Statement by Public Protector Adv. Busisiwe Mkhwebane during a meeting of the Portfolio Committee on Justice and Correctional Services on Tuesday, March 06, 2018 in Parliament, Cape Town.

Honourable Chairperson, Dr. Mathole Motshekga;
Honourable Members of the Committee;
Ladies and gentlemen;

Good morning!

I appreciate the opportunity to appear before the Committee to offer the much needed clarity on matters that appear to have given rise to a sense of disquiet among Honourable Members and the public at large.

In the same breath, I am grateful that this opportunity provides a platform for me to bring to the attention of the Committee a worrying state of affairs in my office that is threatening to hamper the delivery of services to the people of South Africa.

The latter statement refers to conditions that have a potential to pose a serious threat to the realization of the vision that underpins all of my office's operations. That is Vision 2023, an elaborate eight-pillared blueprint whose main thrust is to see to it that the services of this institution make a greater impact at the grassroots than ever before. I will come back to this point shortly.

Honourable Chairperson and Members, my constitutional mandate aside, one of the things I undertook to put high-up on my priority list right at the beginning of my term of office was forging and nurturing mutually beneficial relations between my office and stakeholders.

This was informed by the understanding that, although it is independent, my office is not an island. Its successes and failures depend on how strong the links are

between us and those that have a keen interest in the ever so important task entrusted to us.

Honourable Chairperson, your correspondence to me on behalf of the Committee and at least two media statements issued by the Committee over the last couple of weeks refer to three issues on which clarity is sought.

These are the “public utterances” I made in respect of the Terms of Reference of the Judicial Commission of Inquiry into the phenomenon of state capture and the serious allegations of “suppression of evidence” by my office on some investigations, an accusation that I view in a very serious light.

Lastly, you have asked that I bring the Committee up to speed regarding the dire financial quagmire that we, as an institution, find ourselves in. I will deal with these issues in that order.

1. Public utterances on the Judicial Commission of Inquiry into State Capture

On Tuesday, January 09, 2018, former President Jacob Zuma announced the appointment of a Commission of Inquiry into State Capture to be led by Deputy Chief Justice Raymond Zondo in line with a court order that was reiterating the remedial action of the Public Protector as outlined in an October 2016 report titled *State of Capture*.

The announcement by the former President was a welcome move given how, up to that point, the issue of state capture had had the public in every nook and cranny of this country on tenterhooks.

The announcement marked a step in the right direction in that now we are getting closer to a process that will get to the bottom of state capture, with a view to testing the veracity of the allegations levelled against a number of people while holding those implicated accountable. Similarly, the process presents those that are implicated with a fair chance to clear their names.

However, the announcement by the former President did not come with the Terms of Reference. The understanding was that those were going to be made known at

a later state. Naturally, the people of South Africa took to different platforms to welcome the development and to have their say on what, in their view, ought to form part of the Terms of Reference.

As I have an obligation to monitor the implementation of the remedial actions (this is contained in paragraph 9.1 of the State of Capture Report), I saw in this an opportunity to air my office's take on the matter, bringing to the discourse what I truly believed would enrich the Commission's work. Accordingly, I called for the Terms of Reference of the Commission to be broadened.

Unfortunately this was seen in some quarters as an attempt on my part to subvert the work of the Commission. On the contrary, I made the proposal not to undermine the Court order or the remedial action contained in the State of Capture report but rather because there were issues that were identified in the State of Capture Report, but could not be investigated due to financial constraints and those issues were reserved for phase two of the investigation.

In addition, there were other issues that were not covered in the report but closely linked to the phenomenon of state capture, which I thought could also be included in the Commission's scope of work.

