

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

---

**WRITTEN SUBMISSIONS ON BEHALF OF MINISTER PRAVIN GORDHAN  
IN OPPOSITION TO THE APPLICATION FOR LEAVE TO CROSS-EXAMINE BY  
THOMAS MOYANE**

---

**TABLE OF CONTENTS**

<b>INTRODUCTION</b>	<b>2</b>
<b>GROUND OF OPPOSITION</b>	<b>6</b>
<u>Failure to Comply with Regulation 8(3) and Rules</u>	7
<u>No Disputed Facts Identified by Mr Moyane</u>	12
<u>The Nugent Commission</u>	14
<u>Issues falling outside of the Commission's Terms of Reference</u>	19
<u>Cross-examination abuses the Commission process</u>	19
<b>INSPECTOR GENERAL OF INTELLIGENCE REPORT</b>	<b>20</b>
<b>FILING OF ANSWERING AFFIDAVIT</b>	<b>22</b>
<b>CONCLUSION</b>	<b>23</b>

## INTRODUCTION

1. This application by the former Commissioner of the South African Revenue Service (“SARS”), Thomas Moyane (“Mr Moyane”), purports to seek leave to cross-examine current Minister of Public Enterprises and former Minister of Finance, Pravin Gordhan (“Min Gordhan”), regarding the evidence he placed before the Commission.
2. A preliminary submission that must be stressed is that Min Gordhan has nothing to hide from this Commission or the South African public, and remains willing to assist and continue to support the important work of this Commission.
3. Opposition to Mr Moyane’s application to cross-examine Min Gordhan arises because the application is ill-conceived and vexatious, and is intended to derail, disrupt and distract from the Commission’s important work. Political theatre is not to be staged at a judicial Commission of Inquiry. Nor is bile and insult somehow converted into useful evidence. This Commission should not dignify the denigration of a senior member of the executive in this latest iteration of the failed litigation campaign undertaken by Mr Moyane.<sup>1</sup>
4. It may well be that Mr Moyane should testify in order to assist the work of the Commission. It does not follow that it is necessary that he be afforded the opportunity to cross-examine Min Gordhan since, for the reasons set out below, that exercise does not advance the Commission’s mandate. If Mr Moyane has facts or evidence to provide the Commission, he should testify under oath and place these facts and that evidence before the Commission.

---

<sup>1</sup> Answering Affidavit p 391 para 13.4, p 394 para 15

5. The purposes of cross-examination are not served by granting this application. There is no dispute between the parties that the purposes of cross-examination generally are that:

5.1. cross-examination assists with “the discovery of the truth”<sup>2</sup>;

5.2. as a general rule, cross-examination is allowed in adversarial trial proceedings<sup>3</sup>;

5.3. cross-examination enables the obligation to put to a witness for his or her comment or explanation disputed issues of fact or the opportunity to respond to a suggestion of untruthfulness of evidence given<sup>4</sup>;

5.4. the right to cross-examination gives effect to the section 35(3)(i) right of accused persons, enshrined in the Bill of Rights, to adduce and challenge evidence<sup>5</sup>; and

5.5. a failure to allow cross-examination is a gross irregularity in adversarial litigation.<sup>6</sup>

6. However,

6.1. None of these purposes, rights or obligations are engaged in this application, nor are they served by this application before this Commission; and

