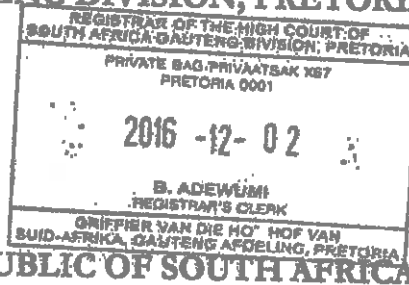


**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**



91139/16

CASE NO:

In the matter between:

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

Applicant

and

**THE OFFICE OF THE PUBLIC PROTECTOR**

First Respondent

**THE PUBLIC PROTECTOR**

Second Respondent

**ECONOMIC FREEDOM FIGHTERS**

Third Respondent

**THE UNITED DEMOCRATIC MOVEMENT**

Fourth Respondent

**THE CONGRESS OF THE PEOPLE**

Fifth Respondent

**THE DEMOCRATIC ALLIANCE**

Sixth Respondent

**MABEL PETRONELLA MENTOR**

Seventh Respondent

**COUNCIL FOR THE ADVANCEMENT  
OF THE SOUTH AFRICAN CONSTITUTION**

Eight Respondent

---

**NOTICE OF MOTION**

---

**BE PLEASED TO TAKE NOTICE THAT** the applicant intends to make application to this Honourable Court on a date to be determined for an order against the first and second respondents in the following terms:

- 1.1 Reviewing and setting aside review and set aside paragraph 8.4 of the remedial action contained in the State of Capture Report: No 6 of 2016/2017 published on 2 November 2016 ("the Report");
- 1.2 Remitting the matter to the second respondent for further investigation;
- 1.3 Costs of suit in the event of opposition;
- 1.4 Further and/or alternative relief

**TAKE NOTICE FURTHER** that the affidavit of **JACOB GEDLEYIHLEKISA ZUMA**, will be used in support of this application.

**TAKE NOTICE FURTHER** that, under Rule 53(1)(a) of the Uniform Rules of Court, the first and second respondents are called upon to show cause why the aforementioned Report should not be reviewed and corrected or set aside.

**TAKE NOTICE FURTHER** that, under Rule 53(1)(b) of the Uniform Rules of Court, the first and second respondents is required within 15 days after receipt hereof to dispatch to the Registrar of this Honourable Court the record of proceedings sought to be reviewed and set aside (including all plans, correspondence, reports, memoranda, documents, evidence and other information which were before the first and second respondents at the time when the Report was compiled), together with such reasons as



the first and second respondents are by law required to give or desire to make, and to notify the applicant that it has done so.

**TAKE NOTICE FURTHER** that, within 10 days of receipt of the record from the Registrar, the applicant may, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of its notice of motion and supplement its founding affidavit in terms of Rule 53(4) of the Uniform Rules of Court.

**TAKE NOTICE FURTHER** that, if the respondents intend to oppose this application, it is required, under Rule 53(5):

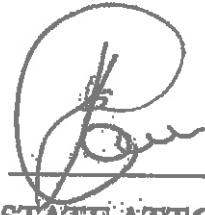
1. Within 15 days after receipt of this notice of motion or any amendment thereof, to deliver notice to the applicant that it intends to oppose and in such notice to appoint an address within fifteen kilometres of the office of the Registrar at which it will accept notice and service of all process in these proceedings; and
2. Within 30 days after the expiry of the time referred to in Rule 53(4), to deliver any affidavit it may desire in answer to the allegations made by the applicant,

**TAKE NOTICE FURTHER THAT** the applicant has appointed the attorneys mentioned hereunder, as the address at which the applicant will accept notice and service of all process in these proceedings.

DATED at Pretoria on this the 02<sup>nd</sup> day of December 2016.



Q.D.



**STATE ATTORNEY**

Applicant's Attorney

Attention: Mr Chowe

316 SALU Building

Francis Baard and Thabo Sehume Street

(Entrance at Thabo Sehume)

Private Bag X91

PRETORIA

Ref:7313/2016/Z75

Email: [ichowe@justice.gov.za](mailto:ichowe@justice.gov.za)

Tel: (012) 309 1562

Fax: 086 507 2194

**TO: THE REGISTRAR  
OF THE ABOVE HONOURABLE COURT**

**AND TO: OFFICE OF THE PUBLIC PROTECTOR**

**AND THE PUBLIC PROTECTOR**

First and Second Respondents

175 Lunnon Street,

Hillcrest Office Park,

PRETORIA, 0083

**AND TO: ECONOMIC FREEDOM FIGHTERS**

Third Respondent

3<sup>rd</sup> Floor, Mineralis Building

Corner De Korte and De Beer Street

Braamfontein

JOHANNESBURG



W.D.

**AND TO: UNITED DEMOCRATIC MOVEMENT**  
Fourth Respondent  
1<sup>st</sup> Floor CPA House  
101 Du Toit Street  
PRETORIA

**AND TO: CONGRESS OF THE PEOPLE**  
4<sup>TH</sup> Floor Marks Building  
90 Plein Street  
CAPE TOWN

**AND TO: DEMOCRATIC ALLIANCE**  
Sixth Respondent  
2<sup>nd</sup> Floor, Theba Hosken House  
Corner of Breda and Mill Streets  
Gardens  
CAPE TOWN

**AND TO: MABEL PETRONELLA MENTOR**  
Seventh Respondent

**AND TO: COUNCIL FOR THE ADVANCEMENT OF THE SOUTH  
AFRICAN CONSTITUTION**  
Eighth Respondent  
7 Olympia Court  
85 Durban Road  
Mowbray  
CAPE TOWN



Handwritten signature, possibly initials, located at the bottom right of the page.