These were specific issues that had been reported to my office post the release of the State of Capture Report, for investigation. They include but are not limited to the following:

a) Allegations that the Guptas received high-level confidential information from the then Minister of communications, Faith Muthambi;
b) Allegations that at least two immigration officials (Mr. Gideon Christians and Ms Munyadziwa) were specially positioned in India by then Minister of Home affairs, to assist the Gupta associate Mr Ashu Chawla to the benefit of Gupta-owned businesses, liaising through Mr Major Kobese (a music producer and director in the foreign office of the Department of Home Affairs;
c) The re-appointment of Mr Brian Molefe as Eskom CEO;
d) Allegations that Mr Matshela Koko channelled contracts to a company partly owned by his step daughter;
e) Allegations that Matshela Koko leaked a legal opinion to the Guptas;
f) The role of Minister Lynne Brown in the re-appointment of Mr Brian Molefe;

g) Allegations of Minister Lynne Brown's failure to exercise the required executive oversight over Eskom, its board and management; and
h) Allegations by former Minister of Mineral Resources, Ngoako Ramatlhodi, that former Eskom CEO, Mr Brian Molefe and former Eskom Board chairperson, Ben Ngubane pressurised him to help the Guptas take over Glencore's coal mine in 2016.

In suggesting that these form part of the Commission's scope of work, not only did I take into account the fact that these matters were closely tied to the phenomenon of state capture as articulated in the State of Capture report, I also considered the reality that my office did not have the resources and the capacity required to carry out such a huge investigation.

Honourable Members will recall that one of the reasons my predecessor, Adv. Thuli Madonsela resolved to refer the investigation of state capture to a Commission of Inquiry was precisely because of the Public Protector's inherent under-resourcing.

In fact, for her to launch an investigation into the matter, she had to request additional funding from the Ministers of Justice and Correctional Services and the Minister of Finance. In the end, she received a paltry R1.5million. Needless to say, the funds proved to be merely a drop in the ocean.

Commissions of Inquiry in this country tend to be well funded and resourced. The Arms Deal Commission, for instance, was funded to the tune of approximately R140million while the Marikana Commission cost the state about R150million. Both these figures are just around half my office's annual budget.

It is my humble view then that it was sensible to suggest that the Commission's Terms of Reference be broadened so as to include all state-capture related matters that are linked to issues investigated by the former Public Protector.

Unfortunately, my innocent suggestion was mischievously twisted. At the time, there were calls from some quarters in society that the Commission should look into alleged state capture from as far back as 1994 and other times.

Nowhere in any of my public statements did I say something similar to these calls or at least imply it. How my critics arrived at the conclusion that I shared these views remains a mystery to me.

I issued a follow-up statement that sought to clarify this point, all in vain. Even when evidence in the form of on-the-record statements by my office showed that I never called for an investigation that goes back 24 years, critics have not relented. They have continuously insisted that I called for the investigation to go back into time.

Incidentally, the Democratic Alliance too, in its statement dated 9 January 2018, called for the broadening of the Commission's Terms of Reference. The following is what the DA said in the statement concerned:

"So as to not inhibit the ability of the Commission to uncover the full extent of State Capture in South Africa, its Terms of Reference must be framed as broadly as possible to include the following:

a) *The activities of the Gupta family and their relationship with President Zuma and his family;*
b) *All dealings by Gupta-linked companies with the State, including all SOEs;*
c) *The capture of state institutions, including SARS, the NPA and the Hawks; and*
d) *Every other allegation outlined in the Public Protector's State of Capture."*

2. Alleged suppression of evidence

I now move to allegations that my office suppresses evidence in some investigations. I must indicate that when the letter of the Committee reached my office and when I came across the Committee's media statement concerning this matter, it was not clear to me which investigation was being referenced as both correspondences did not offer any specifics.

In the absence of details, I was left with no option but to assume that the Committee was referring to an article in the Sunday Times newspaper of February 11, 2018.

In the article concerned, reporter, Ms. Qaanitah Hunter, seemingly relying solely on information from faceless and nameless sources that she claimed had enjoyed close proximity to my investigation on the Vrede Integrated Dairy Project, wrote that investigators had been instructed to look the other way where evidence implicating politicians was concerned.

The alleged politicians in question were the Premier of the Free State, now ANC Secretary-General, Mr. Ace Magashule and his former MEC for Agriculture and Rural Development, the erstwhile Minister of Mineral Resources, Mr. Mosebenzi Zwane.

I would like to encourage people to go and study that report. From where I sit, it is clear that people went on a spirited offensive to criticize what they have not bothered to read.

