

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO:

In the matter between:

QUAKER PEACE CENTRE NPO

First Applicant

("QPC")

FW de KLERK FOUNDATION

Second Applicant

("FWF")

AFRIFORUM NPC

Third Applicant

("AfriForum")

and

THE PRESIDENT OF THE REPUBLIC OF

SOUTH AFRICA

First Respondent

and

THE DEPUTY PRESIDENT OF THE REPUBLIC OF

SOUTH AFRICA

Second Respondent

and

THE GOVERNMENT OF THE REPUBLIC OF

SOUTH AFRICA

Third Respondent

FOUNDING AFFIDAVIT

I, the undersigned

ROMMEL ROBERTS

do hereby make oath and say that

1. I am an adult male human rights activist and hold the of position Secretary of the Quaker Peace Centre (“QPC”) which conducts its business at and from 3 Rye Road, Mowbray, Cape Town.
2. I am duly authorized to depose to this affidavit on behalf of the QPC in terms of the resolution of the Board of the QPC, a copy of which is annexed marked “RR 1”.
3. The facts herein deposed to are within my personal knowledge unless it appears from the context, or is specifically stated to the contrary.

4. To the extent that I refer to the law, or make legal submissions, I do so in reliance on the advice of the QPCs' legal representatives, which I believe to be sound and correct.

THE PARTIES

5. The First Applicant is **QUAKER PEACE CENTRE** ("QPC"), a nonprofit organization registered as such in terms of the Nonprofit Organisations Act, 1997, ("the Act") under registration number NPO 011-790 NPO, of 3 Rye Road, Mowbray, Cape Town.
6. The Second Applicant is the FW de Klerk Foundation ("FWF"). The FWF is incorporated in a Trust (IT1863/99) and is registered as a not-for-profit organisation (NPO 031-061; PBO 930004278) in terms of the Act of Tygerberg Park, Zeezicht Building, 163 Uys Krige Drive, Platteklouf, Cape Town,
7. The Third Applicant is AfriForum NPC ("AfriForum"), a non-profit company incorporated in terms of the laws of the Republic, trading as such at 58 Union Avenue, Kloofsig, Centurion, with registration number as 2005/042861/08. Its main purpose being the promotion and advocacy of democracy, equality, civil-, human-, minority-, and constitutional rights and the protection thereof.

8. The First Respondent is the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** (“the President”) of Union Buildings, Government Avenue, Pretoria.
9. The Second Respondent is the **DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** (“the Deputy President”) of Union Buildings, Government Avenue, Pretoria.
10. The Third Respondent is the **GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA** (“the Government”), of care of the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria.

LOCUS STANDI

11. The QPC approaches this Court in terms of sections 38(a) and (d) of the Constitution, acting in its own interest and in the public interest.
12. The locus standi of the FWF and AfriForum will be expanded on in their respective supporting affidavits.
13. Success in this application would ensure that the President, as a constitutional being, is held to account in relation to his constitutional duties, obligations and responsibilities to uphold,

defend and respect the Constitution as the supreme law of the Republic and as further contained in the oath of office which the President undertook when assuming the office of President of the Republic.

14. In the absence of this application, there is no other reasonable, efficient or effective basis on which the President can be held to account properly in the open and responsive manner contemplated by section 1(d) of the Constitution, read with section 195(1)(b) and section 237 of the Constitution.
15. The risk exists of state capture continuing unabated to the detriment of all inhabitants of South Africa, thus ultimately impacting directly or indirectly on the rights guaranteed in the Bill of Rights because valuable and scarce state resources are misdirected instead of being used to respect, protect, promote and fulfil human rights in the manner contemplated by section 7(2) of the Constitution.
16. The downgrades to economic junk status, for so long as they continue, will limit the Government's access to investor capital, both local and foreign; this setback will occur both in the public and private sectors.