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

CASE NO:

In the matter between:

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** Applicant

and

**THE OFFICE OF THE PUBLIC PROTECTOR** First Respondent

**THE PUBLIC PROTECTOR** Second Respondent

**ECONOMIC FREEDOM FIGHTERS** Third Respondent

**THE UNITED DEMOCRATIC MOVEMENT** Fourth Respondent

**THE CONGRESS OF THE PEOPLE** Fifth Respondent

**THE DEMOCRATIC ALLIANCE** Sixth Respondent

**MABEL PETRONELLA MENTOR** Seventh Respondent

**COUNCIL FOR THE ADVANCEMENT  
OF THE SOUTH AFRICAN CONSTITUTION** Eight Respondent

**APPLICANT'S FOUNDING AFFIDAVIT**

I, the undersigned,

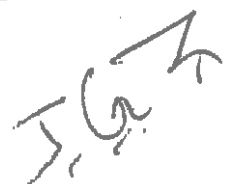
**JACOB GEDLEYIHLEKISA ZUMA**

Q.D

do hereby make oath and state that:



M.R.C



1. I am the President of the Republic of South Africa, duly appointed in terms of section 87 of the Constitution of the Republic of South Africa, 108 of 1999 ("the Constitution"). I am the applicant in the matter.
2. The facts contained herein fall within my personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, both true and correct.
3. Any legal submissions that are made by me are made on the advice of my legal representatives.

#### NATURE OF THE APPLICATION

4. This application seeks to:
  - 4.1 review and set aside paragraph 8.4 of the remedial action contained in the State of Capture Report No 6 of 2016/2017 published on 2 November 2016 ("the Report");
  - 4.2 the remedial action reads "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"; and

M.R.C

Q.D  
I. Co. Lr

4.3 remit the matter to the first, alternatively, the second respondent for further investigation and report in terms of the Public Protector Act 23 of 1994 and the Executive Members' Ethics Act, 82 of 1998 ("Ethics Act").

### THE PARTIES

5. The first respondent is the Office of the Public Protector a juristic person as established in terms of section 5(1) of the Public Protector Act, situated at 175 Lunnon Street, Hillcrest Office Park, 0083. No cost order is sought against the first respondent unless it opposes the relief I seek in this matter.
6. The second respondent is the Public Protector ("the Public Protector") cited herein in her official capacity and appointed in terms of section 183 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") read with sections 1A and 2 of the Act, situated at 175 Lunnon Street, Hillcrest Office Park, 0083. No cost order is sought against the second respondent unless it opposes the relief I seek in this matter.
7. The third respondent is the Economic Freedom Fighters ("the EFF") a registered political party with its main offices at 3<sup>rd</sup> Floor, Mineralis Building Corner De Kaste and De Beer Street Braamfontein Johannesburg cited herein insofar as it has shown interest in the subject matter of the Report. No cost order is sought against the third respondent unless it opposes the relief I seek in this matter.



8. The fourth respondent is the United Democratic Movement ("the UDM") a registered political party with its main offices at 1<sup>st</sup> Floor CPA House 101 Du Toit Street, Pretoria cited herein insofar as it has shown interest in the subject matter of the Report. No cost order is sought against the fourth respondent unless it opposes the relief I seek in this matter.
9. The fifth respondent is the Congress of the People ("COPE") a registered political party with its main offices at 4<sup>th</sup> Floor Marks Building, 90 Plein Street, Cape Town cited herein insofar as it has shown interest in the subject matter of the Report. No cost order is sought against the fifth respondent unless it opposes the relief I seek in this matter.
10. The sixth respondent is the Democratic Alliance ("the DA") a registered political party with its main offices at 2<sup>nd</sup> Floor, Theba. Hosken House, corner of Breda and Mill Streets, Gardens Cape Town cited herein insofar as it has shown interest in the subject matter of the Report. No cost order is sought against the sixth respondent unless it opposes the relief I seek in this matter.
11. The seventh respondent is Mabel Petronella ("Vytjie") Mentor an adult female residing in Cape Town and whose further particulars are unknown and cited herein insofar as it has shown interest in the subject matter of the Report. No cost order is sought against the seventh respondent unless it opposes the relief I seek in this matter.

12. The eighth respondent is the Council for the advancement of the South Africa Constitution ("CASAC") is a non-governmental organisation with its main offices at 7 Olympia Court 85 Durban Road, Mowbray Cape Town cited herein insofar as it has shown interest in the subject matter of the Report. No cost order is sought against the eighth respondent unless it opposes the relief I seek in this matter.

**FACTUAL BACKGROUND**

13. The remedial action is reviewable on one or more or all of the grounds stated hereunder and arising out of the following facts:

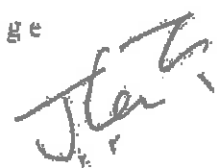
The complaints

13.1 The complaints (which related to the alleged influence the Gupta family has over the day-to-day running of government business (Eskom/Tegeta/OCH/OCM) and, in particular, against my alleged role in the offering of ministerial positions to various individuals at the behest of members of the Gupta Family, which complaint was laid by DA in terms of the Ethics Act). The complaints were lodged on 18 March 2016;



5 | Page

M.R.C



The processes

13.2 The following process set out hereunder, was adopted by the Public Protector, in relation to the complaint of *“whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to engage or be involved in the process of removal and appointing of various members of Cabinet”*, inter alia that

13.2.1 13 interviews of whistle-blowers and persons were conducted during the period 22 July 2016 to 12 October 2016; and

13.2.2 12 subpoenas were issued to persons and various government departments from 15 July to 5 October 2016.

13.3 In relation to Eskom/Tegeta/OCM/OCH the process set out hereunder, was adopted by the Public Protector, inter alia that:

13.3.1 5 interviews were conducted with various persons during the period 9 September 2016 to 16 September 2016; and

- 13.3.2 13 Subpoenas were issued to various government businesses from 5 September to 22 September 2016.
- 13.4 In order to assist the Public Protector, additional funding was received by the office of the Public Protector, in early September 2016, to facilitate the investigation;
- 13.5 Section 7(9) notices (which the Public Protector is enjoined to give to any implicated person in the matter being investigated and which implication may be to the detriment of that person or that an adverse finding pertaining to that implicated person may be made to enable such a person to respond in connection therewith in any manner that may be expedient under the circumstances) were issued to 8 different implicated persons during the period 5 October to 10 October 2016;
- 13.6 On 3 October I received a section 7(9) notice requiring of me to provide comprehensive answers to a range of questions on whether various persons visited a specific residence; when they visited that residence; the reason for their visit; whether I was there during the time of the visit and such like questions. [I am advised that I am not entitled to disclose the list of questions without the

permission of the Public Protector, which permission I do not presently have.]