---

<sup>2</sup> Applicant’s Written Submissions p 9 para 26

<sup>3</sup> Applicant’s Written Submissions p 10 para 27

<sup>4</sup> Applicant’s Written Submissions p 10 para 30

<sup>5</sup> Applicant’s Written Submissions p 11 para 31

<sup>6</sup> Applicant’s Written Submissions p 11 para 32

- 6.2. The Commission’s proceedings are not adversarial litigation; they are inquisitorial and flexible, aimed at ensuring the fulfilment of the Commission’s specified mandate.
7. The purpose of this application according to Mr Moyane is to “*challenge, refute and rebut the evidence [of Min Gordhan] which is calculated to be adverse and damaging to [Mr Moyane’s] legal interests, including his reputation, his career prospects -- not to mention exposure to criminal or civil proceedings*” (sic).<sup>7</sup>
8. He seeks to traverse the following “*cross-examination themes*”<sup>8</sup>:
- “14.1 *Theme One: General credibility;*
- 14.2 *Theme Two: Anti-Moyane bias and hostility;*
- 14.3 *Theme Three: Mr Moyane’s alleged breach of procurement procedures (the Monyeki case);*
- 14.4 *Theme Four: Racist and hurtful utterances, impairment of dignity and vendetta; and*
- 14.5 *Theme Five: The role of the rogue unit.*”
9. None of these assist the work of the Commission and almost all of them do not fall within its Terms of Reference.
10. In sum, Min Gordhan opposes the application for the simple reason that permitting his cross-examination by Mr Moyane (or his legal representatives to

---

<sup>7</sup> Applicant’s Written Submissions p 13 para 40

<sup>8</sup> Applicant’s Written Submissions p 6 para 14

be more precise) on the topics identified by Mr Moyane will not assist the Commission in its important work.

10.1. Rather, it will distract and derail the Commission into a morass of personal vendetta, political grandstanding and a repeat of the already completed and unchallenged work of the Commission of Inquiry into Tax Administration and Governance by the SARS (“Nugent Commission”).

10.2. Mr Moyane does not put before the Commission facts and evidence that contradict Min Gordhan’s factual evidence, nor is a contrary factual version of events falling within the Commission’s Terms of Reference actually put up by Mr Moyane in his application. He raises no disputes with the facts before the Commission. Mr Moyane’s evident dislike of Min Gordhan and disagreement with the circumstances of his removal from SARS are not facts or evidence that will assist this Commission in its work.

10.3. Granting leave to cross-examine will not advance the important work of the Commission since the majority of the topics identified by Mr Moyane for cross-examination are not responsive to or within its Terms of Reference. His views of the political landscape, history of the struggle against apartheid and now the fight against corruption or state capture will not assist the Commission.

10.4. There is no purpose served by this application other than to seek to afford a disgruntled Mr Moyane a public platform to attempt to denigrate Min Gordhan and his record of public service through cross-examination by his legal representatives utilising outlandish conspiracy theories, a

racist and populist political script, all in pursuit of a personal vendetta against him.<sup>9</sup> This is not a legitimate purpose for which to occupy the Commission's schedule; the Commission's hearings ought not to be abused as a platform for spectacles: whether personal or political in nature.

## **GROUNDS OF OPPOSITION**

11. The specific grounds of opposition to the application are addressed in turn below.

They are:

11.1. First, the application fails to meet the requirements of Regulation 8(3) and Rules 3.4 and 3.7 of the Commission's Rules;

11.2. Second, Mr Moyane fails to put up actual facts or any other evidence to contradict Min Gordhan's evidence before the Commission – his evident personal disagreement with that evidence does not create a true factual dispute that requires cross-examination to resolve and reconcile competing factual versions;

11.3. Third, the issues on which Mr Moyane focuses in his application have been investigated and are the subject of findings by the Nugent Commission;

---

<sup>9</sup> Answering Affidavit p 390 para 12

- 11.4. Fourth, the remaining issues identified by Mr Moyane also fall outside of the Terms of Reference of this Commission; and
- 11.5. Finally, permitting cross-examination will permit the Commission to become a platform to advance personal grievance and political plots.

### **Failure to Comply with Regulation 8(3) and Rules**

12. First, the application fails to comply with the applicable Regulation and Rules of the Commission.
13. Regulation 8(3) of the Commission's Regulations requires that *"any person appearing before the Commission may be cross-examined by a person only if the Chairperson permits such cross-examination should he deem it necessary and in the best interest of the function of the Commission."*
14. Cross-examination then is only permitted by leave of the Chairperson of the Commission in terms of a decision pursuant to Rule 3.3.7 of the Rules governing the Commission's proceedings.
15. Rule 3.7 provides that *"there is no right to cross-examine a witness before the Commission but the Chairperson may permit cross-examination should he deem it necessary and in the best interests of the work of the Commission to do so."*
16. Mr Moyane's application is neither necessary nor in the best interests of the work of the Commission.