17. The relief sought in this application is based upon the proper interpretation of section 90(1) of the Constitution. QPC respectfully contends that the words “...or otherwise unable to fulfil the duties of President” cover “any situation involving the risk of a conflict between ... official responsibilities and private interests” of the President. In such a situation, which is contemplated expressly by section 96(2)(b) of the Constitution, the Deputy President is constitutionally obliged by section 90(1)(a) of the Constitution to act as President.

NATURE OF RELIEF SOUGHT

18. The principal relief sought in this application is an order of this Court that:

18.1. consequent on the risk of a conflict of interest between the President’s official responsibilities and his private interests, the President is unable to fulfill his duties as President by appointing a commission of inquiry into state capture as a matter of urgency;

18.2. given the serious risk of conflicted circumstances of the President, the Deputy President assumes the office of Acting

President and is thus constitutionally authorized and solely responsible for the appointment a commission of inquiry into state capture;

18.3. the Deputy President, by acting as President due to the risk of conflict of interest, assumes no other powers or functions of the President; and

18.4. the Government affords the commission of inquiry into state capture appointed by the Deputy President all support and resources as the commission may reasonably require without delay and as may reasonably be requested by the chair of the commission of inquiry.

19. For the purpose of this application, it is neither necessary nor proper for this Court to determine the veracity or otherwise of the allegations of state capture or a silent coup, a task for a credible, independent and fully resourced commission of inquiry.

20. The various possible reasons for the President's failure to appoint a commission of inquiry into state capture are addressed in more detail below. The essence of these reasons is that by appointing a commission of inquiry, there exists a risk that the President could

expose himself, and members of his immediate family, to civil and criminal liability for their participation in the alleged state capture that several authoritative and ostensibly unimpeachable sources have made in a manner which is mutually corroborative and credible on matters of utmost public importance. The President has, by all of these accounts, placed himself at risk of a conflict between his official responsibilities and his private interests.

21. The authority to appoint a commission of inquiry in the circumstances falls exclusively on the Deputy President by operation of section 90(1)(a) of the Constitution due to the President being unable to act by reason of his conflict.
22. Due to the President being unable to act by reason of his conflict, it falls on the Deputy President to exercise his discretion, rationally, to appoint a commission of inquiry into state capture. The Deputy President has already made it known repeatedly and in public that he favours the appointment of such a commission of inquiry. He has however made no move toward doing so, despite the delivery of a detailed demand on 19 May 2017.

DIRECT ACCESS

23. To the extent that the QPC is not entitled, as of right, to direct access to this Court, I contend that there are grounds supporting this application for direct access.
24. The relief sought in this application, as set out in the Notice of Application and summarized in paragraph 15 above, would not require the hearing of oral evidence and relevant disputes of fact are unlikely to eventuate.
25. Should this application become opposed, any dispute arising is likely to be limited to an interpretation of sections 84(2)(f), 90(1) and 96(2)(b) of the Constitution which is a matter contemplated by section 167(4)(e) of the Constitution in that the President has failed to fulfil his implicit constitutional obligation to recuse himself in favour of the Deputy President due the risk of a conflict of interest, which precludes him from appointing the necessary commission of inquiry.
26. The proper interpretation of sections 90(1) and 96(2)(b) of the Constitution read together is that a President at risk of a conflict of interest is by reason of section 90(1) of the Constitution 'unable to

act' and the duty to appoint a commission of inquiry which arises from section 84(2)(f), accordingly and by operation of the Constitution itself, falls to the Deputy President. As neither the President nor the Deputy President appear to be alert to this, the relief now sought is required.

INTERESTS OF JUSTICE – IN RELATION TO DIRECT ACCESS

27. The issue for decision in this matter is of significance and undoubtedly the very essence of a constitutional matter that can only be finally resolved by this Court and thus there is no need for litigation in this matter to commence in the High Court and then by way of appeal, eventually and after considerable time, be before this Court. Indeed the delays inherent in the appeals processes could prove fatal to the continuation of constitutional democracy in South Africa.
28. Besides the Deputy President, the South African Communist Party and opposition parties represented in Parliament, civil society, trade unions and faith-based organisations, have called for the appointment of a commission of inquiry.
29. Indeed, even the National Executive Committee of the African National Congress (the political party to which the President and

Deputy President belong) decided at its meeting which ended on 28 May 2017 that a judicial commission of inquiry into state capture ought to be appointed urgently and that all review proceedings concerning the State of Capture report of the OPP should be expedited.

