealed in his Commission over the past two and half

P. T.M

years, what has happened in various SOEs, Eskom, Transnet, SAA, PRASA, you name them, over a certain period, you are bound to ask the question how is it possible that in each one of those, these SOEs, the types of boards that were there did not do a, b, c, d. How could all of these things happen while they were there?

And that raises the question of how were they appointed? What criteria were followed in selecting people to be put into those boards? How could these SOEs be
10 where they are now or be where they were a few years ago but in some we can say now when they were – they had boards? It is like – it is like there is something common, common problem with all of these boards that made it possible for the SOEs they were supposed to run to be where they are and therefore, as the Commission, one of the things we – some of the things we want to look at is how do we – what recommendations should be made that would try and make sure that in the future if anything like this were to happen, it should just be one, not all of them.

20 **PRESIDENT RAMAPHOSA**: Yes, indeed.

CHAIRPERSON: So obviously you go back and say who were the people who were making appointments here? What was going on? So I am just highlighting that as you share with me what the deployment committee's role is and the ministers, there is that question to say the same thing

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

STATEMENT BY THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA, MATAMELA CYRIL RAMAPHOSA

SUBMISSION ON BEHALF OF THE AFRICAN NATIONAL CONGRESS

INTRODUCTION 2
PURPOSE OF THIS STATEMENT 3
ROLE OF THE POLITICAL PARTY IN SOUTH AFRICA'S CONSTITUTIONAL DISPENSATION 4
OVERVIEW OF ANC STRUCTURES AND PROCESSES 9
CONSTITUTIONAL STRUCTURES 9
CADRE DEVELOPMENT AND DEPLOYMENT 11
PARTY POLITICAL FUNDING 19
RESOLUTIONS, DECISIONS AND ACTIONS OF THE ANC ON CORRUPTION AND STATE CAPTURE 26
THE ANC'S POSITION ON CORRUPTION 27
MEASURES TO ADDRESS CORRUPTION WITHIN THE ANC 31
RESPONSE TO STATE CAPTURE ALLEGATIONS 36
ROLE OF THE ANC IN PARLIAMENT 44
ROLE OF THE ALLIANCE AND OTHER FORMATIONS 50
SIGNIFICANCE OF THE 54TH NATIONAL CONFERENCE 53
SPECIFIC MATTERS RELATING TO THE ANC OFFICIALS 58
PROCESS OF RENEWAL AND CORRECTION 59
ANALYSIS OF THE ANC'S ROLE IN STATE CAPTURE AND CORRUPTION 67
CONCLUSION 72

KJ

P.T.M

I

I, the undersigned,

Matamela Cyril Ramaphosa

do hereby state under oath that:

INTRODUCTION

1. I make the following statement on behalf of the African National Congress ("ANC"), in my capacity as the President of the organisation having been elected to this position at the 54th National Conference of the ANC, on 18 December 2017.

2. I depose to this affidavit voluntarily, in fulfilment of my commitment to do so, made to the Chairperson of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, established in terms of Proclamation 3 of 2018, published in Government Gazette 41403 of 25 January 2018 ("*the Commission*").

3. The facts deposed to in this affidavit are within my own personal knowledge and belief and are true and correct.

4. The African National Congress was founded on 8 January 1912 and is the oldest liberation movement on the African continent. It was first registered as a political party by the Independent Electoral Commission in 1994.

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5. The ANC is the governing party at a national level and in eight provinces. It has received a majority of the national vote in six successive general elections since 1994. It currently has 230 seats in the National Assembly and 54 seats in the National Council of Provinces.

PURPOSE OF THIS STATEMENT

6. This statement follows a request from the Commission to make a submission on a number of matters relevant to the work of the Commission.

7. The ANC considers it necessary that it should make a submission on these matters given its position as the governing party with a view of assisting the Commission in its work.

8. This statement needs to be read together with statements already submitted to the Commission on behalf of the ANC, including those submitted by:

8.1. Mr Samson Gwede Mantashe, ANC National Chairperson and former Secretary General;

8.2. Mr Elias Seigobelo Magashule, ANC Secretary General;

8.3. Ms Yasmin Duarte, ANC Deputy Secretary General;

8.4. Mr Jackson Mthembu, former ANC Chief Whip;

8.5. Mr Zwelini Lawrence Mkhize, former ANC Treasurer General.

9. This statement is structured as follows:

P.T.M KJ

9.1. At the outset, I will discuss the role of the ANC as a political party in South Africa's constitutional dispensation and some of the salient features of the operation of political parties in a democracy.

9.2. Thereafter, I will provide an overview of the relevant structures of the ANC, their composition and respective powers and responsibilities.

9.3. I will then outline the positions and approaches taken by the ANC over time on issues of corruption, patronage, state capture and related matters. This will include the measures the ANC has taken to combat corruption, its response to allegations of state capture, the role of the ANC in Parliament, the role of other formations, and the measures the ANC has taken since its 54th National Conference to correct the mistakes of its past and to undergo a process of renewal.

9.4. Based on the above, I will then offer an assessment of the suitability and adequacy of the ANC positions and actions during the period under investigation.

9.5. Finally, I will conclude with some reflections on some of the factors that contribute to a culture of corruption in society, and on the individual and collective responsibility of ANC members for the activities under investigation by the Commission.

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10. It is important to understand this submission within the broader role of the political party in South Africa's constitutional dispensation.

11. Multi-party democracy is a cornerstone of our post-apartheid Constitution. Apart from affirming the right to vote and to stand for office of all adult citizens, Section 19 of the Bill of Rights recognises the right to form a political party; and to participate in the activities of, or recruit members for, a political party.

12. In a society like ours with a wide variety of cultures and disputed histories, the constitutional enshrining of a multi-party, representative system gives legitimate voice to a variety of political views, interests and concerns.

13. The value of multi-party political pluralism was a major concern for the ANC during the constitutional negotiations. Many electoral dispensation models were examined, discussed and debated. These included the 'first-past-the-post' constituency system, the proportional representation system, and a combination of the two. The debate about electoral systems was closely related to the discussions about the structure of government, such as whether a presidential or prime ministerial government should be adopted, and whether the government would take a unitary or federal form.

14. In a critical survey of electoral systems published in October 1990, Prof Kader Asmal, who was then a member of the ANC Constitutional Committee, reflected on the experience of the constituency system in apartheid South Africa, where it was often the case that

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governments were elected on a minority of the vote and where there were a high number of 'wasted' votes for parties that did not win in a constituency. Prof Asmal cautioned that:

> *"This may result in dangers in a fragmented society where minorities might never be represented and the perceived threat to their integrity or viability would be accentuated. It is considered by many democrats that such 'wastage' is a form of disfranchisment, with dangerous implications."*[1]

15. On the basis of these and other considerations, and after extensive consultations within the ANC and with other social actors, the ANC came to the principled decision that a proportional representation ("PR") system for national and provincial legislatures was both the most inclusive and probably the only practical way to proceed. Coming from our divided past we found that a PR dispensation would be more inclusive as it would enable even the smallest political parties to be represented in Parliament adding up to the overall notion of voice of the people.

16. Deciding on the country-wide delineation of wall-to-wall constituencies would have likely resulted in a prolonged and dispute-driven debate. The delimitation of constituencies is not a politically neutral matter. It often leads to aberrations, such as political parties who do not win the majority of votes nonetheless winning the election as a whole. This is commonly known as the 'winner takes all' system. For example, the 1948 National Party electoral victory was achieved despite the fact that it won less votes than the United Party in that whites-only election. This was because of the imbalance in the weighting of rural

[1] Asmal, Kader, 'Electoral Systems: A Critical Survey', Centre for Development Studies, University of the Western Cape, 1990

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over urban constituencies. There is a substantial literature on the gerrymandering of constituency boundaries, a practice apparently still prevalent in some of the oldest liberal democracies.[2]

17. It was not, however, just pragmatism and a sense of urgency that persuaded us to pursue a PR system. Even if there had been the possibility of timeously agreeing on constituency boundaries, given the ANC's predicted overwhelming electoral support, it was possible that in those first landmark elections most other political parties would not have had a presence in legislatures had there been a constituency-based system. We recognised the dangers of such an outcome for building an inclusive and pluralistic representative democracy and therefore took what was not just a practical but also a principled decision.

18. The early 1990s context is especially relevant here. It must be remembered that there were political forces, both on the white right-wing and from ethnically mobilised forces with power bases in the former bantustans, who were threatening to boycott the elections and to place themselves outside of the constitutional settlement. The fact that the rump of these various forces are now represented within legislatures has been an important basis on which we have been able to stabilise our democracy.

19. I am aware that some concerns regarding our proportional representation system and its impact on the work of the National Assembly and provincial legislatures have been raised

[2] See, inter-alia, Barasch, Emily, "The Twisted History of Gerrymandering in American Politics", The Atlantic, September 19, 2012; Dawkins, Wayne, "In America voters don't pick their politicians. Politicians pick their voters", The Guardian, October 9, 2014; "Majoritarian electoral systems are more prone to gerrymandering than proportional systems", Democratic Audit, June 1, 2016.

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in the course of this Commission's work. It is for this reason that I have sought to contextualise the decision to adopt the PR electoral approach. This should not prevent continued evaluation of this approach and the exploration of alternative electoral systems.

20. Multi-party pluralism and majority democratic rule should not be seen as necessarily mutually antagonistic. If multi-party political pluralism is an important democratic reality, political parties, not least those involved in and emerging from anti-colonial national liberation struggles, often seek to play a centrifugal role in building unity across pre-existing divisions.

21. In such circumstances, political parties do not merely represent their members, but often act as instruments to advance the needs and interests of entire sections of society, both within the arena of Parliamentary democracy and through broader social mobilisation and extra-parliamentary political activity. This is among the reasons that the ANC describes itself as a "liberation movement" first and foremost that, among things, contests elections as a registered political party.

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OVERVIEW OF ANC STRUCTURES AND PROCESSES

Constitutional structures

22. In terms of its Constitution (I annex to this statement the Constitution as amended and adopted at the ANC's 54th National Conference held in 2017 at Nasrec in Johannesburg, marked "ANCCR 1"), the ANC is comprised of the following structures at a national level:

22.1. National Conference, which is the supreme ruling and controlling body of the ANC and is convened at least once every five years. It decides on and determines the policies, and programmes of the ANC, and has the right and power to review, ratify, alter or rescind any decision taken by any of the constituent structures, committees or officials of the ANC.

22.2. National Executive Committee ["NEC"], is the highest organ of the ANC between National Conferences has the authority to lead the organisation, subject to the provisions of the Constitution and resolutions of Conference. It is elected by the National Conference and is constituted as follows:

22.2.1. President, Deputy President, National Chairperson, Secretary General, Deputy Secretary General and Treasurer General,

22.2.2. 80 additional members elected by National Conference,

22.2.3. The Chairperson and the Secretary of each ANC Provincial Executive Committee, who serve as ex-officio members,

P.T.M

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22.2.4. Presidents and Secretaries General of the ANC Women's League, ANC Veterans' League and ANC Youth League respectively, who serve as ex-officio members.

22.3. National Working Committee ["NWC"], which is elected by the NEC and is expected to conduct the current work of the ANC, ensure ANC structures carry out the decisions of the ANC and submit a report to each NEC meeting. It is comprised of the Officials, no more than 20 directly-elected NEC members and one representative each from the ANC Leagues. As a matter of practice, the NWC meets every two weeks.

22.4. NEC Committees, which the NEC establishes to process specific policy or organisational matters. These committees are primarily comprised of NEC members as assigned by the NEC.

22.5. National General Council ("NGC"), which may be convened by the NEC from time to time, but at least midway between National Conferences. The NGC can, within the framework of resolutions of National Conference, determine and review ANC policies and programmes, and has the right to ratify, alter or rescind any decision of constituent structures.

23. Although not a structure in terms of the ANC Constitution, the President, Deputy President, National Chairperson, Secretary General, Deputy Secretary General and Treasurer General

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are collectively known as the Officials. As a matter of practice, the Officials meet on a weekly basis to process matters for the NWC, among other things.

Cadre Development and Deployment

24. The ANC's approach to cadre development and deployment is covered in detail in the statement provided to the Commission by Mr Gwede Mantashe deposed on 12 March 2021. It describes the evolution and development of the ANC's policies over time, the principles that have informed this approach and the structures and processes that the ANC has put in place to manage cadre development and deployment.

25. The policy of the ANC is aimed at ensuring that the person most fit-for-purpose is appointed whatever critical position has been identified (the policy is attached marked "ANCCR 2"). It applies to senior positions in government such as Directors-General and Deputy Directors-General as well as leadership in critical institutions including the private sector.

26. The Commission has also asked me to speak to choices of Ministers. The ANC respects the constitutional prerogative of the President of the country to appoint his or her Cabinet. While inputs and opinions may be sought by the President in making these appointments, these are not matters that would serve before a Deployment Committee.

27. The Deployment Committee essentially operates like a recommendation committee. It is headed by the Deputy President of the ANC. It includes the Deputy Secretary General

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among its 15 members, who are NEC members of the ANC. The frequency of its meetings depends very much on the matters it needs to consider.

28. The Commission will appreciate that at its genesis the ANC deployment policy was aimed at ensuring that the institutions that existed in South Africa at the dawn of democracy were transformed. We sought to ensure these institutions reflected the demographics of our country, but most importantly that they included persons that embraced the new constitutional dispensation. As time went by, the need to ensure that these changes were solidified remained. It continues today. For the ANC this is a means through which we continue our work of transforming South African society in the public and private sectors.

29. As a direct result of what is commonly referred to as the 'sunset clause' – a compromise reached through our negotiated settlement that personnel occupying positions in government institutions at the time would not be forced out of these positions – the change that took place in relevant institutions was slow. It was combined with a deliberate decision to develop and train individuals the ANC felt ought to make themselves available or ought to ensure they qualified for critical positions in government especially.

30. The deployment of cadres to strategic positions is not unique to the ANC. It is practiced in various forms and through various mechanisms – even if not always acknowledged as such – by other political parties in South Africa and in other countries[3].

[3] For a useful comparative view of different international approaches see: "Study on the Political Involvement in Senior Staffing and on the Delineation of Responsibilities between Ministers and Senior Civil Servants", Alex Matheson, Boris Weber and Nick Manning, Emmanuelle Arnould, OECD Working Papers on Public Governance No. 6 (https://dx.doi.org/10.1787/136274825752 and available at https://www.oecd.org/gov/39125861.pdf)

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31. In my view, cadre deployment has acquired the prominence that it has because there is a general view that there should be no political interference in the selection of people who work in the public sector.

32. However, there is a widely held view at the international level, as articulated by Matheson *et al* writing in an OECD Working Paper on Public Governance,[4] that with specific reference, to appointments of senior public service staff –

> ***"political involvement in administration is essential for the proper functioning of a democracy. Without this an incoming political administration would find itself unable to change policy direction. However public services need protection against being misused for partisan purposes, they need technical capacity which survives changes of government, and they need protection against being used to impair the capacity of future governments to govern."***

33. Here at home the application of this approach is described by former DA Western Cape leader Mr Anton Bredell in a submission made to the Public Protector quoted in her Report Number 23 of 2020/21.[5] The report relates to correspondence from Mr Bredell to the

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[4] *Ibid*

[5] An example of this is described by former DA Western Cape leader Mr Anton Bredell in a submission made to the Public Protector quoted in her Report Number 23 of 2020/21. The report relates to correspondence from Mr Bredell to the Acting Executive Mayor, the Speaker, Chief Whip and DA Caucus Chairperson of the George Local Municipality to instruct them not to continue with the appointment of a Director: Corporate Services until it is approved by the DA Federal Executive. In justifying his instructions, Mr Bredell makes reference to a DA resolution to implement "a parallel process of vetting candidates for employment in DA-led municipalities". In a letter to Mr Bredell of 29 January 2021, Western Cape Premier Alan Winde says that such internal rules and policies are "wide-spread [and] common". He compares the DA rules and policies on this matter to a

P.T.M KJ

Acting Executive Mayor, the Speaker, Chief Whip and DA Caucus Chairperson of the George Local Municipality to instruct them not to continue with the appointment of a Director: Corporate Services until it is approved by the DA Federal Executive. In justifying his instructions, Mr Bredell makes reference to a DA resolution to implement *"a parallel process of vetting candidates for employment in DA-led municipalities"*. In a letter to Mr Bredell of 29 January 2021, Western Cape Premier Alan Winde says that such internal rules and policies are *"wide-spread [and] common"*. He compares the DA rules and policies on this matter to a memorandum from the ANC Secretary General that no appointment should be taken to Cabinet without passing through the deployment committee first.

34. The ANC fully embraces the principle that all public servants should undertake their duties in a fair, balanced and non-partisan manner. One of our founding principles is selfless service to all the people of this country and we expect all ANC cadres to adhere to this principle in any deployment.

35. Democracies like South Africa need to *"balance two values that can be in some tension: fair and non-politically partisan service delivery and, subject to the law, the responsiveness of public servants to the policies of the current executive."*[6]

36. At the same time, and in line with the OECD Study by *Matheson and others*, the ANC holds the belief that political involvement in administration is essential for the proper

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memorandum from the ANC Secretary General that no appointment should be taken to Cabinet without passing through the deployment committee first.

[6] *Ibid*

P.T.M KJ

functioning of a democracy as an incoming administration would find it almost impossible to change policy direction without it.

36.1. The ANC has, since the beginning of the democratic period highlighted that in transforming the public service to reflect democratic, more humane values and the demographics of the country we must also emphasise professionalism and competence. This is reflected in our earliest policy pronouncements such as *Ready to Govern (1991)* and reconfirmed at the ANC's 54th Conference. I reflect on the pronouncements of the 54th Conference below.

36.2. We recognise that political involvement in the administration of the public service must be circumscribed by legislation, convention and practice. This is to protect both political and administrative positions and to create certainty as to the division between political and administrative responsibility.

37. The ANC's Deployment Policy is not static. It evolves as the ANC seeks to refine it, and as we identify shortcomings.

37.1. During our 53rd National Conference (the resolutions of which are annexed marked "ANCCR 3"), the ANC decided that we needed to monitor performance of those persons we had deployed to various positions. This meant making sure that people we had nurtured and trained to be able to qualify for senior positions in government were performing at the level needed of them, that recommendations

P.T.M KJ

made by the Deployment Committee, and followed by the relevant institutions, were bearing fruit.

37.2. The 54th National Conference of the ANC went further and determined that continual development would be required to ensure there was no sense of complacency among persons developed and trained to take the lead in critical institutions.

38. Between December 2012 and December 2017, when I was the Chair of this Committee, it functioned on the basis of the principles I have outlined above.

39. I furthermore make the following points for purposes of emphasis:

39.1. The ANC makes a clear distinction between the deployment, on the one hand, of public representatives to the various legislative and executive bodies in government and, on the other hand, of cadres to other strategic positions in the state and society. In the case of the former, specific selection processes are undertaken prior to an election for national, provincial or local spheres of government. Successful candidates are placed on the party list that is provided to the Independent Electoral Commission. In the case of the latter, the organisation identifies candidates who would be suitable, by virtue of their skills, experience and personal attributes, to be considered for positions in various entities in the public sector.

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39.2. The Deployment Committee does not decide who should take up specific positions. Rather it discusses who should be encouraged to apply for this or that position, and makes recommendations to the persons making the appointments. The Deployment Committee furthermore will give its opinion to any Minister who may seek its guidance on critical appointments that Minister must make. It gives guidance; it does not give an instruction to appoint.

39.3. In identifying suitable candidates for positions in public entities, the ANC does not seek to circumvent the established and often legally-mandated processes for the appointment of individuals to these positions. Candidates are still expected to submit their applications, meet the necessary requirements and be subjected to the normal processes of recruitment, selection and appointment.

40. The ANC has recognised that there are several instances where individuals appointed to positions may not have been 'fit for purpose' and may also not have performed the tasks in the way that it was envisaged.

41. The ANC 54th National Conference in December 2017 recognised this problem and resolved on capability and capacity building in the public service that *"the merit principle must apply in the deployment to senior appointments, based on legislated prescripts and in line with the minimum competency standards"*. The Report of the ANC 54th National Conference, December 2017 is annexed hereto marked "ANCCR 4".

P.T.M KG

42. It is the ANC's view that the practice of cadre deployment should not be inconsistent with the principles of fairness, transparency and merit in the appointment of individuals to public entities. We accept, however, that 'cadre deployment' can be misused to justify appointments that do not meet these standards. It is for this reason that the ANC has sought to continually revise its cadre deployment policies and processes, and why this administration has proceeded to implement ANC resolutions on the professionalisation of the public service.

43. As is apparent from its history, the Deployment Policy of the ANC is constantly reconsidered, in order for improvements to be made where and when necessary. This improvement is ongoing and has also been effected to the identification of public representatives who would go either to national, provincial or local spheres of government, the ANC has now appointed an Electoral Commission, which is currently chaired by former President Motlanthe. The role of the Electoral Commission was decided upon at the 54th National Conference of the ANC and includes:

43.1. Ensuring that ANC public representatives undergo a transparent selection and capacitation process to assume leadership and deployment.

43.2. Improve the quality, integrity, and sustainability of the selection and election of public representatives, from local to national sphere.

43.3. Institutionalise the selection process and make it transparent in order to reduce the possibility of current leadership organs from interfering with processes.

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43.4. Have an independent capacity to manage these very demanding processes, but that are essential to organisational unity and legitimacy, and quality of the public representatives that are put forward by the organization for public elections.

44. The identification and selection of candidates particularly for local government includes a process of community validation, where the community expresses its views and preferences of identified persons that may have been identified and selected by ANC internal selection processes. If the community makes clear that the candidate put forward does not suit them or meet their expectations, the ANC branch will have to report as much and the list modified to ensure an alternative candidate is identified for that particular ward position. This exercise has already been undertaken in by-elections held in the last year and for the by-elections being held during the month of April in a number of wards.

45. The description of the ANC's Deployment policy in the public sphere has distorted it into being seen as 'Jobs for comrades' programme. This is far from it. As evinced in government systems such as the United States, or the historical record of Margaret Thatcher, every government seeks to secure the best way to see its vision fulfilled. In South Africa no-one would begrudge the Mandela administration for actively seeking to replacethose who would not embrace basic constitutional principles, service to all South Africans rather than a select few, and respect for human rights, which the new constitutional dispensation required.

Party political funding

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46. In its letter to my office of 12 March 2021, the Commission asked that I address the funding of political parties in general, *"including but not limited to the use of cash donations at political party conferences"*, the *"relationship between the profits of procurement and party funding"*, and what it refers to as *"possible reliance by the ruling party on funding received from the beneficiaries of public procurement"*.[7]

47. Any successful multi-party democracy requires a diversity of functioning political parties that are capable of articulating and representing the needs, interests and concerns of the electorate. It is not sufficient for political parties to be free of any undue restraint on their activities; they also need to have the means to develop policies, undertake organisational activities, implement programmes and campaign for elections. For this, political parties require funding, and, in the absence of sufficient public funds for this purpose, need to rely on donations from members, supportive individuals and businesses.