17. Mr Moyane's application also fails to comply with the requirements of Rules 3.4 and 3.7 of the Commission's Rules:
  - 17.1. Contrary to those requirements, the application fails to *"make it clear what parts of the witness's statement are disputed or denied and the grounds upon which those parts are disputed or denied."*
  - 17.2. Nor does it establish that cross-examination is *"necessary and in the best interests of the work of the Commission to do so."*
18. These defects are a basis to dismiss the application in its entirety.
19. Rule 3.6 in turn provides that *"in deciding an application contemplated in Rule 3.3.6, the Chairperson may, in his discretion and on such terms and conditions as he may deem appropriate, grant leave to an implicated person: (a) to give evidence; (b) to call a witness to give evidence on his behalf; and/or (c) to cross-examine the witness implicating him or her."*
20. Here, Minister Gordhan submits that it may well be appropriate for Mr Moyane to give evidence under oath regarding facts within his personal knowledge that are determined to be relevant to the Terms of Reference of the Commission, and that it is inappropriate to permit cross-examination by him since the Commission's mandate will not be advanced by such cross-examination.
21. In sum, leave to cross-examine is only granted:
  - 21.1. By leave of the Chairperson, decided in his discretion;
  - 21.2. Where it is necessary; and

- 21.3. Where it is in the best interests of the work or functions of the Commission, or where it would advance the interests of the Commission.
22. The tests of necessity and the best interests of the work of the Commission are both to be assessed in terms of the detailed Terms of Reference of the Commission. For the reasons set out in his answering affidavit and these submissions, Min Gordhan submits that Mr Moyane's application fails on both tests.
23. In addition, the Rules governing the Commission's work are clear and instructive that advancing the work of the Commission, fulfilling its mandate and furthering its investigation of its specific Terms of Reference are the lodestar of deciding what evidence to receive overall. For example:
- 23.1. Rule 6.1 requires the receipt of "*evidence that is relevant to [the Commission's] mandate*";
- 23.2. Rule 7.1 provides that oral evidence is given "*at the discretion of the Chairperson*" and that "*the Chairperson's decision to call a witness will be informed by the likely significance of the evidence in advancing the work of the Commission*"; and
- 23.3. Rule 9.1 enables the Chairperson to call a witness in his discretion following a request that includes "*the likely value of the evidence of such a witness.*"
24. These examples illustrate that the Commission's processes are flexible, inquisitorial and fair, and that they are directed at ensuring that the Commission timeously and effectively fulfils its mandate with reference to the specific topics

listed in its Terms of Reference. Permitting this cross-examination will, instead, disrupt the work of the Commission and displace its attention into irrelevant topics and unnecessary spectacles.

25. On Mr Moyane's own version, the evidence of Minister Gordhan that he considers the basis for his application to cross-examination includes the following:

*"13 During his written and oral testimony and in this application, Minister Gordhan gave evidence relevant to this application, during which, inter alia:*

*13.1 He generally portrayed himself as a corruption buster and an opponent of state capture;*

*13.2 He has confirmed that he was twice appointed by President Zuma as Minister of Finance;*

*13.3 He confirmed being an ANC Member of Parliament at all times material to this Commission;*

*13.4 He confirmed he was previously a Commissioner of SARS (in which capacity, it turns out, he was accused of criminal activities and later criminally charged for his role in setting up an unlawful rogue unit, which targeted certain politicians, sports personalities and business people for unlawful surveillance, which charges were later provisionally withdrawn);*

*13.5 He intimated that Mr Moyane was the person who unjustifiably and maliciously laid charges against him in pursuit of a personal vendetta against him;*

*13.6 He has blandly denied racism on his part and the hurt this has caused Mr Moyane (without bothering to substantiate or even to address the specific examples thereof given by Mr Moyane under oath);*

*13.7 He confirmed that he was opposed to Mr Moyane's appointment as SARS Commissioner from the outset and campaigned to have him removed. (It is common cause*

*that Mr Moyane was finally removed by executive decree and without a hearing on 1 November 2018);*

13.8 *He accused Mr Moyane of unlawful “defiance of and resistance to the required executive oversight of SARS (by Minister Gordhan)”;*

13.9 *He accused Mr Moyane of having participated in the unlawful granting of an IT tender to a company owned by his alleged friend, Mr Monyeki. The name of the company was [New Integrated Credit Solutions (“NICS”)];*