30. Unfortunately, the Secretary General of the ANC, is under the false impression that the Constitution specifies that the President alone is empowered to appoint a commission of inquiry. It is also erroneous to assume that the review proceedings in relation to the State of Capture report have anything to do with what is actually urgently required and is sought in this application.
31. State capture has become a matter of significant public interest, stress and concern not least given the negative consequences of the economic rating downgrades already imposed and those that are threatened to be imposed. These developments will have a deleterious effect on the public at large in terms of impaired service delivery and impoverished governance. The general public requires, as it is entitled to, an inquiry into and an explanation for the serious allegations of state capture, whether or not these allegations are true.

32. QPC respectfully contends that there is widespread public alarm that the allegations of state capture have not been sufficiently investigated and addressed as they most certainly ought to be. The President would appear to have no interest in addressing concerns regarding state capture and has not appointed a commission of inquiry. The Deputy President does not appear to accept that the sole constitutional power to do so is his. Both appear to be under the false impression that certain review proceedings, referred to below, concerning the fate of a report of the Office of the Public Protector, need to be finally determined before any commission of inquiry can be appointed.
33. The QPC is respectfully of the view that it is obliged to launch this application in order to ensure that the rule of law is respected, that violations of the Constitution, if any, are identified and dealt with, and that the actions of those allegedly involved under the broad rubric of “state capture” or a “silent coup” are fully investigated in a way that exacts accountability.
34. The values of economy, efficiency and effectiveness enshrined in section 195(1)(b) of the Constitution require that the correct vehicle for the inquiry is a judicial commission. Anything less won't do as

the credibility and independence of the process is fundamental to its success.

35. For the purposes of this application, the risk that the President is conflicted and thus unable to fulfil his duties, arises primarily from:
 - 35.1. the report of the Office of the Public Protector (“OPP”) titled ‘State of Capture’ (Report No 6 of 2016/2017 and published on 14 October 2016) (“the OPP Report”);
 - 35.2. the report by the South African Council of Churches (“SACC”) to the Church Public on the Unburdening Panel process and published on 18 May 2017, (“the SACC Report”) a copy of which is annexed marked “RR 2”;
 - 35.3. the report of the State Capacity Research Project titled ‘Betrayal of the Promise: How South Africa has been Stolen’ convened by renowned Professor Mark Swilling, whose supporting affidavit will be filed with this affidavit, published on 25 May 2017 a copy of which is annexed marked “RR 3”; and
 - 35.4. the publication titled ‘The Republic of Gupta: A Story of State Capture’ authored by Pieter-Louis Myburgh, whose supporting

affidavit will be filed likewise with this affidavit (“the Publication”).

36. The abovementioned reports and publication are in the public domain and suggest, at a minimum, that there are serious allegations of malfeasance and misfeasance which have led to possible state capture or a silent coup which require urgent attention from this Court as guardian of the Constitution.
37. The mere existence of the allegations, whether or not true, negatively impact on the survival of our democratic constitutional project, on economic confidence in the country and the welfare of the people of the country, the inescapable conclusion being that, whether the allegations are true or not, a commission of inquiry ought to be appointed urgently by the Deputy President and it would be unreasonable and irrational for him not to do so.
38. The Deputy President has in fact repeatedly expressed himself in favour of the appointment of such a commission and will surely appoint one if the QPC’s interpretation of the provisions of section 90(1)(a) Constitution is accepted by this Court.

