

**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF  
STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC  
SECTOR INCLUDING ORGANS OF STATE**

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**CHAIRPERSON'S DECISION ON THE OBJECTION TO THE APPOINTMENT OF MR  
TERENCE NOMBEMBE AS HEAD OF INVESTIGATIONS**

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**Introduction**

1. On the 7<sup>th</sup> March 2018 I announced the appointment of, among others, Mr Terence Nombembe as the Commission's Head of Investigations. Mr Nombembe is a Chartered Accountant and auditor. He is a former Auditor-General of South Africa. He is also the Chief Executive Officer of the South African Institute of Chartered Accountants (SAICA).
  
2. By way of a letter addressed to me dated 9 March 2018, the Economic Freedom Fighters (EFF) raised an objection to Mr Nombembe's appointment. They said that, as SAICA CEO, Mr Nombembe had accepted a donation of R1 270 000,00 from Trillian Capital (Pty) Ltd a company against which, they said, there were allegations of corruption connected with State Capture and Gupta-linked companies. The EFF said that this had happened when allegations of corruption against Trillian Capital were already a matter of public knowledge. In effect, the EFF was saying Mr Nombembe is tainted because of having accepted that donation. Before it wrote this letter on the 9<sup>th</sup> March 2018, the EFF had held a media conference on the 8<sup>th</sup> March 2018 in which it had, among other things, announced its objection to Mr Nombembe's appointment. On the 9<sup>th</sup> March 2018 SAICA issued a media statement responding to the allegations about the donation. I shall refer shortly to what SAICA's response was as articulated by it in that media statement and other correspondence that they subsequently sent me.

**The process**

3. It may be important to set out the process I followed in affording both the EFF and Mr Nombembe an opportunity to place information and representations before me before I could decide this matter. After I had received the EFF's letter of objection, I caused

a copy of that letter to be made available to Mr Nombembe and SAICA so that they could respond to the allegations. SAICA stood by what it had said in its media statement. Mr Nombembe responded to the allegations by way of a letter addressed to me dated 12 March 2018. There were attachments to the letter. Mr Nombembe's response and a copy of SAICA's media statement were then sent to the EFF to enable the EFF to consider them and respond if it wished to do so. The EFF responded by way of a letter dated 14 March 2018. This was a detailed response. In the letter the EFF dealt with both SAICA's media statement and Mr Nombembe's response to their allegations.

4. Subsequently, I asked Mr Nombembe and SAICA to clarify certain issues. Mr Nombembe furnished me with a memorandum which I received on 3 April 2018. SAICA furnished me with a letter from the Acting CEO, Ms F Lamola, dated 29 March 2018. I then caused Mr Nombembe's memorandum and SAICA's letter to be sent to the EFF with a request that the EFF consider them and let me have anything that they might wish to place before me by 14h00 on 4 April 2018 before I could make a decision on the objection. The EFF sent me a letter dated 4 April 2018 in response. At this stage Mr Nombembe indicated that he had nothing further to add to what he had already said.

#### **Consideration of the objection**

5. The EFF's objection was captured in paragraphs 4, 5 and 6 of its letter of objection dated 9 March 2018. It was that Mr Nombembe is the CEO of SAICA "which received a donation of R1,2 million from Trillian Capital in 2017, an entity which has close links with the Gupta family, which itself may well be subjected to investigation by the Commission". The EFF went on to say that "by the time SAICA received the donation, it was common cause and public knowledge that Trillian Capital was used as a corruption vehicle by the Gupta criminal syndicate and had received more than R500 million from ESKOM". It then said: "This alone, we respectfully submit, should disqualify Mr Nombembe as it demonstrates either an actual or perceived conflict of interest." It then requested "that Mr Nombembe be recused before the Commission can commence with its work and in any event within 7(seven) days from the date of this letter."
6. As I indicated, both SAICA and Mr Nombembe responded to the EFF's objection and the allegations. The facts which emerge from the documents and correspondence placed before me by SAICA and Mr Nombembe which the EFF has been given an opportunity to controvert but has not been able to controvert include the following:
  - 6.1. SAICA has an entity called Thuthuka Bursary Fund (TBF) which it established in 2002. The aim of the TBF is to provide bursaries to previously

disadvantaged students who wish to become chartered accountants to so as to help them to achieve their dreams. This means that the TBF seeks to contribute to the transformation of the accountancy profession. The TBF has a Board of Directors or trustees. As SAICA CEO, Mr Nombembe is part of TBF's Board of Directors. According to Mr Nombembe's memorandum, the day to day management and administration of the TBF "is run by a dedicated division within SAICA headed by an Executive Director who reports to the CEO on broader Nation Building matters including the affairs of TBF". Mr Nombembe pointed out in his memorandum that "elaborate specifics of the TBF performance and dashboards are presented for more extensive consideration and deliberation in the TBF quarterly Board of Trustees meetings". Generally, the reports from the Executive Director to the SAICA CEO relate to whether broad priorities are being met by the Nation Building Division.