13.10 *He further accused Mr Moyane of having committed the criminal offence of perjury by lying to Parliament in respect of the NICS contract award;*

13.11 *He actively omitted to reveal any knowledge of his alleged wrongdoing in respect of procurement activities or the setting up of unlawful activities of the notorious rogue unit;*

13.12 *He attached a copy of his long sworn statement in support of the removal of Mr Moyane from office, which was eventually done by Presidential decree, without a hearing, on 1 November 2018. Relatedly, he confirmed that he held an undisclosed “preliminary” meeting with the Chairperson of the SARS Commission, at the latter’s request, after the appointment of the Commission but before he gave his evidence before that Commission!”*

26. These topics must each be evaluated against the central question for the Chairperson to determine: whether it would be necessary and advance the work of the Commission in fulfilling its Terms of Reference to permit Mr Moyane to cross-examine Minister Gordhan on these issues? These answer is obviously that it would not.

27. Mr Moyane’s stated purpose for his application is to rehabilitate his reputation, improve his career prospects, revive the wholly discredited narrative of there being a so-called “rogue unit” at SARS, air his grievances regarding his removal by President Ramaphosa from the critical post of Commissioner of SARS, ventilate what appears to be a personal vendetta against Minister Gordhan and,

finally, use the platform of the Commission to speculate on political theories regarding the Minister's history in the struggle and role as a member of the executive.

28. None of these are necessary to or will fulfil the work of the Commission, as required by the applicable Regulation and Rules.
29. The application should be denied for this first reason.

### **No Disputed Facts Identified by Mr Moyane**

30. Second, the purpose of cross-examination is to test evidence against an alternate set of facts provided by the party that seeks to cross-examine.
31. Min Gordhan testified about Mr Moyane in three respects (though only the third was considered by the Commission to implicate him).<sup>10</sup>
  - 31.1. Min Gordhan testified about his concerns regarding Mr Moyane's appointment and his resistance to executive oversight when Min Gordhan was the Minister of Finance to whom Mr Moyane was accountable;
  - 31.2. Min Gordhan provided evidence to the Commission regarding the apparent irregularity of a contract approved by Mr Moyane when he appointed NICS as a debt collector at SARS and his misleading statements to Parliament regarding that involvement; and

---

<sup>10</sup> Answering Affidavit p 388 para 8

- 31.3. Min Gordhan testified as to the political campaign against him when he was re-appointed as Minister of Finance that included the launching, and subsequent withdrawal, of criminal charges against him arising from a docket opened by Mr Moyane. Min Gordhan testified regarding its impact on him personally.
32. Mr Moyane has not placed a competing factual version before the Commission with which to test any of this factual evidence through cross-examination. His disagreement with Min Gordhan's personal impressions and experience does not assist the Commission.
33. The initial factual dispute regarding Mr Moyane's contending that he was not the complainant in the criminal charges brought and withdrawn against Min Gordhan has been resolved.
- 33.1. He has now admitted that he filed the complaint that led to those charges against Min Gordhan. He disputes his motivation for laying that complaint, though that dispute does not engage with the Commission's mandate.<sup>11</sup>
- 33.2. Even this issue does not require cross-examination since it was considered and resolved by the Nugent Commission against Mr Moyane.<sup>12</sup>

---

<sup>11</sup> Answering Affidavit p 393 para 14.4, p 408 para 50 et seq.

<sup>12</sup> Answering Affidavit p 408 para 52 citing p 669 para [44] of the Interim Report of the Nugent Commission

34. The application should be denied for this second reason -- that there is no factual dispute raised by Mr Moyane with Min Gordhan's evidence that can be resolved by cross-examination.

### **The Nugent Commission**

35. Third, all of the SARS-related issues identified by Mr Moyane regarding which Min Gordhan testified have been investigated and are the subject of findings by Justice Nugent in his completed Commission of Inquiry. As set out at length in the answering affidavit<sup>13</sup>, that judicial commission has investigated, considered and made several findings that render this application redundant.

36. Mr Moyane's application amounts, in effect, to an attempt to review or reopen the Nugent Commission. Neither is appropriate or possible before this Commission.