13.7 On 11 October 2016 the Public Protector, in a press statement and a letter to me, stated that she had not concluded her investigations into this matter and that she awaited my list of questions that I wanted to pose to various persons who gave information to her office;

13.8 On 14 October 2016, the Public Protector stated that she has finalised the Report in which the remedial action is made.

#### Interactions with the Public Protector

14. The interactions, regarding procedural requirements, between myself and the Public Protector in relation to this Report are as follows:

14.1 A complaint by the Democratic Alliance leader Honourable M Maimane on 18 March 2016 was received by the Public Protector.

14.2 To this letter the Public Protector responded on 22 March 2016 that the Office of the Public Protector is not in a position to conduct the requested investigation expeditiously as human

resources are currently stretched beyond the limit with more than 200 investigations currently older than a year.

14.3 On 22 March 2016, the Public Protector wrote to inform me that she received a request from the DA to conduct an investigation into the alleged breach of the Executive Members' Code by myself and my alleged role in the offering of ministerial positions by members of the Gupta Family. In this letter the Public Protector records that she was still assessing the complaints and invited me to make any comment or provide any information that can assist her office. [This letter did not reach me as the incorrect email address was used]

14.4 On the 22 April 2016, the Public Protector wrote me a further letter in which she stated that the letter of the 22 March 2016, did not reach my Office. Attached to that letter of the 22 April was the letter of 22 March. The Public Protector then stated in the April letter that *"Your Excellency, the purpose of this letter is to alert you that, we will not be able to meet the deadline due to inadequate resources."* This is with reference to her obligations to submit a report to me regarding any breach of the Ethics Code, if she is unable to

Q.D.  
M.R.C. Jh

conclude the investigation within the 30 day time period of the lodgement of the complaint as provided for in the Ethics Act.

14.5 A few months later being 13 September 2016, The Presidency received a third letter from the Public Protector asking for a meeting in order to brief me on the investigation about the complaint of state capture and also to afford me an opportunity to answer on the allegations pertaining to my son Mr Duduzane Zuma.

14.6 In response and on 21 September 2016, The Presidency advised, that the earliest available date for the meeting was 6 October 2016 given my other official commitments during this time period.

14.7 In addition and on 27 September 2016, the Presidency sent a further letter to the Public Protector, requesting that they please provide more details on the investigations and the allegations levelled against me in order for me to adequately prepare for the meeting.

14.8 In response to the letter dated 27 September 2016, and on 1 October 2016, the Director General in The Presidency received

from the Public Protector the requested documents (the three complaints and newspaper articles).

14.9 On 2 October 2016, I received a letter from the Public protector which purported to be a notice in terms of section 7(9) of the Act. The effect of this notice was to inform me that I have been implicated in the investigation and was therefore being afforded an opportunity to respond to the allegations. In essence, I was afforded three days before the meeting to prepare and to give evidence on a whole range of matters which exceeded the ambit of the stated request for the meeting.

14.10 It should be noted at this stage, that the questions that require an answer from me were varied and required extensive information from me. Also some of the information required from me, dates back to 2009 and would require me to first establish what transpired before I am able to meaningfully answer the questions.

14.11 Instead of the meeting of 6 October 2016 being a briefing session regarding the investigations of the Public Protector the meeting changed to probe different issues. The meeting was now to ascertain answers from me in terms of the section 7(9) notice. As a result when I met with the Public Protector on that day, I asked



that the meeting be postponed so that I can be provided with the relevant documents and records and where necessary be allowed to question the persons who had already provided information to the office of the Public Protector.

14.12 The Public Protector disagreed with my request and instead offered to provide me with written questions to which I would be required to respond to under oath. A further set of questions were provided from the Public Protector to me. [Again I am unable to attach this list of questions to the papers unless the written permission of the Public Protector is obtained. I presently do not have such permission.]

14.13 I also informed the Public Protector that I was due to attend a state visit to Kenya and that I would not be in a position to attend to this and would require additional time as I would only arrive back from Kenya late on 12 October 2016.

14.14 My verbal request to the Public Protector was formally communicated on 10 October 2016, where The Presidency wrote to the Public Protector requesting that I be provided with additional time in order to provide a comprehensive answer to those questions.

14.15 The Presidency also requested that I be provided with the list of persons who appeared before the Public Protector, their statements and/or affidavits as well as transcripts of any interviews conducted which implicated me in this investigation. Furthermore, I wanted to exercise my right, in terms of section 7(9)(b)(ii) of the Public Protector Act[which affords an affected person, through the Public Protector, to question witnesses who had appeared before the Public Protector. Such persons are to be determined by the Public Protector], to question some of the persons before responding to the written questions and adducing evidence.

14.16 This letter also requested the Public Protector to provide an undertaking on or before close of business on 11 October 2016 that she will not conclude the investigation and issue any interim report until I have been properly heard on this matter.

14.17 The Public Protector issued a media statement on 10 October 2016 noting the Presidency statement. In this statement, the Public Protector mentioned, amongst others, that a letter has been prepared to advise the President to submit questions that will be put to witnesses on his behalf.

M.R.C. I.G.

14.18 I was also given an extension from 10 October to 13 October 2016 (mere three days) to provide the necessary answers to the section 7(9) notice and the memorandum of questions. I could clearly not provide answers to such wide ranging issues within such a short period especially since I was on international duties until the evening of 12 October 2016.

14.19 On 14 October 2016, the Public Protector finalised the Report without any input from me in which the remedial action, the subject matter of this review, is stated.

### The Report

15. The Public Protector in the Report made various observations on which the remedial action is based and further provided that the record of this investigation and the Report should form the basis of the investigation to be undertaken by a judicial commission of inquiry in accordance with the remedial action.

## LEGAL FRAMEWORK

### The Constitution



16. Section 1 of the Constitution provides that the "Republic of South Africa is one, sovereign, democratic state founded on the following values ... (c) Supremacy of the constitution and the rule of law". This constitutional provision has profound implications in these proceedings. One of the tenets of the rule of law is the separation of powers between the executive, the legislature and the judiciary. No arm of government can constitutionally intrude into the sphere of the other unless authorised by the Constitution.

