

Address to the SBI Indaba

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Kelvin Grove Club

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I wish to thank the organisers of this Indaba for inviting me to share some thoughts with you as you address some of the key challenges of the day in South Africa, challenges that confront not just small business but all of us – foremost amongst these is the focus of this Indaba – job creation. It is an issue occupying the minds of all of us from the President, Government, Parliament, business, labour and of course civil society and ordinary people in our country.

As a part of the civil society or NGO sector we play a role in laying the basis for the development of our country in terms of the Constitution. We seek to affirm the rule of law, support and strengthen institutions of governance, and provide platforms, fora and interventions to hold Government to account.

CASAC was launched in September 2010 and has since established itself as a key role-player in the civil society environment. The Council is a project of progressive people who want to advance the South African Constitution as the platform for democratic politics and the transformation of society. It subscribes to the principles and values enunciated in section 1 of the Constitution, and promotes the notion of progressive constitutionalism to promote the rights of citizens and protect human dignity. CASAC's driving motivation is that the Constitution provides the principled bedrock for the operation of public and private power in South Africa, and for the transformation of our society.

In recent times this has involved engaging with Government, Parliament and some institutions in an adversarial manner whether in public discourse or litigation. We have seen an upsurge in court-room activity that has challenged interpretations of the separation of powers doctrine, independence of institutions and public interest. There has been a revival of civil society activism during the latter years of the Zuma era as the state capture project

was exposed – this is something that needs to be retained and developed. Much of this civil society focus has been on restoring the legitimacy of the state and protecting institutions of governance that underpin our constitutional democracy. I will deal with a few of these matters this morning, primarily the National Prosecuting Authority (NPA), the Public Protector (PP) and the Electoral Commission.

1. National Prosecuting Authority

In mid-2015 CASAC launched an application in the High Court challenging the golden handshake of R17,3m paid by Government to the former National Director of Public Prosecutions (NDPP), Mr Mxolisi Nxasana in the form of an exit package. This was calculated on the basis of the remuneration that he would have earned had he fulfilled his non-renewable ten year term of office. It will be recalled that Mr Nxasana had been appointed following an application brought by CASAC in the Constitutional Court challenging the President's failure to appoint a permanent NDPP, after the courts had ruled that another former NDPP, Menzi Simelane had been irregularly appointed. Ms Nomgcobo Jiba had been Acting NDPP for a period of about 18 months, a situation that undermined the independence of that office and institution. The security of tenure that is granted to a duly appointed NDPP is one of the factors that protects independence. An Acting NDPP does not enjoy that protection and the perception may therefore exist that they are vulnerable to political or other improper interference. This was certainly a perception that arose in the case of Ms Jiba. Soon after his appointment Mr Nxasana faced a backlash from Ms Jiba (who had aspired to and coveted the top job) and some of her cohorts in the NPA. This resulted in the President seeking to suspend and then remove Mr Nxasana as NDPP on the basis that he was not a fit and proper person to hold office. Issues relating to his previous convictions and the lack of security clearance were cited as examples of his unfitness. In 2015 an enquiry into his fitness to hold office was instituted under Adv Nazir Cassim. On the eve of the Enquiry getting underway the then President Zuma announced that Mr Nxasana had resigned as NDPP, thereby aborting the enquiry. It has since transpired in documents that Mr Nxasana produced in court proceedings that there had been extensive discussions between the Presidency, Mr Hulley and the Ministers of Justice and State Security to entice

Mr Nxasana to resign. The negotiations were ultimately about the settlement amount, and Mr Nxasana prevailed.

The CASAC application was heard in October 2017 together with a similar one brought by Corruption Watch and Freedom under Law (these parties seek the reinstatement of Mr Nxasana), and judgment was delivered in December last year. The court ruled that the settlement agreement with Mr Nxasana was unlawful and that it be set aside, that Mr Nxasana should 'pay back the money', and that the appointment of Shaun Abrahams as NDPP was consequently also invalid. The court ordered that the then Deputy President, Cyril Ramaphosa appoint a new NDPP within 60 days. However as the court had made a finding of constitutional invalidity – also in relation to two sections of the NPA Act that CASAC challenged regarding the President's powers to extend the NDPP's term of office, and to suspend a NDPP without pay and for an indefinite period – this constitutional invalidity meant that the order had to be confirmed by the Constitutional Court before it becomes effective. The power to appoint a new NDPP was delegated to the then Deputy President because Zuma would have faced a conflict of interest in appointing someone who would need to take a decision on whether the fraud, corruption and racketeering charges relating to his relationship with Schabir Shaik should be reinstated or not. With the resignation of Zuma, this issue is now moot.

The Constitutional Court heard the application to confirm the orders of the High Court on 28 February 2018, and judgment is awaited. Given that the confirmation application and cross appeals by Zuma, Abrahams, the NPA and Mr Nxasana were heard on an urgent basis one would have expected judgment by now. There has been some media speculation about the apparent reasons for the 'delay' in issuing judgment but I will offer no comment on that, save to say that we hope to receive judgment soonest.