- 6.2. On 28 February 2017 Trillian Capital paid an unsolicited donation of R1 270 000,00 to TBF. Both Mr Nombembe and the Acting CEO of SAICA, Ms Lamola, confirm that this was the only donation that Trillian Capital ever made to TBF. On the 8th March 2017 the Business Development Manager of the TBF wrote to Trillian Capital thanking them for the donation.
- 6.3. In his memorandum Mr Nombembe stated that "the Trillian matter emerged as a public matter in the media through [a] Business Day article in April 2017 and more elaborately in May 2017 [through] the rest of the other media houses". He continued: "Furthermore, the Trillian matter became formal in June 2017 as quoted in the SAICA media statement..."
- 6.4. In its media statement of 9 March 2018 SAICA states that on 29 June 2017 Adv Geoff Budlender SC "issued the Report to the Chairman of Trillian, Mr TMG Sexwale on the allegations with regard to the Trillian Group of companies and other related matters in terms of which the issues around Trillian and some of Trillian's controversial business connections and transactions were ventilated."
- 6.5. On the 18<sup>th</sup> of July 2017 the TBF Board of Directors held a meeting and they deliberated upon the donation. Mr Nombembe was part of this meeting. In regard to this meeting and the donation, SAICA states:

"As an institute that prides itself on ethical conduct, the TBF Board of Trustees deliberated on the donation from Trillian at a board meeting in July 2017 in light of all the information that was emerging about Trillian. The Board unanimously resolved to return the donation to Trillian with immediate effect."

6.6. The fact that Mr Nombembe was part of this meeting means that he was part of the decision to reject the donation. Pursuant to the resolution of the Trustees, the TBF Executive Director: Nation Building, Ms Chantyl Mulder, wrote to Trillian Capital on the 24th July 2017 to convey the rejection of the donation by the TBF. Among other things, she said:

“2. ...we appreciate the generous donation in the amount of R1 272 000.00 (one million two hundred and seventy-two thousand rand) (the “**Donation**”). However, in light of recent events related to your business activities, we regret to inform you that we are unable to accept the Donation. As such, the Donation will be refunded to you.

3. To ensure that the Donation is returned to you promptly, it would be appreciated if you could provide the writer with your banking details into which the Donation will be refunded within 5 (five) Business Days of receipt of this letter.

4. Further, as the Donation will be refunded to you, please note that the Receipt No.: 283 is therefore cancelled, and any terms and conditions related to the Donation are therefore unenforceable and not binding on the parties.”

In paragraph 2 of this letter the TBF made it clear that it was “unable to accept the Donation”.

6.7. It is clear from the decision of the Board of Trustees and the contents of the letter that SAICA and the TBF were not prepared to be associated with Trillian Capital in any way after they had learnt of the allegation of corruption associated with it which emerged from Advocate Budlender SC’s report.

6.8. On 22 August 2017 Trillian Capital addressed an email to the TBF giving SAICA its banking details. That email read as follows in part:

“It is with regret that I receive and accept your email. As a business we have been tried and convicted in the media. Due to this, our name has been unfairly tarnished. We are truly sad regarding your stance on the matter. Our bank account details are attached.”

6.9. The TBF wasted no time in transferring the refund to Trillian Capital. It transferred it on the same day. SAICA provided me with proof of the repayment of the donation to Trillian Capital. I furnished this proof to the EFF to enable them to comment on it if they so wished. They did not dispute the rejection and repayment of the donation to Trillian Capital.

7. Although it is true that the TBF, a SAICA entity, received an unsolicited donation from Trillian Capital, the following must be borne in mind:

(a) there is no evidence that Mr Nombembe – as opposed to the TBF which had its own management – received the donation from Trillian;

(b) as far as Mr Nombembe knows, the allegations of corruption against Trillian Capital emerged publicly in an article in the Business Day in April 2017 which was followed by other media houses in May 2017. That was after the donation had been received by the TBF.

