



PO Box 33
Noordhoek 7979
Cape Town

The State Attorney

18 September 2018

Dear State Attorney

RE: Non-compliance with the findings of the Constitutional Court in respect of the requirements for anti-corruption machinery of state.

1. We write on behalf of the Cape Town Peace Centre an NGO in Cape Town. The CTPC wishes to follow through on the endeavours of Hugh “Bob” Glenister, a Gauteng businessman who has litigated in the Constitutional Court on three occasions with a view to securing effective and adequately independent anti-corruption machinery of state. The CTPC does so with his blessing. In the view of the CTPC the current structure and operations of state machinery in this sphere do not comply with the criteria laid down by the Constitutional Court in the Glenister cases decided in March 2011 (“G II” in this letter) and November 2014 (“G III”) The first Glenister case, an unsuccessful attempt to prevent the dissolution of the Scorpions, is called “G I” in this letter.
2. We have been instructed to address you as legal representative of the respondents in that litigation and in particular the president, as head of the national executive, the minister of police, as responsible minister as well as the speaker of the national

Patron: Archbishop Emeritus Desmond Tutu

Trustees: G Galant; D Scott; W Thring

Directors: P Hoffman, SC.; Adv G Lloyd-Roberts; Adv C Shone, B Malherbe

PBO: 930037416

www.accountabilitynow.org.za

assembly and the chair of the national council of provinces on behalf of the legislature.

3. This letter is also being copied to IPID, the Inspecting Judge of the DPCI and to three of the Chapter Nine Institutions which have an interest in the subject matter under consideration, namely: The Auditor General, who has through his auditing caused over 3000 dockets to be referred to the NPA concerning corruption in the national supply chain, the SA Human Rights Commission, because failure to address corruption effectively and efficiently has been a human rights issue since G II in March 2011, and the Public Protector, whose mandate on mal-administration is often stretched to cover corruption in the absence of any effective anti-corruption entity. We are also copying the SIU which has recently complained that 686 matters it wishes to have prosecuted have not received the necessary attention.
4. The factual matrix upon which our client relies is set out in:
 - The State of Capture Report of the Public Protector of 14 October 2016;
 - The Unburdening Report of the SACC in May 2017;
 - The Betrayal of the Promise report of leading academics in SA published by PARI and the follow up book “Shadow State” by Ivor Chipkin and Mark Swilling;
 - The 400 page dossier on presidential corruption prepared by OUTA;
 - The book “The Republic of Gupta” by Pieter Louis Myburgh;
 - The book “The President’s Keepers” by Jacques Pauw;
 - The ongoing publication by Scorpio, Amabhungane and News24 of the #Guptaleaks in the press;
 - The book “Enemy of the People” by Adriaan Basson and Pieter du Toit;
 - The book “How to Steal a City” by Crispian Olver;
 - The book “How to Steal a Country” by Robin Renwick;
 - Un-investigated corruption is also a matter of record in the three previous cases Glenister has taken to the Constitutional Court;
 - You will be aware from reported case law and other media reports (e.g. <https://www.biznews.com/global-citizen/2017/11/10/sa-gupta-saga-atul-zuma-bloomberg-businessweek>; <https://www.dailymaverick.co.za/article/2017-11-30-analysis-sitasaps-capture-scopa-hearing-marks-a-turning->

[point-as-massive-fraud-uncovered/#.WjotuVWWbIU](#)) that the corruption situation in SA has gone from bad to worse since November 2014, when last the Court considered the constitutionality of the machinery of state to prevent, combat, investigate and prosecute corrupt activities and organised crime.

- It is fair to say that no one who is politically well connected has faced trial as a consequence of the efforts of DPCI or any other institution of state active in the sphere since 2014. Indeed, the prediction of the Chief Justice in the opening paragraph of G III regarding the “malady” of corruption “graduating into something terminal” appears to be coming to pass.
 - The judgment of the Constitutional Court in the civil litigation flowing from the invalid and illegal dis-appointment of Mxolisi Nxasana as NDPP.
 - The evidence currently being presented to the Zondo Commission of Inquiry into State Capture.
5. We are instructed to place on record that the CTPC supports the efforts of Accountability Now to secure the establishment of a new Chapter Nine institution to prevent, combat, investigate and prosecute serious corruption. The CTPC acknowledges that the political will to do so is not in place at present and that litigating to create an Integrity Commission is not legally feasible.
 6. The Constitutional Review Committee of the National Assembly gave Accountability Now a good hearing on 15 April 2016 and is considering its submissions with regard to the creation of an Integrity Commission. These submissions include a draft constitutional amendment and draft enabling legislation. Both of these drafts are available on the website of Accountability Now on the Glenister case page. Our client considers that in the current political situation of SA, the prospects of developing the political will to create an Integrity Commission are slim but it is in all fairness willing to give the state the opportunity of doing what is accountable and responsive in the circumstances set out in the material upon which it relies as listed above and as revealed daily in the hearings of the Zondo Commission of Inquiry into State Capture.
 7. Our instructions are accordingly to explore with you the possibility of avoiding having to litigate over the manifest failure of the state to