Judgment from the Constitutional Court will clarify the position of Mr Abrahams as well as that of Mr Nxasana, and whether a new NDPP is to be appointed by Cyril Ramaphosa, now in his capacity as President. It is important to stress that the courts have not been asked to decide whether Abrahams is fit and proper to hold office but merely whether his appointment was valid, and whether it undermines the independence and integrity of the NPA. CASAC argued that failing to remove Abrahams would permit a President to unlawfully remove an NDPP, appoint a new NDPP and then insulate that new NDPP from removal. Only

if Mr Nxasana's removal was lawful would Mr Abrahams' appointment be lawful. To those who say, 'well this is unfair on Mr Abrahams' my response is that the primary concern must be the independence of the NPA rather than those of Mr Abrahams or Mr Nxasana.

What happens if the court rules, as it could, that it is just and equitable for Mr Abrahams to remain in office? It is clear that Mr Abrahams has found a new appetite for prosecutions and doing the right thing since December. Was that was precipitated by the High Court judgment that I have just outlined, or another event that took place a week later at NASREC? I would assert that Mr Abrahams decision to prosecute Jacob Zuma, and to initiate action against some of the state capture conspirators, notably in relation to the Vrede Dairy Farm, are signs of his playing to the political gallery rather than exercising the power to prosecute without fear, favour or prejudice – after years of supporting Zuma's bids to resist reinstatement of the charges, can he be trusted not to cosy up to the political elite, albeit a new one. Should the Constitutional Court opt not to declare Abrahams appointment invalid, President Ramaphosa would have to consider instituting an enquiry into his fitness to hold office as NDPP.

Restoring the integrity of the NPA, and public confidence in its ability to carry out criminal prosecutions independently, will not be achieved merely by removing Shaun Abrahams. A report commissioned by Mr Nxasana and produced by retired judge, Zak Yacoob, in 2014 found that the problems in the NPA were extensive, and he recommended a judicial commission of inquiry into the NPA. Whether that is the best way to deal with the NPA crisis can be debated but what is unquestionable is that the organisation is in need of an overhaul. In saying that I am not seeking to undermine the work done by the many committed staff at the NPA. They are let down by a failed leadership. It is worth noting that Ms Jiba and head of the SCCU, Lawrence Mwrebi are on special leave as they seek to appeal a court ruling that they be struck off the roll of advocates. The recent failure by the Asset Forfeiture Unit (AFU) to preserve the assets of the Guptas in the Vrede Dairy Farm matter point to the loss of capacity in this unit. In his State of the Nation Address earlier this year, President Ramaphosa indicated that he will deal with this leadership crisis at the NPA – we must make sure that he does so.

A rejuvenated NPA is necessary for the restoration of respect for the rule of law, an end to impunity and to ensure that those who break our laws are brought to justice. In this vein,

the inaction of the NPA in respect of state capture allegations that are in the public domain whether as a result of the Public Protector's State of Capture Report or the #Guptaleaks emails must be remedied. There is no justification in saying that all prosecutions must await the Zondo Commission of Inquiry. Where evidence exists prosecutions must be brought now. Justice Zondo may well recommend that other prosecutions should follow from his investigations, and those should be dealt with by a competent NPA.

State Capture Commission of Inquiry

On this issue of the Zondo Commission it is a concern that the work has commenced very slowly. In a media conference a few weeks ago Justice Zondo cautioned that the investigators had yet to be formally appointed and it is not clear whether this has now been done. The rules of the Inquiry are yet to be announced, and we are told that hearings will likely only start in August, and that the Commission will need approximately 18 to 24 months to complete its work. That will take us to August 2019 or February 2020, whereas Adv Madonsela in her report said that the inquiry should complete its work within 180 days – this was endorsed by the High Court and forms part of the terms of reference for the Commission. It can only be varied with the consent of the court. Three and a half months have already elapsed since the Commission was deemed to start in March 2018. I would argue that there are aspects of the terms of reference that could be disposed of relatively swiftly. These include whether inducements were offered by the Guptas to Mcebisi Jonas and Vytjie Mentor to take up Cabinet posts to favour the family's business interests, and whether Jacob Zuma was aware of this. Operating in such a phased manner would demonstrate that issues are being dealt with; it will boost public confidence in the work of the Commission. We should not have to wait for 18 months to hear the recommendations of Justice Zondo. The establishment of the Commission had already been delayed for over a year due to Zuma's judicial review of parts of the Public Protector's report which was published in November 2016. Zuma's review failed and he was ordered by the High Court to personally pay the costs in the case, a decision he is now seeking to appeal in his personal capacity. The courts finally caught up with Zuma's shenanigans and his abuse of the court process using public funds as part of his Stalingrad strategy to avoid his day in court.