36.1. Mr Moyane has legal avenues open to him if he wishes to dispute the findings of the Nugent Commission. Cross-examination of Min Gordhan is not one of them.

36.2. In addition, the process and findings of the Nugent Commission have been endorsed by the Constitutional Court when it dismissed Mr Moyane's two applications to review that Commission and the decisions taken in reliance upon its findings by President Ramaphosa. This

---

<sup>13</sup> Answering Affidavit p 392 para 14.3.1, p 393 para 14.5, p 396 para 25 – p 400 para 34, p 402 para 37, p 404 para 44 – p 407 para 49, p 408 para 52 – p 410 para 54

Commission cannot undermine those endorsements under the guise of cross-examination by Mr Moyane.

- 36.3. Finally on this topic, the Constitutional Court did not even disturb the punitive costs order imposed on Mr Moyane by the High Court (at para [44] of the decision) for his conduct of those proceedings. That costs order was imposed for the following reasons, some of which may be evident in this application as against Min Gordhan<sup>14</sup>:

*It is clear from my judgment that the conduct of the Applicant in these proceedings is particularly reprehensible. It is vexatious and abusive. Both the Office of the President and the Third Respondent [Justice Nugent] have been attacked, insulted and defamed without any reasonable cause. Allegations impugning their integrity and character have been made regardless of the objective facts. Insults have been hurled at every conceivable opportunity. No reasonable or lawful grounds exist for such unwarranted attacks on the integrity of the First and Third Respondents. No cause of action has been made out for interim relief and the whole of the application is an abuse of the process of this Court. I cannot think of a single reason of why this application should be classified as a bona fide attempt to secure or safeguard the Applicant's constitutional, common law or contractual rights. I have set out the relevant considerations in my judgment and on the facts of the matter before me, there is in my view no reason whatsoever why I should not make a cost order against the Applicant. Not only is a cost order appropriate in this instance, but on the punitive scale of Attorney and client for the reasons that I have already mentioned. It is time that litigants realize that they cannot lightly make abusive allegations in Court affidavits under the mantle of safeguarding their constitutional rights, on the assumption that Court cost orders would not be granted against them. In my opinion, the facts of the matter before me clearly show that a punitive cost order against the Applicant is justified. His behaviour throughout these proceedings is abominable.*

---

<sup>14</sup> Min Gordhan abided those High Court proceedings since no relief was sought against him; he opposed both Constitutional Court applications by Mr Moyane which sought declaratory relief regarding his participation as a witness in the disciplinary proceedings before Adv Bham SC.

- 36.4. As in those proceedings, Mr Moyane's application and written submissions before this Commission repeatedly insult and cast aspersions on the character and integrity of Min Gordhan, and disparage his life-long record of public service to all South Africans.
- 36.5. An application for cross-examination, and cross-examination itself, is not permissibly a vehicle for defamation.
37. Three areas can be identified in Mr Moyane's application as the topics he wishes to canvass in cross-examination: (i) Min Gordhan's political and personal history, (ii) the so-called "rogue unit" narrative at SARS and (iii) the New Integrated Credit Solutions ("NICS")/Patrick Monyeki issue at SARS.
- 37.1. The first and second are irrelevant to, and outside of, this Commission's Terms of Reference.
- 37.2. The second also has been thoroughly examined by the Nugent Commission and it found that there was no unlawful "rogue" unit<sup>15</sup>, and that the unit's capacity to combat the illicit trade should be re-established at SARS.<sup>16</sup>
- 37.3. The third cannot be taken further through cross-examination of Min Gordhan since it is Mr Moyane who should testify if he wishes to place facts before the Commission that contradict what was contained in the evidence already placed before the Commission and what has now been established by the Nugent Commission. Min Gordhan has no further

---

<sup>15</sup> Interim Report of the Nugent Commission at p 667 para [36]

<sup>16</sup> Final Report of the Nugent Commission at p 646 para 6

personal knowledge on these matters with which to assist the Commission.<sup>17</sup>

38. The NICS issue is the only issue identified by the Commission itself in its Notice in terms of Rule 3.3<sup>18</sup> as being a matter regarding which it considers Min Gordhan to have implicated Mr Moyane in his evidence.