implement the decisions of the Constitutional Court in the G II and G III cases.

8. We are instructed to stress that the breakdown in public trust in the proper administration of criminal justice needs to be addressed urgently in the interests of the survival of constitutional democracy under the rule of law in the country. In this regard our client draws attention to paragraph [166] of G II.
9. You will recall that the court has laid down in binding fashion the five criteria for the proper functioning of the anti-corruption entity as: specialisation, training, independence, resources and security of tenure of office. We will call these the “STIRS criteria” in this letter for ease of reference.
10. The first point we are instructed to make in relation to the STIRS criteria is that the court envisages a single entity for the anti-corruption entity’s structure and operations. This is apparent from G III paras [1 & 2]. Instead, the executive has elected to create an “Anti-Corruption Task Team” drawn from a multitude of agencies of the state. The ACTT is dysfunctional. Its work rate is abysmal, its success rate appallingly poor. When asked to make a presentation to parliament ACTT sent two disgraced individuals, General Ntlemenza and Adv Jiba, to make the presentation in a manner that was far from satisfactory. Quite apart from these facts, the legal position is that the court requires a single specialised entity, not a task team. The conduct of the executive in assembling the ACTT is accordingly inconsistent with the Constitution and invalid.
11. The first STIRS criterion for the anti-corruption entity is that it be specialised. The Hawks (or DPCI) is not a specialised anti-corruption entity; it is a unit expressly created for “priority” crime investigation as its name reveals. This, as far as corruption is concerned, it does badly. The mere fact that it is structured to investigate “priority crimes” instead of as a specialist anti-corruption entity renders it non-compliant with the binding interpretation of the Constitution that the laying down of the STIRS criteria by the courts in the antecedent Glenister cases constitutes. As an anti-corruption entity, the DPCI is not a valid response to the judgments in G II and G III as its work ranges from human trafficking to rhino poaching.
12. The training of Hawks in anti-corruption work seems to be lacking. The work rate and success rate of the DPCI over the

years has dwindled alarmingly. This is, at least in part, attributable to the lack of appropriate training, in breach of the findings of the court in this part of the STIRS criteria. Recruits to the DSO or Scorpions were sent to the FBI and Scotland Yard to be imbued with the qualities of an effective and efficient anti-corruption entity as envisaged in section 195(1) of the Constitution. They succeeded so well that they were disbanded by a feral cabal within the leadership of the ANC and the government of the country. The urgent resolution taken at Polokwane to disband the DSO was done to prevent the investigation of high ranking members of the ANC and their friends in business. This was admitted by Gwede Mantashe, then the Secretary General of the ANC, now its Chairman, when he met with Helen Zille and others at Luthuli House in April 2008 to explain the rationale behind the decision to disband what was an effective and efficient anti-corruption entity. The affidavit of Zille in G I explains the meeting in detail. The meeting is also summarized accurately in "Confronting the Corrupt" (page 142) a book written to record the anti-corruption work of Accountability Now.

13. The independence of the Hawks is lacking to such an extent that it is fair to suggest that it is completely absent when it is most needed. This has manifested itself in the referral of corruption matters to the OPP or detective services in SAPS instead of the Hawks. The Hawks are so much in the thrall of the executive that it has been known to happen that two cabinet ministers are asked to address a media conference called by the Hawks. No "big fish" have been prosecuted by the Hawks. Their investigation of charges of corruption relating to the termination of the services of Mxolisi Nxasana as NDPP has dragged on since July 2015 despite the simplicity of the factual matrix involved in the investigation. Whether the charges of fraud, theft and corruption laid in respect of the goings on at the Nkandla homestead of the president ever even reached the Hawks is open to doubt. When General Dramat called for the dockets he was immediately illegally suspended on trumped up charges of kidnapping, charges that could not conceivably succeed given the unsuccessful fate of related charges against Robert McBride of IPID. Indeed, the said charges have now been belatedly withdrawn by the NPA. Process has been abused in order to protect the capturers of the state.