(c) there is no suggestion that Mr Nombembe knew in advance that Trillian Capital was going to pay a donation to the TBF. Therefore, it cannot be suggested that he could have prevented the TBF from receiving the donation. However, after Mr Nombembe and his co-directors had learnt of the donation, they discussed it and unanimously rejected it and instructed the TBF management to return the donation to Trillian Capital.

(d) once Trillian Capital had paid the donation to the TBF, there is nothing in Mr Nombembe's conduct for which he can be criticized. He did the right thing by being part of the decision to reject the donation.

8. Given the above facts, I can see no basis upon which Mr Nombembe can be criticized in regard to the donation. On the contrary, he should be commended for having been part of the decision of the TBF Board of Directors that the donation be rejected and returned to Trillian Capital. It would seem that the EFF may not have been aware at the time of lodging the complaint that the donation was rejected and returned to Trillian Capital and that Mr Nombembe was part of those who made that decision. I cannot see why they would have based their objection to his appointment on the allegation that he and SAICA accepted this donation if they knew that not only was the donation rejected and returned but that actually Mr Nombembe was part of the decision to reject the donation. Therefore, in so far as the EFF's objection was based on the allegation that Mr Nombembe and SAICA had accepted the donation from Trillian Capital, there is no proper basis for the objection and it falls to be dismissed.

9. In its letter of 14 March 2018 the EFF said that the receipt of the Trillian Capital donation by SAICA raised the question of why, "despite it being public knowledge that Trillian is involved in fraud, corruption and State Capture, SAICA still received the donation and even went as far as thanking them." The EFF stated that they were pursuing "this line of argument in view of the numerous scandalous relationships of SAICA members who are accredited auditors who have covered up in the past in all their dealings with Gupta-linked companies, and Gupta-linked SEO transactions." The EFF said that in this regard it was referring "to the KPMG and Sizwe Ntsaluba Gobodo accountants and auditors whom the EFF will submit to the Commission to be subpoenaed for their complicity in State Capture, despite a professional duty to report red flags to relevant regulating authorities."

10. It is necessary to explain the nature of the relationship between SAICA and its members. Both Mr Nombembe and the Acting CEO of SAICA have explained the nature of that relationship. In his memorandum Mr Nombembe pointed out that “SAICA is a member organisation that operates in terms of a Constitution...” He said that SAICA’s constitution includes provisions in terms of which:
  - (a) SAICA is required to preserve and regulate the professional independence, integrity and conduct of its members (clause 5.4 and 5.5 of the SAICA constitution).
  - (b) SAICA may not have a share or other interest in the business profession or occupation that is carried on by its members and similarly no SAICA member may have an interest in SAICA (clause 12.1 and 12.2 of the SAICA constitution).
11. Clause 5 of the SAICA constitution deals with SAICA’s objects. Clause 5.4 reflects that one of its objects is to “preserve at all times the professional independence of members and associates.” Clause 5.5 reflects that another object of SAICA is to “insist upon a high standard of professional behaviour on the part of members, associates and students of the Institute and to preserve and maintain the integrity and status of the profession, to take steps which may be thought necessary to stop or prevent dishonourable conduct and practices by members, associates and trainee accountants and to take disciplinary action against members, associates and trainee accountants, including the termination of their membership, associateship or registration, as the case may be, and their expulsion from SAICA.”
12. In the light of clause 5.5 of the SAICA constitution SAICA’s responsibility would include ensuring that disciplinary steps are taken against a SAICA member, where SAICA becomes aware, or, is informed of, allegations of improper professional conduct on the part of such a member. Mr Nombembe said: “Accordingly, my role as the SAICA CEO is primarily to preserve, uphold and facilitate the realisation of SAICA’s Constitutional prescripts and objects. Therefore, as the SAICA CEO it is not possible [for me] to have a conflict of interest (actual or perceived) on account of the conduct of any of the members of SAICA.” This was a response to the EFF’s contention that Mr Nombembe has an actual or perceived conflict of interest in his roles as SAICA’s CEO and as the Commission’s Head of Investigations. He continued “I wish therefore to reaffirm that neither SAICA nor myself as the SAICA CEO had an inappropriate relationship with Trillian Capital that could be deemed to demonstrate either an actual or perceived conflict of interest in my role as the Head of Investigations for the Judicial Commission on State Capture.”
13. The EFF has not placed any evidence before me that suggests that SAICA and Mr Nombembe, as SAICA’s CEO, were at any time aware of any allegations of improper

conduct by any of its members but they failed to act thereon when they should have acted.