38.1. All that Minister Gordhan placed before the Commission was a copy of the affidavit used to substantiate the disciplinary charges brought against Mr Moyane by President Ramaphosa before Advocate A Bham SC. The thrust of the charge was that Mr Moyane had misled Parliament when he claimed not to have had any involvement in the appointment of NICS at SARS.<sup>19</sup>

38.2. However, this was found to be untrue by Justice Nugent who investigated this issue thoroughly and concluded as follows<sup>20</sup>:

***The New Integrated Credit Solutions Contract***

[22] I have already indicated that Mr Moyane approved the appointment of New Integrated Credit Solutions to the panel of service providers on 17 December 2015. Again on 15 February 2018 he approved its appointment for Phase 2 of the project. In each case he did so by signing the report of the National Bid Adjudication Committee.

---

[25] So far as Mr Moyane conveyed that he had no hand in the appointment of New Integrated Credit Solutions, that is not true. It is also not true that 'the bid adjudication committee which is the NBAC ... make an announcement and the award of the tender to the preferring tender, tender presenter.' It is apparent from the documents that, on each of the occasions that New Integrated Credit Solutions was

---

<sup>17</sup> Answering Affidavit p 389 para 11

<sup>18</sup> Rule 3.3 Notice p 270 at p 271 para 3, p 272 paras 5 - 6

<sup>19</sup> The affidavit appears as Annexure 28 to the witness statement filed by Min Gordhan with the Commission

<sup>20</sup> Nugent Commission Final Report p 609 para 22 et seq.

appointed to the panel, and again appointed to Phase 2, the National Bid Adjudication Committee made a recommendation to Mr Moyane, who then approved it by appending his signature to the report. He cannot but have known that the NBAC's decision was not the end of the process, and cannot but have known that New Integrated Credit Solutions was appointed, bearing in mind that he approved it.

[26] It is also not true that he does 'not get involved' in such appointments. His was the final approval for the award of the contract. Indeed, that assertion contradicts the assertion he made in the application to set aside the contract with LTC, the very foundation of which was that he was 'involved' in the award of the contract. In his replying affidavit he acknowledged expressly that he had been 'involved' in the award of the contract:

'As a matter of fact, I was "involved with" the evaluation and adjudication of the bids. The National Bid Adjudication Committee's process resulted in a recommendation made to me in my capacity as SARS' accounting [officer], which recommendation I personally signed. I was also "involved with" the evaluation and adjudication, in the sense that I am responsible for ensuring that all procurement occurs in accordance with a lawful system, and in that the ultimate recommendations emanating from that system needed my approval'.

[27] The records available to the Commission reflect that Mr Monyeki was never a director of New Integrated Credit Solutions and I have no evidence of any other direct interest. The records suggest that a business relationship of some kind existed in 2015 between New Integrated Credit Solutions and Mahube Payment Solutions, of which Mr Monyeki was then a director (he resigned on 13 February 2017), in that a large payment was made by Integrated Credit Solutions to Mahube Payment Solutions.

(emphasis added)

39. The Nugent Commission has investigated, considered and made unchallenged findings that Mr Moyane, under oath, contradicted his claim that he played no role in the appointment of NICS at SARS. There is no need to cross-examine Min Gordhan about this issue in this Commission.
40. As a result, the application should be denied for this third reason.

### **Issues falling outside of the Commission's Terms of Reference**

41. The fourth reason to deny this application is that most of the issues raised by Mr Moyane and which he identifies as the topics he would like to canvass in cross-examination fall wholly outside of the Commission's Terms of Reference.
42. These issues and topics are either his unflattering personal views of Min Gordhan or the regurgitation of a political narrative used against Min Gordhan in the political arena.
43. Neither category are a proper basis for cross-examination within the Commission's proceedings.

### **Cross-examination will abuse the Commission process**

44. The final reason to deny this application is that the airing of Mr Moyane's personal opinions of Min Gordhan or the fanning of a political campaign against him is not a proper use of the Commission process.
45. Its proceedings, limited public resources and constrained time are better spent on matters actually falling within its purview and which will advance its work.