48. Until the adoption of the Political Party Funding Act, which takes effect on 1 April 2021, there were few, if any, specific restrictions on donations to political parties and no requirements on the reporting of donations, either publicly or to any particular authority. Political party donations would only be subject to the general laws relating to, among others, financial transactions, taxation and the prevention of corruption, money laundering and other financial crimes.

[7] Letter from the Commission to then Acting DG Ms Mxenge, paras 8.5(b), 8.7 and 8.8

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49. The finances of the organisation are the responsibility of the Treasurer General, and corresponding Treasurers in the sub-national structures. There is an NEC sub-committee, known as the Finance Committee, that is responsible for supporting the Treasurer General in managing the organisation's finances.

50. Like other parties, the ANC relies on several sources of funding. These include funds allocated from the Represented Political Parties' Fund (which is administered by the IEC), membership subscriptions and levies, fundraising initiatives like the Progressive Business Forum, fundraising dinners and other events, and donations from individuals and companies.

51. Despite the absence of an official policy on donations, there is an expectation – based on the ANC Constitution, its principles and its values – that the ANC would not knowingly accept monies that are the product of a criminal act, are offered in exchange for favours or are from a source known to engage in illegal or unethical activities.

52. I have heard that evidence has been presented to the Commission that suggests that the ANC may have been the recipient of donations from individuals and companies that received contracts from the state, including in instances where the awarding of those contracts are alleged to have been unlawful.

53. The lack of transparency in donations to political parties increases the potential for corruption and the exercise of improper influence on political activity and government

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processes. It was to address this problem that the ANC resolved at its 52nd National Conference in December 2007 that:

> *"The ANC should champion the introduction of a comprehensive system of public funding of representative political parties in the different spheres of government and civil society organisations, as part of strengthening the tenets of our new democracy. This should include putting in place an effective regulatory architecture for private funding of political parties and civil society groups to enhance accountability and transparency to the citizenry."*

The Resolutions of the ANC 52nd National Conference, December 2007, are annexed marked "ANCCR 5".

54. However, it was not until after the next National Conference, in December 2012 (the Resolutions of which are annexed marked ANCCR 3) – which resolved that public funding of funding should be expanded and *"accompanied by full accountability and transparency, including regulation of private financing of political parties"* – that the Political Party Funding Bill was introduced into Parliament.

55. As a consequence of these, on 21 January 2019, I assented to the Political Party Funding Act, Act No. 6 of 2018. All the necessary regulations and administrative measures have been put in place by the government and the Independent Electoral Commission. The Act comes into operation on 1 April 2021.

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56. The Act ushers in far-reaching changes in the management, accountability and transparency of the finances of political parties. The Act restricts the amount of money that a party can take from a single donor and its related parties so as to prevent undue influence over parties by big donors. No party may accept more than an upper limit of R15 million from a donor in the same year. Importantly, section 8(3) of the Act says: *"A political party may not accept a donation that it knows or ought reasonably to have known, or suspected, originates from the proceeds of crime and must report that knowledge or suspicion to the Commission"*.

57. The Political Party Funding Act will have far reaching implications for the integrity and transparency of our political system. It will help to rebuild public trust in the political process. Voters will be able to more easily discern whose interests are being advanced: those of the country, a party, or private individuals or entities. Donors will be able to exercise their right to freedom of association and political conscience without having their motives constantly questioned.

58. Represented parties will benefit, as a transparent funding regime places them above suspicion of being beholden to private interests. They should also receive sufficient funds to perform their work in a fair and equitable manner. The Act also protects the State and its resources from being used for party political activities or to support the political ambitions of individuals.

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59. The Act is a victory for accountability, good governance and transparency in political activity. It marks a new era in our body politic, and is a milestone in our quest to build a capable, ethical state free of corruption and influence-peddling.

60. In addition, I have also enacted the Promotion of Access to Information Amendment Act, 31 of 2019, which will also take effect on 1 April 2019. This amendment is the result of litigation that was taken to the Constitutional Court, and will make political party finances subject to applications for information in terms of that Act.

61. As regards the Commission request that I speak to the use of cash donations at political party conferences the ANC has for many years been concerned about the role of money within the organisation, and particularly in the contestation for leadership positions. There are few campaigns for regional, provincial or national elective conferences that are not funded.

62. The ANC has identified weaknesses in its approach to the funding of internal contests. Specifically, it has noted that its guidelines on the conduct of internal leadership elections are not suited to the conditions of the time, and has initiated a process to review its policies on this matter. In particular, this issue forms part of the discussion documents published last year in preparation for the ANC's upcoming National General Council. The relevant

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document, entitled "Through the eye of a Needle",[8] is annexed hereto for ease of reference and marked "ANCCR 6".

63. In raising this issue during the NEC meeting of 26 July 2019, I said:

> *"In the absence of clear, appropriate and realistic guidelines, our leadership contests will continue to play themselves out in the shadows, in conditions of secrecy and mistrust, encouraging patronage and factionalism."*(my full statement is annexed marked "ANCCR 7").

[8] 'Through the Eye of a Needle: Towards a Review', Umrabulo NGC 2020 Special Edition, also available at https://www.anc1912.org.za/umrabulo-special-ngc2020-edition

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RESOLUTIONS, DECISIONS AND ACTIONS OF THE ANC ON CORRUPTION AND STATE CAPTURE

64. Corruption is not a new phenomenon in South Africa. The apartheid system was morally and systemically corrupt. Not only did its legal provisions appropriate to a small minority the assets and resources that rightfully belonged to all South Africa's people, but there was also a prevailing culture of corruption within the apartheid state, state-owned companies, private business establishment and bantustan administrations.

65. Hennie van Vuuren captures this reality effectively in the introduction to his book, 'Apartheid Guns and Money', where he writes:

> *"A powerful misconception, fuelled by former NP leaders and persistent racism, is that corruption in South Africa is a phenomenon that is intrinsic to majority rule. It is the subtext of some criticism of the post-apartheid state. It is made more obvious by the singular focus on contemporary corruption in government, with little reflection on the private sector where white South Africans are more prominent. As the book shows, the apartheid regime lied, bribed and broke every rule in the book to bust sanctions.... These were not piecemeal activities. Instead, state capture was systemic."*[9]

[9] Van Vuuren, Hennie (2017), 'Apartheid Guns and Money', Jacana Media

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66. The advent of democracy in South Africa was an opportunity to make a decisive break with that past. Through the adoption of a new democratic constitutional dispensation, the country sought to establish a new era of transparency, accountability, ethical conduct and respect for the rule of law. The experience of the past 27 years shows that endeavour to have been, for the most part, successful. The country has a Parliament elected by universal suffrage in regular free and fair elections, a strong and independent judiciary, robust institutions supporting democracy, and a free and vibrant media.

The ANC's position on corruption

67. One of the tasks that the ANC undertook in the immediate aftermath of the first democratic election was to contribute to the building of a different society in which the institutions and resources of state were directed towards the needs and interests of the people as a whole.

68. However, even in the early days of democracy, the organisation was alive to the potential for corruption within the new democratic state and within the ranks of the ANC itself. In his closing address to the ANC's 49th National Conference in December 1994 (annexed marked "ANCCR 8"), the late President Nelson Mandela said:

> *"But we must never forget the saying that power corrupts, and absolute power corrupts absolutely. It has happened in many countries that a liberation movement comes in to power and the freedom fighters of yesterday become members of the government. Sometimes without any idea of mischief, precisely because they are committed and hard working, they concentrate so*

P.T.M

much on their portfolios that they forget about the people who put them in power, and become a class, a separate entity unto themselves, who are not accountable to their membership, and who rely on law, that now I am a Cabinet Minister, the political organisation that put me in power can do nothing."

69. Three years later, at the ANC's 50th National Conference in December 1997, former President Mandela was less generous in his assessment of the motives of those in power *"who become a separate entity unto themselves"*. In his political report to the conference, annexed marked "ANCCR 9"[10], he said:

"During this period, we have also been faced with various instances of corruption involving our own members, including those who occupy positions of authority by virtue of the victory of the democratic revolution. These have sought either to steal public resources or to extort financial tributes from the people in return for services to which the people are entitled and which those in authority are legally and morally obliged to provide... Clearly, we have to take all necessary measures to purge ourselves of such members and organise ourselves in a way that will make it difficult for corrupt elements to gain entry into our movement."

[10] Political Report of the President, Nelson Mandela to the 50th National Conference of the African National Congress: Mafikeng, December 16, 1997

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70. In every ANC Conference since then, the issue of corruption within the state, business and society more broadly has been raised and various resolutions adopted on the actions required to combat it.

71. An important aspect of the ANC's approach to corruption over the years is a recognition of the extent to which some ANC leaders and members were responsible for corrupt actions, and, as a consequence, the extent to which corruption contributed to practices of patronage, factionalism and the manipulation of organisational processes within the ANC.

72. This is illustrated in the following extract from the ANC's 'Strategy and Tactics' document, which was adopted at its 50th National Conference in 1997 (annexure "ANCCR 10" to this statement) and reaffirmed by its 51st National Conference in 2002:[11]

> *"Positions in government also afford the movement and its leaders powerful possibilities for patronage. There is nothing untoward per se in advancing cadres who, by their selfless contribution to the cause, deserve such acknowledgement. Yet this can easily lend itself to corrupt practices, undermining good governance and destroying critical and independent thought and expression, and the vibrancy of a truly revolutionary movement."*

73. The organisation took the view that as much as such corruption had a corrosive effect on the state, the economy and society, it was also deeply harmful to the ANC. The 52nd

[11] Strategy and Tactics. As amended at the 50th National Conference, December 1997 and reaffirmed by the 51st National Conference, December 2002

P.T.M

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National Conference in 2007, for example, noted that *"our accumulated weaknesses include [an] inability to effectively deal with new tendencies arising from being a ruling party, such as social distance, patronage, careerism, corruption and abuse of power"*. Its report is annexed marked **"ANCCR 11"**.

74. The ANC has therefore long recognised the existence of corruption within the democratic state, that some members of the ANC are complicit in this corruption and that such corruption undermines our democracy and the integrity of the ANC.

75. The recognition of these facts does not mean that the ANC is uniquely affected by corruption. There are other institutions in society, including other political parties, social formations and in the private sector, that have to confront corruption within their ranks. Nor is South Africa alone in the world. Many other countries have to deal with corruption in the political, economic and social spheres. I detail my understanding of what state capture is in the statement in my capacity as President of the Republic. In short, after studying the transition of former communist countries to market based economies, institutions such as the IMF identified a new form of corruption: state capture. This form of corruption is a means through which so-called oligarchs seek to manipulate policy formulation and change the rules of the game for their own interests. The corruption of the entire system in order to benefit a select few firms leads primarily to poor governance, and therefore to poor service delivery. A government whose decisions are focused on

advantaging a few firms will not pay due attention to the needs of the many. There lies the crux of the problem.[12]

76. It is clearly not sufficient to recognise the problem. The task of any organisation like the ANC – especially with its history of principled struggle, its values and its mission – is to address the problem.

Measures to address corruption within the ANC

77. The ANC Constitution, annexed to this statement and marked ANCCR 1, provides the basic guide to members on their rights, duties and required conduct. On joining the organisation, each new member is required to make the following declaration:

> *"I, [...], solemnly declare that I will abide by the aims and objectives of the African National Congress as set out in the Constitution, the Freedom Charter and other duly adopted policy positions, that <u>I am joining the Organisation voluntarily and without motives of material advantage or personal gain</u>, that I agree to respect the Constitution and the structures and to work as a loyal member of the Organisation, that I will place my energies and skills at the disposal of the Organisation and carry out tasks given to me, that I will work towards making the ANC an even more effective instrument of liberation in*

[12] See Joel S. Hellman; Geraint Jones and Daniel Kaufmann *Seize the State, Seize the Day: State Capture, Corruption, and Influence in Transition* published in the "Policy Research Working Papers" of the World Bank Group: September 2000 and Joel Hellman and Daniel Kaufmann *Confronting the Challenge of State Capture in Transition Economies* published in the International Monetary Fund's "Finance and Development" magazine, Vol. 38, number 3, September 2001, available at https://www.imf.org/external/pubs/ft/fandd/2001/09/hellman.htm

P.T.M

the hands of the people, and that ***I will defend the unity and integrity of the Organisation and its principles, and combat any tendency towards disruption and factionalism.*** *"* [My emphasis]

78. Members of the ANC decide freely to submit themselves to the rules, decisions and discipline of the organisation. Members who choose not to abide by the rules contained in the ANC Constitution or the decisions of its structures are free to leave the organisation.

79. Members of the ANC also affirm that they join the organisation selflessly, without anticipation of any personal reward. Clearly, any member that is involved in corrupt activities or seeks in any other way to use their position for undue self-enrichment is in violation of this basic undertaking.

80. The ANC Constitution contains remedies for the violation of its rules, in the form of disciplinary proceedings. In terms of Rule 25.3 of the ANC Constitution:

> *"Any member, office bearer or public representative who fails, refuses and/or neglects to abide by the provisions of the Constitution of the ANC, its Standing Orders, Rules, Regulations, Resolutions and policies adopted or made in terms of the Constitution shall be liable to be disciplined in terms of this Constitution."*[13]

[13] ANCCR 1, p22

P.T.M

81. Among the acts of misconduct in respect of which disciplinary proceedings may be instituted are:

81.1. Engaging in any unethical or immoral conduct which detracts from the character, values and integrity of the ANC, as may be determined by the Integrity Commission, which brings or could bring or has the potential to bring or as a consequence thereof brings the ANC into disrepute;

81.2. Abuse of elected or employed office in the Organisation or in the State to obtain any direct or indirect undue advantage or enrichment;

81.3. Being convicted in a court of law for the offence of fraud, theft of money, corruption, money-laundering, racketeering or any other act of financial impropriety.[14]

82. Among the sanctions that may be imposed for such misconduct are a fine, a reprimand, suspension of membership, expulsion from the ANC, or in the case of an office bearer, removal or suspension from office.

83. In addition, the NEC, NWC, Provincial Executive Committee or Provincial Working Committee may, at any stage prior to the commencement of disciplinary proceedings

[14] *Ibid*, p23-24

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P.T.M

against a member, summarily suspend the membership of that member, having regard, among other things, to the nature and seriousness of the alleged violation.

84. Each incoming NEC appoints a National Disciplinary Committee and a National Disciplinary Committee of Appeal to hear and adjudicate on disciplinary cases. Similar disciplinary structures exist at the lower levels of the organisation.

85. These disciplinary structures have played an important role in holding members to account for actions that violate the rules of the ANC Constitution, including acts of corruption, fraud and abuse of office.

86. A recurring challenge in the management of organisational discipline is that, in certain instances, the institution of disciplinary proceedings is dependent on a conviction in a court of law. This is particularly the case with respect to offences related to corruption and fraud. This has meant that the organisation has been unable to act against members facing serious charges of financial impropriety until the completion of court processes, which can often be lengthy.

87. In an effort to address this problem among others, the 53rd National Conference in 2012 agreed to the establishment of an Integrity Commission. The Report of this conference, held in December 2012, is annexed marked "ANCCR 3". Among other things, the Integrity Commission was to recommend action against leaders and members of the ANC who face damaging allegations of improper conduct. While the work of the Integrity Commission

would not substitute for disciplinary action, it was established with the expectation that it would assist in dealing with allegations that had not yet been tested in court.

88. In resolving on the establishment of the Integrity Commission, the 53rd National Conference noted the following:

> *"More urgent steps should be taken to protect the image of the organisation and enhance its standing in society by ensuring, among others, that urgent action is taken to deal with public officials, leaders and members of the ANC who face damaging allegations of improper conduct. In addition, measures should be put in place to prevent abuse of power or office for private gain or factional interests. The ANC can no longer allow prolonged processes that damage its integrity."*

89. Since the establishment of the Integrity Commission in March 2013, there has been ongoing debate within the ANC on its status and powers. The ANC's 4th National General Council in October 2015, for example, took the view that the Integrity Commission should get powers to implement decisions and not just to recommend to the NEC. The Report of the 4th ANC National General Council held at Gallagher Estate, Midrand, 08-11 October 2015 is annexed marked "ANCCR 12".The 54th National Conference in December 2017

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P.T.M

passed the matter on to the incoming NEC to give consideration to the two options, namely whether decisions of the Integrity Commission should be binding or advisory.[15]

90. In September 2018, the NEC adopted revised terms of reference for the Integrity Commission. The ANC Revised Terms of Reference and Rules of Procedure of the ANC Integrity Commission, as adopted by the NEC 28-30 September 2018 and revised by Officials 15 April 2019 are annexed marked "ANCCR 13".These empower the Commission to make any recommendation on alleged unethical conduct by ANC members *"that it deems fit"*, which may include a recommendation for disciplinary action. The Integrity Commission is required to provide its judgments to the ANC Officials, NEC and any affected member, and these must be tabled at the NEC for noting. Any member may appeal against a decision of the Integrity Commission to the NEC, which is the final arbiter on any appeal.

Response to state capture allegations

91. Having outlined the ANC's general approach to corruption within its ranks, I will now turn to the specific allegations that arose with respect to 'state capture' and other matters under investigation by the Commission. I will outline how these allegations arose within the structures of the ANC and how the organisation responded.

92. It should be noted that while there is now broad consensus within South African society that a process of state capture took place over the course of several years, it took some time for the term to gain currency and for the phenomenon it described to be clearly

[15] Annexure ANCCR 4

P.T.M

recognised as such. Therefore, even though some of the incidents that I refer to below may be regarded as instances of state capture, they were not necessarily recognised or described as such at the time. And even as the term gained currency, there were individuals in the ANC and in society more broadly who contested both the use of the term and the existence of the phenomenon.

93. One of the earliest claims made within the formal structures of ANC of the possibility that members of the Gupta family may have had an improper role with respect to the functioning of the Executive was a statement by Minister Fikile Mbalula at an NEC meeting in 2011. I understand evidence with respect to this statement has been led before the Commission by Minister Mbalula, former Minister Trevor Manuel and others. While I recall the NEC meeting in which this statement was made, this matter was not, to my knowledge, taken further by the NEC or in any other structure of the organisation. For me, the statement did not at the time prompt any specific concerns about the capture of the state.

94. From a public perspective, perhaps one of the earliest signals to the ANC of an unhealthy influence by private individuals over state institutions and resources was the landing of a private aircraft at Waterkloof Air Force Base in April 2013, carrying guests for a wedding of the Gupta family.

95. In a statement released in the hours following the landing (dated 30 April 2013 and annexed marked "ANCCR 14"), the ANC said:

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"The African National Congress has learnt that guests of a family hosting some wedding at Sun City landed at the Waterkloof Airforce Base today... We demand that those who are responsible for granting access to land aircraft in our country also explain the basis upon which such permission was granted, particularly to land at Waterkloof Airforce Base. Those who cannot account must be brought to book."

96. The matter was raised at the NEC meeting of 17-19 May 2013 (the statement of this meeting is annexed marked "ANCCR 15"). The NEC noted the reports that had been compiled and concluded the matter by saying: *"We are confident that the relevant Ministers will take the process to its logical conclusion so that this incident does not repeat itself."*

97. It should be noted that the Ministers of the Justice, Crime Prevention and Security ("JCPS") Cluster concluded an investigation into the landing of the aircraft at Waterkloof Air Force Base on 17 May 2013. Among other things, this investigation concluded that the landing of the flight followed "the exercise of undue influence" and that the activities of then Head of State Protocol Ambassador Vusi Bruce Koloane and South African Air Force Lieutenant-Colonel Christine Anderson "were a serious dereliction of duty". A copy of this report[16] is annexed marked "ANCCR 16".

[16] JCPS Cluster Report 'Landing of a Chartered Commercial Aircraft at Air Force Base Waterkloof', 17 May 2013

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98. Allegations of state capture assumed greater prominence in the aftermath of the removal of Mr Nhlanhla Nene as Minister of Finance in December 2015 and revelations by Deputy Finance Minister Mcebisi Jonas in March 2016 that members of the Gupta family had earlier offered him the position of Finance Minister.

99. These issues were raised sharply at the NEC meeting of 18-20 March 2016. Among other things, the media statement released at the conclusion of the meeting said:

> *"The ANC NEC had frank and robust discussions on the serious allegations surrounding the Gupta family and its purported influence in the appointment of ministers, their deputies and other positions in key state owned entities in their interests. Such actions can have no place in the ANC or its government as they have the potential to undermine and erode the credibility and confidence of our people in the leadership of their organisation, the ANC and its government.*
>
> *"We reject the notion of any business or family group seeking such influence over the ANC with the contempt it deserves while also recognizing the need to act to protect the integrity of our government and our organisation. The appointment of ministers and deputy ministers is the sole prerogative of the President of the Republic, in line with the Constitution. To this end, the ANC continues to confirm its full confidence in our President."*

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This statement is annexed marked "ANCCR 17".

100. Given the seriousness of the allegations, the NEC mandated the Officials and the NWC *"to gather all pertinent information about the allegations to enable the ANC to take appropriate action on this matter."* The NEC made a call on all members who have information to approach the ANC Secretary General's Office.

101. Following the NEC's call for people to come forward with information, it was reported that a number of ANC members came forward to engage with the Office of the Secretary General. However, only one person would make a written submission on the matter. On the basis of this report, the NEC said:

> *"The allegations made were serious, they cannot be treated lightly and many warrant a comprehensive investigation. The NEC has advised comrades to formalise their complaints to institutions that deal with complaints of this nature."*

The statement of this NEC meeting, held between 27 and 30 May 2016, is annexed marked "ANCCR 18".

102. While the call for ANC members to come forward did not yield much information that the organisation could use, it is significant that the NEC called for further investigations by the competent authorities and for ANC members to provide information to any such investigations.

P.TIM

103. Another important development during this time was the decline in the ANC's electoral support in the local government elections of August 2016. Opinion research at the time indicated that the issue of corruption was becoming an issue of greater concern among voters and that it was among the factors that contributed to the ANC's weaker performance. This was one of the more direct ways, although not the only one, in which public opinion contributed to a shift in the ANC's response to state capture.

104. One of the investigations arising from the allegations in the public domain was that conducted by former Public Protector Thuli Madonsela, who released her 'State of Capture' report on 2 November 2016. It is critical to note that while allegations of state capture were directed at senior leaders, it is ANC members who brought this matter to the attention of the movement, and many of them provided evidence to the Public Protector. Similarly, it was ANC members in the NEC (and other structures) who were calling for stern action on these allegations.

105. Later that month, the NEC held a meeting at which a call was made by some members of the NEC for ANC President Jacob Zuma to consider stepping down as President of the Republic in light of the issues raised in the Public Protector's report and reported in the media. The NEC statement (annexed and marked "ANCCR 19"[17]) described the discussion as follows:

[17] Statement of the ANC NEC Meeting, 26-27 November 2016

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"The NEC decided that even though the issue was neither on the agenda nor in the Political Report, the debate should be allowed without any suppression... Following robust, honest, candid and at times difficult discussions, the NEC did not support the call for the President to step down. The NEC resolved it was more urgent to direct the energies of the ANC in its entirety to working towards the unity of the movement."