39. The OPP Report runs to some 355 pages and to avoid unnecessarily burdening this application, a copy of the entire OPP Report has not been annexed. A copy of the OPP Report will be made available to the Court at or before the hearing of this application as necessary or if requested. I will however annex relevant extracts from the OPP Report as necessary.
40. I pause to stress that the OPP Report, the SACC Report, the SCRP Report and the Publication are referred to, annexed or to be provided to the Court are not tendered as proof of truth of the contents thereof, but rather are provided as proof that the allegations contained therein are in the public domain.
41. Each of the OPP Report, the SACC Report, the SCRP Report and the Publication identify issues which indicate the real possibility of currently ongoing state capture which implicates the President in a way that the risk of his being conflicted arises.
42. The President appears to be content for the OPP, alone, to investigate state capture at some distant and unspecified date after lengthy review litigation. This approach won't do. The OPP is significantly under-resourced to the extent that the OPP is thus unlikely to be in a position to initiate and complete any meaningful

and conclusive investigation within a reasonable time frame, if at all. Furthermore the OPP is constitutionally mandated to investigate maladministration not the type of malfeasance and misfeasance which accompanies capture of the state.

43. Any delay in the institution of a proper independent investigation into allegations of state capture simply allows the process and conduct involved, to continue.
44. A commission of inquiry is the obvious, appropriate and logical approach for a thorough and comprehensive investigation into the circumstances surrounding allegations of state capture and whether or not State capture has occurred.
45. In the absence of a properly resourced and proactive commission of inquiry being appointed, state capture is likely to continue unabated to the detriment of the economy and society.

GROUNDS FOR URGENCY

46. I am advised in order for this matter to be accorded priority on the roll for hearing, it is necessary for me to advance grounds for urgency.

47. I have further been advised that it is unnecessary to remind the Court of its *dicta* in the Glenister II at [166] and HSF/Glenister III at [1] and [2] as well as [130].
48. I respectfully submit that it is self-evident that it is urgent that a proper inquiry into allegations of state capture be held as soon as possible with a view to restoring South Africa to its rightful place as a sovereign state in the family of nations (as aspired to in the preamble of the Constitution) rather than becoming what has already been described as a 'mafia state'.
49. Even if the allegations of state capture are baseless, it is nevertheless urgent that this be cogently and reliably ascertained in an independent inquiry of probity and integrity so that ratings agencies and investors, who rely on ratings agencies, can be better informed as to the economic prospects in South Africa and can adjust ratings and investment decisions accordingly.
50. It is self-evident that an unavoidable consequence of state capture is that resources are stolen from the poor and inequality is exacerbated. In a state that has foundational values aimed at promoting human dignity, the achievement of equality and advancement of human rights and freedoms, this is intolerable.

51. I accordingly and respectfully request that this matter be accorded top priority on the roll as it is irrational to decline to appoint a commission of inquiry when one is so sorely needed by the entire country.
52. The President and the Deputy President are in default of their constitutional duties as a consequence of their respective irrational failures to have a properly resourced commission of inquiry in place.

BACKGROUND

53. On 19 May 2017, the QPC's attorneys addressed a letter of demand to both the President and the Deputy President. A copy of the letter of demand is annexed marked "RR 4".
54. The articles referred to in the letter of demand by way of hyperlink are annexed marked "RR 5", "RR 6" and "RR 7" in the order in which they are referred to in the letter of demand. The portions of the OPP Report referred to in "RR 6" are relied upon by QPC in motivating this application.
55. The purpose of the letter of demand was to demand that, given the President's risk of conflict of interest in appointing a commission of

inquiry into state capture, for reasons more fully expanded upon in paragraphs 6 and 7 of the letter of demand;