## INSPECTOR GENERAL OF INTELLIGENCE REPORT

46. It is necessary to make some submissions regarding Mr Moyane's response to Min Gordhan's concern that he is in possession of a classified document purporting to be a report to the Inspector-General of Intelligence ("IGI"). Mr Moyane glibly dismisses the concern as to how he came to possess that document by stating that it is in the public domain having been attached to the affidavit filed by Mr Floyd Shivambu, of the Economic Freedom Fighters political party ("EFF"), in the Equality Court proceedings<sup>21</sup> that are currently pending, that relate to various statements and allegations made by the EFF leadership against Min Gordhan on the occasion of his evidence to the Commission.
47. The unauthorised possession of this report is a criminal offence.<sup>22</sup>
48. The recently-released report by the High-Level Panel into the securitisation of the state and the abuse of the intelligence services during the administration of former President Zuma<sup>23</sup> similarly shows that the use of intelligence reports for political purposes is yet another unfortunate feature of the state capture era, and an instrument used for those intent on fighting back against efforts to recapture the state and have consequences for corruption. The Report, at p 2, summarised its work and findings as follows:

*"Apart from its specific findings and recommendations, the Panel asked itself the question: 'What went wrong?' In answering this question, it must be said that the findings of the Panel do not impugn every member of the SSA and its management, but focus on the things that went wrong. It identified five high-level answers to this question:*

---

<sup>21</sup> Replying Affidavit p 708 para 57

<sup>22</sup> As shown by recent media reports that criminal charges have been laid against the Public Protector for possession of the same report - <https://city-press.news24.com/News/spy-boss-charges-public-protector-busisiwe-mkhwebane-over-classified-report-20190311> (accessed 11 March 2019)

<sup>23</sup> Available at <http://www.thepresidency.gov.za> (accessed 11 March 2019)

- *Politicisation: The growing contagion of the civilian intelligence community by the factionalism in the African National Congress (ANC) progressively worsened from 2009.*
- *Doctrinal Shift: From about 2009, there was a marked doctrinal shift in the intelligence community away from the precepts of the Constitution, the White Paper on Intelligence, and the human security philosophy towards a much narrower, state security orientation.*
- *Amalgamation: The amalgamation of National Intelligence Agency (NIA) and South African Secret Service (SASS) into the SSA did not achieve its purported objectives and was contrary to existing policy.*
- *Secrecy: There is a disproportionate application of secrecy in the SSA stifling effective accountability.*
- *Resource Abuse: The SSA had become a 'cash cow' for many inside and outside the Agency."*

49. Mr Moyane's reliance on this suspicious document, without a meaningful and fulsome explanation as to how he comes lawfully into possession of it, confirms that this application is a stalking horse for a political (and personal) agenda. The furtherance of that agenda, as opposed to the proper work of the Commission, is not a basis on which to permit cross-examination.

## FILING OF ANSWERING AFFIDAVIT

50. Mr Moyane devotes several pages of his replying affidavit<sup>24</sup> and written submissions<sup>25</sup> to the timing of the filing of Min Gordhan's answering affidavit. No directives were issued by the Chairperson of the Commission in this regard. The Secretariat advised of various deadlines leading up to the hearing on 13 March 2019 and adjusted those following engagement with the legal representatives of the parties to this application. Both sides have had the opportunity to file responsive papers and written submissions on all issues raised in this application.
51. Accordingly, no prejudice can be claimed by Mr Moyane from the adjustment by the Secretariat of its deadlines. The application is ripe for hearing following both parties' full ventilation of the issues. No delay in its finalisation, nor further expansion of the already voluminous record of this application is required for its determination.
52. As provided for in Rule 11.2, it is submitted that it is in the interests of the work of the Commission and for good cause to entertain and determine this application now. Further submissions will be made in this regard at the hearing of the application, if directed to do so by the Chairperson.

---

<sup>24</sup> Replying Affidavit p 695 para 5 et seq

<sup>25</sup> Applicant's Written Submissions p 2 para 5 et seq

## **CONCLUSION**

53. For the reasons set out above, and in Min Gordhan's answering affidavit, and to be submitted at the hearing of this application, Mr Moyane's application for leave to cross-examine Min Gordhan should be dismissed in its entirety.

**MM LE ROUX**  
Counsel for Min Gordhan

Chambers, Sandton  
11 March 2019