14. A tour of the offices of the Hawks around the country reveals a lack of resources to enable them to acquit themselves of the tasks of an effective anti-corruption entity. Lifts do not work, filing systems are inadequate, staff members are dispirited, vacancies are not filled and a general air of dilapidation hangs over the DPCI offices and officials. The resources made available to the Hawks are inadequate for the proper discharge of the functions of an anti-corruption entity that is operating in accordance with the STIRS criteria. This is a clear breach of the requirements of the court in G II, as confirmed in G III. It is arguable that the Hawks are at least partially captured by those bent on State Capture, as revealed in evidence before the Zondo Commission. Treating criminal complaints as “DA matters” which must be derailed is subversive of the proper administration of criminal justice. The belated suspension of Zinhle Mnonopi, for doing just that, suggests that the Hawks know, after being reminded, that it is wrong for senior personnel to attempt to defeat the ends of justice by suborning witnesses.
15. The presentation made by General Lebeya, new Hawks Head, to the police portfolio committee of the National Assembly on 15 August 2018 confirms that the capacity, resources and skills of the Hawks are either lacking or in short supply.
16. As for security of tenure of office of Hawks personnel: the hounding out of office of Generals Dramat and Booysen speaks volumes. The dismissal of Shadrack Sibiyi on trumped up charges and the side-lining of anyone willing to do his or her job properly shows that the Hawks do not enjoy security of tenure of office in the current set up. The fate of General Ntlemeza, indeed, even the thought that he might be an adequate leader of the Hawks, shows that the executive has completely lost its way by seeking to maintain control over the Hawks and their activities. This is in breach of the requirements of the court in G II and G III. Executive control, although desired by the current executive, is not the route selected, in a binding way, by the Constitutional Court for the proper functioning of the anti-corruption entity.
17. In G II the court drew attention to the need for any decision on the creation of an anti-corruption entity to be reasonable “in the circumstances”. The CTPC regards the circumstances that prevail today to be such that it is currently unconstitutional to house the anti-corruption entity within the SAPS. The SAPS is dysfunctional,

led by crooked personnel like Major General Mnonopi, currently suspended and number three in seniority in the Hawks, and constitutionally under the control of the executive. The court requires that there be no executive influence or interference with the anti-corruption entity. The Hawks are constantly interfered with by the executive, to the detriment of their efficient and effective functioning. They should report to parliament, not to the executive. They don't do so; they have in effect become the "dirty tricks department" of a certain faction in the ANC as can be gleaned from their aborted prosecution of the former minister of finance, Pravin Gordhan. The new Ramaphosa chosen Minister of Police, Bheki Cele, dismissed as National Commissioner of Police for his incompetence and dishonesty is a grossly inappropriate choice.

18. If the process of the creating of an Integrity Commission is going to be stillborn, the only way in which to address the current shortcomings in the anti-corruption entity of SA is via negotiation with your clients, and failing success in the negotiations, litigation aimed at rendering the Hawks constitutionally compliant. It is up to your clients to decide whether to create an Integrity Commission or to discharge their current obligation to render the Hawks constitutionally compliant. If the political will to do so remains absent, the notion having been first suggested to parliament in 2012, the CTPC is left with no alternative but to approach the Constitutional Court for relief that will be able to address the failure of the state to deal with corruption in the manner required of it by the Constitution as interpreted by the Court in G II and G III in a manner which is binding on the state.
19. We are writing to you in an effort to avoid the resort to litigation on the topics we have raised in this letter. We are instructed that in the absence of any positive response to the matters we have raised within one month of date hereof, we will institute proceedings on behalf of the CTPC, and such other parties as may elect to join it, in which the relief set out in the draft founding affidavit supporting the notice of motion attached, sans its attachments, so that your clients can be fully apprised of the seriousness of the case. The CTPC reserves the right to amend, amplify and update the draft. The draft affidavit is furnished to enable you to obtain full instructions and to give properly informed advice to your clients too. It contains a summary of the relief to be

claimed if resort to litigation is unavoidable and the attachments to it can be electronically accessed by you and your clients.

20. Kindly acknowledge safe receipt of this letter and let us know whether you are able to obtain useful instructions within the period of one month we have specified. In order to facilitate your obtaining instructions we are copying this communication to the respondents in G III.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Paul Hoffman", is centered below the closing. The signature is written in a cursive style with a large initial "P".

Paul Hoffman SC