- 55.1. the President acknowledge that he is unable to act in appointing a commission of inquiry to investigate state capture because he is conflicted, or may reasonably be perceived to be conflicted;
- 55.2. the Deputy President acknowledge that he is thus vested with the power to appoint such a commission of inquiry, as provided for in sections 84(2)(f) of the Constitution, in terms of section 90(1)(a) of the Constitution;
- 55.3. the Deputy President forthwith appoint a commission of inquiry into state capture with such terms of reference as he deems meet the exercise of his powers, pursuant to section 90(1)(a) of the Constitution and in terms of section 84(2)(f) of the Constitution;
- 55.4. the commission of inquiry submits its recommendations, following conclusion of the commission of inquiry, to the Deputy President;

55.5. as a matter of priority, the Government provide the commissioner, or the commissioners, all such support (including financial resources) as may be necessary and reasonably required by the chair of the commission to discharge the mandate given it by the Deputy President.

56. The letter of demand afforded the addressees 10 days from the date of demand to appoint the commission of inquiry and publish such appointment in the Government Gazette failing which relief, as set out in paragraph 12 of the letter of demand, would be sought by direct application to this Court. The ten days expired on Monday, 29 May 2017. No response has been received to date.

THE RISK THAT THE PRESIDENT IS CONFLICTED AND THUS UNABLE TO FULFIL HIS DUTIES

57. The letter of demand identifies the conflicts of interest which preclude the President from appointing a commission of inquiry into state capture and which require the Deputy President to do so. These conflicts of interest include:

57.1. the relationship between the President's son (Duduzane Zuma) and the Gupta family and their various business interests;

- 57.2. the President's own admitted relationship with the Gupta family;
 - 57.3. the President's generally compromised status flowing from the many scandals and allegedly corrupt activities in which he has been involved as more fully set out paragraph 6(c) of the letter of demand; and
 - 57.4. the fact that the President would be appointing a commission of inquiry to investigate himself with terms of reference determined by him.
58. Additionally, I contend that a consideration of the contents of each to the OPP Report, the SACC Report, the SARP Report and the Publication, gives a sufficient basis to the allegations of state capture to demonstrate conclusively that there are many risks that the President is conflicted if he is not actually deeply conflicted.
59. Given the broad scope of these allegations, they ought to be investigated by way of a fully resourced commission of inquiry appointed by the Deputy President and resourced by the Government.
60. Prior to addressing the applicable constitutional framework as relates to the appointment of a commission of inquiry, I address

each of the OPP Report, the SACC Report, the SARP Report and the Publication so as to highlight the allegation that state capture has occurred resulting in the President being at risk of being conflicted and thus unable to perform his duties. Section 96(2)(b) of the Constitution obliges the President not to act in any way inconsistent with his office, or expose himself to any situation involving the risk of a conflict between his official responsibilities and private interests. It is only necessary for the QPC to show a risk of conflict in this application, not actual conflict of interests.

STATE OF CAPTURE REPORT

61. In the OPP Report, the erstwhile Public Protector investigated alleged improper and unethical conduct by the President and other functionaries of state concerning alleged improper relationships with and the involvement of the Gupta family in the appointment and removal of members of the Cabinet and directors of state owned enterprises resulting in the improper and potentially corrupt awarding of state and other contracts for the benefit of the Gupta family, their businesses and other persons.

62. Extracting the essence of the OPP Report as it is directly relevant to this application, a critical aspect is that the President's son,

Duduzane Zuma, is a business associate and partner of the Gupta family (page 86 of the Report). An extract from the OPP Report in this regard is annexed marked “RR 8”.

63. The significance of this relationship is addressed in further detail below.
64. The OPP Report additionally makes reference to the President’s pliability in that the Gupta family allegedly influenced the President in his decision to remove Cabinet members and appoint Cabinet members at their behest.
65. The remedial action set out in paragraph 8.4 of the OPP Report, requires that the President “...appoint, within 30 days, a commission of inquiry headed by a judge solely selected by the Chief Justice who shall provide one name to the President.” An extract from the OPP Report in this regard is annexed marked “RR 9”.
66. I am advised that the remedial action as set out in paragraph 8.4 of the OPP Report is impermissible in terms of the Constitution and thus is incapable of being lawfully implemented. Whether or not this is correct is not material to the success of this application.