17. Section 2 of the Constitution provides that any law or conduct inconsistent with the Constitution is invalid. To the extent that the remedial action is inconsistent with the Constitution, such remedial action would be invalid. As I demonstrate later and am so advised, the remedial action is inconsistent with the Constitution and therefore invalid.

18. The Constitutional Court has on occasions dealt with the supremacy of the Constitution and stated that under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on a constitutional institution such as the Public Protector. When I and the Public Protector exercise our constitutional authority, we must act in accordance with, and within the limits of, the Constitution.

19. The supremacy of the Constitution requires that the obligations imposed by it must be fulfilled. Courts are required by the Constitution to ensure that I

Q.D

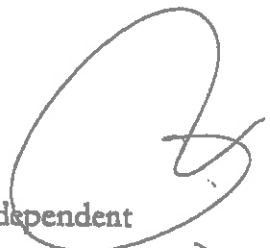

M.R.C. J. G. C.

and the Public Protector must act within the law and fulfil our constitutional obligations. The court has been given the responsibility of being the ultimate guardian of the Constitution and its values. Section 167(4)(e), in particular, entrusts the court with the power to ensure that the I and Public Protector fulfil our constitutional obligations. This section gives meaning to the supremacy clause, which requires that the obligations imposed by the Constitution must be fulfilled.

20. Remedial action insofar as it does not adhere to the Constitution and the rule of law is invalid. Conduct by either myself or the Public Protector which does not accord with our constitutional obligations and is not within the confines of the constitution is impermissible as it violates the Constitution.
21. The President is both the head of State and head of the national Executive. Section 84(2)(f) of the Constitution provides that the President is responsible for:

"84(2)...

(f) *appointing commissions of inquiry."*

22. Section 84(2)(f) does not derive its authority from, and is not dependent upon, legislative enactment. The powers of the President under section 84(2)  

are expressed in wide and unqualified terms. These powers must be exercised without the concurrence of the Cabinet.

23. Where the Public Protector instructs that a president must exercise an executive power in a particular manner and time frame, I am advised, would be unconstitutional for reasons fully set out in this affidavit.

### The Commissions Act

24. The Commissions Act 8 of 1947 ("the Commissions Act") provides for the conferring of certain powers on commissions appointed by the Governor-General [the President] for the purpose of investigating matters of public concern. Section 1 of the Commissions Act deals with the application of this act to commissions of inquiry appointed by a president. In this regard it states:

*"(1) Whenever the Governor-General has, before or after the commencement of this Act, appointed a commission (hereinafter referred to as a 'commission') for the purpose of investigating a matter of public concern, he may by proclamation in the Gazette-*

*(a) declare the provisions of this Act or any other law to be applicable with reference to such commission, subject to such modifications and exceptions as he may specify in such proclamation; and*

*(b) make regulations with reference to such commission-*

- (i) *conferring additional powers on the commission;*
  - (ii) *providing for the manner of holding or the procedure to be followed at the investigation or for the preservation of secrecy;*
  - (iii) *which he may deem necessary or expedient to prevent the commission or a member of the commission from being insulted, disparaged or belittled or to prevent the proceedings or findings of the commission from being prejudiced, influenced or anticipated;*
  - (iv) *providing generally for all matters which he considers it necessary or expedient to prescribe for the purposes of the investigation.*
- (2) *Any regulation made under paragraph (b) of subsection (1) may provide for penalties for any contravention thereof or failure to comply therewith, by way of-*
- (a) *in the case of a regulation referred to in subparagraph (i), (ii) or (iv) of the said paragraph, a fine not exceeding two hundred rand or imprisonment for a period not exceeding six months;*
  - (b) *in the case of a regulation referred to in subparagraph (iii) of the said paragraph, a fine not exceeding one thousand rand or imprisonment for a period not exceeding one year.*
- (3) *Notwithstanding anything to the contrary in any other law contained, a magistrate's court shall have jurisdiction to impose any penalty prescribed by any such regulation." (own emphasis)*

25. The reading of the provisions makes it plain that the commission of inquiry is at the instance of the President to enquire into matters which he or she as president would want an investigation into and advice on. It must be a matter of public concern. The Commission Act does not conceive of a commission of inquiry into matters which other people or entities deem to be matters of public concern and therefore requiring a commission of inquiry to be instituted.
26. If it were possible and legally competent for any person or entity who deem any particular of public interest to require any probing and would by law be entitled to demand that such a commission of inquiry be appointed by the President, then there possibly would be no end to such commissions. It would also mean that the power is ceremonially that of the executive. This interpretation, I am advised, is improper. It is the President who must consider a matter of public concern to require a commission of inquiry to probe and to report on. I haven't made this decision in respect of the issues which are the subject matter of the complaints referred to the Public Protector. To be told to do so would undermine the executive powers I hold under the Constitution.

**The Public Protector Act**



27. It is appropriate at this stage to deal with the statutory framework governing the powers and functions of the Public Protector under the Constitution, the Ethics Act and the Public Protector Act.
28. Section 182 of the Constitution empowers the Public Protector 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; to report on that conduct and to take appropriate remedial action. I might add as well that it is only the Public Protector has these powers under the Constitution and the law. Were any member of the Cabinet to instruct the Public Protector to do or not do a particular investigation, such instruction would be in breach of the Constitution and the law. No less where the Public Protector instructs a member of the Executive to exercise his or her executive powers.
29. Of relevance is section 7 of the Public Protector Act which provides for an investigation by the Public Protector. Subsection (3)(b) of this section addresses the circumstances under which the Public Protector can delegate an investigation to any person. In its language it reads:

*"(3)(b)(i) The Public Protector may designate any person to conduct an investigation or any part thereof on his or her behalf and to report to him or her and for*

*that purpose such a person shall have such powers as the Public Protector may delegate to him or her."*

30. A remedial action which has as its effect that the investigation of a complaint laid with the Public Protector must instead be investigated by a judicial commission of inquiry would clearly constitute an improper delegation contemplated in section 7(3)(b)(i) of the Public Protector Act. To the extent that the first and second respondent may contend that the remedial action was not a delegation, it would be argued at the hearing that the remedial action has that effect and for that reason unlawful.