14. In her letter to me dated 29 March 2018, the Acting CEO of SAICA also dealt with the relationship between SAICA and its members. She referred to the definitions of “member” and “associate” in SAICA’s constitution and pointed out that an audit firm does not qualify to be a member of SAICA. She pointed out that one of the objects of the SAICA constitution is that SAICA must assist and co-operate with the Independent Regulatory Board of Auditors with regard to the monitoring of the Institute’s professional development programme. In so far as any registered auditors may have made themselves guilty of improper conduct in the execution of their duties, the following points should be borne in mind:

14.1. section 3 of the Auditing Professions Act No 26 of 2005 establishes an independent regulatory board for Auditors.

14.2. section 4 of the same Act obliges the independent regulatory board for Auditors to, among others;

(a) takes steps to promote the integrity of the auditing profession, including,

(i) investigating alleged improper conduct.

(ii) conducting disciplinary hearings.

(iii) imposing sanctions for improper conduct.


15. The Acting CEO of SAICA also pointed out that:

(a) the SAICA constitutive documents empower SAICA to regulate and govern the professional conduct of individual persons who are its members, associates or trainees and not the audit firms, who may be employed by audit firms which are engaged to provide various services by government departments and state-owned entities. She said that, in accordance with the provisions of the SAICA constitution, should a member’s, associate’s or trainee’s conduct breach any of the provisions of the Code of Professional Conduct for Chartered Accountants, SAICA is required to institute disciplinary proceedings against such a member.

(b) the SAICA constitution and By-Laws do not confer on SAICA the power to oversee or regulate the functions and conduct of audit firms (as these are not included in the definition of members in SAICA’s constitution) nor are there legislative prescripts empowering SAICA to do that. As such, SAICA has no power to institute any disciplinary proceedings against audit firms for audit firm misconduct. She said that that function falls within the remit of the Independent Regulatory Board of Auditors in terms of the provisions of the Auditing Profession Act, 26 of 2005. In this regard I note that Chapter V of that Act deals with the accountability of registered auditors including disciplinary matters.

There is a disciplinary committee of the Regulatory Board that conducts disciplinary hearings for auditors,

- (c) further, the SAICA constitutive documents prohibit the Institute from participating or engaging in any way whatsoever in the business, profession or occupation carried on by its members or associates. She stated that SAJCA, as a voluntary association, is not involved in directing the business activities of members employed in the audit firms.
- (d) thus, the only relationship which is relevant to SAICA is SAICA's relationship with its members and not with audit firms or the businesses where such members are involved. Therefore, said the Acting CEO, the expectation that SAICA should account for member misconduct relating to such business activities is misplaced."
16. It is true that there may be auditors who are members of SAICA in respect of whom there may emerge allegations that they conducted themselves in a manner which facilitated or covered up fraud and corruption relating to State Capture. Although there may be auditors who are members of SAICA, there will be other auditors who are not members of SAICA. Improper professional conduct on the part of SAICA members -- not on the part of audit firms in which SAICA members may be employed -- is conduct that SAICA and Mr Nombembe as SAICA CEO would have been required to ensure was properly investigated and dealt with in terms of SAICA's constitution and professional Code of Conduct if it was reported to them. If, as Head of Investigations, Mr Nombembe or his team of investigators come across such conduct by members of SAICA, they will be required to ensure that that conduct is properly investigated and is not only brought to the attention of the Commission but also reported to SAICA for disciplinary action. The role of SAICA CEO and the role of Head of Investigations of the Commission do not present a conflict of interest (actual or perceived). In any event, I emphasise that no evidence has been placed before me which suggests that any professional misconduct by members of SAICA that is connected with allegations of State Capture was reported to SAICA or Mr Nombembe and he failed to act against such member or members in circumstances where he should have acted.
17. In these circumstances I conclude that there is no proper basis for the EFF's objection to Mr Nombembe's appointment and the objection is dismissed.

  
ZONDO DCJ

**CHAIRPERSON OF THE JUDICIAL COMMISSION OF INQUIRY INTO  
ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN  
THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

10 April 2018