THE UNBURDENING PANEL REPORT

67. The 'Unburdening Panel' comprised SACC President, Reverend Ziphozihle Siwa, Grace Bible Church Pastor, Mosa Sono, social activist Brigalia Bam and Judge Yvonne Magoro.
68. The Unburdening Report, released on 18 May 2017, identifies, on page 4 thereof, seven ways in which the President's power elite undermines the state and provides seemingly authoritative and credible evidence on how this has been achieved.
69. The SACC has declined to provide a supporting affidavit due to the delicate stage that its own process has reached.
70. Trends were identified of inappropriate control of state systems through a power-elite that is pivoted around the President that is systematically siphoning the assets of the state by securing:
 - 70.1. control over state wealth, through the capture of state-owned companies by chronically weakening their governance and operational structures;
 - 70.2. control over the public service by weeding out skilled professionals;

- 70.3. access to rent-seeking opportunities by shaking down regulations to their advantage, and to the disadvantage of South Africans;
 - 70.4. control over the country's fiscal sovereignty;
 - 70.5. control over strategic procurement opportunities by intentionally weakening key technical institutions and formal executive processes;
 - 70.6. a loyal intelligence and security apparatus; and
 - 70.7. parallel governance and decision-making structures that undermine the executive.
71. On any interpretation, the fact that the President is alleged to be implicated in state capture, identifies a risk that he is or may be conflicted, and thus unable to fulfill his constitutional obligations under section 84(2)(f) of the Constitution.

THE SCRP REPORT

72. The SCRP Report, released on 25 May 2017, is an academic appraisal of the “system” or “virus” that has been employed to extract rents from the state, with the President as the key facilitator.

73. The authors of the report, all leading academics, save for one who is seasoned investigative journalist, argue that a silent coup has taken place in that decisions relating to the functioning and administration of the government are being taken without the consent of the governing party.
74. One of the key thrusts of the SCRP Report is the analysis of how state institutions have been “repurposed” to reward a political elite, referred to as the “power elite”.
75. The authors identify that the President sits at the head of the table, and his role has been to centralise the illegal rent-seeking and undertake a number of activities that strengthen the relationship between the constitutional state and the shadow state where families like the Guptas feature prominently, along with other factions.
76. An affidavit from Professor Mark Swilling, Convenor of the State Capacity Research Project, wherein he confirms that the research for SCRP Report corroborates the work of the Public Protector as set out in the OPP report, [will be filed herewith](#).

THE REPUBLIC OF GUPTA

77. The Publication, “*The Republic of Gupta*”, written by award-winning investigative journalist, Pieter-Louis Myburgh identifies the depth and reach of the Gupta family influence over the President, the connections, relationships and associations with the President and his family, and the involvement and influence of the Gupta family in state activity, including procurement and contracting, and decisions of the President as both Head of State and head of the national executive.
78. Even if only some of the serious allegations made and documented in the Publication are accurate, the urgent need for a commission of inquiry is obvious. Indeed, QPC contends that even if all of the allegations in the said book, many of which mirror the observations contained in the OPP Report, are not true then the need for a commission of inquiry is self-evident in order to establish that no state capture, as alleged, exists. That is, finality on the question of whether state capture has taken place is essential and urgently required in the national interest and to secure the future of constitutionalism in South Africa.

79. An affidavit from Pieter-Louis Myburgh, wherein he confirms that the research for his book is corroborated by all of the observations made in the OPP State of Capture Report, [will be filed herewith](#).