### The Ethics Act

31. The Ethics Act provides for the code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of provincial Executive Councils. The Public Protector has stated in the Report that the report was premised on a complaint in terms of the Ethics Act<sup>1</sup>. Section 3 of the Ethics Act provides that the Public Protector is to investigate breaches of the code of ethics. This section provides that

*"(1) The Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint contemplated in section 4.*

<sup>1</sup> The Report page 7 paragraph (xiv) in the Executive Summary and page 33 paragraph 2.14 in the Complaint

- (2) The Public Protector must submit a report on the alleged breach of the code of ethics within 30 days of receipt of the complaint —
- (a) to the President, if the complaint is against a Cabinet member, Premier or Deputy Minister; and
- (b) to the Premier of the province concerned, if the complaint is against an MEC.
- (3) If the Public Protector reports at the end of the period referred to in subsection (2) that the investigation has not yet been completed, the Public Protector must submit another report when the investigation has been completed.
- (4) When conducting an investigation in terms of this section, the Public Protector has all the powers vested in the Public Protector in terms of the Public Protector Act, 1994 (Act 23 of 1994).
- (5)(a) The President must within a reasonable time, but not later than 14 days after receiving a report on a Cabinet member or Deputy Minister referred to in subsection 2(a), submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the National Assembly.
- (b) The President must within a reasonable time, but not later than 14 days after receiving a report on a Premier referred to in subsection (2)(a), submit a copy of the report and any comments thereon to the National Council of Provinces.
- (6) The Premier must within a reasonable time, but not later than 14 days after receiving a report referred to in subsection (2)(b), submit a copy of the report and

*any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the provincial legislature." (own emphasis)*

32. Section 3 of the Ethics Act is in peremptory language and instructs the Public Protector as the institution which will investigate and report on conduct of the members of Cabinet, Deputy Ministers and members of provincial Executive Councils.
33. The remedial action of the Public Protector violates section 3 of the Ethics Act by clothing a judicial commission of inquiry with the necessary jurisdiction to investigate and report on the conduct of members of Cabinet. The remedial action under review by a judicial commission of inquiry will not have the powers that a Public Protector has under the Public Protector Act. A commission of inquiry submits its report to the President for his consideration and possible action. This alone shows the remedial action to be irregular and unlawful.
34. A judicial commission of inquiry into the complaints of such a complex issue may go well beyond the 30 days within which these matters are to be reported upon. This too would fall foul of the provisions of the Ethics Act. The remedial action is also for this reason irregular and unlawful.

35. The Ethics Act contemplates that at the conclusion of the investigation, the Public Protector's report must be submitted to the National Assembly by the President, for the National Assembly to decide upon. To do what the remedial action instructs would not meet and fulfil the provisions of the Ethics Act. For this reason the remedial action is irregular and unlawful.

36. From the excerpts of the legislative prescripts governing the powers and functions of the Public Protector, it is clear that it is only the Public Protector (or one delegated by him or her) who is empowered in terms of the Constitution, the Ethics Act and the Public Protector Act to:

36.1 Investigate a complaint in terms of section 4 of the Ethics Act;

36.2 Investigate a complaint in terms of the Public Protector Act;

36.3 Conduct an investigation of that complaint in terms of section 7 of the Act; and

36.4 Designate any person to conduct an investigation or any part thereof on her behalf and to report to the Public Protector. That 'designated person' shall have such powers as the Public Protector may delegate to him or her and the provisions of the Treasury

M.R.C.

Regulations in relation to commissions of inquiry shall relate to that 'designated person'.

37. The Public Protector is therefore the only institution that has wide powers to ensure that complaints are investigated in terms of the Constitution and the Public Protector Act. A remedial action which instructs that a complaint laid with the Public Protector's office should instead be investigated by a judicial commission of inquiry improperly does violence to the provisions of the Public Protector Act.

#### THE REVIEW APPLICATION

38. This is an application in which I am reviewing the remedial action provided for in the Report under paragraph 8.4.

*"8.4 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."*

39. The remedial action falls to be reviewed and set aside on the ground that it is inconsistent with the constitution and is unlawful.

  
P.D.

## GROUNDS OF REVIEW

40. The nature of the remedial action straddles the separation of powers doctrine — which is the rule of law. The Public Protector is directing remedial action in areas which the Constitution has left to the Executive.

41. As I have pointed out earlier, the remedial action stands to be set aside for one or more of the grounds set out hereunder.

41.1 The Constitution has decidedly given the power to appoint a commission on a president. This is a power that the president must exercise where the president holds a view that a matter of public concern requires such a process. The remedial action directs me to hold commission of inquiry because she and her office are of the opinion that such a commission must be established.

41.2 Whereas section 84(2)(f) of the Constitution would leave it open for a president to choose what type of commission of inquiry should be established whether a judicial commission of inquiry or any other. The remedial action has made that choice for me as head of State. This is impermissible.

41.3 Whereas the provisions of section 84(2)(f) of the Constitution would leave it to the president to determine what particular matter of public concern should trigger the exercise of that power to institute a commission of inquiry, the remedial action has decided that issue for me. This too renders the remedial action unconstitutional and invalid.

41.4 It is now commonly accepted that commissions of inquiry are executive action and that having them presided by a member of the judiciary should be discouraged for they cross the line for what is an executive function and that which is a judicial function. The remedial action offends this line of sound legal reasoning.

41.5 The remedial action also directs that the institution of a judicial commission of inquiry in terms of section 84(2)(f) of the Constitution must be presided over by a judge solely selected by the Chief Justice nowhere does the Constitution or the Public Protector Act give such a power on a Public Protector. The remedial action in its content has no lawful basis.

41.6 The remedial action also confers a power on the Chief Justice to select which judge should preside over the inquiry, a power which



the Chief Justice does not have under the Constitution. For this reason the remedial action is unconstitutional and invalid.

