IFAISA
ACCOUNTABILITY NOW

PO Box 33
Noordhoek 7979
Cape Town

www.accountabilitynow.org.za
NPO NO: 070-681

Secretary General of the ANC
Luthuli House
Johannesburg
By email

4th April 2016

Dear Secretary General,

RE: Our response to your press conference 1st April 2016

1. During your press conference on the evening of 1 April, 2016, you appealed to the public to engage with the ANC regarding the implications of the Constitutional Court judgment concerning the non-security enhancements to the President's private home at Nkandla and more generally, as we understood you, regarding the trajectory of our hard-won constitutional democracy under the rule of law in which openness, accountability and responsiveness are all foundational values in the order of the day. We welcome your invitation and have decided to act on it.

2. You may recall that we have engaged with you previously regarding the suitability of the President for the high office he holds. We cautioned you before the last general elections that his candidature would be objected to on the basis that he is too compromised and too conflicted properly to discharge the duties, obligations and functions of the office of Head of State and leader of the national executive. The Democratic Alliance did so object, but it failed to follow through on the overruling of its objection by instituting judicial review proceedings. We suspect that the DA has tactically decided that it is to its advantage to have the President in office because his actions could drive ANC voters to abstain from voting, or, worse still for the ANC, to change their political allegiance in exasperation with the choice of leader of the ANC. The continued presence in office of the President afford the opposition political parties countless opportunities to raise criticisms of his conduct and leadership, to

propose motions of no confidence repeatedly in parliament and now to seek to impeach the President through his removal from office without benefits. While all of these activities can be described as "political noise" because of the ANC majority in the National Assembly, they do place the focus of the voting public on the shortcomings of the leadership of the ANC to the detriment of its popularity according to objective scientific survey work conducted before the Nkandla judgment was handed down last week. The survey is given prominence on the front page of the Sunday Times of 3 April 2016. If it is accurate, it does not auger well for the ANC's showing in the urban areas in the forthcoming local government elections.

3. In June last year we wrote to you again to suggest the recall of the President by the ANC due to his involvement in the corrupt settlement package accepted by Mxolisi Nxasana in exchange for his resignation as National Director of Public Prosecutions and also because the Pesident illegally, and in a manner that amounts to defeating the ends of justice, gave an undertaking to the President of Sudan that he would not be arrested in South Africa. President Robert Mugabe, then head of the AU, made our President's undertaking public before both the Full Bench of the High Court in Pretoria and the Supreme Court of Appeal confirmed the illegality of not arresting Al-Bashir. Should the matter actually reach a hearing in the Constitutional Court it is likely to rule the same way, thereby bringing the fitness for office of the President into question once more. The ethos of the President in our constitutional structure is central to the survival of the rule of law and the supremacy of the Constitution. The conduct of the President is constrained by the principles of the Constitution, he is not entitled to do as he pleases; he is obliged always to conduct himself in a manner that is consistent with the Constitution. A president who repeatedly breaks the law is not fit for office.

4. As regards the Nxasana debacle, and as fore-shadowed in our last letter to you, we have laid criminal charges against the President and the Minister of Justice. The docket opened at the Ocean View police station is under investigation by the Hawks. There are also civil proceedings pending in relation to the matter, which, if successful, will throw further light on the illegality involved in paying out Nxasana the undiscounted balance of his ten year term of office in order to get rid of him, allegedly because of his willingness to prosecute corruption in high places. The outcome of the civil proceedings will inform the further conduct of the criminal case.

5. In your capacity as Secretary General of the ANC you are doubtless aware and advised that:

   - the Al-Bashir case is unlikely to end well for the President;
   - the Commission of Inquiry into the fitness for office of his appointee, Riah Phiyega, our current National Commissioner of Police, is unlikely to give her a clean bill of health;