REVIEW PROCEEDINGS

80. The President has launched review proceedings in the High Court Gauteng Division, Pretoria, under case number 91139/16, in which he seeks to have the remedial action contained in paragraph 8.4 of the OPP Report reviewed set aside (“the Review Application”), which remedial action required that *“The President to appoint, within 30 days, a commission of inquiry headed by a judge solely selected by the Chief Justice who shall provide one name to the President”*.
81. The President’s founding affidavit in the Review Application is annexed marked “RR 10”.
82. The President would appear to suggest in his founding application in the Review Application that it falls exclusively on the OPP to deal with the question of and issues surrounding state capture as contained in the OPP Report such that the appointment of a

commission of inquiry, on the instructions of the OPP, is impermissible and in conflict with the Constitution.

83. At paragraph 25 of the President's founding affidavit he states that a commission of inquiry falls to be appointed by him alone to enquire into matters in which he would want an investigation and on which he would want advice, and that it must be a matter of public concern.
84. At paragraph 26 of the President's founding affidavit he states that he [alone] hasn't made a decision in relation to issues which are the subject matter of the complaints referred to the OPP.
85. What the President ultimately seeks to achieve in the Review Application is for the OPP to continue with its investigation into state capture.
86. I add at this juncture that paragraph 8.1 of the OPP Report records that the OPP is under-resourced and completion of the OPP Report required additional funding, was partially acceded to in the amount of R1,5 million, which was wholly insufficient in the circumstances.

87. As recently as March 2017, the OPP requested an increase in its budget allocation to at least R1 billion, noting that due to budget constraints it was only functioning at 50% of capacity.
88. I contend that an under-resourced OPP would not be in a position fully and effectively to investigate state capture as sought by the President in the Review Application.
89. It has been reliably reported in the media that the President has in any event shifted his position on Friday 26 May 2017 to accepting the need for a judicial commission of inquiry, at some unspecified future date after his review of the State of Capture report is finally determined. This concession on his part does not suffice because it does not address the urgency of the situation facing the country.

CONSTITUTIONAL FRAMEWORK

90. The President assumes office by swearing or affirming faithfulness to the Republic and obedience to the Constitution in terms of section 87 read together with paragraph 1 of Schedule 2 of the Constitution.

91. The President alone appoints the Deputy President and Ministers and assigns them powers and functions in terms of section 91(2) of the Constitution and the President alone may dismiss the Deputy President and Ministers.
92. The President has the powers entrusted in him by the Constitution and legislation in terms of section 84(1) of the Constitution.
93. Section 84(2)(f) of the Constitution provides that the President, as Head of State, is responsible for appointing commissions of inquiry.
94. The President's power to appoint a commission of inquiry is a discretionary power conferred on the President alone. The President thus acts without the concurrence of his Cabinet.
95. The President's decision to appoint, or not appoint, a commission of inquiry remains subject to the principle of legality including rationality.
96. In relation to the appointment a commission of inquiry, it is well-established that the functions of a commission of inquiry are to determine facts and to advise the President through the

recommendations emanating from and made by the commission of inquiry. The President is neither bound to accept any factual findings nor any recommendations that may be made.

97. Section 96(2)(b) of the Constitution provides that members of the Cabinet, which in terms of section 91(1) of the Constitution would include the President, may not 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.*” (emphasis added).
98. Section 90(1) of the Constitution provides that the when the President is ‘...*unable to fulfil the duties of President ...*’ then an office-bearer acts as President.
99. While the Constitution contains no definition of the meaning of an ‘office-bearer’, the meaning may be distilled from the remainder of section 90(1) with reference to the sequence of possible appointees as referred to in that section, the first appointee being the Deputy President in terms of section 90(1)(a) of the Constitution.

100. Significantly, as the President will be aware he, and members of his family, not least one of his sons, Duduzane Zuma, may well be implicated in the factual findings and recommendations of any commission of inquiry into state capture.
101. Section 96(2)(b) of the Constitution refers to the risk of a conflict, not the factual and proven existence of any conflict of interest. It is not necessary that the risk materialize. That is, the risk of a conflict is sufficient for the purposes of section 96(2)(b) of the Constitution to establish that the President is unable to fulfil his duties, not least in relation to the appointment of a commission of inquiry in terms of section 84(2)(f) of the Constitution, whether consequent on the remedial action set out in the OPP Report or otherwise.
102. Based on all the available information as referred to herein, I contend that there is a more than reasonable apprehension that there exists a risk that the President is irredeemably conflicted and thus unable to act in appointing a commission of inquiry into state capture and the President is thus unable to act for the purposes of sections 84(2)(f) of the Constitution read with section 96(2)(b) of the Constitution.