- 41.7 Whereas a president has in terms of section 84(2)(f) of the Constitution the power to determine the timelines of the establishment of the commission and its terms of reference, the remedial action impermissibly dictates when such a commission should be established and its terms of reference.
- 41.8 The remedial action improperly outsources an investigation instituted in terms of the Public Protector Act to be done through a judicial commission of inquiry. This is irregular and invalid for that reason.
- 41.9 The decision to make the remedial action, that is to outsource it, was irrational since the only conceivable deduction to be made was that the then Public Protector's term of office was coming to an end and she was unwilling for the office to continue with the investigation outside her control.
- 41.10 A complaint laid in terms of the Ethics Act has its own processes that are prescribed in terms of the Ethics Act. The remedial action is invalid on grounds set out hereunder:

41.10.1 The remedial action instructs that the investigations be done by a commission of inquiry. This offends against the provisions of section 3 of the Ethics Act which says that a complaint of the nature filed by the DA must be investigated by the Public Protector, not a commission of inquiry.

41.10.2 A commission of inquiry does not have the powers which a Public Protector has and to investigate breaches of ethics through a commission would run counter to the powers and purpose of the Public Protector under the Ethics Act.

41.10.3 The Public Protector is enjoined by the Ethics Act to report within 30 days of receipt of the complaint, if not, it must inform the President. The Commissions Act does not have such controls.

41.10.4 Once an investigation is concluded in terms of the Ethics Act, the Public Protector must file a report with the President for him to table at the National Assembly. A commission of inquiry does not have these processes.

41.11 Any commission instituted at the dictate of another is unlawful. A commission of inquiry in terms of the remedial action would be through dictation.

41.12 Remedial action has binding legal consequences whereas a commission of inquiry does not. The latter is merely for the advice of the President who may or may not act in terms of its recommendations.

Nature of a commission of inquiry

42. A commission of inquiry is an adjunct to the policy formation responsibility of a president. It is a mechanism whereby a president can obtain information and advice. A president may appoint a commission of inquiry to investigate specific events; circumstances of a matter of public interest.

43. I as the head of State, have not independently made a decision to hold a commission of inquiry, to do so would be at the dictate of another functionary. Further to be told that the Chief Justice is the suitable person to appoint the presiding judge is to repose powers on the head of the Judiciary which the Chief Justice does not have under the Constitution. Therefore, in this instance:

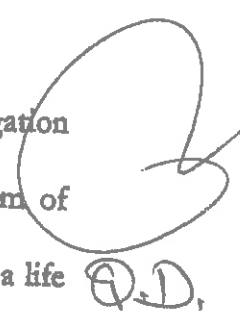
43.1 There are no policy issues that I would require advice upon by a commission of inquiry. I will just be rubber stamping the desires of the Public Protector by appointing a commission of inquiry and that conduct would not be consistent with my duties under the Constitution;

43.2 There are no specific events that I would require advice upon through the appointment of a commission of inquiry. I will just be rubber stamping the desires of the Public Protector by appointing a commission of inquiry and that conduct would not be consistent with my duties under the Constitution;

43.3 There are no circumstances that I would require advice upon by the appointment of a commission of inquiry. I will just be rubber stamping the desires of the Public Protector by appointing a commission of inquiry and that conduct would not be consistent with my duties under the Constitution; and

43.4 There is no matter of public interest that I would require advice on by the appointment of a commission of inquiry. I will just be rubber stamping the desires of the Public Protector by appointing a commission of inquiry and that conduct would not be consistent with my duties under the Constitution.

48. If I were to appoint a judicial inquiry in terms of section 84(2)(f) of the Constitution as per the dictates of the Public Protector then my conduct would be inconsistent with the Constitution and invalid.
49. The Public Protector does not have the power to direct the Chief Justice to select a Judge to head the judicial inquiry. Again, this power can only be exercised by a President.
50. The Chief Justice does not have the power to select a judge to preside over a section 84(2)(f) inquiry in circumstances where the Constitution has given those powers to the Executive. This amounts to a breach of the doctrine of separation of powers.
51. ~~The Public Protector has abdicated or misconstrued the law in relation to her responsibilities, powers and functions by requesting me to appoint a judicial inquiry and to have issues properly falling within the ambit of the Public Protector Act to be done by a commission of inquiry.~~
52. The Public Protector's recommendations are of a binding nature. To remove the complaint from her jurisdiction would be to essentially dilute the binding nature of the findings of the Public Protector and reduce them to mere recommendations which are not binding on a president.

53. The Public Protector investigates a complaint in terms of section 6 and 7 of the Public Protector Act. To remove the complaint to a judicial inquiry would be to remove the procedure that the Public Protector needs to follow to a different instrument which follows a different investigative procedure.
54. The Ethics Act provides that the Public Protector must investigate a complaint laid in terms of that act and must submit a report on the alleged breach of the code of ethics when the investigation has been completed. The Public Protector does not have the power to remove the jurisdiction given to her in terms of the Ethics Act from her office to a judicial inquiry. A judicial inquiry does not have the jurisdiction to investigate a complaint under the Ethics Act.
55. The Public Protector can only provide a designated person in terms of section 7(3) of the Public Protector Act the power to investigate a complaint if that designated person reports to the Public Protector only and the Public Protector then reports on the findings and makes the necessary recommendations.
56. The Public Protector offers no cogent reasons as to why the investigation must be outsourced. On the present facts, it is only because her term of office was coming to an end, yet the office of the Public Protector has a life 

beyond any incumbent. This is irrational and stands to be set aside for that reason.

57. I therefore call upon the Public Protector to furnish reasons as to why the investigation could not be completed by the office of the Public Protector beyond the date of 14 October 2016.
58. If I did not independently apply my mind to this decision, I would be challenged by others on the principle of legality, that my decision is not rational having been a consequence of the remedial action as opposed to an independent exercise of an executive power.
59. Therefore, the Public Protector seeks to frustrate the grounds of review of affected persons, by becoming the decision - maker and not allowing me to be the decision - maker so that I may be able to resist such a challenge. It also raises complicated questions on whether those affected by such an investigation would have a right to review my decision which they would otherwise have. In this instance the decision would not have been mine but that of the Public Protector.
60. The purpose of the remedial action was to ensure that I am not the judge and jury in my own case, as determined by the Public Protector and provided in paragraph 8.3 of the remedial action. Following the remedial action, I

would indeed be acting as judge and jury in my own course since the commission of inquiry would be reporting to me for my action or inaction on its recommendations.