106. At a subsequent NEC meeting, in May 2017, a call was once again made for former President Zuma to consider stepping down as President of the Republic. The statement released at the conclusion of the meeting, annexed marked "ANCCR 20", said the following:

"This [the call for President Zuma to step down] we considered to be part of a broader discussion characterised by the restlessness manifesting itself in society, where certain sections have made similar calls. A number of members of the NEC were of the view that the ANC should listen to this call. Various contributions in support of and against the appeal to President to step down were raised. Many more were neither in favour nor against the appeal but emphasized the need for unity within the organisation. The NEC sought to have a detailed analysis of the consequences of removing the President; appreciating that some calls, especially those made by the opposition, are not so much about removing the President but rather dislodging the ANC itself from power. The NEC concluded the matter by recommitting itself to focus on the task at hand and what our people expect from us."

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107. The same NEC meeting endorsed the proposal arising from the Public Protector's Report for the establishment of a judicial commission of inquiry into allegations of state capture without delay. It said:

> *"The terms of reference of such Commission of Enquiry must be broad enough to uncover the influence of business on the state. The NEC expressed its desire to see all processes of reviewing the Public Protector's State of Capture report accelerated so that they are not an obstacle to the speedy establishment of the Judicial Commission into State Capture."*[18]

108. Support for the establishment of a commission of inquiry into state capture was further reaffirmed by the ANC's 5th National Policy Conference in June/July 2017 and by the Alliance Political Council in October 2017. The ANC's 54th National Conference in December 2017 reaffirmed the call for the "expeditious establishment" of such a commission of inquiry.

109. On 12 February 2018, the NEC held a special meeting to reflect on the position of former ANC President Jacob Zuma as President of the Republic of South Africa. After an "exhaustive discussion", the NEC decided to recall President Zuma. A statement released after the meeting (annexed marked "ANCCR 21") said:

[18] Statement ANCCR 21

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P.T.M

"The National Executive Committee firmly believes that this situation requires us to act with urgency in order to steer our country towards greater levels of unity, renewal and hope. We are determined to restore the integrity of the public institutions, create political stability and urgent economic recovery... The decision of the NEC provides certainty to the people of South Africa at a time when the economic and social challenges facing the country require urgent and resolute response by all sections of society."

Role of the ANC in Parliament

110. The role of the ANC in Parliament, particularly with respect to the exercise of oversight, is dealt with at length in statements submitted to the Commission by Mr Magashule, deposed on 8 October 2020, and Mr Mantashe, deposed on 12 March 2021. I will therefore only deal with specific matters on which the Commission has sought comment to the extent to which these have not been canvassed in the aforementioned submissions.

111. Within our constitutional framework, members of the Executive are also members of the National Assembly (with the exception of the President and up to two Ministers and Deputy Ministers appointed from outside the National Assembly). This means that most Ministers and Deputy Ministers are elected members of the National Assembly in their own right, are members of the caucus of the governing party and participate in any forums or structures established to coordinate the work of the governing party in Parliament.

112. In addition to exercising oversight over the Executive, Parliament has a broader Constitutional mandate, including:

P.T.M

112.1. choosing the President;

112.2. providing a national forum for public consideration of issues;

112.3. passing legislation;

112.4. scrutinising and overseeing executive action.[20]

113. For the governing party, this means that a fundamental feature of its role in Parliament is the implementation of its electoral mandate. This is a responsibility that falls as much to members of the Executive as it does to other members of Parliament that are not in the Executive.

114. Members of the Executive and other members of Parliament therefore have both common and distinct responsibilities. They have a common responsibility to implement the policies and programmes contained in their election manifesto. Yet, at the same time, members of Parliament have a distinct responsibility to hold the Executive to account.

115. This presents a natural tension in the fulfilment of the various elements of the Constitutional mandate of Parliament. Such a tension is not unique to South Africa; it is prevalent in many political systems around the world. The challenge for any democracy is how to manage this natural tension to ensure that Parliament effectively exercises all elements of its mandate. I would argue that this management is a function of several factors, including the design of Parliament's rules and structures, its conventions, the

[20] Constitution of the Republic of South Africa, 1996, Section 42(3)

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prevailing political culture, and the role and influence of other formations, both within and outside the state.

116. This is not only a function of the design of our Constitutional dispensation. This tension is also present, in different forms and to differing degrees, in constituency-based Parliamentary systems (like the United Kingdom) and in systems where the President and legislators are elected on different ballots (like the United States). In both of these cases, and in many others, party affiliation and electoral mandates are significant factors in the exercise of legislative oversight.

117. I make these observations not to excuse lapses in the exercise of Parliamentary oversight of the Executive, but to provide a context in which exercise of oversight needs to be understood.

118. A related matter, on which the Commission has asked me to comment, is whether ANC MPs should be entitled to vote "in accordance with their conscience" on issues related to allegations of corruption by members or deployees of the ANC.

119. As indicated in 77 above, the ANC is an organisation that individuals join voluntarily. It is open to all South Africans above the age of 18 years, *"who accept its principles, policies and programmes and who are prepared to abide by its Constitution and rules."*[20] For most people, therefore, joining the ANC is an act of conscience, motivated by the objectives and

[20] See ANCCR 1

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P.T.M

values contained in the ANC Constitution. Members are, however, expected to abide the rules of the organisation, to accept its discipline, to participate in its activities and to defend the policies and the positions of the organisation. Members who do not wish to do so, are free to leave the organisation.

120. These rights and responsibilities apply equally to ANC MPs. As with any other member, they are bound by the decisions of the relevant structures of the organisation, duly arrived at through democratic processes. Though this would apply to varying degrees under any electoral system, this is reinforced under proportional representation, where MPs are elected on the basis of the number of votes received by their party. They are in Parliament to implement the manifesto of their party and to act in accordance with the collective position of their party on matters before Parliament.

121. All Members of Parliament have an overriding duty arising from the affirmation they make on assuming their positions. Among other things, they undertake to *"be faithful to the Republic of South Africa and [to] obey, respect and uphold the Constitution and all other law of the Republic"*.[21] In other words, all parties have to ensure that their constitutions, policies and practices accord with the basic law of the land.

122. The ANC has endeavoured throughout the 27 years of the democratic Parliament to ensure that its members act both in accordance with their oath of office and in line with

[21] Constitution of the Republic of South Africa, 1996, Schedule 2, 4(1)

P.T.M

the electoral mandate that they carry; that they are both faithful to the Constitution and abide by the decisions of the collective.

123. The question posed by the Commission – and by the allegations of corruption in the Executive and in other parts of the state – is what is expected of MPs who believe that there is a conflict between the position of their party and the oath they have undertaken. This is not a theoretical consideration. I would suggest that it is a consideration that has been faced by several MPs during the period under review. For some MPs, this may have come down to a choice between one's 'conscience' and the 'party line'. I would argue, however, that some MPs took another view, asking themselves how they could fulfil their oath as MPs and remain true to the principles of their party in a context where, to their mind at least, the party collective was not acting against allegations of corruption. How could they, in the context of a politically contested space, ensure that Parliament exercised oversight?

124. In my view, the answer to this question can be found, at least in part, in the events that unfolded in Parliament from late 2016 and into 2017, where the ANC and other parties initiated a number of inquiries into allegations of malfeasance in some state-owned enterprises and parts of government. The affidavit of the former ANC Chief Whip, the late Mr Jackson Mthembu, deposed to on 7 October 2020, provides an adequate description of these inquiries and the decisions that informed them.

125. It is clear from Mr Mthembu's account that the determination of the ANC in Parliament to probe these allegations was both a response to the evidence of wrongdoing that was

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P.T.M

accumulating in the public domain and the implementation of the decisions taken by the ANC's constitutional structures, especially its NEC, to ensure the proper investigation of these allegations.

126. There may, of course, be instances where decisions arrived at by appropriate structures of the ANC on specific issues do not accord with the letter and spirit of the country's Constitution or could have the effect of undermining efforts to attain the ideals it enshrines. Other matters may invoke a contradiction between preferred collective policy action and the privately-held beliefs of individual public representatives. These instances would, in a political party system, be the exception – not the norm. I would suggest a few ways in which such difficulties are managed:

126.1. The first level is to attempt to convince the decision-making structures, including the caucus, of what a member may consider to be the correct position, or vice versa.

126.2. The second level is to draw the attention of relevant leadership structures to the conflict that a member may experience in supporting a particular policy approach and seek guidance on how to manage the issue. There are instances where the ANC has found ways to manage such situations as with some religious leaders in the ANC caucus, many years ago, in dealing with the issue of termination of pregnancy. In this instance, the weight of the issue and the implications for both the individual member and the party are carefully weighed by the leadership.

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126.3. The third and ultimate level derives from the very essence of democracy: if the party consistently takes decisions that are against the interests of the people, the voters themselves would pass their judgement in an election.

Role of the Alliance and other formations

127. No account of the ANC's response to state capture would be complete without a reflection on the role and influence of formations allied to the ANC. This includes the ANC's Alliance partners, the South African Communist Party ("*SACP*") and the Congress of South African Trade Unions ("*COSATU*"), groupings of ANC stalwarts and military veterans, and civil society organs. While these organisations can and should speak for themselves, the positions, pronouncements and activities of these groupings undoubtedly had an impact on the approach taken by the ANC. They also played an important role in drawing public attention to the issue of systemic corruption and thereby contributed to the steps that have been taken to investigate it.

128. While it is neither possible nor appropriate to provide a comprehensive account of their contribution, I will cite a few examples by way of illustration.

128.1. The spectre of state capture (although it was not described in those terms) was pointedly raised in an Alliance Summit held from 27 June to 1 July 2015. The Summit brought together the national leadership structures of the ANC, SACP, COSATU and South African National Civic Organisation ("*SANCO*"). The Declaration of the Summit (annexed marked "ANCCR 22") raised concern about the "deliberate

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P.T.M

manipulation" of internal democratic processes and the systemic emergence of patronage and nepotism. It said this behaviour is *"the entry-point for corporate capture and private business interests outside of our formations to undermine organisational processes"*.

128.2. The SACP has been vocal in its opposition to corruption and state capture. Following public pronouncements by several of its leaders, in June 2016 the SACP Central Committee took a firm public stance, which included a criticism of the ANC leadership. This statement is annexed marked "ANCCR 23". Among other things, it said:

> *"We believe that it is misguided, therefore, for those in the ANC's leadership who now seek to dismiss concern about corporate capture as if it were just a marginal issue. We certainly agree that neither the ANC nor government are corporately captured in their entirety. But the problem is widespread, and threatens to become endemic... In fact, it is only by addressing the challenges of parasitic corporate capture head-on, without fear or favour, that we will reaffirm the values of our liberation struggle, and begin to regain the respect of millions of ANC supporters and South African citizens in general."*

128.3. In the Political Report to its 14th National Congress in July 2017, the SACP said that state capture undermined the developmental capacity of the state and called for

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the immediate establishment of an independent judicial commission of inquiry into state capture. A copy of the Political Report is annexed and marked as "ANCCR 24".

128.4. In August 2017, COSATU called a nationwide strike against state capture. Significantly, this strike call received support from several quarters, including Business Unity South Africa, Business Leadership South Africa and the Chamber of Mines. A copy of the COSATU Central Executive Committee Statement of August 2017 is annexed and marked as "ANCCR 25".

128.5. In October 2016, a group of more than 100 stalwarts of the democratic movement, which included Rivonia Treason Trialists Ahmed Kathrada, Andrew Mlangeni and Denis Goldberg, released a statement calling on the ANC to *"reclaim the trust of society and moral high ground"*[22] (It is annexed and marked "ANCCR 26"). In the statement, they said:

> *"Communities that have looked to the ANC for leadership and who we should serve, increasingly see self-enrichment, corruption, nepotism and the abuse of power... As stalwarts and long-serving members of the ANC, we have profound responsibility to the movement and the country to ensure that the principles and values of the ANC are not destroyed."*

[22] 'For the Sake of Our Future', Press Release, 27 October 2016

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128.6. In April 2016, the South African Council of Churches ("SACC") created an 'Unburdening Panel' to receive information of any experiences of corruption covering the period of South Africa's democratic era.[23] Its report annexed and marked "ANCCR 27". The process was triggered by allegations made by Mr Jonas and former ANC MP Vytjie Mentor about being offered Cabinet positions by members of the Gupta family. From testimony received during the process, the SACC concluded that:

> *"A careful analysis makes the case for... observable trends of inappropriate control of State systems through a power-elite that is pivoted around the President of the Republic that is systematically siphoning the assets of the State."*

129. While the impact of these and other developments on the ANC may not have been immediately apparent, I would argue that the positions taken by allied formations and respected voices in society played an important role in influencing the direction of discussions within the ANC.

Significance of the 54th National Conference

130. Since its formation, the ANC's national conferences have often marked significant milestones in the organisation's growth and development. The 54th National Conference, which was held at Nasrec, Johannesburg on 16-20 December 2017, was no different in this

[23] SACC Report to the Church Public on the Unburdening Panel Process, Regina Mundi Church, Soweto, 18 May 2017

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P.T.M

respect. It was a watershed moment in the ANC's efforts to assess its strengths and weaknesses and to confront state capture and corruption within its ranks.

131. Much of the discussion at the Conference on issues of state capture was framed by a 'Diagnostic Organisational Report' presented by then Secretary General Gwede Mantashe to the National Policy Conference in July 2017. (Policy Conferences are generally held around six months before a National Conference to prepare policy proposals for consideration at the National Conference.) The Diagnostic Organisational Report, which was presented on behalf of the NEC, directly addressed the allegations against the Gupta family and some ANC leaders in the broader context of state capture.

132. Given the significance of the document, it is worth quoting some passages at length:

> *"Mistakes committed at Government level affect the ANC directly, and the organisation cannot claim not to be involved.*
>
> *"An example of this is the debate on State Capture, which was started within the movement and the Communist Party was vociferous about. The issue of the Gupta family being too influential in the decisions of the state has become a household discussion...*
>
> *"However, their relationships with the families of prominent leaders attract the attention of the people. When there are benefits that accrue to families of the leadership, it is assumed to be corrupt in that the political leaders are*

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supposed to have facilitated the accrual of benefits. The leadership of the ANC should never be taken by surprise when society reacts to such relations. In our case, we become dismissive and defensive about it.

The public outcry about the influence of the Gupta family has led to investigations by both the Office of the Public Protector and the South African Council of Churches. Serious allegations were made against a number of the leaders of the ANC. Instead of dealing with the reality facing the movement, a defence was developed by using the real threats we face as a movement. A narrative was developed to link any discomfort with the influence of the Gupta family to the regime change agenda. While it must be acknowledged that regime change is a real threat that needs to be analysed and a strategy to defend the country and the movement needs to be developed, this cannot be used as a response to the perception or reality of corruption."[24]

The Diagnostic Organisational Report is attached hereto as "ANCCR 28".

133. The National Conference adopted a resolution on organisational renewal that noted, among other things, the following:

133.1. an increase in corruption, factionalism, dishonesty and other negative practices that seriously threaten the goals and support of the ANC;

[24] 'A Diagnostic Organisational Report', 5th National Policy Conference, 30 June – 5 July 2017

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P.T.M

133.2. that the lack of integrity perceived by the public has seriously damaged the ANC's image, the people's trust in the ANC, its ability to occupy the moral high ground, and its position as leader of society;

133.3. that current leadership structures seem helpless to arrest these practices, either because they lack the means or the will, or are themselves held hostage by them; and,

133.4. that the state investigative and prosecutorial authorities appear to be weakened and affected by factional battles, and unable to perform their functions.

134. The Conference consequently resolved to:

134.1. demand that every ANC member accused of, or reported to be involved in, corrupt practices account to the Integrity Commission immediately or face disciplinary processes;

134.2. summarily suspend people who fail to give an acceptable explanation or to voluntarily step down, while they face disciplinary, investigative or prosecutorial procedures;

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P.F.M

134.3. publicly disassociate the organisation from anyone, whether business donor, supporter or member, accused of corruption or reported to be involved in corruption;

134.4. ensure that ANC members and structures cooperate with the law-enforcement agencies to criminally prosecute anyone guilty of corruption; and,

134.5. require the ANC deployees to Cabinet, especially Finance, Police and Justice, to strengthen state capacity to successfully investigate and prosecute corruption and account for any failure to do so.

135. The 54th National Conference resolutions signalled a clear determination by the membership of the ANC to acknowledge the organisation's failings, to make a decisive break with corrupt practices and to initiate an ethical, political and organisational renewal of the ANC.

136. In my closing address to the 54th National Conference (annexure "ANCCR 29" hereto), I reflected the outcomes of the Conference on this matter in the following terms:

> *"At the state level we must confront the reality that critical institutions of our state have been targeted by individuals and families through the exercise of influence and the manipulation of governance processes and public resources...*

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P.T.M

"Whether we call this state capture or simply corruption, this has undermined the integrity of our institutions, cost our economy hundreds of billions of rands and contributed to the further impoverishment of our people...

"This Conference has resolved that this must be acted upon and stopped. We must also act fearlessly against alleged corruption and abuse of office within our ranks... This Conference has resolved that corruption must be fought with the same intensity and purpose that we fight poverty, unemployment and inequality."[25]

Specific matters relating to the ANC Officials

137. The Commission has requested that I provide information on specific matters that would have served before the ANC Officials.

138. With respect to the dismissal of Mr Nene as Finance Minister and his replacement by Mr van Rooyen, the dismissal of Mr Gordhan as Finance Minister and the proposed appointment of Mr Brian Molefe as Finance Minister, these matters are dealt with in the statement made in my capacity as President of the Republic.

139. On the appeal by Mr Popo Molefe regarding PRASA, Mr Molefe met the ANC Officials. I cannot readily remember exactly when this took place. He made certain allegations regarding the situation at PRASA. The Officials acknowledged that Mr Molefe raised serious

[25] Closing Address by ANC President Cyril Ramaphosa to the 54th National Conference, 20 December 2017

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P.T.M

matters and made significant allegations that were best handled by the appropriate law enforcement agencies. The ANC is not an investigatory body or law enforcement agency capable of dealing with matters of alleged corruption and criminality. The Officials therefore advised Mr Molefe to approach the relevant agencies to ensure these matters were investigated.

140. On the approaches made by former Directors-General, military veterans and others on the issue of state capture, these need to be viewed in the context of statements, actions and representations by various social actors during this period, some of whom approached the ANC leadership to raise their concerns. I deal with some of these in the section above on 'Role of the Alliance and other formations'. I understand that the meetings held between full-time members of the ANC top 6 and some former DGs and military veterans are dealt with in affidavits filed with this Commission by persons with personal knowledge of the meetings.

141. On the alleged donation to the ANC from Ms Maria Gomez, I am informed that this matter is dealt with in the submission to the Commission by former ANC Treasurer General Mr Zwelini Mkhize, in an affidavit he deposed to on 3 December 2020.

Process of renewal and correction

142. Following the 54th National Conference, and in line with its resolutions, the ANC embarked upon a process of organisational rebuilding and renewal. This included corrective measures both within the ANC and in the State. While the latter are dealt with extensively in my statement to the Commission in my capacity as President of the Republic,

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and I will therefore not discuss them again here, it is important to note that these measures were informed by the mandate of the ANC's National Conference.

143. Just a few weeks after the National Conference, the incoming NEC released its first January 8th Statement (a full copy of which is annexed marked "ANCCR 30"), which outlined the organisation's priorities and tasks for 2018. It took a firm position against corruption:

> *"Corruption in [state-owned enterprises] and other public institutions has undermined government's programmes to address poverty and unemployment, weakened key institutions, discouraged investment and contributed to division within the ANC and the Alliance...*
>
> *"Anti-corruption efforts within the state must be more effectively coordinated and all forms of corruption must be exposed and prosecuted. This includes corruption, collusion and other criminal activity in the private sector, which must be fought with equal diligence and determination.*
>
> *"Strong and efficient law-enforcement agencies are critical to the fight against corruption and crime generally, and to the restoration of the integrity and legitimacy of the state. In this regard, the ANC is of the firm view that the country's intelligence services, the police and prosecutorial authorities should be strengthened and fortified to act with professionalism, and without fear, favour or prejudice. They should continue to be at the forefront of the fight*

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against corruption and state capture, and work with communities to deal decisively with acts of criminality that threaten to tear communities apart."[25]

144. The January 8th Statement said that among the priority tasks for the organisation for 2018:

"We shall work to restore the integrity and credibility of the ANC. We need cadres who are committed to serve no other interest than the interests of the people, who seek no advantage for themselves or their families from the positions they occupy, and who safeguard public resources. We shall strengthen the Integrity Commission to deal with matters of ethics in the organisation and finalise its standing and the status of its decisions by June this year."[27]

145. An important part of the ANC's renewal process was to publicly identify and acknowledge the extent of corruption within the State and within its own ranks. The ANC's 2019 Election Manifesto (dated January 2019 and annexed marked "ANCCR 31") was a significant moment in this process. Among other things, the Manifesto said:

"The ANC acknowledges that we made mistakes and veered off course.

[26] Statement of the National Executive Committee on the occasion of the 106th anniversary of the African National Congress, 8 January 2018

[27] *Ibid.*

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P.T.M

"As a nation, we have learned the harsh impact of corruption on society and the economy. We have witnessed the loss of integrity in some of the institutions of state, business and political and other organisations. We have learned hard lessons about the vigilance needed to stop lawlessness, greed and selfishness from taking root. We are resolved to work with our people to address this cancer in our society...

"We will actively promote a culture of integrity throughout the state, society and within our people's organisation – the ANC. We will ensure that leaders and members of the ANC and the broader movement and those entrusted with public responsibilities are uncorrupted, honest and self-disciplined with clear values who can resist moral pressures. We will not tolerate practices that harm the public interest. We will hold people accountable and those who loot public resources must face the might of the law."

146. As detailed in 144 above, the ANC has since the 54th National Conference also strengthened the Integrity Commission. In its meeting of July 2019, the NEC revised the terms of reference of the Integrity Commission to enable it to call on ANC members and leaders to appear before it, to enable members to present themselves to the Commission and to strengthen the Commission's investigative capacity.

147. The allegations that surfaced during the coronavirus pandemic about corruption in the procurement of personal protective equipment and other essential supplies compelled the ANC to reaffirm its stance against corruption and undertake further measures in the

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implementation of its Conference resolutions. I refer here to the Statement of the National Executive Committee of the African National Congress held on 31 July – 2 August 2020, annexed marked "ANCCR 32".

148. It prompted a letter from the ANC President to the membership of the organisation in which I outlined actions the ANC should take without delay. These included the following:

148.1. the ANC should implement without delay the resolutions of the 54th National Conference on dealing with corruption, including that:

148.1.1. every cadre accused of, or reported to be involved in, corrupt practices must account to the Integrity Commission immediately or face disciplinary processes;

148.1.2. people who fail to give an acceptable explanation or to voluntarily step down while they face disciplinary, investigative or prosecutorial procedures should be summarily suspended;

148.1.3. the ANC should publicly disassociate itself from anyone, whether business donor, supporter or member, accused of corruption or reported to be involved in corruption;

148.2. require ANC leaders to make regular declarations of financial interests;

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148.3. conduct lifestyle audits of all ANC leaders and public representatives;

148.4. develop a clear policy on ANC leaders and their family members doing business with the state;

148.5. strengthen the Integrity Commission and provide it with clear administrative and legal support.