103. In the circumstances, given the urgency and importance of the need for a commission of inquiry into state capture, the Deputy President is expressly permitted, in terms of section 90(1)(a) of the Constitution, to act as President and implicitly permitted to appoint a commission of inquiry into state capture in terms of section 84(2)(f) of the Constitution.
104. If the risk of a conflict is ignored, it is inexplicable, based on the findings contained in the various reports and the Publication referred to herein, that the President has not appointed a commission of inquiry into state capture in the circumstances, more so given the obvious public concern and interest in state capture.
105. The President has previously said in relation to the appointment of an inquiry: *"I could not have carried out the evaluation myself lest I be accused of being judge and jury in my own case"*. (OPP Report, paragraph 8.3). Correctly so and supportive of the fact that the President is conflicted.
106. Rather than appoint a commission of inquiry himself in terms of the remedial action set out in the OPP Report, the President seeks only to review and set aside the remedial action contained in paragraph 8.4 of the Report.

107. The President would appear, until his concession on 26 May 2017, referred to above, to be content that any further investigation into state capture ought to be conducted exclusively by the OPP, this despite the fact that the OPP has insufficient budget and resources to do so, as he ought to be aware. Consequently, the prospects of state capture being thoroughly investigated by the OPP are limited.
108. Accepting that the President may be constitutionally correct in adopting the position that he cannot be instructed to appoint a commission of inquiry by the OPP, or otherwise, the President has failed to grasp the essential issue.
109. This issue is that authoritative, mounting and credible allegations of state capture demand an urgent, thorough and comprehensive investigation, by way of a commission of inquiry, fully funded and resourced with credibility and probity far beyond the station of any Chapter Nine institution.
110. The President's failure to appoint a commission of inquiry can reasonably be interpreted as evidencing his reluctance to do so given that he, and certain members of his family, are irredeemably conflicted and thus he seeks to avoid or delay any commission of

inquiry. For the purposes of this application the QPC needs to prove no more than a risk of a conflict of interest.

111. Accordingly, given the President's risks of conflict of interests in the circumstances, he is unable (even unwilling) to appoint a commission of inquiry into state capture and the Deputy President is therefore expressly permitted to do so in terms of section 90(1)(a) of the Constitution and the Government must provide the necessary resources to the commission of inquiry to be appointed by the Deputy President.

112. The Deputy President, very properly so, has expressed himself in favour of a commission of inquiry, but has done nothing, notwithstanding demand, to appoint a commission of inquiry. This is conduct inconsistent with his constitutional duty, given the urgency of the situation in relation to allegations of state capture. It is irrational that he has not acted with extreme urgency in the face of the mounting allegations of state capture which now include the leaking of numerous emails, allegedly hacked from the Gupta's computers, that put flesh on the bones of the allegations of state capture already in the public domain and sufficiently traversed in the affidavit.

113. Lest there be any attempt to starve the commission of resources, the QPC is advised that it is prudent to claim the limited relief sought against the Government, *ex abundante cautela*. This step will help empower the commission and facilitate the expeditious completion of the task given it in the terms of reference set by the Deputy President. The President himself has no role to play in the determining of the terms of reference of the commission of inquiry due to risk of conflict of interests.

CONCLUSION

114. In the premises, the Applicants respectfully request that the relief set out in the Notice of Motion be granted.

ROMMEL ROBERTS

I CERTIFY that the Deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me on this... day of2017 at
..... In administering the oath, the requirements of Regulation R2477 dated 16 November 1984, as amended, have been complied with.

COMMISSIONER OF OATHS