- the review of the withdrawal of 783 corruption charges against the President himself, whether or not it is won in the courts, reflects poorly on the choice of leader of the ANC especially as his former financial adviser, Shabir Shaik, was sentenced to 15 years imprisonment for corrupting the President;
- the prospects of the applicants' success in the litigation challenging the removal from office of Nxasana are good, which will lead to his reinstatement as NDPP;
- the legal challenge to the cabinet endorsed choice of Berning Ntlemeza as head of the Hawks has merit;
- the underlying reasons for the friction between the Minister of Finance and the Hawks will, if made public in greater detail, plunge the President into yet another crisis involving his integrity, probity and his fitness for office;
- the name of the Zuma family is implicated in the "Panama Papers" corruption data leak from the legal firm Mossack Fonseca in Panama lending credence to the denied claims by Julius Malema that the President recently took a vast amount of cash to Dubai for the Gupta family;
- the on-going harassment of the Public Protector by the Hawks is both counter-productive and ill-considered – matters of legal opinion can never be the subject matter of successful perjury proceedings;
- the decision of the ANC majority in the National Assembly to decline the well-reasoned request of the Public Protector for additional funding is lamentable and ought to be reversed forthwith so as to ensure the dignity and effectiveness of that office, as is constitutionally required;
- none of the afore-going factors does anything positive to grow the national economy and all of them hasten the looming financial downgrades of South Africa to junk status;
- due to the negative implications of junk status for the economy, the ability of the state to respect, protect, promote and fulfil the rights in the Bill of Rights, particularly the expensive pro-poor socio-economic rights, is placed in jeopardy;
- Nene-gate and the irregular nuclear build programme as well as allegations of state capture and the inability of the President to make sound appointments due to his compromised and conflicted status contribute to the negative outlook for the economy;
- The effect on the political popularity of the ANC in a climate in which social security services are cut back, the public administration is shrunk; housing, health care and education are not delivered on the scale to which the public have become accustomed will be negative.

6. We are obviously not privy to the confidential deliberations of the National Executive Committee of the ANC on which you serve. We would hope that the facts and factors listed above are all given due weight in its deliberations and that it has due regard to the confidential market research on voting trends which the ANC conducts.

7. We respectfully submit that there is much to commend the immediate recall of the President and we ask that the views of branches be democratically canvassed so that the NEC, as the highest decision making body of the ANC between conferences, can be put into a position to give well-informed reconsideration to its decision not to recall the President at this delicate time in a dangerous year.

8. In our list of bullet points set out above we have tried to concentrate on the future as much as possible. Like all patriotic South Africans, we are concerned that the international, and indeed local, perception of the sustainability, viability and probity of the country as an investment destination is adversely affected by all of the facts and factors we have listed for you. As the Minister of Finance has pointed out, it is essential to stimulate economic growth of the kind that creates jobs in large numbers for the currently unemployed youth of the country. This will not happen if the country is downgraded to junk status and junk status is more probable under the leadership of the President than if he is replaced as leader. The reverse he has suffered in the trenchantly worded decision on Nkandla by the Constitutional Court has served to strengthen the Rand, as speculators seek to profit from his potential political demise. There is much for the ANC to cogitate upon in this development.

9. You may have noticed that in our list above we have not mentioned Nkandla. The debacle over the non-security enhancements to Nkandla has unfortunately not ended with the judgment of the Constitutional Court. In his apology to the nation on 1 April 2016, the President let it be known that it was always his intention to comply with the remedial action of the Public Protector as set out in her "Secure in Comfort" report. He said: "…It was never my intention not to comply with the remedial action taken against me by the Public Protector …" According to clause 11.1 of that report the President must:

> *"Take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the DPW at his private residence that do not relate to security, and which include Visitors' Centre, the amphitheatre, the cattle kraal and chicken run, the swimming pool … [and] … Pay a reasonable percentage of the cost of the measures as determined with the assistance of National Treasury, also considering the DPW apportionment document*"

10. Even without having regard to the detailed content of the report itself and the items in the DPW apportionment document, it is plain from the words quoted above that it was the intention of the Public Protector that all of the measures that do not relate to security that were implemented and paid for by the DPW are covered. They would have to be, as the public is only legally liable for security enhancements. The five items listed are obviously set out as examples of the kind of measures that do not relate to security and they are not an exhaustive list on any proper interpretation of

the words used by the Public Protector. The explicit reference to the cost of "measures as determined with the assistance of National Treasury" would be entirely superfluous had the five items listed been intended as an exhaustive list.

11. If regard is had to the report itself as an aid to interpretation then it is plain that many more items than the five examples listed in clause 11.1.1 are at play in the investigation, including but not limited to, air-conditioning, the sewerage upgrade, paving and professional fees of various kinds that arose because of what the Public Protector rightly calls "scope creep" in the project of the DPW at Nkandla. Indications are that these additional items and features could have cost in excess of R 40 million.