On perusing the report, people will learn that the complaints on which the investigation was based, which complaints were lodged by a Member of the Free State Provincial Legislature in 2013, 2014 and 2016, contained no direct or indirect allegations against the Premier or the then MEC of Agriculture and Rural Development.

In a nutshell, the matter centered on the decision the Provincial Executive Committee took in relation to the Vrede Integrated Dairy Project. In terms of that decision, the Head of the Department of Agriculture and Rural Development, as the Accounting Officer, was required to implement the project within the parameters of the Public Finance Management Act and Treasury Regulations and he failed at that.

The evidence before me showed that the deviation documents or procurement documents were processed, prepared and signed off by the Accounting Officer. I could not find any documentary evidence which linked the Premier and the former MEC to the procurement process and the payments to Estina.

Therefore, the claims that investigators were instructed to turn a blind eye on evidence implicating the Premier and the former MEC could not be further from the truth. It is anyone’s guess what the intentions of these fabrications are. But I am not shaken, for my conscience is clear.

Honourable Members may be aware that two court applications have been instituted to have the report reviewed and set aside. Since this matter is now *sub judice*, I will not comment further on the Vrede Report, lest I come across as undermining the proper administration of justice and interfering with the functioning of the courts, in violation of section 165(3) of the Constitution. However, and in order to allow the court to adjudicate the matter properly, I have instructed my office to ensure that all evidence collected by my office during the investigation is filed in court in terms of rule 53.

It is common cause that any aggrieved party is at liberty to take any of my reports on judicial review. That is democracy is action. However, what worries me about these particular court bids is that the applicants want me as the respondent to bear the costs of the litigation personally.

It is my considered view that this could possibly have implications for the constitutional provision that states that the Public Protector is “independent, and subject only to the Constitution and the law”, and that I must be “impartial and must exercise its powers and perform its functions without fear, favour or prejudice”.

To this end, the question we may want to ask ourselves is: Do we want to put the Public Protector in a position where she is afraid to make certain findings because of fear that she may have to bear the costs of the litigation personally if the resultant report is successfully reviewed and set aside? This is something for all of us to think about.

Other claims that have been made are that I paid no attention to information that came to the surface following what is known as the “Gupta Leaks”. Had critics gone through the report, they would have picked up that I indicated that I did not investigate, amongst others, the so-called “Gupta Leaks” due to capacity and financial constraints experienced by my office.

In addition, the leaks came to the surface in June 2017. By then, my investigation was already at such an advanced stage. Had we received a complaint on the matter around that time, it would have had to be a subject of a separate investigation.

I would like to stress that I make all of my findings on the basis of irrefutable evidence and not on a hunch. If it were any true that I am here to shield politicians, I would not have found as I did a few weeks back that the Minister of Cooperative Governance and Traditional Affairs, Hon. Des van Rooyen, misled the National Assembly when he responded to a Parliamentary question on his whereabouts prior to his short-lived appointment as Minister of Finance in late 2015. Again, I would not have found that Minister Lynne Brown inadvertently made a misleading statement to the National Assembly when she denied that there were no other contracts of engagement concluded between Eskom and Trillian Capital Partners.

I welcome constructive criticism on my work. It builds us as a team and helps us learn. However, there are some cases of fault-finding that seem largely designed to fit the narrative of sections of society that never supported my appointment to this position from the very beginning and those that jumped on the bandwagon shortly after I assumed duty.

Their reasons for objecting to my appointment did not stick because they failed dismally to produce evidence to back up their claims. Now they have resorted to putting me under surveillance, watching every step I take in a desperate search for faults so that they can call for my removal from office.

Again, I will not be distracted. I have my eyes fixed on the prize, which is taking the services of this institution to the grassroots and this Committee should, in accordance with its obligation in terms of section 181 of the Constitution, not allow anybody or anything to deter me.

3. On the state of our finances

I now move on to the final matter on which I would really appreciate Honourable Members' ear. This Committee, more than anybody else in this country, knows of our financial and resourcing struggles.

Even prior to my time, it has always been the norm that whenever this office appears before this Committee, it brings along its begging bowl hoping for the kind of resourcing that befits an institution whose mandate is so broad it covers the 39 National Government Departments, 90 Provincial Government Departments, 258

Municipalities and countless other State Institutions, including State-Owned Enterprises.