The letter from the ANC President to ANC members has been attached as "ANCCR 33".

149. The NEC, in its meeting of 28-30 August 2020 endorsed the letter from the ANC President as a *"clear articulation of the policies and positions of the organisation, and agreed to the implementation of the points of action contained therein"*.

150. The NEC further directed that the following should happen:

150.1. Members of the ANC who are formally charged with corruption and other serious charges must immediately step aside from all leadership positions in the ANC, legislatures or other government structures pending the finalisation of their matters and mandated the Officials to develop "guidelines and procedures" for the implementation of the "step aside" resolution.

150.2. Members who did not step aside, in line with the resolution, may be summarily suspended.

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150.3. Members of the ANC who are reported to be involved in corrupt and other serious criminal practices must go to the Integrity Commission and provide a credible explanation for these allegations or reports. Should members fail to give an acceptable explanation, they may be suspended.

150.4. Members of the ANC who are convicted of corruption or other serious crimes must resign from leadership positions and face disciplinary action in line with the ANC Constitution.

The NEC Statement of 28-30 August 2020 is attached hereto as "ANCCR 34".

151. The NEC further directed the Officials to develop guidelines on the implementation of the Conference resolution and subsequent NEC decisions. The Officials appointed a task team of venerable elders and stalwarts, supervised by the Treasurer-General and led by former ANC Deputy President Kgalema Motlanthe, to develop the guidelines and procedures on stepping aside.

152. The draft guidelines and procedures were presented to the NEC meeting of 13- 14 February 2021 and adopted at this meeting. Full implementation of the resolution was deferred by a month to effect technical refinements and workshop structures to foster common understanding and unity on the approach to implementation. The NEC Statement of 13-14 February 2021 is attached as "ANCCR 35".

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153. The NEC in its meeting of 26–29 March 2021 resolved to implement the Resolutions of the 54th National Conference on 'stepping aside' and directed that *"all members who have been charged with corruption or other serious crimes must step aside within 30 days, failing which they should be suspended in terms of Rule 25.70 of the ANC Constitution."*

154. The NEC Statement of 26–29 March 2021 is attached as "ANCCR 36"

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ANALYSIS OF THE ANC'S ROLE IN STATE CAPTURE AND CORRUPTION

155. As is evident from the decisions and statements outlined above, the ANC recognises that state capture and corruption have taken a great toll on our society and our economy. These practices erode the values of our Constitution and undermine the rule of law. They threaten the achievement of the growth, development and transformation of our country.

156. The ANC's 54th National Conference resolved to support the establishment of this Commission, and has consistently expressed its support for the objectives and the work of the Commission. The ANC maintains that this Commission is an important part of the broader social effort to end all forms of state capture and corruption.

157. The ANC's position has been that it is the responsibility of ANC members – and indeed of all South Africans – to assist the commission in its work.

158. In addition to the damage inflicted on society, state capture and corruption has had a serious impact on the integrity, unity, capability and credibility of the ANC.

159. The allegations of malfeasance that the Commission was established to investigate and about which much testimony has been led occurred while the ANC was the governing party in national government and in most provinces and municipalities.

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160. Allegations have been made at the commission against a number of ANC leaders and members. While many of these allegations have not yet been tested and the commission has yet to make any findings, these allegations do have a cumulative effect on the ANC's integrity and standing in society.

161. However, as is evident from section 67 above, corruption within the ranks of the ANC was a broad issue of concern over many years. Indeed, there have been occasions where allegations have been made against ANC leaders and members, and instances where ANC leaders and members have been prosecuted by the State and disciplined by the organisation.

162. With the passage of time, however, as more reports began to surface in the public domain about the alleged 'capture' of public entities by private interests and the undue influence of certain individuals, notably members of the Gupta family, in executive decisions and appointments, ANC members began to raise concerns within the various structures of the organisation.

163. As the volume of evidence began to mount in the public domain, the issue of state capture was increasingly a subject under discussion in the NEC and other ANC structures. It was also a matter taken up more directly by the ANC's Alliance partners, the South African Communist Party and the Congress of South African Trade Unions, and by ANC veterans and others outside the structures of the organisation.

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164. The issue of state capture – whether indeed it existed, its extent and form, and what should be done about it – became a matter of political contestation within the ANC. Differences over this issue contributed to divisions within the NEC and other ANC structures, which divisions were evident also in government, in parliament and other sections of society.

165. Indeed, the issue of state capture and corruption was prominent in the contestation that took place ahead of the ANC's 54th National Conference in December 2017.

166. Although the ANC, as an organisation, did not have direct evidence of state capture activities at the time they were being perpetrated, and did not have the investigative capacity to probe the various allegations, it is necessary to address the issue of whether the organisation, through action or inaction, enabled the commission of these activities.

167. In this regard, certain objective and subjective factors should be considered:

167.1. Corruption is, by its nature, a covert activity. Those who perpetrate corruption and related crimes generally seek to keep their actions hidden and disguise their intentions. Therefore, even as corrupt activities may be taking place within institutions, it is entirely conceivable that most members of the institution would be unaware. It was due to the covert nature of these activities that, for the most part and for much of the period under consideration by the Commission, these issues did not arise within the structures of the ANC, and, it would be fair to say, were not known to most of the members of these structures.

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167.2. The ability of any organisation – but especially a political formation – to act on allegations of malfeasance relies not only on its formal rules and procedures, but also on the balance of power within its structures. The alignment of views within such an organisation is further influenced by access to the offices of state, where the ability to appoint and dismiss – and even to dispense patronage – is concentrated among a few individuals.

167.3. The ANC has recognised the erosion over time of its organisational integrity, as processes have been manipulated to advance the material interests of certain members and associated private companies and individuals. This manifests itself in weak and pliable branches, vote buying and gate keeping (where certain potential members are deliberately prevented from joining or participating), factionalism and even open conflict. This provides fertile ground for state capture and corruption.

168. The ANC recognises – as clearly stated at its 54th National Conference – that it needs to rid itself of the practices, tendencies and organisational culture that corruption has implanted, and which in turn have enabled corruption.

169. The ANC has therefore embarked on a process of renewal and rebuilding, to build a movement characterised by integrity, accountability and the highest standards of ethical behaviour. The process of renewal is ongoing. The rate of progress is determined not only by the existence of political will and organisational capacity, but also by the continued

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existence of vested interests and resistance from those who have much to lose from the corrective measures mandated by the ANC's 54th National Conference.

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CONCLUSION

170. This statement has sought to outline the ANC's approach to corruption, its knowledge of and response to allegations of state capture, and the measures it is taking to address its organisational deficiencies.

171. The statement is not a comprehensive or definitive description of the impact and operation of state capture as it pertains to the ANC. This is something that will likely only emerge with time, as processes of investigation, research and analysis unfold. The work of this Commission will undoubtedly contribute much to the understanding of how state capture occurred and what function the different formations in society – including the ANC – performed in enabling or restricting these criminal activities.

172. It may not be within the remit of this Commission to delve into all the causal factors that contribute to the development of a culture of corruption within the state, political and other organisations, the business community and other sections of society. However, we have referred to some of these issues in this statement. Many other important matters that may require reflection include:

172.1. the character of South Africa's political transition and how the structures, networks, systems and culture of corruption within the apartheid state and established business may have been carried over into the democratic dispensation;

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172.2. the nature of our social relations and a value system in broader society which measures success on the basis of the material possessions that individuals command;

172.3. the tendency among companies to succumb to extortion, adapt their operations to corrupt environments and themselves to become facilitators of corruption and state capture;

172.4. the management of the rise of an entrepreneurial 'class' among those previously marginalised and the temptations in this process to cut corners;

172.5. the criteria for accession to political office in parties and in the state which may result in situations in which individuals with no other avenues for material self-advancement rely on state patronage to pursue glided lifestyles;

172.6. and the system of party political funding which we are only now starting to regulate in a systematic way.

173. These systemic causal factors of corruption and state capture require ongoing reflection within our society, the better to find solutions that are effective and lasting.

174. The position of the ANC on leaders and members who have committed acts of corruption or other crimes is clear. Their actions are a direct violation, not only of the laws

P.T.M

of the land, but also of the ANC Constitution, its values and principles, and the resolutions and decisions of the ANC's constitutional structures.

175. Such members must face the full legal consequences of their actions. They cannot rely on the ANC for support or protection, nor may they appeal to the principle of collective responsibility. In accounting for their actions, they stand alone.

176. While the ANC distances itself from those within its ranks who have been involved in corruption or who are complicit in state capture, the organisation must – and does – acknowledge the responsibility that it bears for the matters currently under investigation by the Commission.

177. State capture took place under our watch. It involved leaders of our organisation and it found fertile ground in the divisions, weaknesses and tendencies that have developed in our organisation since former President Mandela sounded his clear warning in 1994.

178. The vast majority of ANC leaders, cadres and members are vehemently opposed to corruption in all its manifestations. But they will also acknowledge that the organisation could and should have done more to prevent the abuse of power and the misappropriation of resources that defined the era of state capture.

179. Particularly during the period under review by this Commission, the ANC does admit that it made mistakes as it sought to execute the mandate it was given by the voters. It failed to live up to the expectations of the South African people and it was inconsistent in

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upholding the values and principles that have defined the movement over more than a century of its existence.

180. As the leadership of the African National Congress, duly elected at our 54th National Conference, we acknowledge these shortcomings of our organisation and we extend a sincere apology to the South African people.

181. We further undertake to work alongside all South Africans to ensure that the era of state capture is relegated to history and that the excesses that took place may never again occur in our country.

MATAMELA CYRIL RAMAPHOSA

I hereby certify that the deponent declares that he knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Hyde Park on this 22 day of April 2021 and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

FULL NAMES:
ADDRESS:
DESIGNATION:
AREA:
Stamp:

SOUTH AFRICAN POLICE SERVICE
PRESIDENTIAL PROTECTION SERVICE
2021-04-22
PRESIDENTIAL PROTECTION SERVICE
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AFRICAN NATIONAL CONGRESS

53rd National Conference Report

Contents

1. *Introduction by the Secretary General* 2

2. Credentials Report 3

3. National Executive Committee 6
   1. Officials 6
   2. NEC 7

4. Declaration of the 53rd National Conference 9

5. Resolutions 11
   1. Organisational Renewal 11
   2. Social Transformation 18
   3. Economic Transformation 27
   4. Legislature and Governance 34
   5. Peace and Stability 41
   6. International Relations 45
   7. Communications and the Battle of Ideas 57
   8. Education and Health 75
   9. Fundraising 87

6. Closing address by the President 90

KG

P.T.M

the Policy Conference further recommend that the 53rd National Conference should declare the next decade a Decade of the Cadre in which there will be a key focus on the ideological, political, academic and moral training of a critical mass of ANC members.

- The One Million Members Campaign should be buttressed by a national programme to develop and transform most ANC members into activists and cadres who will be at the cutting edge of the on-going struggle fundamental political, social and economic transformation of our country. Accordingly, ANC members should understand fully what it takes for a member to go through the full cycle of becoming and remaining a tried and tested cadre. It must be clear that joining the ANC is the beginning of a long journey towards becoming a cadre.

- In the new phase of the NDR, deployment should always be preceded by systematic academic, ideological, and ethical training and political preparation. Cadre Deployment should be underpinned by a rigorous system of monitoring and evaluation of the performance of cadres deployed and elected to leadership positions. This will avoid a situation wherein leadership assessment and evaluation take place only in the run-up to conferences.

- It is in this spirit that the establishment and rollout of the ANC's comprehensive political school system – national, provincial, regional, sub-regional/zonal and branch level – is an urgent task during the Decade of the Cadre.

- The ANC veterans and former combatant of MK should be deployed in the programme of rolling out the political education cadreship development programme. This applies to individuals whose conduct is beyond reproach. The proposal that cadre deployment should also consider academic qualifications.

- The ANC should adopt a programme to raise the level of literacy, education and skills among its members as part of the nation-wide campaign to make education and training a national priority.

- The ANC should be a specific focus on the recruitment, political and ideological training of students and young intellectuals

8. Conference further instructs the incoming NEC to develop and implement programme to give effect to the next ten years being declared a Decade of the Cadre

On safeguarding core values

- Having noted that the gradual erosion of the core values of the ANC threatens its continuing existence in the second centenary, Conference agrees unanimously that safeguarding and promoting the core values of the ANC constitute one of the key tasks of second phase of the transition. The promotion of our core values should be undertaken within the context the ideological struggle to cultivate progressive values among all South Africans as part of building a national democratic society.

- Conference reaffirms the NGC resolution on the setting up of the Integrity Commissions at all levels of the organisation. More urgent steps should be taken to protect the image of the organisation and enhance its standing in society by ensuring, among others, that urgent action is taken to deal with public officials, leaders and members of the ANC who face damaging allegations of improper conduct. In addition, measures should be put in place to prevent abuse of power or office for private gain or factional interests. The ANC can no longer allow prolonged processes that damage its integrity.

- Conference supports the rules on lobbying and called on the NEC to ensure that they are form part of conference rules. However, the idea that those wishing to stand for election should be given an organisational platform to campaign was rejected.

- Conference emphatically condemned factionalism as well as the practice of slates during conferences. In addition, delegates called for the ANC to tackle the underlying roots of these problematic practices which

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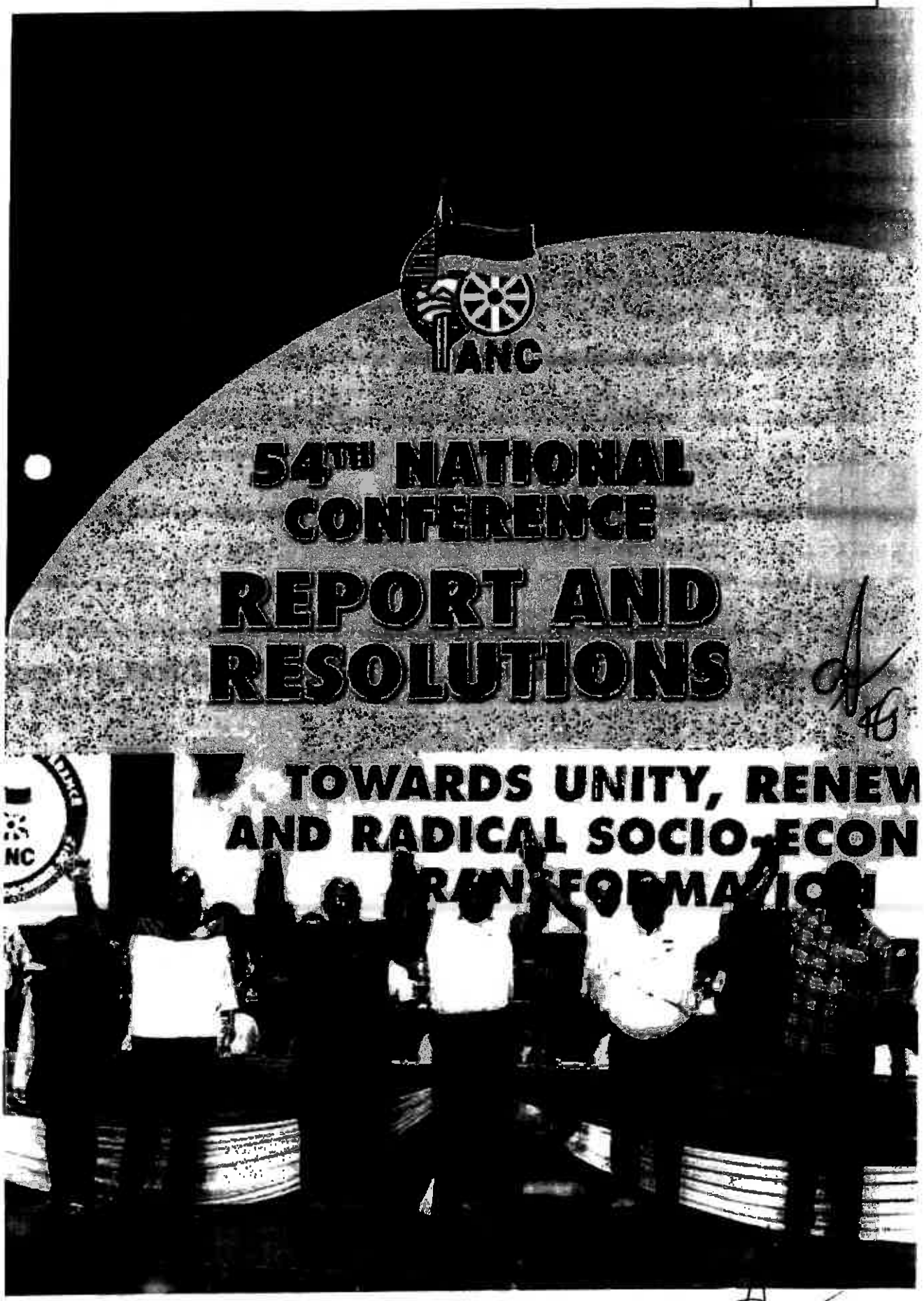
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54TH NATIONAL CONFERENCE
REPORT AND RESOLUTIONS
TOWARDS UNITY, RENEW
AND RADICAL SOCIO-ECON
TRANSFORMATION

the above support and programmes for our work among the people.

2. The Secretary's office at all levels must monitor the achievements and outcomes of each programme and take the necessary action to address weak implementation.
3. Include a permanent elections and sectoral work capacity at national, provincial and regional level
4. Branch audits should include the Programme of Action as an indication of the life of the branch.

CADRE DEVELOPMENT

Noting

- Our deployment of cadres in many areas of work
- The challenges faced by our structures, public representatives and members
- The rapid turnover in leaders and public representatives
- The cadre development resolutions adopted by previous conferences
- The need for all cadres to understand the goals, values, policies, principles and the programmes of the ANC
- The need to develop the capacity of cadres deployed to higher levels of government and management

RESOLVES:

1. All ANC members must do the membership induction course during the probation period to be trained in the goals, values, principles and structure of the ANC. All BECs must be inducted with the BEC induction programme. THE Induction courses should also be available online
2. All REC, PEC and NEC members must attend an induction course as soon as they assume office
3. All councillors must be inducted for at least three days in the ANC approach to local government as well as the work we expect from councillors
4. The political school curriculum must be completed in an online version for branch study group or individual use by mid 2018. All ANC cadres available for selection as leaders and candidates must complete the school and pass the courses.
5. All leaders and candidates for deployment to government must ensure that they build their skills and qualifications to enhance their capacity
6. The ANC should develop a real and virtual discussion forum on topical issues to help inform our structures of positions on current debates
7. Our communication to branches should be improved and include more topical political and news analysis.
8. Radio Freedom and any other vehicle (like podcasts) should be used to spread the ideas of the ANC and help us in the battle of ideas.
9. The ANC should ensure that leaders deployed in government go through compulsory, regular and ongoing development; in addition to the responsibility of individuals to continually develop themselves.

ELECTIONS

Noting

- Our declining levels of support and inability to implement our complete election campaign strategy
- Decreasing campaign management capacity and inability to maintain data on supporters and respond to issues
- Our inability to communicate coherently and get leaders to stay on message
- The candidate selection process and controversy that surrounds it in some areas
- The change in VD and ward boundaries that affect ANC branches and the fact that urbanisation happens mostly in our wards. Delaying re-demarcation for more than one 5 year period negatively affects our vote as more voters have the same vote as less voters in wards that do not grow. And that it will be unconstitutional as wards must be within 10% the same size
- A tendency to insult voters by "gifts" of food parcels and blankets before elections as a substitute for effective service delivery
- An increase in dirty tactics by political parties in local elections, like "busing" voters to register outside their own ward and intimidation to stop voters from participating

RESOLVES

1. Building a professional and permanent election capacity at national and provincial level, instructing the NEC and other leadership collectives to implement the resolution on maintaining full-time election capacity at national, provincial and regional level.
2. Building on the ANC national cloud data base and

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OECD Working Papers on Public Governance No. 6

Study on the Political Involvement in Senior Staffing and on the Delineation of Responsibilities Between Ministers and Senior Civil Servants

Alex Matheson,
Boris Weber,
Nick Manning,
Emmanuelle Arnould

https://dx.doi.org/10.1787/136274825752

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STUDY ON THE POLITICAL INVOLVEMENT IN SENIOR STAFFING AND ON THE DELINEATION OF RESPONSIBILITIES BETWEEN MINISTERS AND SENIOR CIVIL SERVANTS

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P.T.O

TABLE OF CONTENTS

ACRONYMS 4

INTRODUCTION 5

Overview 5
Methodology 7

CONTEXT 8

1. The public service is inherently political 8
2. Balancing values and making tradeoffs 9
   2.1. A hierarchy of public service behaviours 9
   2.2. The political/administrative interface 10

FINDINGS 14

3. Formal institutional arrangements 14
   3.1. Codification of the Principles of Political Neutrality 14
   3.2. Political involvement in the careers of senior civil servants 15
   3.3. Formal delineation of the roles of politicians and public servants 19
   3.4. Institutional oversight of the political/administrative boundary 21
   3.5. Arm's-length agencies 22
4. Characterising problems 23
   4.1. Turnover of staff following elections 23
   4.2. Ministerial interference in management issues 24
5. The significance of informal conventions 25
6. Particular pressures for political responsiveness 27

CONCLUSION 30

7. Reviewing the findings 30
8. A tentative framework 31
   8.1. Is there a problem to be solved? 32
   8.2. Could this problem implicate the political/administrative interface? 32
   8.3. Is the nature of the existing oversight arrangements fully understood? 32
   8.4. Are the oversight arrangements, formal and informal, appropriate for the degree of political involvement envisaged in staffing issues? 33

ANNEX 1. REPORTED TRENDS 34

ANNEX 2 INSTITUTIONAL CONSTRAINTS TO POLITICAL RESPONSIVENESS WITHIN EXECUTIVE BODIES 43

ANNEX 3 HYBRID APPOINTMENT PROCEDURES: THE EXAMPLE OF BELGIUM 49

ANNEX 4 CIVIL SERVICE COMMISSIONS 51

ANNEX 5 THE QUESTIONNAIRE 58

ANNEX 6 THE TOP FIVE LEVELS AS INDICATED BY COUNTRY RESPONDENTS 64

P.TIM

ANNEX 7 COUNTRY RESPONDENTS 65
REFERENCES 71

Boxes

Box 1. Pressure for political responsiveness in the United Kingdom 11
Box 2. Pressures for inclusiveness in Mexico 12
Box 3. Developments in oversight agencies in the United States 13

P.T.M

ACRONYMS

APA	Administrative Procedures Act (United States)
CSC	Civil Service Commission
ECIE	Executive Council on Integrity and Efficiency (United States)
GAO	General Accounting Office (United States)
GSA	General Services Administration (United States)
HRM	Human resource management
LOLF	La Loi Organique Relative aux Lois de Finances (du 1er Août 2001) (France)
MSPB	Merit Systems Protection Board (United States)
OGE	Office of Government Ethics (United States)
OMB	Office of Management and Budget (United States)
OPM	Office of Personnel Management (United States)
OSC	Office of Special Counsel (United States)
PCIE	President's Council on Integrity and Efficiency (United States)
PSC	Public Service Commission
SELOR	Bureau de Sélection de l'Administration Fédérale (Belgium)
SGAE	Secrétariat Général des Affaires Européennes (France)
SSC	State Services Commission (New Zealand)

INTRODUCTION[1]

Overview

In their quest for legitimacy, democratic regimes find themselves having to balance two values that can be in some tension: fair and non-politically partisan public service delivery and, subject to the law, the responsiveness of public servants to the policies of the current executive.[2]

Neutrality, in the sense of political non-partisanship in public administration, is of course a precondition for ensuring that, regardless of their political orientation, citizens are treated fairly and in an equitable manner. Operationally it is delivered by emphasising professionalism, merit and competence amongst public servants. These values are important to the level of justice and continuity in public administration – arguably a significant determinant of how much trust citizens place in their system of government. At the same time public servants must be accountable to the government[3] for the effective delivery of its programme, and responsiveness of the administration to the government of the day within the law and the constitution is key to the effective implementation of government policies (Sossin: 2006).[4]

This report depicts the way in which different countries have developed institutional arrangements which balance these two concerns, to avoid the extremes of a self-serving public service immune to political leadership, or an over-politicised public service hostage to patronage and serving partisan rather than national interests.