**CONCLUSION**

- 61. Therefore the remedial action of the Public Protector in paragraph 8.4 is unconstitutional and unlawful. Any attempt by to implement paragraph 8.4 would be an abdication of my constitutional responsibility and would render the judicial inquiry unlawful and a nullity.
- 62. The remedial action contained in paragraph 8.4 of the Report violates the rule of law in that it is inconsistent with the Constitution and breaches the separation of powers principle.
- 63. The remedial action in paragraph 8.4 of the Report of the Public Protector stands to be reviewed and set aside.

**WHEREFORE** I pray for the relief as provided for in the Notice of Motion.




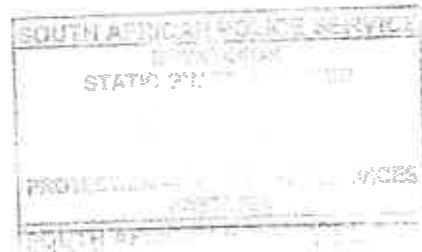
**JACOB GEDLEYIHLEKISA ZUMA**





I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit; which was signed and sworn to before me at PRETORIA (BRYANTERION) on this the 02<sup>nd</sup> day of DECEMBER 2016, the regulations contained in Government Notice No 3619 of 21 July 1972 and No 1648 of 19 August 1977 having been complied with.

 7052762-3  
SGT  
M.R. CHEPAPE  
COMMISSIONER OF OATHS



  
Q.D.

---

**SUPPORTING AFFIDAVIT**

---

I, the undersigned,

**MARK SWILLING**

do hereby make oath and say that:

1. I am a professor at the Centre for Complex Systems in Transition at the Stellenbosch University.

2. The facts herein deposed to are within my own knowledge.

3. Under the <sup>four South African Universities</sup> ~~auspices of the Public Affairs Research Institute~~ ~~("PARI")~~, a report entitled "BETRAYAL OF THE PROMISE – HOW SOUTH AFRICA IS BEING STOLEN" was published on 25 May 2017. The said report is, so am advised, attached to the founding affidavit in this application to compel the appointment of a commission of inquiry into state capture or what the authors of the report have called "a silent coup" in South Africa. I am one of the authors and the others are identified on the first page of the report.

*MS*

---

**SUPPORTING AFFIDAVIT**


---

I, the undersigned,

**PIETER-LOUIS MYBURGH**

do hereby make oath and say that:

1. I am an investigative journalist, employed by **News24**, part of the **Media24 Group**, having its Johannesburg Offices where I work, at Mediapark, 69 Kingsway Avenue, Aucklandpark, Johannesburg, GAUTENG.
2. I have written a series of stories concerning the procurement of new locomotives by PRASA for which I won the prestigious Taco Kuiper Award for investigative journalism.

P-L M  


3. After completing my BPhil(honours) in journalism at Stellenbosch University I was employed as a general reporter by Die Beeld newspaper.
4. Thereafter I found my feet as an investigative journalist at the Afrikaans weekly newspaper Rapport, before moving on to News24 where I am at present employed.
5. I am the author of a work of non-fiction called "The Republic of Gupta" which is about state capture in South Africa by the Gupta and Zuma families and those associated with them. The book was published in 2017.
6. The book is carefully researched and confidential sources have been corroborated wherever possible. I have applied the highest standards of ethical journalism to the research I have conducted during the preparation of the book.
7. As I mentioned on page x of the preface of the book:  
*"... the use of unnamed sources raises concerns over the credibility of the information they provide. For this reason, it is of the utmost importance to determine the veracity of such*

*P-C M*

*information before it is stated as fact. Where it is not possible to do so, the journalist needs to consider carefully whether such unverified information should be made public at all. At the very least unproved claims should be labelled as just that. This is a good ethos to be guided by while writing about a topic as controversial as the one tackled in 'The Republic of Gupta'."*

8. I have read and studied the "State of Capture" Report of the Office of the Public Protector dated 14 October 2017.
9. From my perusal and consideration of the State of Capture report I can confirm that my work on the aspects of state capture that I deal with in my book is corroborated by the content of the said report.



---

**PIETER-LOUIS MYBURGH**

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 ~~6<sup>th</sup>~~ day of ..... June ..... 2017  
at ..... Cape Town ..... In administering the oath,  
the requirements of Regulation R2477 dated 16 November 1984,  
as amended, have been complied with.



---

**COMMISSIONER OF OATHS**

**EBEN STEPHANUS GROBBELAAR**  
Commissioner of Oaths  
Practising Advocate  
Republic of South Africa  
Member of the Cape Bar  
42 Keerom Street, 4th Floor, Cape Town

P-LM

---

**SUPPORTING AFFIDAVIT FOR THE SECOND APPLICANT**

---

I, the undersigned ,

**DAVID WHITEFOORD STEWARD**

make oath and say that:

1. I am the Chairman of the Second Applicant, the FW de Klerk Foundation, which has been properly identified by Rommel Roberts in the founding affidavit filed of record in this matter.
2. I am duly authorised to depose to this affidavit on behalf of the FWF by reason of my position as its Chairman.
3. The FWF supports and promotes the Constitution, the Bill of Rights and the rule of law through the activities of the Centre for Constitutional Rights and promotes unity in diversity by working for cordial inter-community relations and national unity through the activities of the Centre for Unity in Diversity.
4. The FWF accordingly has the necessary locus standi in judicio to join as Second Applicant in this application.
5. I have read the notice of motion and founding affidavit in this matter and confirm that the FWF supports the relief claimed



and I confirm the content of the founding affidavit insofar as it relates to the FWF.

  
D W Steward

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 2 day of June 2017 at Cape Town. In administering the oath, the requirements of Regulation R2477 dated 16 November 1984, as amended, have been complied with.