12. While the Constitutional Court has very properly and correctly described the remedial action quoted above as binding and enforceable, its orders relating to the remedial action required of the President by the Public Protector are in effect a dilution, probably to a value measured in millions of rand, of the Public Protector's requirements. For your ease of reference we quote the provisions of orders 5 and 6:

> *"5. The National Treasury must determine the reasonable costs of those measures implemented by the Department of Public Works at the President's Nkandla homestead that do not relate to security, namely the visitors' centre, the amphitheatre, the cattle kraal, the chicken run and the swimming pool only.*
>
> *"6. The National Treasury must determine a reasonable percentage of the costs of those measures which ought to be paid personally by the President."*

13. The Public Protector's words "*and which include*" have erroneously and illegally been changed to "*namely … only*" Not only does this error infringe upon the binding and enforceable nature of the remedial action, which the President now says he has always wanted to comply with, the omission of the reasonable percentage of the costs of measures that are partly security related and partly not (such as professional fees on the whole project and air-conditioning – where security redoubt or bunker air-conditioning would be security related but the luxury of air-conditioning in housing would not) will cost the hard pressed taxpayers a great deal of money which, on any proper interpretation of the "Secure in Comfort" report, ought to be paid by the President. The word "only" in order 5, which was emphasized during the oral delivery of the judgment, obviously qualifies the phrase "those measures … that do not relate to security" The repetition of the words "those measures" in order 6 render the orders unintelligible and order 6 potentially contradictory of order 5 unless the phrase "those measures" in order 6 is read to mean "those other measures" in which event greater fidelity to the content of the remedial action required by the Public Protector will be achieved.

14. The error in the orders 5 and 6 which gives rise to the ambiguity described above is best cleared up by the President himself announcing publicly that he understands orders 5 and 6 to mean that he must pay the full reasonable costs of the five items listed in order 5 and a reasonable percentage of such other measures as do not relate to security as determined by Treasury in order 6. This step by the President will tend to enhance the sincerity of his apology (which has already been criticised as "hollow") and it will obviate the need for an application to court to rectify the error or ambiguity we have pointed out above. Another way of solving the situation is to regard the words "namely … to … only" in order 5 as pro-non scripto.

15. Orders 5 and 6 are susceptible of an interpretation which is far narrower than the ambit of the "Secure in Comfort" report. There is no basis, in law or in fact, for narrowing down the remedial action required by the Public Protector. None is foreshadowed in the judgment itself. It is possible that the draft orders proposed by the President in the eight days before the hearing of the matter in the Constitutional Court muddied the waters. As the settlement came to nought it does not bind the parties to the two applications, what binds them is the erroneously or ambiguously worded provisions of orders 5 and 6 and what binds the President is the remedial action ordered by the Public Protector.

16. Should the President seek to support the narrower interpretation in order to avoid personal liability for any non-security measures beyond the five mentioned in the report and the orders of court, he will simply add fuel to the fires of criticism against him and he will provoke the launching of applications to the Constitutional Court aimed at the correction of the orders numbered 5 and 6. His statement on 1 April that he always intended to comply with the remedial action of the Public Protector will ring hollow.

17. Given the deadlines specified in the orders of the Constitutional Court there is an element of urgency in clearing up the matter sooner rather than later. We have complained to the Public Protector that her remedial action will have been irregularly diluted if the President does not accept the broader interpretation of the wording of orders 5 and 6 quoted above. We are also furnishing her with a copy of this communication.

18. As regards the impeachment debate in the National Assembly tomorrow, we would urge the ANC to allow its members a free and secret ballot in that debate so as to enable them to exercise unfettered oversight over the head of the executive as is their constitutional obligation and also to facilitate the exacting of accountability on the part of the President. Any failure to do so could lead to further litigation and to a finding that the ANC members of the National Assembly have been required, as a matter of party discipline, to act in a manner that is inconsistent with the Constitution itself. This is because a vote against impeachment of any president who

has acted inconsistently with the Constitution in the manner now in evidence is itself a violation of the oversight and accountability functions of members of the National Assembly.

19. We are willing to engage with you further should you so desire. We respectfully ask that you acknowledge receipt of this letter and let us have your substantive reply both on the possibility of recalling the President and on the enforcement of the Nkandla case order of court as soon as is possible.

Yours sincerely,

Accountability Now