Although informed by a systematic survey of expert respondents, the conclusions of the study are inevitably somewhat speculative for two reasons. First, day-to-day practice can differ strikingly from constitutional, legal or administrative theory – and without other survey data, it is hard to know how closely reported behaviours reflect reality.[5] Second, political neutrality is not a sharply defined goal – it is a broad judgment that can be made only over a considerable period of time. The tensions between the values of neutrality and responsiveness are not always evident in the short term. Political responsiveness can be enhanced by selecting staff on the basis of both merit and commitment to a particular policy programme. The question is whether those staff would just as willingly assist in the implementation of the policy priorities of a new government, and the next.

The study considers appointments to mainstream public service managerial positions. Other than for some occasional comparisons, it does not consider the appointment of political advisors outside of the usual public service hierarchy. In some settings this can be a significant body of staff.[6]

The report highlights that political involvement in administration is essential for the proper functioning of a democracy. Without this an incoming political administration would find itself unable to change policy direction. However public services need protection against being misused for partisan purposes, they need technical capacity which survives changes of government, and they need protection against being used to impair the capacity of future governments to govern.

P.T.M

In summary, the key findings of the report are:

1. While principles of public service neutrality in the sense of non-partisanship are espoused by all countries in the survey, this does not equate to an apolitical process for senior appointments.

2. Countries have a range of laws, conventions and procedures which spell out the division of responsibility between ministers and civil servants, and in some cases by prohibiting politicians or civil servants from being involved in certain areas.

3. There is diversity in the institutional oversight arrangements for enforcing limitations on political involvement in staffing matters and in complying with restrictions on functional roles.

4. Informal arrangements, and particularly long-standing popular conventions, are very significant when assessing arrangements for ensuring non-partisan public services.

5. Constraints on party political influence on the public service vary with constitutional type and administrative history – and that political involvement can be a rational response to situations where the executive faces structural arrangements which generate a multiplicity of principals who might block change. Put starkly, when there are multiple principals, the single political principal with some responsibility for the sector portfolio (minister, secretary in the United States, etc.) faces a distinctive incentive for politicization as it gives them a stronger handle on an otherwise unresponsive bureaucracy. This conclusion argues against the assumption that underpins much public management literature, which warns about the negative effects of political involvement and often suggests that purely administrative determination of staffing decisions is the preferred state and that any steps down the path of political involvement are intrinsically damaging to governance.

These findings appear to encompass both the *Rechtsstaat* continental European civil service traditions and the Anglo-Saxon "public interest" tradition.[7]

In offering a framework for any country level review of the political/administrative boundary, the report suggests that there are four key questions which merit consideration:

1. Is there a problem to be solved?

2. Could this problem implicate the political/administrative interface?

3. Is the nature of the existing oversight arrangements fully understood?

4. Are the oversight arrangements, formal and informal, appropriate for the degree of political involvement envisaged in staffing issues?

In each case, it provides the detailed lines of inquiry which can throw light on these questions.

There are three modest claims that the authors make for this study. First, it should assist in opening up an issue for discussion amongst practitioners in the OECD. There has been a tendency, particularly in Westminster-based systems, to assume that a completely apolitical appointment process is in some way the ideal, and that any evidence of political involvement is a departure from a preferred path. This study might provide some encouragement for those that note that the issues are rather more shaded than this would suggest and that the part played by informal institutions in support of merit and of separation between administrative and political roles is significant.

P.T.O.

Second, and related, the study identifies a series of questions which will be pursued in future OECD surveys of human resource management within the public sector.

Finally, and consistent with its part-funding from the World Bank, the study may offer interested practitioners outside of the OECD a slightly more realistic overview of the nature of political involvement in the senior civil service than has been available to date.

Methodology

This report draws on an empirical examination of how different national systems define the sphere and boundaries of political influence in the management of the public service. It does not assess whether these arrangements are, of themselves, "effective". Such a judgement can be made only after observing a governmental system over a period of time, and assessing whether it earns a broader legitimacy and trust from its citizens or whether these ends have been undermined by a self-serving and politically unresponsive civil service, or by politically partisan patronage by ministers in their use of public resources.

The research for the report is based on:

- a literature review;
- a study of legal texts, constitutions, laws, regulations, codes of conduct;
- a survey and subsequent interviews with 12 country contacts (federal government of Belgium,[8] Denmark, France, Italy, Korea, Mexico, New Zealand, Poland, Sweden, the United Kingdom, the United States and South Africa). The countries selected offer diversity in regards to region and to political systems.

The country experts responded to a survey covering general arrangements, historic development, personnel management, the delineation of functional responsibilities, variations of terms during the period of elections and oversight arrangements. Those contacts were current or former high-level public servants, some of them the heads of general staffing or recruitment offices. It should be noted that they responded with experience and considered judgement, but did not speak formally on behalf of their respective governments. The survey focused on the appointment and management arrangements for the five most senior levels directly below the politically appointed minister.[9]

The study looks at various means by which the systems of government achieve a balance between political neutrality in the sense of non-partisanship and responsiveness of the public service. These include legal and conventional constraints on ministerial decision-making, the promotion of a culture of apolitical professionalism amongst public servants (however appointed), formal delegations and divisions of labour between ministers and public servants, openness of process, and oversight by legislative or judicial authorities.

Unless otherwise stated, the source for all tables within the report is the OECD survey of expert respondents undertaken between March and June 2006.

The research takes core ministries as the "base case", but also examines whether and how agencies or other arm's-length bodies diverge from this.

The research was significantly funded by the World Bank.

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CONTEXT

1. The public service is inherently political

Discussions about the relationship between bureaucrats and politicians frequently take Max Weber's model of bureaucracy as a starting point (Weber: 1980). Weber argued that the division of labour between politicians and bureaucrats would work best when there is a clear distinction between the two sets of actors. He saw administrators as instrumental and subordinate to politicians – as technical experts who should advise and efficiently execute the decisions of politicians as the sovereign representative. He saw "neutral competence" as a determining characteristic of the administrator.

However while politicians are in charge of defining the policies to be implemented by bureaucrats, Weber pointed out the danger that career civil servants might dominate politicians through their superior knowledge, technical expertise and longer experience, in contrast to the frequently changing ministers. This observation corresponds to what new institutional economics refers to as "information asymmetry" – the possibility that the "principal" may be thwarted in their efforts to control and direct the "agent", because the agent is in a position to hide, or fail to reveal important information. The modern movement to formalise agreements on goals and reporting requirements between the political and administrative domains (and between the legislative and executive domains) can be seen as attempting to reduce this informational disadvantage.

Weber's theoretical model, often considered as an ideal type of bureaucracy, was, however, rarely found in practice. (Peters *et al*: 2004) argue that the public service is inherently a political creation, and, thus can never be made fully apolitical. Bureaucrats, in delivering a public service to the citizens, inevitably participate in the political role of deciding who gets what from the public sector (Christensen and Laegreid: 2004).

However, many authors claim politicisation has increased over the years, citing a "thickening" with added layers of political appointees even in countries that already possessed several politically appointed echelons such as the United States (Dunn: 1997; Light: 1995; Peters *et al*: 2004). (Aberbach, Putnam *et al.*: 1981; Aberbach and Rockman: 1994; Hart: 2006) similarly report a growing involvement of political actors in roles which are traditionally played by public servants.

Critics point to the negative effect this has on policy making. Politicians' options become more limited when civil servants do not feel free to deliver free and frank advice and do not "speak truth to power" undermining the key "challenge" function in policy assessment. Furthermore, they argue, it makes career civil service less attractive since the lead is taken by more and more political appointees (Campbell and Wilson: 1995; Dunn: 1997).

Others argue that this is not only understandable but to some extent necessary. Ministers in a legally appointed government have a legitimate right to control their government's organisation and reduce deflection from their policy direction. (Peters *et al*: 2004) observe that the delegation and deregulation of New Public Management reforms has in effect reduced the control of politicians over bureaucrats. However, because in the public eye ministers are still held responsible for the actions of their departments, ministers may seek to control their administration by appointing loyal followers whom they would trust to implement their policy decisions without tampering with them.

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Rose (1976) offered the criticism that career civil servants were historically often not responsive enough to changes in the priorities of their political leaders. Responsiveness to the elected officials is now widely seen as a legitimate way of being responsible to the citizens (Dunn: 1997; Hood and Peters: 2004; Self: 1972). The "neutral competence" of civil servants is therefore complemented by the somewhat contrasting value of "responsive competence".

2. Balancing values and making tradeoffs

2.1. A hierarchy of public service behaviours

How would we know if the balance between fair and non-politically partisan public service delivery and the responsiveness of public servants to the policies of the current executive was about right? We could make the connection with public trust – but this is a rather slippery issue as trust is capable of many meanings and is very resistant to precision (OECD: 2005a).

Arguably, the balance is right when the resulting behaviour of the public service supports a perception of the legitimacy of government. Values such as probity or propriety are thus not just ends in themselves; their demonstration through the behaviour of public servants contributes to the public willingness to be governed (OECD: 2000).

If this is a key test, then there are several areas in which we might look for evidence of legitimacy-supporting behaviours as depicted in Figure 1.

Figure 1. Hierarchy of public service behaviours underpinning the legitimacy of government as an institution

Short term significance for government legitimacy

Long term significance for government legitimacy

RESPONSIVE PUBLIC SERVICE	PERFORMING PUBLIC SERVICE
Civil service faithfully executes policies of the day. *Legitimacy is supported through responsiveness to political priorities*	Meets needs of client groups. Communicates and consults with them. *Legitimacy is supported through proficiency/quality in service delivery*
IMPARTIAL AND INCLUSIVE PUBLIC SERVICE	
Serves interests of all citizens, attends to long-term impact of policies. Whole-of-government interest not subordinated to sectoral interests. Does not burden future generations. Adaptive – takes "hard" resource and organisational decisions when necessary. *Legitimacy is supported through visible concern for the collective interest*	
CONSTITUTIONAL RESPECT AND CONTINUITY	
Constitution and law-abiding in spirit/action. Respects individuals and communities. Sense of security maintained. Transparent decision-making. Use of coercive power safe-guarded. Collective interest protected from private gain. Professional civil service under legitimate political direction, ensures policies are carried consistently and without political bias. A government is constrained from taking action which jeopardises the legitimacy of future governments. *Legitimacy is supported through stability and maintenance of trust in public institutions*	

Source: Developed from OECD (2005b).

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These four domains of public service behaviours are in a hierarchy, with respect for the Constitution and institutional continuity as both the most traditional requirement on the public service, and also the area in which the legitimacy that they support is likely to be long-lasting. By contrast, earning legitimacy through quantitatively demonstrated "performance" measures is a relatively recent arrival on the scene – and the legitimacy that behaviours in this domain earn for government could be seen as somewhat more fragile.

Setting these out in more detail:

1. *Respect for the constitution and for institutional continuity.* Public service institutions do not have authority over political institutions, but they do act as a quasi-constitutional constraint on those institutions. Legitimacy derives from adherence to constitutional and legal requirements, regardless of the implications for the elected government.

2. *An impartial and inclusive public service.* Moving one step up the hierarchy, a demonstrable concern for the collective interest from the public service provides assurance that non-elected public officials do not exert power arbitrarily in their own interests, to support their friends, to harm their enemies, or act with impunity to deny citizens basic rights (for instance by unlawful detention, or denial of benefits), also provides a lasting legitimacy for governments (OECD: 2000). Impartiality in this sense is a widely recognised aspiration of the public sector. However, many commentators have associated this with representativeness on the basis that impartiality is all but impossible in practice without this.[10] Legitimacy in this sense can be undermined by arrangements which allow the public service and the public powers and resources they administer, to be used as party political tools – for example if political opponents are subjected to more active tax investigations than ruling party supporters, or if permits or licences for trade go only or mainly to the party faithful.

3. *A responsive public service.* It seems increasingly the case that governmental legitimacy can be improved through demonstrated responsiveness on the part of the public service to political priorities. Responsiveness to the elected officials is now widely seen as a legitimate way of being responsible to the citizens (Dunn: 1997; Hood *et al*: 2004; Self: 1972). Rosenthal (1977) stresses the role modern media plays. In times of increasingly frequent public-opinion polls, e-mail, call-in radio and television surveys greater responsiveness is expected of legislators and subsequently of the government and its administration. This is most readily but perhaps most dangerously achieved by emphasizing political criteria in the selection, retention, promotion, rewarding and disciplining of public servants.

4. *A performing public service.* Finally, as Schick (2005) has pointed out, governments must increasingly earn their legitimacy through delivering on their service delivery promises. Garrett, Thurber *et al.* (2006) provide some examples of how an excessive concern for politically loyal senior executives to increase political responsiveness can undermine efficiency and service delivery.

2.2. *The political/administrative interface*

Managing the political/administrative interface is a key aspect of the tradeoffs that must be made. In industrialised democracies, the objectives of political involvement in senior appointments are usually politically responsive policy and implementation, rather than patronage in the form of jobs to party faithful or family members (Peters *et al*: 2004). This is doubtless because there are other mechanisms, particularly transparency, which inhibit nepotism in those countries, although this is certainly not to suggest however that "jobs for the boys" has become extinct amongst governments of industrialised countries. Moving too

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far down the path of politicised appointments opens up the risk that responsiveness will be achieved at the expense of the other key behaviours of the public service (OECD: 2003).

In countries with weaker governance systems, politicisation in civil service recruitment and management presents greater risks, and exposes the system to the associated problem of senior officials lacking the competence to carry out their functions.

Box 1. Pressure for political responsiveness in the United Kingdom

The pressure to find mechanisms that encourage responsiveness in the administration has arguably been particularly strong in the Westminster model as the distinction between political and administrative appointees within the traditional career civil service is very clear resulting in what many consider to be a public service that is particularly resistant to political priorities.

In the United Kingdom the most senior levels are occupied by professional career officials who, for a long time, have held the monopoly of advice to the government. Campbell *et al.* (1995) claim that in no other system ministers are so dependant on bureaucrats. Fast-track civil servants write answers to Parliament and speeches for ministers. Neutrality in the sense of non-partisanship is strongly valued and civil servants are expected to work for any government with the same commitment. (Campbell *et al.* 1995) have noted that the same officials have had to enact contradictory policies for subsequent Labour and Conservative governments, for example the nationalisation and then privatisation of ports, leading them to conclude that civil servants in the Westminster model should not only be politically neutral but politically "promiscuous".

Historically, critics have argued that the resulting generalist approach has led to amateurism (Lord Fulton (chair): 1968). Ministers have often voiced a concern about their strong dependence on civil servants and reported that they feel that civil servants are insufficiently responsive. Conversely, civil servants have often reportedly felt their advice was ignored. At the end of the 1980s, these tensions were particularly strong and Campbell *et al.* (1995) note that Prime Minister Thatcher explicitly identified what she saw as an unresponsive civil service as an obstacle to implementing her policy changes. Through the Next Steps Programme the Thatcher Government created agencies outside the traditional civil service. None of the chief executives came from the traditional fast track whose members have held top positions so far and, as James (2003) reports, one-third were recruited from outside the civil service. Responsiveness to government priorities was a priority and James (2003) observes that ministers sometimes intervened *ad hoc* on a day-to-day basis when they felt it necessary. In his survey, the staff of the Benefits Agency, for example, complained about unjustified interference of the department of Social Security, including the minister.

The original focus of the Next Step agencies was responsiveness in service delivery. However, by the mid-1990s, policy analysis and advice had increasingly been contracted out also. Policy units were introduced, with some half of their staff recruited from outside of the civil service. Campbell *et al.* (1995) argue that such measures and the rise of think tanks have broken the monopoly of civil servants over policy and allowed the politicians to regain dominance over the administration.

Schick (2005) has pointed at the risk that responsiveness and service delivery performance could be achieved at the expense of the long-term and more fundamental foundations of legitimacy (stability and trust in the public institutions and concern for the collective interest). Flexibility and service delivery are popular – but as Figure 1 highlights, they do not by themselves sustain the legitimacy of government. In fact, if they are achieved by unconstrained political involvement which erodes the impartiality and inclusiveness of the public service and the degree to which it is seen to respect the constitution, then they undermine the longer term legitimacy of the government.

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Box 2. Pressures for inclusiveness in Mexico

The case of the administrative reform in Mexico in 2003 is an example of how a deeply politicised public service is seen to undermine the legitimacy of government because of its exclusion of key actors. Before the reform public officials were hired in a way that excluded followers of opposition parties and merit criteria were neglected in the selection process.

Octavio (2004) reports the widespread concern about "the lack of a true democracy" in Mexico. Gault and Klinger (2004) characterise the situation in Mexico since the 1920s as a one-party system with, in addition, power strongly centralized in the executive branch. Philip (2003) differentiates three phases: pre-1994 as authoritarian; 1994 to 2000 as democratisation; and from 2000 on as a democratic phase. This successful democratisation has been strengthened by the reform of the public service in 2003.

Prior to the reforms, the upper level of the bureaucracy comprised about 2 700 political appointees, with connections. The President chose his cabinet secretaries and they would choose their own immediate subordinates, who would then select theirs. High-level bureaucrats belonged to groups of allies known as "*camarillas*", bureaucratic politicians who moved from one short-term posting to another, building their career on political stances.

This situation led to widespread problems of corruption and led to rising criticism from international agencies and donor countries. The election of Vicente Fox in 2000 was the first change of power since the 1910 Revolution. In the following years, Congress agreed a major reform of the public service introducing a career-based merit system for mid and high levels of the public service.

Approved in April 2003, the Professional Career Service Law (*Ley de Servicio Profesional de Carrera*) decreed that, following a procedure that assessed performance, and competencies, around 42 000 bureaucrats will be given "tenure". Since 2003 their further advancement and the recruitment of new administrators depends on merit criteria judged by collegiate bodies formed by public officials from within the agency, the Selection Committees. The number of purely political appointees was reduced to a few hundred.

The beginning of this reform movement can be found in independent agencies such as the statistics agency (*Instituto Nacional de Estadística Geografía e Informática*) which was considered as a "Weberian island" within the Mexican spoils system. The set up of the Federal Electoral Institute staffed by a professional career civil service as early as 1990 led to more efficient oversight of elections and to some observers it seemingly served as a model for subsequent broader administrative reform.

Further examples are the independent and highly reputed Central Bank (*Banco de México*), an autonomous institution since 1994, and the Diplomatic Service, which was created as a career civil service in the 19th Century.

While in the United Kingdom independent agencies in the framework of the Next Step strategy were seen as a means to enhance responsiveness of the administration, the Mexican agencies were associated with steps towards increased political neutrality within a newly created career civil service.

Under any combination of arrangements, the institutional arrangements for oversight can be dauntingly complex, as Box 3 suggests for the United States. Further details are provided in Recent developments leading to re-examination of the political/administrative boundaries in Annex 1. Reported Trends.

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Box 3. Developments in oversight agencies in the United States

The 1970s saw the creation of the Federal Elections Commission, the Office of Government Ethics (OGE), the Merit Systems Protection Board (MSPB), and the Office of Special Counsel (OSC). Also in the late 1970s a system of Inspector General offices was created. The 1980s witnessed the establishment of the President's Council on Integrity and Efficiency, and the strengthening of OGE and OSC. The 1990s have seen the establishment of the Office of Federal Financial Management within the Office of Management and Budget and the reauthorization of the independent counsel law.

A second development has been the use of disclosure as a tool for achieving greater accountability on the part of public officials. A public financial disclosure system for all three branches of government was established by law in 1978. The 1989 Ethics Reform Act provided for an improved system of confidential financial disclosure. These financial disclosure systems, which apply the principle of transparency to the financial interests of public officials, are a basic tool for identifying potential conflicts of interest and working out appropriate remedies.

A third development has been the promulgation of more detailed rules to govern the conduct of government officials in both the executive and legislative branches. Standards of Conduct for the executive branch recently issued by the Office of Government Ethics provide specific guidance on such questions as gifts, conflicting financial interests, impartiality, seeking employment, misuse of position and outside activities.

Source: Gilman (2003).

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FINDINGS

3. Formal institutional arrangements

3.1. Codification of the Principles of Political Neutrality

The principle that civil servants should undertake their duties in a manner that serves the collective rather than a partisan interest is espoused by all countries in the survey, either by entrenching the principle within the Constitution, a law or regulation, or by limitations on political involvement in administration, or by strong conventional or customary support.

Table 1. Principle of political neutrality in administrative actions

	Principle of political neutrality spelled out in Constitution, law or regulation	Administrative law places limits on political involvement in public service administration
Belgium	**Yes**	**Yes**
Denmark	**No**	**Yes**
France	**Yes**	**Yes**
Italy	**Yes**	**Yes**
Korea	**Yes**	**–**
Mexico	**Yes**	**Yes**
New Zealand	**Yes**	**Yes**
Poland	**Yes**	**Yes**
Sweden	**No**[11]	**Partly**[12]
United Kingdom	**Yes**	**Yes**
United States	**Yes**	**Yes**
South Africa	**Yes**	**Yes**

Note: **Bold = strong public or customary support of the principle of political non-partisanship.**

The legal framework and principles of political neutrality are usually present, but expressed in many different ways. Country respondents generally agreed that the laws and/or associated conventions did establish the principle of apolitical public service. Denmark and Sweden are both countries with strong administrative law which is very specific about how government policies are to be executed and, while most countries had laws which asserted political non-partisanship as a positive value, for these countries political non-partisanship was seen as the logical consequence of clearly defined administrative processes.[13]

Political non-partisanship is entrenched in the constitution for Korea and Italy, but most countries spell out the principle in civil service laws or codes that define political non-partisanship as a value. In the United Kingdom, a Civil Service Code and Civil Service Management Code also sets out various restrictions on involvement in political activity. In France certain categories of civil servants face more severe restrictions than the general public service. For example members of the military are not allowed to belong to any association of a political nature.[14]

Of the countries assigning less importance to political non-partisanship of public servants (though still acknowledging it), the United States have a strong constitutional framework in which the relatively powerful role of the legislature imposes an external constraint on the public service, which is not so present

in other countries. In Italy, another country with less customary support of the principle, legal arrangements limiting political involvement in public service administration have been introduced for the first time in 1993. However, the direction of change for direct political control of the public service has been reversed several times in recent years.