Our mantra when appearing before this Committee or engaging with the National Treasury is always the same: We have an approved organogram that provides for positions in excess of 700 and yet only half of those are funded, meaning we are operating at only half our full potential.

The Acting Chief Executive Officer will provide details on this matter. However, if the Committee allows, but in a nutshell, I would like to remind Honourable Members that in March 2017, I requested this Committee to provide my office with at least R1 billion in funding to ensure that my office "stays afloat" and remains effective.

I further indicated that the R310 million allocation for the 2017/18 financial year (R8million of which has since been reclaimed by Treasury) and the R319 million allocations for the following year, will not be enough to ensure that this office is fully operational.

As things stand, we face a grim final quarter of 2017/18, where we run the risk of not meeting our Annual Performance Plan targets. This situation has resulted in unprecedented austerity measures that have seen investigators failing to do their work because we have had to ground our pool cars as we can barely afford a drop of fuel.

Coming here to honour the Committee's invite, we have had to breach our own moratorium on travel. This has only served to exacerbate the reality that, come the end of March, we will be sitting with a huge deficit on our hands, bringing back the question of solvency.

After the Nkandla judgement, which confirmed the binding nature of our remedial action, the Public Protector has seen a spike in the number of applications to have our reports reviewed. Almost every report that we issue is taken on review. As a result we are spending a lot of money, which we do not have, on litigation. We are now faced with a dilemma in that we must pick and choose which cases to defend. Either way, there will be devastating implications for the institution.

I plead with the Committee to seriously consider our plight. Not adequately funding this office is at odds with section 182(4) of the Constitution, which enjoins the Public Protector to be accessible to all persons and communities.

This is because, when this office is unable to render services, the people of South Africa are essentially denied their entitlement to have their service delivery grievances investigated, reported on and remedied as envisaged in section 182(1)(a) to (c).

Honourable Chairperson and Members will recall that Chapter 14 of the National Development Plan affirms the critical role that institutions such as my office plays in the fight against corruption. It goes further to say such institutions should be adequately funded in order to effectively implement their mandates.

In addition, President Cyril Ramaphosa has committed his government to deal decisively with corruption. The Public Protector South Africa is a resource to his government to rid the country, where we have jurisdiction, of such malpractices.

While I recognise that the whole of government is cash-strapped and priorities such as fee-free higher education for those that qualify have to be given preference, I plead with the Committee to help argue for my office to be properly funded.

This will go a long way in enabling us to implement Vision 2023 and to take the services of this institution to the grassroots, where they are needed the most.

Once again, let me thank you, Honourable Chairperson and Members, for the opportunity to address the Committee and offer clarity on matters of concern. I trust that my explanation has cleared any misunderstandings and confusion that may have been created as a result of the distortions that have, of late, swirled in the public domain.

I am also thankful that, in asking these questions, the Committee has not demanded that I explain why and how I made certain types of findings as opposed to others.

I believe this was in recognition of the constitutional non-negotiable mandate that

the Public Protector is independent, and subject only to the Constitution and the law, and that this institution must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice.

I also believe it was in recognition of the constitutional imperative that other organs of state (such as Parliament) must assist and protect the Public Protector to ensure its independence, impartiality, dignity and effectiveness.

The same, I believe, applies to the constitutional caution that no person or organ of state may interfere with the functioning of this institution.

It pleases me to know that Parliament is always mindful of these fundamental constitutional provisions when dealing with my office and like-minded institutions.

For my part, I continue to pledge to act independently and exercise my powers and execute my functions impartially, without fear, favour or prejudice. In doing this, I will continue to be guided by and subject only to the Constitution and the rule of law.

Lastly, on 16th February 2018, the North Gauteng High Court delivered its judgment on CIEX report. I have instructed the Senior Counsel to advise me on the effect of that judgment, especially on the institution and its constitutional mandate. I shall take an appropriate decision on the way forward upon receipt of the legal opinion on the judgment.

Thank you.

Adv. Busisiwe Mkhwebane
Public Protector of South Africa