**COMMISSIONER OF OATHS**

**Johannes Petrus Marais**

Kommissaris van Ede / Commissioner of Oaths

Prokureur / Attorney

Technostell 8  
Quantumstraat 9  
Stellenbosch



**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

10  


---

**SUPPORTING AFFIDAVIT FOR THE THIRD APPLICANT**

---

I, the undersigned,

**MONIQUE TAUTE**

make oath and say that:

1. I am the Head of AfriForum's Anti-Corruption Unit, and as such I confirm that AfriForum NPC has been properly identified by Rommel Roberts in the founding affidavit filed of record in this matter.
2. I am duly authorised to depose to this affidavit on behalf of the AfriForum as is evident from the Resolution I annex hereto marked as Annexure "MT 1".

**LOCUS STANDI**

3. As is mentioned in the Founding Affidavit AfriForum NPC is incorporated as a non-profit company. I annex hereto only a relevant extract of AfriForum's memorandum of articles, as was certified by the CIPC, marked as Annexure "MT 2". I confirm that the remaining MOA is available on request should it be desired.

10  


4. AfriForum NPC has approximately 190 000 members, most of whom are law abiding citizens of the Republic whom work and live throughout the country. It also has organized structures throughout the country. Their members have an interest in subject matter of this application in that they want to know whether the democratic constitutional state they call home has been captured, with the concomitant effects thereof felt throughout the country, as is enunciated in the Founding Affidavit of Rommel Roberts.
5. AfriForum NPC therefore acts herein:
- a. in its own interest by virtue of the annexed extract of the memorandum of articles;
  - b. on behalf of its members who would be desirous to act herein but who cannot act in their own name, for whatever reason, and whom are the rights bearers of Constitutional rights, which is likely to be infringed;
  - c. As such AfriForum also act in the interest of their members as envisaged by s 38(1)(c) of the Constitution, and the public at large as the public interest in this matter cries out for a commission of inquiry.

Handwritten signature and initials in the bottom right corner of the page.

**RESOLUTION PASSED BY THE BOARD OF AFRIFORUM (A NON – PROFIT COMPANY) ON 31 MAY 2017**

**It is resolved that –**

- a) **Monique Taute** in her capacity as the Head of AfriForum's Anti-Corruption Unit is hereby authorised to act on behalf of AfriForum NPC in the Application in the Constitutional Court against the President, the Deputy President, and the Government of South Africa, along with QPC and the FWF.
- b) **Monique Taute** is hereby authorised to depose to any affidavits and to sign any documents that may be necessary to give effect to the resolution passed herewith.

**Certified a true extract from the minutes of the meeting.**



---

Deputy Chief Executive Officer

AfriForum



"MT 2"

214

- 3.2.4.2 die bepalings soos vervat in Bylae 1 van die Wet en wat spesifiek op nie-winsmaatskappye van toepassing is en soos weergegee in Skedule 1 van hierdie Akte;
- 3.2.4.3 alle verdere bepalings van die Wet met of sonder enige beperking, uitbreiding, verandering of substitusie soos in hierdie Akte vervat en in soverre mate as wat sodanige beperking, uitbreiding, verandering of substitusie deur die Wet toelaatbaar is; en
- 3.2.4.4 deur die bepalings van hierdie Akte.
- 3.2.5 Ondanks die weglating van 'n bepaling te dien effekte uit hierdie Akte, kan die Maatskappy enigiets doen wat die Wet hom sou gemagtig het om te doen indien die Maatskappy dit wel in sy Akte so opgeneem gehad het.
- 3.2.6 Die Maatskappy beskik oor alle regsbevoegdheede en status soos wat 'n regspersoon en/of 'n Individu toekom en beperk hierdie Akte geensins daardie bevoegdheede nie en gevolglik is Artikel 19(1)(b)(ii) van die Wet, nie op die Maatskappy van toepassing nie.
- 3.2.7 Die Maatskappy notuleer dat, slegs tot die mate wat in hierdie Akte aangedui word of tot die mate wat dit, as synde 'n nie-winsmaatskappy daartoe verplig word om anders te reël, verkies die Maatskappy om nie vrywillig te voldoen aan die uitgebreide rekeningkundige vereistes van Hoofstuk 3 van die Wet nie.

3.3-

**Doelstellings en bevoegdheede van die Maatskappy**

- 3.3.1 Die hoofdoelstelling en hoofbesigheid van die Maatskappy is die bevordering van of voorspraak vir demokrasie deur die aktivering van die burgerlike samelewing tot deelname aan die openbare lewe; gelykheid; burger-, mense-, minderheids- en grondwetlike regte in Suid-Afrika. Die enigste oogmerk van die Maatskappy is om een of meer openbare weldaadaktiwiteite op 'n nie-winsgewende grondslag en met altruïstiese of filantropiese bedoeling te onderneem, soos omskryf in Artikel 30(1) van die Inkomstebelastingwet 58 van 1962 (soos gewysig). Geen aktiwiteit sal regstreeks of onregstreeks die ekonomiese eiebelang van enige fidusiarus of werknemer van die Maatskappy bevorder, anders as by wyse van redelike besoldiging nie. Minstens 85% van sodanige weldaadaktiwiteite, gemeet aan of die koste of die tyd daaraan bestee, sal tot die voordeel van persone in die Republiek van Suid-Afrika beoefen word.
- 3.3.2 Die Maatskappy het verder die volgende aanvullende doelstellings wat in ooreenstemming met die hoofdoelstelling uitgevoer word:
  - 3.3.2.1 Om in uitvoering van sy aktiwiteite sy Christelike grondslag te erken;
  - 3.3.2.2 Om die inhoud van AfriForum se Burgerregtemanifes (hierby aangeheg as "A") te bevorder en uit te bou en waar nodig volhoubare burgerlike instellings op 'n wye reeks van terreine tot

3.3.2

I certify that this document is a true reproduction/copy of the original document which was examined by me and that from my observations, the original has not been altered in any manner

Rank: Registrar

Sign: [Signature]

(Ex Officio) Commissioner of Oaths

Date: 27/05/16 Place: PTA

Companies and Intellectual Property Commission (CIPC)