3.2. Political involvement in the careers of senior civil servants

While there is near universal agreement on the general principle of political non-partisanship, it is not necessarily equated with an apolitical process for senior appointments. The survey showed there is wide diversity in the level of involvement by politicians in the appointment and management of senior civil servants. It is important to note that in the tables that follow, the fact that a politician is involved in appointments or dismissals does not, *per se*, make that appointment or dismissal political or partisan. For example, the Swedish Constitution requires that all appointments to posts in the public administration should be made "on objective grounds such as skills and merits" even though they might be made by politicians.

Table 2. Who appoints?

More political

More administrative

Country	Level 1	Level 2	Level 3	Level 4	Level 5	Special political advisors outside normal hierarchy
United States	Political	Political	Political	Political-hybrid	Political-hybrid	Political
Sweden[15]	Political	Political	Political	Political	Adm.	Political
Italy[16]	-	-	Political	Political	Adm.	Political
South Africa	Political	Political	Hybrid.	Hybrid.	Adm.	--
Mexico	Political	Political	Adm.	Adm.	Adm.	Hybrid
France	Political	Hybrid	Hybrid	Hybrid	Adm.	--
Belgium	Hybrid	Hybrid	Hybrid	Hybrid	Hybrid	Political
Poland	Political	Hybrid	Adm.	Adm.	Adm.	--
Korea	Political	Adm.	Adm.	Adm.	Adm.	--
New Zealand	Hybrid[17]	Adm.	Adm.	Adm.	Adm.	Hybrid
Denmark	Hybrid	Adm.	Adm.	Adm.	Adm.	--
United Kingdom	Adm.	Adm.	Adm.	Adm.	Adm.	Political

Notes:

Adm. = administrative.

Hybrid refers to a procedure in which administrative selection criteria are combined with political considerations. The situation in the United States is referred to as political-hybrid as purely politically driven appointments coexist with administratively determined Senior Executive Service appointments at some levels – and in some agencies most if not all senior managers are political appointees.

On this measure, the countries sampled diverge significantly, with the biggest contrast being between the United States where most senior appointments are directly made by politicians, and Denmark and the United Kingdom where there are no politically-driven appointments at all (apart from political advisers outside of the normal hierarchy).

Most senior levels in the public service in the United States serve "at the pleasure of the President" and can in principle be dismissed readily. The dominant role in most appointments is played by the Personnel Office of the White House which is run by politically selected administrators, appointed by the President. The only non-political actor involved is the FBI which conducts a background check on candidates but which has no other direct influence in the appointment procedure. Exceptionally, in the case of a conflict of interest, the Office of Government Ethics may be involved.

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Political involvement in the appointment procedures in Sweden and Italy is only slightly shallower. In these countries, public servants are appointed administratively at level 5 and below.

Conversely, in the United Kingdom even the most senior positions are filled by administratively appointed career officials who are expected to serve any elected minister with the same commitment (see Box 1).

As far as the intermediate systems are concerned, there are two types. One can be seen in the Mexican system which draws a clear line between different levels of senior civil servants where the higher ranks are appointed politically and the lower ones using an administrative procedure.

The second type is illustrated by the systems in the federal government of Belgium where senior civil servants – unlike staff working in the political cabinets – are appointed by a hybrid procedure. For example at level 1 (position of Chairman of the Board), administrative selection criteria like merit and experience are combined with a final political decision. Typically there is first an administrative selection procedure made by the *Bureau de Sélection de l'Administration Fédérale* (SELOR) which establishes a shortlist of suitable candidates from which the minister makes the final choice. During the administrative procedure, SELOR puts together a jury which consists of high level civil servants as well as human resources, management and technical experts from the public and private sector. They engage in a complex procedure in which applications are studied and interviews evaluated and which leads to a shortlist that is then presented to the minister (see Annex 3: Hybrid Appointment Procedures: The Example of Belgium).

Appointment is the most powerful personnel instrument that politicians can wield – although appointing political sympathisers does not guarantee they will follow a party line, just as administrative appointment does not necessarily prevent the courting of political favour. Potentially, influence could also be exerted through management procedures such as for dismissal, promotion or even transfer to another position. In most cases the power of dismissal rests with the same body that makes appointments. In Westminster systems, transfer is sometimes used to move senior public servants who for one reason or another are not able to work effectively with a particular minister. This is sometimes referred to as when "the face doesn't fit".

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Table 3. Who dismisses?

Country	Level 1	Level 2	Level 3	Level 4	Level 5	Special political advisors outside normal hierarchy
United States	Political	Political	Political	Political	Political	Political
Italy	-	-	Political	Political	Adm.	Political
South Africa	Political	Adm.	Adm.	Adm.	Adm.	–
Mexico	Political	Hybrid	Adm.	Adm.	Adm.	Political
Poland	Political	Hybrid	Adm.	Adm.	Adm.	–
France	Political	Hybrid	Hybrid	Hybrid	Adm.	–
Belgium[18]	Hybrid	Hybrid	Hybrid	Hybrid	Hybrid	Political
New Zealand	Hybrid	Hybrid	Adm.	Adm.	Adm.	Hybrid
Sweden[19]	Hybrid	Hybrid	Hybrid	Hybrid	Adm.	Political
Korea	Political	Adm.	Adm.	Adm.	Adm.	-
Denmark	Hybrid	Adm.	Adm.	Adm.	Adm.	–
United Kingdom	Adm.	Adm.	Adm.	Adm.	Adm.	Political

More political

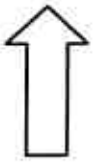
More administrative

The picture emerging from the overview of appointment arrangements is more or less replicated in looking at dismissal procedures. However, in the case of South Africa, the autonomy of administrators on levels 2, 3 and 4 is strengthened. All are appointed by a political or hybrid procedure, but can only be dismissed through a purely administrative process.

Table 4. Who promotes?

Country	Level 1	Level 2	Level 3	Level 4	Level 5	Special political advisors outside normal hierarchy
United States	Political	Political	Political	Political	Political	Political
Italy	–	–	–	Political	Political	–
South Africa	–	Political	Hybrid	Hybrid	Hybrid	–
France	Political	Hybrid	Hybrid	Hybrid	Adm.	–
Mexico	Political	Hybrid	Adm.	Adm.	Adm.	–
Poland	Political	Hybrid	Adm.	Adm.	Adm.	–
Belgium[20]	–	–	–	Adm.	Adm.	Political
Korea	Political	Adm.	Adm.	Adm.	Adm.	-
New Zealand	–	Adm.	Adm.	Adm.	Adm.	
Denmark	Hybrid	Adm.	Adm.	Adm.	Adm.	–

More political



More administrative

In South Africa, the strengthening of administrative autonomy identified in Table 3 is somewhat attenuated by the promotion arrangements. Table 4 indicates that although administrators on levels 2, 3, and 4 cannot be dismissed on political grounds, their career advancement does depend on political considerations. The same observation is valid in Italy where an administrator at level 5 can be appointed to level 4 and an administrator at level 4 can be appointed to level 3.

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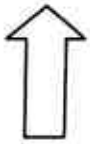
Table 5. Arrangements for transfer to another position at the same level

More political



More administrative

Country	Level 1	Level 2	Level 3	Level 4	Level 5	Special political advisors outside normal hierarchy
United States	Political	Political	Political	Political	Political	Political
Italy	–	–	–	Political	Adm.	-
South Africa	Political	Hybrid	Hybrid	Hybrid	Adm.	-
Mexico	Political	Hybrid	Adm.	Adm.	Adm.	Political
Poland	Political	–	–	Adm.	Adm.	–
France	–	Hybrid	–	Hybrid	Adm.	–
Belgium[21]	–	–	–	Adm.	Adm.	Political
Korea	Political	Adm.	Adm.	Adm.	Adm.	-
Denmark	Hybrid	Adm.	Adm.	Adm.	Adm.	-
United Kingdom	Adm.[22]	Adm.	Adm.	Adm.	Adm.	Political

It can be argued that the United Kingdom case indicates that arrangements for transferring an administrator at level 1 to a position at the same level can potentially be open to political involvement – but any replacement will have to be administratively chosen.

Table 6. Arrangements for performance assessment

More political

More administrative

Country	Level 1	Level 2	Level 3	Level 4	Level 5	Special political advisors outside normal hierarchy
United States	Political	Political	Political	Political	Political	Political
France	Political	Political	Political	Hybrid	Hybrid	–
Italy	–	–	Political	Adm.	Adm.	Not applicable[23]
South Africa	Political	Hybrid	Hybrid	Hybrid	Adm.	
Poland	Political	Hybrid	Adm.	Adm.	Adm.	–
Belgium[24]	Political	Hybrid	Adm.	Adm.	Adm.	Political
Mexico	Political	Hybrid	Adm.	Adm.	Adm.	Political
New Zealand	Political	Adm.	Adm.	Adm.	Adm.	Hybrid
Denmark	Hybrid	Adm.	Adm.	Adm.	Adm.	
Korea	Hybrid	Adm.	Adm.	Adm.	Adm.	–

Arrangements for performance assessment confirm the overall picture seen in relation to appointment and promotion procedures. Again it shows the potential of using the different levers for some balancing as, despite the political considerations taken into account in promotions, the performance assessment which precedes such promotion decision is based on administrative or hybrid procedures – attenuating the purely political character of such decisions to some degree (see levels 2 and 3 in Mexico, level 5 in South Africa). However, performance assessment can also be used as a counterweight measure in the reverse sense. While appointments, dismissal, promotion and transfer place France in a middle position depicting a balanced picture from political (level 1) to hybrid (levels 2, 3 and 4) and on to administrative (level 5) arrangements, a shift towards political or hybrid proceedings can be noted in regards to performance assessment. This places France close to the situation of systems with more political involvement such as the United States and Italy. As France has a strong tradition of equal and non-partisan access to the civil service, this might be seen as a balancing lever to ensure responsiveness to the minister's political agenda.

3.3. *Formal delineation of the roles of politicians and public servants*

3.3.1. *Restrictions on public servants*

As noted above, the principle that civil servants should undertake their duties in a manner that serves the collective rather than a partisan interest is, in one way or another, espoused by all countries in the survey. The study showed that countries have a range of laws, conventions and procedures which seek to ensure that partisan politics are excluded from administration by spelling out the division of responsibility between ministers and civil servants, and in some cases by prohibiting politicians or civil servants from being involved in certain areas.

Table 7 highlights the key legal restrictions on the political actions of public servants. It indicates that the United States, Korea and South Africa have the most comprehensive restrictions on the rights of civil servants to engage in political activities.[25] The numerous restrictions in Mexico and Poland are the result of relatively recent changes in policy towards a merit-based career civil service. In Mexico, following the election of a new government, several concrete rules were established for the first time in 2003/2004, shaping the principle of political non-partisanship.[26]

In total, seven of the 12 countries legally prevent civil servants from engaging in high profile political activity and in Sweden such activity is restricted by long-standing convention. Half of the countries limit administrators from standing for public office.

Table 7. Laws, codes or customs which limit political actions of public employees

	Country	Standing for public office?	High profile party political activity?	Other party political activity?	Trade union activity?
Most restrictions	**United States**	**Yes**	**Yes**	**Yes – except the many political appointees, as long as they separate party from public activities**	**Yes**
	Korea	**Yes**	**Yes**	**Yes**	**Only lower grades**
	South Africa	**Yes**	**Yes**	**Yes – public employees may not preside party meetings or speak at them**	**No**
	Mexico	**Yes**	**Yes**	**Yes**	**Yes**
	Poland	**Yes**	**Yes**	**Yes**	**Yes**
	United Kingdom	**Yes**	**Yes**	**Yes**	**No**
	New Zealand	**No**	***Yes, Senior public servants***	**No**	***Yes, Senior public servants***
	Italy	**Yes**[27]	**No law – but avoided by convention**	**No**	**No**
	Sweden	**No**	**No law – but unacceptable to the public by convention**	**No**	**No**
Least restrictions	**France**[28]	**No**	**No**	**No**	**No**
	Denmark	**No**	**No**	**No**	**No**
	Belgium	**No**	**No**	**No**	**No**

Note:

Bold = limits are for all public employees.

Non-bold = limits are only for those holding civil service status.

Italic = limits are only for senior civil servants.

3.3.2. *Restrictions on politicians*

In considering politically partisan actions by politicians in the administration, Table 1 showed that only one country, Sweden, does not place legal limits on political involvement in public service through the Constitution, law, regulation or administrative law – and here, political non-partisanship is strongly supported by custom and convention. Sweden also has a long established system of delivering public services through agencies with strong protection against involvement by ministers.

The functional areas which are outside of ministerial oversight in Westminster countries (New Zealand and the United Kingdom) concern statutory decision rights in specialised areas such as land registration, or in areas of importance to governance such as the head of the electoral commission, and the State Services Commissioner. In the United Kingdom this assignment of statutory responsibilities is recorded for the accounting officer role of senior public servants. This way of rendering some administrative decisions politically neutral was not noted by the other countries. It may be a feature of the Westminster system only, where this might be construed as a counterweight to the wide legal discretion given to ministers for public administration matters.

Table 8. Constraints on administrative actions of politicians

Most restrictions

Least restrictions

Country	Civil servants hold administrative responsibility not subject to ministerial oversight?
New Zealand	Yes
United Kingdom	Yes
Denmark	Yes
Belgium[29]	Yes (with exceptions)
United States	Yes, but those are rare exceptions
France	No
Sweden	No
Mexico	No
Poland	No
Italy	No

An interesting finding is that some countries like New Zealand and Sweden have conventions which support the principle of "free and frank" advice to ministers as a dimension of political non-partisanship, while for other countries like Mexico and Korea the convention is rather the opposite, that a civil servant should not give contrary advice to ministers.

3.3.3. *Particular issues arising in election periods*

During changes of government, the public service, in the absence of an elected government, has a constitutionally important role in providing continuity. There are significant risks. On the one hand, a politicised administration can take action to tip the electoral balance. On the other, a government seeing the prospect of electoral defeat might seek to take administrative action to affect adversely the prospects of any in-coming government. Most countries therefore have rules and conventions both to inhibit inappropriate political decisions, and to ensure that the public service plays a care-taking role only and does not use the absence of political direction as an opportunity to push its own agenda. As James (2006) notes, not having adequate rules could not only harm the legitimacy of the government but also the public servants themselves. The perception that officials arbitrarily supported the former government could create incentives for a new government to remove those public servants.

The United Kingdom, federal government of Belgium and New Zealand each operate under a law or convention that no high-level appointments are made in the lead-up to an election. This may be explained by the fact that in these countries the role of ministers in senior civil service appointments is restricted.

Such a provision may be unnecessary in countries where any pre-election appointments could be easily undone by the incoming government. In Italy, the civil service law states that heads and boards of non-ministerial or departmental agencies appointed by the government in the last semester before a general election can be removed by the new government.

Table 9. Special arrangements before elections

High level appointments are ... Restricted	There are no restrictions
Belgium (by convention) Italy New Zealand (by convention) United Kingdom	Denmark France Korea Mexico Poland Sweden United States

With the exception of the United States and Belgium, respondents noted that there are conventions for the public service to provide information to prospective members of an incoming government fairly. New Zealand, which recently moved from a first-past-the-post to a proportional representation electoral system, has restrictive "caretaker" provisions for public servants in the government formation period.

Table 10. Special arrangements between elections and the formation of a new government

Civil servants face additional restrictions on activities that might be construed as political	Civil servants must provide impartial advice and information to all prospective members of the government	There are no restrictions
Denmark New Zealand United Kingdom – from the announcement of the election	New Zealand – when the election does not yield a clear result Sweden – information to the new government as soon as its identity is known United Kingdom	Belgium (federal government) France Korea Poland Mexico United States – not applicable: government comes into office with the presidential election

3.4. Institutional oversight of the political/administrative boundary

Respondents were asked about the relative importance of the influence of other branches of government in ensuring an appropriate delineation between politics and administration.

Five of the eight countries answering this question considered that the legislature was most important and for one of these, the United States, the role was *ex ante*.[30] There, for 1 500 of the most senior civil service appointments, the executive's nominations have to be approved by the Senate before they can proceed. This is a very powerful check on the executive's power to appoint.

New Zealand as a Westminster tradition country, and Denmark, which has many of the features of a Westminster system, did not rate the legislature as important. In the case of New Zealand, this is consistent with the general perception of Westminster countries having relatively weak parliaments. For those two countries, the most important oversight body was the Auditor General.

P.T.O

No respondent in this sample assigned importance to the role of the judiciary. However some countries, especially Sweden, gave high importance to the law itself in ensuring the delineation. In Belgium oversight is the responsibility of an administrative court, the *Conseil d'Etat* which forms part of the executive branch but takes fully autonomous and may nullify any administrative act.

Arguably an important factor may be whether administrative law allows wide discretion, as in the Westminster systems, or whether it is prescriptive as in many systems in continental Europe. It would appear that where control is exerted through more prescriptive administrative law, there are fewer other mechanisms for constraining political influence.

Table 11. Institutional oversight arrangements

Country	Legislature		Judiciary		Auditor General		Other Institutions	
	Active or Infrequent	*Ex ante* or *Ex post*	Active or Infrequent	*Ex ante* or *Ex post*	Active or Infrequent	*Ex ante* or *Ex post*	Active or Infrequent	*Ex ante* or *Ex post*
Belgium	None		None[31]		None		Conseil d'État	*Ex post*
Denmark	Infrequent	*Ex post*	Infrequent	*Ex post*	Active	*Ex ante* and *ex post*	Active and Infrequent	*Ex ante* and *ex post*
France	None	None	Infrequent	*Ex post*	Infrequent	*Ex post*	-	-
Italy	Infrequent	*Ex post*[32]	n/a	n/a	Active[33]	*Ex ante*	n/a	n/a
Korea	Active	Both	Infrequent	*Ex post*	Infrequent	*Ex post*	Active-constitutional court, election management commission	*Ex post*
Mexico	Active	*Ex post*	Infrequent	*Ex post*	Active	*Ex ante* and *ex post*	Active	*Ex ante* and *ex post*
New Zealand	None	None	Infrequent	*Ex post*	Active	*Ex post*	Infrequent -Governor General in Executive Council	*Ex post* Governor General in Executive Council
Poland	Infrequent	*Ex post*	Infrequent	*Ex post*	-	-	-	-
Sweden	Active	*Ex post*	None	None	Not yet	*Ex post*	None	None
United States	Active[34]	*Ex-ante*	No role	-	No role	-	*Ex ante*[35]	-

The missing variable in this review of formal oversight arrangements concerns the degree to which the convention of political neutrality is internalised and held as a strong public value. The case of Sweden seems to provide the key insight that politicisation can be constrained with relatively few formal rules is because of the deep internalisation of these values. The significance of the popular acceptance of the convention of political neutrality is explored further below.

3.5. Arm's-length agencies

The arrangements for oversight of arm's-length agencies are clearly distinctively different and this could be a useful subject for further work (see Table 12 and OECD: 2002). It seems likely that the differences arise from the fact that such bodies tend to be more heavily engaged in implementation than policy, and with high managerial delegation, are therefore less exposed to politicisation. However in at

P.T.m

least two countries (the United Kingdom and New Zealand) the governing boards of many such bodies have real decision-making, as opposed to advisory, powers. In these cases the risk of inappropriate political involvement moves from the appointment and management of the senior executive to the appointment and dismissal of board members.

Table 12. Special arrangements for arm's-lengths agencies

Country	Do arrangements limiting political involvement apply to arm's-length agencies?	Do personnel procedures differ in arm's-length agencies?	Oversight arrangements apply to non-departmental arms-length public bodies with equal force, less force, more force?
Belgium	Yes	Yes	Less force
Denmark	Not relevant	–	Equal force
France	-	No	Equal force
Italy	Yes	No	Equal force
Korea	Yes	–	–
Mexico	Yes[36]	Yes	Equal force
New Zealand	Yes	No	Less force
Poland	No	Yes	Less force
Sweden	No	Yes	Equal force
United Kingdom	Yes	Yes, not as strict	Less force
United States	Yes	Yes	Not at all

4. Characterising problems

In considering potential difficulties at the political/administrative interface, two likely candidates emerge as potentially indicative of an imbalance between the arrangements for ensuring fair and non-politically partisan public service delivery and those that ensure the responsiveness of public servants to the policies of the current executive: high turnover of staff following elections and ministerial interference in management issues.

4.1. Turnover of staff following elections

In considering the change of staff, at senior levels the United States is an extreme case. However, in the senior civil service (non-political appointees largely but not entirely below the top five levels investigated in this study) only 1-2% is typically changed following elections. By contrast, the political appointees at the top five levels are exchanged on a large scale even if a newly elected president belongs to the same party as the previous one (Savoie: 1994). Turnover is not dependent on party-membership as much as on loyalty to the elected president. In the transition from the Reagan to the first Bush presidency, for example, there was a turnover of 97%. The federal government of Belgium and Denmark are extreme in the other direction; in Belgium however, staff of the ministerial cabinets (political appointees) change with governments.

P.T.M

Table 13. Public servants change with change of government

High turnover

Low turnover

Country	Are there levels/positions of public servants who change with change of government?	If senior civil servants are selectively changed for political reasons are these changes...
United States	Yes	Widespread
Italy[37]	Yes (levels 3)	Widespread (levels 3)
Mexico	Yes	Significant (levels 1 and 2)
Poland	Yes (level 1, Cabinet)	Significant
Korea	Yes (level 1, vice ministers)	–
France	Yes (level 1, Cabinet)	Few
Belgium	No[38]	Few – only one position
United Kingdom	No[39]	Not applicable
New Zealand	No	–
Denmark	No	If any, very few
Sweden	No	Few - extremely rare

Table 14. Percentage of senior civil servants who changed jobs for any reason, including transfers[40]

High turnover

Low turnover

Country	Level 1		Level 2		Level 3		Level 4		Level 5		Special political advisors outside normal hierarchy	
	A	B	A	B	A	B	A	B	A	B	A	B
United States	6	100	6	100	6	100	6	100	6	100	-	-
Mexico	55	100	55	100	55	70	55	70	55	70	55	100
Italy	-	-	-	-	-	100		0[41]		0	-	100
France	-	-	2-6	1-5	2-6	1-5	-	-	-	-	-	-
Belgium	0	0	0	0	0	0	0	0	0	0	0-100[42]	0-100
Denmark	0	0	0	0	0	0	0	0	0	0	-	-

A= recent re-election of an existing government or election won by the governing party.

B= recent election of a new government.

Mexico and Italy offer two interesting half-way positions. In Italy there is a sharp distinction between the level 3 which is completely exchanged and levels 4 and 5, where staff stay in post. In Mexico, the turnover is more tapered. The top two levels are completely exchanged, and the turnover in lower levels is also relatively high – with 70% of the administrators being exchanged following the election of a new government.

4.2. Ministerial interference in management issues

Respondents considered that the United Kingdom and New Zealand have less interference in management responsibilities and more demarcated responsibilities that are set outside of the oversight of the minister. Elsewhere, respondents considered that ministers tend to interfere in the management responsibilities of high level administrators occasionally or, in countries like Italy, Poland and Denmark, even frequently.

Overall, the degree of autonomy senior civil servants enjoy tends to be a stable arrangement in most countries. With the exception of the United States, Poland and Mexico this matter does not change with a change in government. As the system in Mexico has recently been reformed from a deeply politicised spoil system to a very different, politically neutral career system such stability has not yet been reached. Mexico is still in a state of transition with some political key players leaning towards the former politicised system and others towards the new career system.

P.T.O.

Table 15. Administrative actions of politicians

Less autonomy ↑ More autonomy

Country	Ministers tend to interfere in management responsibility of senior civil servants?	Degree of involvement by politicians in administrative matters changes with changes of government?
Italy	Frequently to seldom	No [43]
Poland	Frequently	Yes
Denmark	Frequently	No
United States	Frequently to seldom	Yes
Belgium	Frequently to seldom	No
Mexico	Seldom	Yes
Sweden	Seldom	No
France	– [44]	No
United Kingdom	Seldom	No
New Zealand	Never	No

5. The significance of informal conventions

Table 16 summarises previous responses to provide a broad overview of the involvement of politicians in key staffing decisions in the countries studied. As one would expect, political involvement in one dimension of human resource management is a strong predictor of political involvement in others.

Table 16. Overview of political involvement in staffing

More political involvement ↑ Less political involvement

Country	Appointment	Dismissal	Promotion	Transfer to another position	Performance assessment
United States	High	High	High	High	High
Italy	High	High	High	High	Medium
South Africa	High	Medium	High	High	High
Mexico	Medium	Medium	High	Medium	Low
France	Medium	Medium	Medium	Medium	High
Poland	Medium	Medium	Medium	Medium	Medium
Belgium	Medium	Medium	Medium	Medium	Medium
Sweden	Medium	–	–	–	–
New Zealand	Low	Medium	Low	–	Low
Korea	Low	Low	Low	Low	Low
Denmark	Low	Low	Low	Low	Low
United Kingdom	None	None	–	Low	–

The similarities between the rankings in Table 16 and Table 17 suggest that more extensive involvement in staffing matters by politicians tends to be associated with more formal delineation of the respective roles of politicians and public servants.

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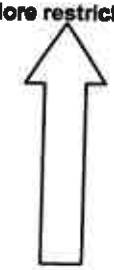
Table 17. Overview of restrictions on functional responsibilities

More restricted



Less restricted

Country	Restrictions on political activities of public servants	Restrictions on administrative activities by politicians
Korea	High	High
United States	High	Medium
South Africa	High	–
Poland	High	Low
United Kingdom	Medium - High	–
Italy	Medium	Medium to High
Mexico	Medium - High	Medium
New Zealand	Medium	Medium
Belgium	Low	Low
France	Low	Low
Denmark	Low	Low
Sweden	Low	Low

The United States provides the starkest example of the association between political involvement in senior staffing issues and restrictions on functional responsibilities through the staff confirmation role of the Senate and the "line by line" *ex ante* involvement of the House of Representatives in public expenditure.[45]

The interesting finding here concerns the exceptions. Although Korea has a distinctly different traditional career-based civil service[46] with little political involvement in staffing decisions, it has established very strict rules even prohibiting their public servants to join a party or any other political organisation. In Sweden, despite higher levels of political involvement, staffing restrictions on the political activities of public servants are low. In Italy medium restrictions on political activities are associated with medium to high restrictions on administrative activities by politicians, who reportedly tend to interfere in managerial responsibilities by senior civil servants

The respondents were asked to assign relative weights to various factors in ensuring the separation of politics from administration, including the active development of a culture of political neutrality for the civil service. The results are not reproduced as the striking finding is how much they vary and that each issue is considered by some of the respondents to be of major significance. In sum, boundaries are often overseen by formal political institutions, however this is not always the case and broader popular support for political neutrality in administration is significant.

Overall, it appears that more extensive involvement in staffing matters by politicians is associated with more formal delineation of the respective roles of politicians and public servants, unless, as in the case of Sweden, there is a long-standing and well-recognised popular acceptance of the convention of political neutrality.

Korea highlights the significance of such popular conventions in a different way. As was noted above, it displays very strict rules concerning the delineation of roles even though this seems unnecessary given the low level of political involvement in staffing decisions. This seemingly highlights the somewhat tentative popular acceptance of the significance of political neutrality in the public service.

6. Particular pressures for political responsiveness

Table 18 summarises the data to highlight issues that are often associated with particular concerns for responsiveness of public servants to the policies of the current executive.

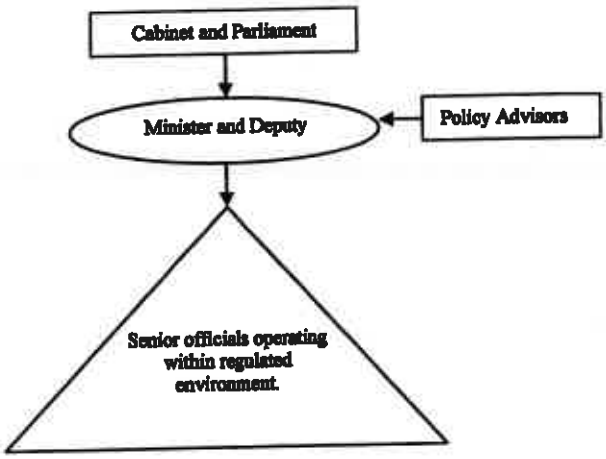
Table 18. Issues associated with strong concern for political responsiveness

	Country	Turnover of staff following elections	Reported ministerial interference in management issues
Suggestive of strong push for political responsiveness	Italy	Medium	Frequent to seldom [47]
	Poland	Medium	Frequent
	United States	High	Frequently to seldom
	Mexico	High	Seldom
	Korea	Medium	–
	Denmark	Low	Frequent
	France	Low	–
	Belgium	Low	Frequently [48] to seldom
	Sweden	Low	Seldom
	United Kingdom	Low	Seldom
Less suggestive	New Zealand	Low	Never

One way to interpret this is to examine the types of arrangements for providing political control over executive bodies.[49]

The "Few Principals" model, most readily captured in the Westminster systems, provides a structure for ministries and departments that is closest to the Weberian idea of a bureaucracy (Gerth and Mills: 1958; Rheinstein: 1968). In such systems, and in stylised term, a single principal, the minister, has responsibility for policy, and makes those decisions based on information provided by professional and impartial career civil servants. In reality of course there can be a layer of politically appointed advisors who support ministers in their policy-making. Sweden is a more complex case because of the strict division of powers between the Parliament, the government and the administration, and independently managed agencies for all implementation of parliament and government decisions. However, within both ministries and agencies, the managerial arrangements are relatively unconstrained by other veto players and so it falls within this category.

Figure 2. The "Few Principals" model



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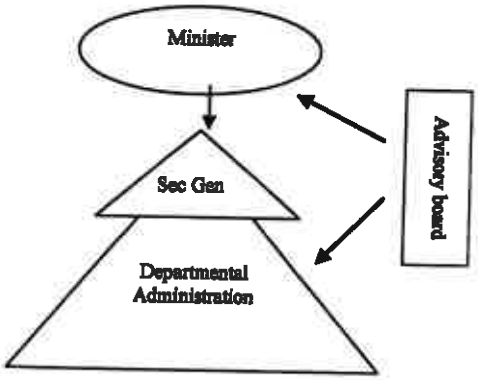
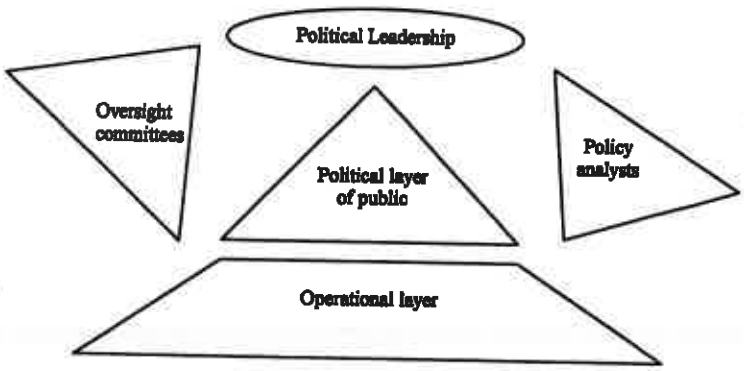
The "More Principals" model, unlike the Westminster model, somewhat weakens the authority of the minister over the department, as her control is mitigated through a powerful Secretary General or equivalent with an extensive armoury of administrative law. At the same time, advisory boards from outside the government oversee and provide policy advice. This model is most readily recognised in continental Europe, especially France.

Figure 3. The "More Principals" model



The "Multiple Principals" shows more fragmentation in political authority over executive bodies. Participation of interest groups is facilitated and the legislature is actively involved in public administration matters and assumes a control function, as does the judiciary. This model is characterized by deep political penetration into the department with non-public service appointments and the absence of clear boundary between political appointments and public service appointments. The United States exemplifies this tradition.

Figure 4. The "Multiple Principals" model



Annex 2 provides further details. It reviews the range of actors that comprise the principals in these stylised models. It notes that principals can be considered as veto-players whose agreements are a condition for the successful policy implementation within a ministry – in effect competing with the minister to act as a principal in relation to key "agents" within the ministry.[50] Loosely defined in this way, the following institutions can act as competing principals:

1. the legislature;

2. other ministries or departments;

P.T.O.

3. veto players deriving authority from legal frameworks or professional rules;

4. special inspection bodies.

Table 19 shows that, unsurprisingly, the perceived need for strong political responsiveness as defined above in Table 18 is strongly correlated with the multiplicity of principals for ministries and departments.

Table 19. Structural elements and the push for political responsiveness

Countries	Principals	Turnover of staff following elections and reported ministerial interference in management issues
New Zealand	Few	Low
Korea	Few	Low
Sweden	Few	Low
Denmark	More	Low
Belgium	More	Low
France	More	Low
Italy	More	Medium
Mexico	Multiple	Medium
United States		High

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CONCLUSION

7. Reviewing the findings

Five key findings emerged.

The first finding of the study is that while principles of public service neutrality in the sense of non-partisanship are espoused by all countries in the survey, this does not equate to an apolitical process for senior appointments. Of course the fact that a politician is involved in appointments or dismissals does not make the decision politically partisan.

Most systems are intermediate systems. In some cases a clear line drawn between senior staff appointed politically and lower ones appointed using an administrative procedure. In others, senior staff are appointed by a hybrid procedure in which administrative selection criteria like merit and experience are combined with political considerations. In one case (the United States), purely politically driven appointments coexist with administratively determined appointments at some levels – and in some agencies most if not all senior managers are political appointees.

Political involvement in one dimension of human resource management is a strong predictor of political involvement in others.

The second finding is that countries have a range of laws, conventions and procedures which spell out the division of responsibility between ministers and civil servants, and in some cases by prohibiting politicians or civil servants from being involved in certain areas.

The degree of these formal restrictions varies with the United States and Korea seemingly the most restrictive on the roles of civil servants, and with Denmark, the federal government of Belgium and Sweden the least. Formal restraints on politicians' actions are the greatest in New Zealand and the United Kingdom, and the least in Sweden, Mexico and Poland.

In many cases, particular formal restrictions apply during changes of government.

The third finding was the variety of institutional oversight arrangements for enforcing limitations on political involvement in staffing matters and in complying with restrictions on functional roles. The variations in the ways in which the legislature and judiciary are involved, and the diversity of roles played by the Auditor General, *Cour des Comptes* and other bodies such as the Constitutional Court, election management commission, Governor General, *Conseil d'État* make it clear that there is nothing that approaches a single model.

The fourth finding was the significance of informal arrangements, and particularly long-standing popular conventions.

The study revealed that there are major variations in the turnover of staff following elections, and in reported ministerial influence in administrative matters. In considering the change of administrative staff, at senior levels the United States is particularly high and the federal government of Belgium and Denmark

P.T.M

reportedly very low. In considering ministerial interference in management issues, the United Kingdom and New Zealand have less perceived interference in management responsibilities in contrast to Italy, Poland and Denmark.

These differences are only partly explained by formal arrangements. While in general more political involvement is associated with more restrictions on roles, the exceptions suggest the significance of informal conventions. Overall, it appears that more extensive involvement in staffing matters by politicians is associated with more formal delineation of the respective roles of politicians and public servants, unless, as in the case of Sweden, there is a long-standing and well-recognised popular acceptance of the convention of political neutrality.

The fifth finding is that constraints on party political influence on the public service vary with constitutional type and administrative history. In this sample, countries with a very strong executive, most notably Westminster-style systems, have such constraints within the executive itself through independent appointment arrangements. In countries where the executive is more constrained in its authority, having to co-exist with the veto power that derives from administrative law or the power of the legislature, there is greater political influence on personnel matters. The interpretation offered by the paper is that political involvement is a response to situations where the executive faces structural arrangements which generate a multiplicity of principals who might block change. Put starkly, when there are multiple principals, the single political principal with some responsibility for the sector portfolio (minister, secretary in the United States, etc.) faces a distinctive incentive for politicization as it gives them a stronger handle on an otherwise unresponsive bureaucracy. If correct, this suggests that some degree of political involvement in staffing decisions is widespread, and is a reasonable strategy as it is one way to obtain responsiveness to political priorities within ministries and departments that might otherwise resist, not least because they are subject to pressures from other competing principals.

This situation of multiple principals is primarily a constitutional point. However, arguably, countries that are recently emerging from political transition such as from a spoils system or from a strongly authoritarian government are also situations of multiple principals because of the depth of extra-constitutional capture by special interest groups. Thus constitutional type and administrative history are probably both implicated in creating the context for politicisation.

This conclusion argues against the assumption that underpins much public management literature, which warns about the negative effects of political involvement and often suggests that purely administrative determination of staffing decisions is the preferred state and that any steps down the path of political involvement are intrinsically damaging to governance.

8. A tentative framework

There is likely to be continuing evolution of the political/administrative boundary. In general those surveyed consider that their historical trend is towards less politicisation – despite the prevalence of political advisory posts, position-based employment arrangements, and arm's-length public bodies (see Annex 1). In principle, the movement could be either way. In public services which are not strongly checked by the legislature, the sheer technical demands of public service management may make politicians more disposed towards meeting credible requirements for merit and competence, when making political appointments. In others, the pace of new government initiatives in response to increasing social change may lead to the conclusion that a public service that was previously considered sufficiently responsive is in fact creating bottlenecks to rapid policy change.

There seem to be four key questions which merit consideration in any review of the political/administrative boundary.

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8.1. Is there a problem to be solved?

In many areas of public administration, the issues are sufficiently nuanced and uncertain to apply the general maxim that things that are not broken need not be fixed. The framework used by this study suggests key areas of inquiry for assessing whether there are grounds for concern:

1. Does the public service function adequately as a quasi-constitutional constraint on political institutions, ensuring adherence to constitutional and legal requirements, regardless of the implications for the elected government?

2. Is the public service inclusive or are there concerns that it and the powers and resources it administers can be used as party political tools?

3. Is it responsiveness to changing political priorities?

4. Does it deliver on its service delivery promises?

8.2. Could this problem implicate the political/administrative interface?

1. Is there distinctively high turnover of staff following elections?

2. Is there unwarranted ministerial interference in management issues?

3. Is there insufficient political traction over public service policy implementation?

8.3. Is the nature of the existing oversight arrangements fully understood?

Table 20 offers a stylised approach for setting out the contribution of the formal and informal arrangements for providing oversight of the political/administrative boundary.

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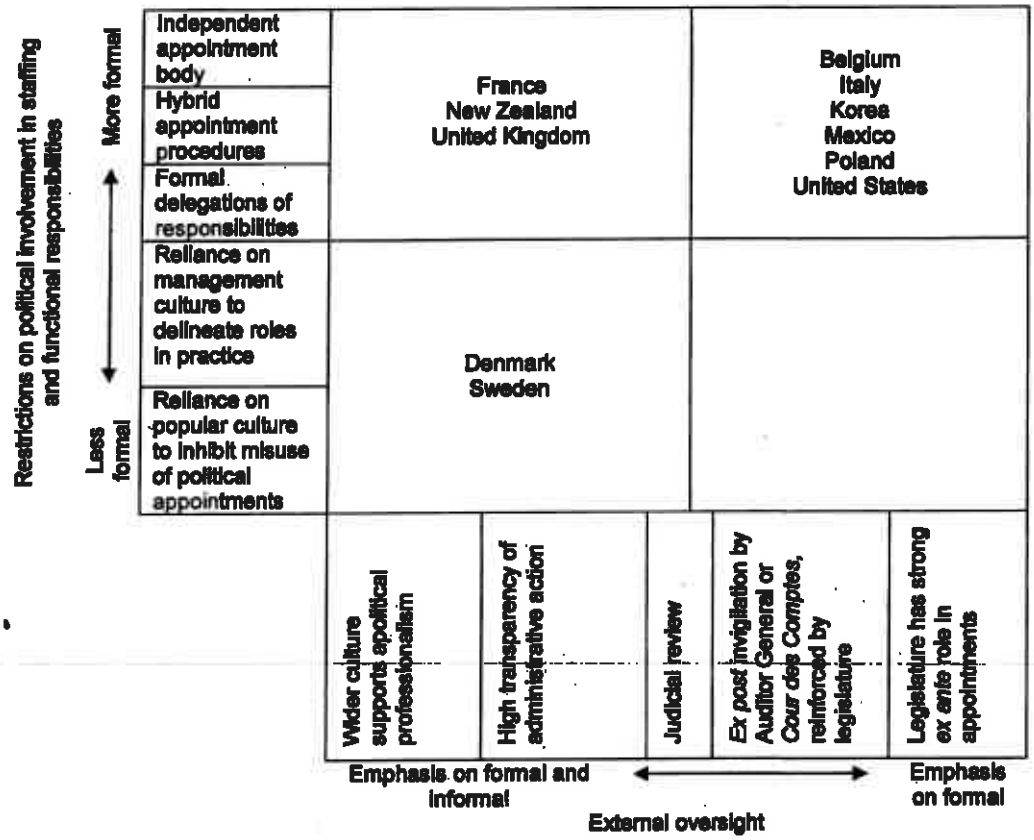
Table 20. Stylised representation of the contribution of formal and informal arrangements



8.4. Are the oversight arrangements, formal and informal, appropriate for the degree of political involvement envisaged in staffing issues?

We note that some pressures for political involvement emerge from the political structures, with situations of multiple principals giving rise to particular pressures for deeper political involvement. Where an executive is left with few levers through which to enforce policy, some increase in the risk of the misuse of political influence may be a price worth paying in the wider governance interest.[51] However, the counterbalance for such political involvement is heavily dependent on the wider social context, and when there is strong popular support for a neutral, apolitical public service, informal arrangements can be very effective. Conversely, when such popular support is yet to form or otherwise absent, particularly strong formal oversight arrangements are necessary.

In sum, the study suggests that more political influence in staffing matters may work well, if there are other checks and balances overseeing functional responsibilities, and may be essential if the alternative is very weak political traction on the public service. Getting the balance wrong could provoke an unexpected backlash. In particular, a too strictly drawn Weberian boundary between ministers and public service may provoke pressure for alternative or duplicate systems to increase political responsiveness.

The devil however is in the detail and the risk is that countries under the banner of promoting more responsiveness will be tempted to increase the level of political involvement in administration without paying attention to the checks and balances which ensure this does not harm deeper legitimacy issues such as inclusiveness, respect for the constitution and continuity.

P.Tim

MCR14

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Per email:

24 June 2021

Sir

REQUEST FOR DEPLOYMENT COMMITTEE AND DISCIPLINARY COMMITTEE RECORDS OF THE AFRICAN NATIONAL CONGRESS (ANC)

Your letter dated 18 June 2021 bears reference.

In paragraph 3 of your abovementioned letter, you reiterate the Commission's request of 25 May 2021 for the "*minutes of the National Deployment Committee for the period December 2012 to December 2017*". Paragraph 3 of the letter states that despite the views expressed in our letter to the Commission dated 18 June 2021, the Commission persists in the request for the relevant Deployment Committee minutes.

Following receipt of the Commission's letter dated 18 June 2021, we have conducted a thorough search for minutes of the National Deployment Committee for the period December 2012 to December 2017. No minutes of the meetings of the National Deployment Committee for the relevant period could be found.

To our knowledge, the meetings of the National Deployment Committee were not being minuted during the period as requested.

We trust that the Commission will find the above to be in order.

Yours faithfully

KRISH NAIDOO
LEGAL ADVISER

P.T.O

MCR16

REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994

PUBLIC PROTECTOR
SOUTH AFRICA

"Allegations of a breach of the Executive Ethics Code by the Member of the Executive Council responsible for Local Government, Environmental Affairs and Development Planning of the Western Cape Provincial Government, Mr A Bredell"

REPORT NUMBER 23 OF 2020/21

ISBN NUMBER: 97-8-1-990-942-89-1

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A BREACH OF THE EXECUTIVE ETHICS CODE BY THE MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING OF THE WESTERN CAPE PROVINCIAL GOVERNMENT, MR A BREDELL

P.T.M

INDEX

Executive Summary 3

1. INTRODUCTION 7

2. THE COMPLAINT 8

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR 8

4. THE INVESTIGATION 13

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS 16

6. FINDINGS 24

7. REMEDIAL ACTION 25

8. MONITORING 25

P.T.M

Executive Summary

(i) This is my report as the Public Protector in terms of section 182(1)(b)of the Constitution of the Republic of South Africa, 1996, (the Constitution), section 8(1) of the Public Protector Act, 1994 (the Public Protector Act) and section 3 of the Executive Members' Ethics Act, 1998 (EMEA).

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into complaint of a breach of the Executive Ethics Code by the Member of the Executive Council responsible for Local Government, Environmental Affairs and Development Planning of the Western Cape Provincial Government, Mr A Bredell (MEC).

(iii) The complaint was lodged by Mr C Dugmore (Complainant), a Member of the Western Cape Provincial Legislature, on 19 February 2020.

(iv) In the main, the Complainant alleged that:

(a) Mr Bredell addressed a letter on 8 May 2018 to the Acting Executive Mayor, the Speaker, the Chief Whip and the Chairperson of the Democratic Alliance (DA) Caucus, of the George Local Municipality (Municipality), in his capacity as the Provincial Chairperson of the DA, instructing them not to proceed with the appointment of the Director: Corporate Services at the Municipality, until permission was granted by the Federal Executive of the DA.

(b) It was inappropriate for Mr Bredell, holding the office of the MEC for Local Government, Environmental Affairs and Development Planning, to have interfered in the appointment process of a senior official of the Municipality and that in so doing he acted in violation of paragraph 2 of the Executive Ethics Code.

P.T.M

(v) Based on the analysis of the complaint, the following issues were identified for the investigation:

(a) Whether the MEC for Local Government, Environmental Affairs and Development Planning on 8 May 2018 requested the Acting Executive Mayor, the Speaker, the Chief Whip and the Chairperson of the DA Caucus of the Municipality not to proceed with the appointment of the Director: Corporate Services at the Municipality, until permission for the appointment was granted by the Federal Executive of the DA; and if so whether such conduct was improper and constitutes a breach of the Executive Ethics Code.

(vi) The investigation was conducted in terms of section 182(1) of the Constitution, sections 6 and 7 of the Public Protector Act and sections 3 and 4 of the EMEA. It included correspondence with the MEC and the Complainant, a virtual meeting held with the Complainant on 22 July 2020 and consideration and application of the relevant law and legal prescripts.

(vii) Having considered the evidence and information obtained during the investigation, I make the following findings:

(a) **Regarding whether the MEC for Local Government, Environmental Affairs and Development Planning on 8 May 2018 requested the Acting Executive Mayor, the Speaker, the Chief Whip and the Chairperson of the DA Caucus of the Municipality not to proceed with the appointment of the Director: Corporate Services at the Municipality, until permission for the appointment was granted by the Federal Executive of the DA; and if so whether such conduct was improper and constitutes a breach of the Executive Ethics Code.**

P.T.O

(aa) The allegation that the MEC on 8 May 2019, in his capacity as Chairperson of the DA political party in the Western Cape, requested the Acting Executive Mayor, the Speaker, the Chief Whip and the Chairperson of the DA Caucus of the Municipality not to proceed with the appointment of the Director: Corporate Services at the Municipality, until permission for the appointment was granted by the Federal Executive of the DA, is substantiated.

(bb) The allegation that the MEC's conduct in this regard was improper and constitutes a breach of the Executive Ethics Code, is also substantiated. The Constitution and the Executive Ethics Code oblige Members of the Executive to conform to the prescribed ethical standards at all times, irrespective of the capacity in which they perform their actions. They are expected to always behave in an exemplary and ethical manner, whether performing their official functions or not, and in whatever capacity.

(cc) Therefore, it was improper for a MEC, acting as Chairperson of the provincial DA, to instruct office bearers of a Municipal Council, albeit, in their capacity as DA caucus members, that the appointment of a senior official of the Municipality is subject to the approval of the political party that he/she represents.

(dd) A MEC breaches the Executive Ethics Code, if his/her actions as a member of a political party in the furtherance of the interest of the political party are in conflict with his/her statutory responsibilities of ensuring proper an effective governance by a Municipality, in his/her capacity as a Member of the Provincial Executive.

(ee) In this matter, the MEC's party political involvement in the appointment by the Council of the Municipality of a senior official also

P.T.O

placed his impartiality to attend to potential disputes on the appointment in his capacity as MEC, at risk due to a conflict of interest.

(ff) Interference in and influencing the Municipal Council's decision on which candidate to appoint in a senior position therefore also put the MEC at risk of a conflict between his responsibilities to ensure proper and effective governance by the Municipality in accordance with the relevant and applicable legislation, and his private interests in the political party that he represents. Such conduct would accordingly be inconsistent with his office and not in the best interests of good governance and constitutes a breach of the Executive Ethics Code.

(gg) The MEC's conduct was improper and in violation of the provisions of section 136(2) of the Constitution. It also constitutes a breach of paragraphs 2.1(c), 2.1(d), 2.3(c), and 2.3(f) of the Executive Ethics Code

(viii) The appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution is the following:

(a) The Premier of the Western Cape to:

(aa) In terms of section 3(6) of the EMEA within a reasonable time, but not later than 14 days after receiving this report, submit a copy thereof and any comments thereon, together with a report on any action taken or to be taken in regard thereto to the Western Cape Provincial Legislature.

P.T.M

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF BREACH OF THE EXECUTIVE ETHICS CODE BY THE MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING OF THE WESTERN CAPE PROVINCIAL GOVERNMENT, MR A BREDELL

1. INTRODUCTION

1.1 This is my report as the Public Protector in terms of section 182(1)(b)of the Constitution of the Republic of South Africa, 1996, (the Constitution), section 8(1) of the Public Protector Act, 1994 (the Public Protector Act) and section 3 of the Executive Members' Ethics Act, 1998 (EMEA)

1.2 The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act and section 3(3) of the EMEA to Mr A Winde, the Premier of the Western Cape, to inform him of the outcome of my investigation:

1.3 Copies of the report are also provided to:

1.3.1 Mr Anton Bredell, the Member of the Executive Council of the Western Cape Provincial Government responsible for Local Government, Environmental Affairs and Development Planning; and

1.3.2 Mr Cameron Dugmore MPL, who lodged the complaint.

1.4 The report relates to an investigation of a complaint of a breach of the Executive Ethics Code by Mr Anton Bredell, the Member of the Executive Council of the Western Cape Provincial Government responsible for Local Government, Environmental Affairs and Development Planning (MEC).

P.T.M

2. THE COMPLAINT

2.1 The complaint was lodged by Mr C Dugmore (Complainant), a Member of the Western Cape Provincial Legislature, on 19 February 2020.

2.2 In the main, the Complainant alleged that:

2.2.1 Mr Bredell addressed a letter on 8 May 2018 to the Acting Executive Mayor, the Speaker, the Chief Whip and the Chairperson of the Democratic Alliance (DA) Caucus, of the George Local Municipality (Municipality), in his capacity as the Provincial Chairperson of the DA, instructing them not to proceed with the appointment of the Director: Corporate Services at the Municipality, until permission was granted by the Federal Executive of the DA.

2.2.2 It was inappropriate for Mr Bredell, holding the office of the MEC for Local Government, Environmental Affairs and Development Planning, to have interfered in the appointment process of a senior official of the Municipality and that in so doing he acted in violation of paragraph 2 of the Executive Ethics Code.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has the power as regulated by national legislation –

P.T.M

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action."

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 In the matter of the *Economic Freedom Fighters* v *Speaker of the National Assembly and Others: Democratic Alliance* v *Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.[1] The Constitutional Court further held that:

"When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."[2]

3.6 In the above-mentioned constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:

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1 [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

2 *Supra* at para [73].

P.T.M

3.6.1 **Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);**

3.6.2 **An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the *Constitution* cannot properly be upheld or enhanced (paragraph 67);**

3.6.3 **Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);**

3.6.4 **The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);**

3.6.5 **Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);**

3.6.6 **The Public Protector's power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71);**

3.6.7 **Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps.**

P.T.M

Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));

3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and

3.6.9 "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).

3.7 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others, Case No 91139/2016 (13 December 2017),* the Court held as follows when confirming the powers of the Public Protector:

3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 71);

3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question. (para 82);

3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101):

a) Conduct an investigation;
b) Report on that conduct; and
c) To take remedial action.

3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (para 104);

3.7.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Para 105);

3.7.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraphs 107 and 108); and

3.7.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112 of the judgment).

3.7.8 Section 3 of the EMEA provides, *inter alia* that the Public Protector <u>must</u> investigate any alleged breach of the Executive Ethics Code on receipt of a complaint by the Premier or a member of the provincial legislature, if the complaint is against a MEC of the province. If the complaint is against a MEC, the Public Protector has to submit her report on the investigation to the Premier.

3.7.9 Mr Bredell is a Member of the Executive Council of the Western Cape Provincial Government. The complaint of a breach of the Executive Ethics Code was lodged in terms of the EMEA by a member of the Western Cape Provincial Legislature. Accordingly, the matter falls within the jurisdiction of the Public Protector and I was by law obliged to investigate the complaint.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182 of the Constitution, sections 6 and 7 of the Public Protector Act and sections 3 and 4 of the EMEA.

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the Investigation

4.2.1 The investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to breach of the Executive Ethics Code, improper conduct and/or maladministration?

4.2.1.4 In the event of a breach of the Executive Ethics Code, improper conduct and/or maladministration, what would it take to remedy the wrong and what action should be taken?

P.T.M

4.2.1.5 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Western Cape MEC for Local Government, Environmental Affairs and Development Planning acted in breach of the Executive Ethics Code on 8 May 2018 by requested the Acting Executive Mayor, the Speaker, the Chief Whip and the Chairperson of the DA Caucus of the Municipality not to proceed with the appointment of the Director: Corporate Services at the Municipality, until permission for the appointment was granted by the Federal Executive of the DA.

4.2.1.6 The enquiry regarding what should have happened, focuses on the EMEA, the Executive Ethics Code and the law or rules that regulate the standard that should have been met by the MEC, to prevent a breach of the Executive Ethics Code.

4.2.1.7 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of a breach of the Executive Ethics Code.

4.3. On analysis of the complaint, the following issues were identified for investigation:

4.3.1 Whether the MEC for Local Government, Environmental Affairs and Development Planning on 8 May 2018 requested the Acting Executive Mayor, the Speaker, the Chief Whip and the Chairperson of the DA Caucus of the Municipality not to proceed with the appointment of the Director: Corporate Services at the Municipality, until permission for the appointment was granted by the Federal Executive of the DA; and if so whether such conduct was improper and constitutes a breach of the Executive Ethics Code.

4.4 The Key Sources of Information

4.4.1 Documents

4.4.1.1. The letter of complaint submitted by the Complainant on 19 February 2020 with the Public Protector South Africa.

4.4.1.2 A copy of the letter, dated 8 May 2018, from Mr Bredell (MEC) addressed to the Acting Executive Mayor, the Speaker, the Chief Whip and the Chairperson of the DA Caucus, of the Municipality.

4.4.2 Correspondence between the Public Protector and:

4.4.2.1 The MEC on 13 July 2020 and 27 July 2020.

4.4.3 Meetings held:

4.4.3.1 A virtual meeting held with the Complainant on 22 July 2020.

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution of the Republic of South Africa, 1996.
4.4.4.2 The Public Protector Act, No 23 of 1994.
4.4.4.3 The Executive Members' Ethics Act, No 82 of 1998.
4.4.4.4 The Local Government: Municipal Systems Act, No 32 of 2000.
4.4.4.5 The Local Government: Municipal Structures Act, No 117 of 1998.

P.T.M

4.4.5 Notices issued in terms of section 7(9)(a) of the Public Protector Act

4.4.5.1 A Notice was issued in terms of section 7(9)(a) of the Public Protector Act to the MEC on 4 November 2020, and he responded on 18 November 2020.

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the MEC for Local Government, Environmental Affairs and Development Planning on 8 May 2018 requested the Acting Executive Mayor, the Speaker, the Chief Whip and the Chairperson of the DA Caucus of the Municipality not to proceed with the appointment of the Director: Corporate Services at the Municipality, until permission for the appointment was granted by the Federal Executive of the DA; and if so whether such conduct was improper and constitutes a breach of the Executive Ethics Code.

Common cause or undisputed facts

5.1.1 It is also common cause that on 8 May 2018, the MEC addressed a letter (in Afrikaans) to the Acting Executive Mayor, the Speaker, Chief Whip and Chairperson of the DA Caucus, on a letterhead of the DA. In this letter, the MEC informed the addressees that it had come to the DA's attention that they were in the process of appointing a Director: Corporate Services for the Municipality.

5.1.2 The MEC requested them not to continue with the appointment, until it was approved by the Federal Executive of the DA. He further indicated that the addressees were aware of the fact that such appointments had to be signed off by the DA Federal Executive. He also requested that they explain the grounds on

which they were deviating from the recommendation of the Municipality's Selection Committee.

5.1.3 The letter was signed in his capacity as the Provincial Chairperson of the DA.

Issues in dispute

5.1.4 The Complainant contended that:

"It is clear from the contents of the attached letter that Mr Bredell, in his capacity as DA provincial chairperson, was issuing an instruction to the various office bearers of the George Municipality not to proceed with an appointment until approved by the DA Federal Executive committee. This is not only grossly inappropriate for a functionary of a political party to interfere in the appointment process of a senior official at municipal level but is clearly against the Code of Ethics for Executive Members.

This is a clear conflict between MEC Bredell's constitutional and legal role as the MEC for Local Government and his role as DA office bearer and we believe that his conduct constitutes a breach of the Executive Code."

5.1.5 In his response to the complaint, dated 27 July 2020, the MEC questioned my decision to investigate his alleged breach of the Executive Ethics Code, as he contended that his letter of 8 May 2018 was sent to members of the DA holding office at the Municipality, as the Provincial Chairperson of the DA and not in his capacity as MEC. He stated that:

"In doing so, I was fulfilling my political mandate as the Provincial Chairperson of the Democratic Alliance political party by reminding those members of the party who held office in the George Municipality at the time to act in accordance with the Democratic Alliance's Federal Executive's oversight resolutions, taken in

2016 to ensure the lawful appointment of competent senior, strategic or political staff in those organs of state where the DA has been elected to govern. In this way the DA seeks to ensure that its election ticket of competent and effective administration in government is achieved."

5.1.6 He further stated that the aim of his letter was not to interfere in the appointment process underway at the Municipality, but to remind the DA members of their obligation to ensure that they comply with the resolutions of the DA's Federal Executive.

5.1.7 The MEC responded on 18 November 2020 to the notice that I issued in terms of section 7(9) of the Public Protector Act on 4 November 2020, affording him an opportunity to respond to the evidence obtained during the investigation and the findings that I intended to make. He persisted with his earlier response to the complaint that in sending the letter of 8 May 2018, he was acting in terms of his mandate as the Provincial Chairperson of the DA, reminding members of the DA holding office at the Municipality that they had to comply with the relevant resolution of the DA's Federal Executive. He stated in this regard, *inter alia* that:

"[T]he motivation … was not, as the complainant asserts, to interfere or impede in the statutory appointment process that applies to any municipal officials, but rather to ensure <u>that a very necessary additional vetting of candidates for posts in those organs of state where the DA has been elected to govern</u>- takes place prior to appointment by council. This is done by an internal Democratic Committee established for this purpose only." **(emphasis added)**

and

"The municipal vetting and verification process, if effectively performed should ensure that the hiring of recurring "bad apples" in local government is halted and

P.S.M

that they are thus weaned out of the system, but because these processes are not being applied effectively or consistently, a resultant gravy train of employment for almost any official, at another municipality, no matter why he or she left their previous employment currently exists. Once these persons are re-employed somewhere else it is too late for external parties to raise any concerns over their prior conduct, but which prior conduct often perpetuates itself and may well end up detracting from their ethics or capabilities of the new employer organ of state too in due course.

In implementing a parallel process of vetting candidates for employment in DA-led municipalities, by way of this resolution, the DA seeks to ensure that its election ticket of competent and effective administration in government is hence better achieved. My role, as Provincial Chairperson, is to ensure that DA resolutions are applied and in respect of this matter this intent aligns with my oversight role as Minister of Local Government." (emphasis added)

5.1.8 The MEC further reiterated that he sent the letter as Western Cape Chairperson of the DA at the time and not as MEC, and that his actions therefore could not be investigated in terms of the EMEA. He referred in this regard to section 2(1) of the EMEA which provides that the code of ethics prescribes the standards and rules with which Cabinet members, Deputy Ministers and MEC's must comply in performing their official responsibilities.

5.1.9 He also insisted in his response that:

"My letter was furthermore intended not to interfere nor in any way deviate or detract from the legitimate business of the George Council in its appointment process. The aim was to ensure that prior to the matter coming before the house, the members of the DA would be able to ensure that the Democratic Alliance's own vetting process had taken place and in so doing that the process itself had integrity. This was especially so when it had become known within the Democratic

P.T.M

Alliance that the second preferred candidate was rumoured to have a criminal record. "

5.1.10 The MEC concluded his response that the purpose of his letter of 8 May 2018 was in line with his oversight role as MEC for Local Government, that he accordingly had no conflict of interest.

Application of the relevant law

5.1.11 Section 125 of the Constitution provides that the executive authority of a province is vested in the Premier, who exercises it together with the other members of the Executive Council.

5.1.12 The Premier of a province appoints, in terms of section 132(2) of the Constitution, the members of the Executive Council, assigns their powers and functions, and may dismiss them.

5.1.13 Members of the Executive Council are, in terms of section 133(2) of the Constitution, collectively and individually accountable to the Provincial Legislature for the exercise of their powers and the performance of their functions.

5.1.14 The conduct of Members of provincial Executive Councils is primarily regulated by section 136 of the Constitution. It provides that:

(1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Executive Council of a province 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."* (emphasis added)

5.1.15 Sections 3(1) and 4 of the EMEA provide that the Public Protector must investigate any alleged breach of the Executive Ethics Code on receipt of complaint against a MEC by a member of the Provincial Legislature and must report on the investigation to the Premier of the Province.

5.1.16 The Executive Ethics Code was published in terms of section 2(1) of the EMEA on 28 July 2000.

5.1.17 Paragraph 2.1 provides that Members of the Executive must to the satisfaction of the President or the Premier, as the case may be-

5.1.17.1 Perform their duties and exercise their powers diligently and honestly;
5.1.17.2 Fulfil all the obligations imposed on them by the Constitution and the law;
5.1.17.3 Act in good faith and in the best interest of good governance; and
5.1.17.4 Act in all respects in a manner that is consistent with the integrity of their office or the government.

5.1.18 Paragraph 2.3 of the Executive Ethics Code provides *inter alia,* that Members of the Executive may not:

5.1.18.1 Act in a way that is inconsistent with their position;
5.1.18.2 Expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.

5.1.19 Every municipality must, by virtue of the provisions of section 18 of the Local Government: Municipal Structures Act, 1998 (Municipal Structures Act), have a Municipal Council that is elected in terms of section 22 of the Act.

P.F.M

5.1.20 Section 19(1) of the Municipal Structures Act provides that a municipal council must strive within its capacity to achieve the objectives set out in section 152 of the Constitution.

5.1.21 Section 151 of the Constitution provides that the executive and legislative authority of a municipality are vested in its Municipal Council. It further provides that a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation as provided for in the Constitution.

5.1.22 Section 56(a) of the Local Government: Municipal Systems Act, 2000 (Municipal Systems Act) provides that:

"*A municipal council, after consultation with the municipal manager, appoints a manager directly accountable to the municipal manager.*"(emphasis added)

Conclusion

5.1.23 The executive authority of a Municipality is by virtue of the provisions of section 151 of the Constitution vested in the Municipal Council. The appointment of managers directly accountable to the Municipal Manager, such as the senior official in this case, is the responsibility of the Municipal Council of the Municipality, in terms of section 56(a) of the Municipal Systems Act. The Municipal Manager also has to be consulted.

5.1.24 There is no provision in the relevant legislation regulating the affairs of local government, for political parties or Members of the Executive of the Provincial Government to play any role in the appointment of senior officials of a Municipality. The decision of the Municipal Council on who to appoint is clearly, by law, not to be influenced or directed by any political party or any MEC and is not subject to their approval or a pre vetting process of candidates, as referred to

PJM

by the MEC. Any such interference would render the appointment irregular, as it would not be based on the objective decision of the Municipal Council, in consultation with the Municipal Manager, but based on approval and direction from elsewhere.

5.1.25 It is clear from the provisions of section 136 of the Constitution that Members of the Provincial Executive are expected not to 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.

5.1.26 This imperative of ethical conduct is repeated in paragraph 2.1 of the Executive Ethics Code Act that requires of Members of the Executive to act in all respects in a manner that is consistent with the integrity of their office or the government.

5.1.27 It is also evident from the provisions of paragraph 2.3 of the Executive Ethics Code, that Members of the Executive are prohibited from exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.

5.1.28 The Constitution and the Executive Ethics Code oblige Members of the Executive to conform to the prescribed ethical standards at all times, irrespective of the capacity in which they perform their actions. They are expected to always behave in an exemplary and ethical manner, whether performing their official functions or not, and in whatever capacity.

5.1.29 Therefore, it was improper for a MEC, acting as Chairperson of the provincial DA, to instruct office bearers of a Municipal Council, albeit, in their capacity as DA caucus members, that the appointment of a senior official of the Municipality is subject to the approval of the political party that he/she represents.

5.1.30 A MEC breaches the Executive Ethics Code, if his/her actions as a member of a political party in the furtherance of the interest of the political party are in conflict

P.T.M

with his/her statutory responsibilities of ensuring proper an effective governance by a Municipality, in his/her capacity as member of the provincial executive.

5.1.31 In this matter, the MEC's party political involvement in the appointment by the Council of the Municipality of a senior official also placed his impartiality to attend to potential disputes on the appointment in his capacity as MEC, at risk due to a conflict of interest.

5.1.32 Interference in and influencing the Municipal Council's decision on which candidate to appoint in a senior position therefore also put the MEC at risk of a conflict between his responsibilities to ensure proper and effective governance by the Municipality in accordance with the relevant and applicable legislation, and his private interests in the political party that he represents. Such conduct would accordingly be inconsistent with his office and not in the best interests of good governance and constitutes a breach of the Executive Ethics Code.

6. FINDINGS

6.1 Regarding whether the MEC for Local Government, Environmental Affairs and Development Planning, acting as Chairperson of the DA in the Western Cape, on 8 May 2018 requested the Acting Executive Mayor, the Speaker, the Chief Whip and the Chairperson of the DA Caucus of the Municipality not to proceed with the appointment of the Director: Corporate Services at the Municipality, until permission for the appointment was granted by the Federal Executive of the DA; and if so whether such conduct was improper and constitutes a breach of the Executive Ethics Code:

6.1.1 The allegation that the MEC on 8 May 2019, in his capacity as Chairperson of the DA political party in the Western Cape, requested the Acting Executive Mayor, the Speaker, the Chief Whip and the Chairperson of the DA Caucus of the Municipality not to proceed with the appointment of the Director: Corporate

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Services at the Municipality, until permission for the appointment was granted by the Federal Executive of the DA, is substantiated.

6.1.2 The allegation that the MEC's conduct in this regard constitutes a breach of the Executive Ethics Code, is also substantiated.

6.1.3 The MEC's conduct was improper and in violation of the provisions of section 136(2) of the Constitution. It also constitutes a breach of paragraphs 2.1(c), 2.1(d), 2.3(c), and 2.3(f) of the Executive Ethics Code.

7. REMEDIAL ACTION

7.1 The appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution is the following:

7.1.1. The Premier of the Western Cape to:

7.1.1.1. In terms of section 3(6) of the EMEA within a reasonable time , but not later than 14 days after receiving this report, submit a copy thereof and any comments thereon, together with a report on any action taken or to be taken in regard thereto to the Western Cape Provincial Legislature.

8 MONITORING

8.1.1 Premier of the Western Cape to inform me within 30 days of the date of this report of the implementation of the remedial action taken in paragraph 7.1.1, and of the action taken or to be taken against the MEC.

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8.1.2 The implementation of my remedial action shall in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.

ADV BUSISIWE MKHWEBANE
THE PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 19 / 12 /2020

Assisted by: Ms Shireen Lengeveldt, PII Coastal