2. Public Protector – Vrede Dairy Farm matter

Another person at the wrong end of a personal costs order is Busisiwe Mkhwebane, the Public Protector. In the matter of the Bankcorp – CIEX Report the PP was ordered to personally pay 15% of the costs of the SA Reserve Bank, whose constitutional mandate she purported to instruct Parliament to change. She is currently seeking leave to appeal to the SCA on the costs order, arguing that being saddled with such an order stifles her ability to do her job. How ironic that she seeks to shift the blame onto the courts, whereas it her own incompetence that lands her in court so often. It was startling to hear at her press conference on Monday this week that almost 20% of the 50 reports published by her office since her appointment in October 2016 have been or are being challenged in the courts.

CASAC has brought an application in the North Gauteng High Court to review and set aside the PP's Report on the Vrede Dairy Project. We argue that she failed to discharge her duties in terms of the Constitution and the PP Act by failing to conduct a thorough investigation and blatantly ignored crucial information that had been in the public domain. The report absolved key political leaders, including the former Premier of the Free State Ace Magashule and former MEC for Agricultural Affairs, Mosebenzi Zwane. Mkhwebane defended her report on the basis that her office had a lack of capacity and faced resource constraints – this allegedly prevented her from investigating the involvement of the Guptas in the money-laundering scam that was the Vrede Dairy Project. She failed to follow the money – having determined that there were procurement irregularities, she should have asked why, who benefited etc. She closed her eyes to this, an abdication of her responsibility to investigate without fear or favour.

Initially the PP indicated that she would not oppose CASAC's application but would render to the court an affidavit to explain the circumstances of the report. As in cases of this matter the public official whose decision is being challenged is required to provide the court with what is known as a Rule 53 Record – this constitutes all the information and documents relied upon by the public official to reach the decision that is being contested. On scrutiny of this record it became apparent to CASAC that Adv Mkhwebane had deliberately curtailed the investigation and acted in a manner inconsistent with the demands of an independent office. The record revealed that:

- A National Treasury Report which had previously not been made public pointed to the active involvement of senior politicians, former Premier Ace Magashule and former MEC for Agriculture, Mr Mosebenzi Zwane, in facilitating the unlawful project, and recommended that disciplinary action be taken against the head of the Department of Agriculture, Mr Peter Thabethe and its CFO, Ms Dlamini – no such action has been taken;
- The Final Report on the ‘Vrede Integrated Dairy Project’ released by Adv Mkhwebane on 8 February 2018 made no reference to a Provisional Report having been prepared as is the custom in such investigations by the Public Protector. However the Record now shows that such a Provisional Report was concluded by former Public Protector, Adv Thuli Madonsela. Of particular concern is that it now appears that Adv Mkhwebane altered that Provisional Report in material ways to exonerate the officials named above. In the Provisional Report, Adv Madonsela found that:
 - the accounting officer (Mr Thabethe) was guilty of improper conduct, abuse of power and maladministration Yet Mkhwebane’s report said that the Premier institute disciplinary action against “implicated officials’, removing the specific reference to Mr Thabethe
 - a proper accounting and forensic investigation and audit be conducted by the Auditor General was necessary to verify all expenditure incurred in the project and whether there was value for money – this was inexplicably excised from the Final Report
 - the Special Investigating Unit (SIU) should conduct a forensic investigation into maladministration, improper conduct by Departmental officials, and the unlawful expenditure of public funds – this was also removed from the final report by Adv Mkhwebane.

As we stated in our supplementary affidavit after receiving the Rule 53 record:

“In the absence of any explanation from the Public Protector, CASAC submits that the only possible inference, which the Court should not hesitate to draw, is that she deliberately curtailed the Report’s findings and remedial action in an effort to protect Department officials, and thereby acted for an improper purpose and in bad faith.”

It is for those reasons of the duplicity of the PP that we amended our Notice of Motion – we had initially asked the court to order the PP to investigate the matter properly in accordance with the Constitution and the law. We now have no faith in her ability to do so and now merely seek the setting aside of her report. In view of her conduct we have also asked the court to issue a punitive costs order against the PP. Adv Mkhwebane has now also indicated that she will oppose CASAC’s application to set aside the Vrede Report. She had earlier said she would not oppose it.

In a few minutes from now the Portfolio Committee on Justice & Correctional Services will be discussing the issue of an enquiry into the fitness of Adv Mkhwebane to hold office as the PP. The removal of the PP requires a finding of misconduct, incapacity or incompetence by a committee of Parliament, and the adoption of a resolution calling for removal from office supported by a two-thirds majority of the members of the National Assembly. One of the three grounds must be established for the removal of the PP – in the case of Mkhwebane it can be argued that it’s a case of 3 strikes – misconduct, incapacity and incompetence!

Very few would argue that in the 20 months she has been in office, Mkhwebane has not brought it into disrepute. It is an office that is integral to good governance in the public sector, providing accessible mechanisms for ordinary citizens – what former PP, Thuli Madonsela called the ‘Gogo Dlamini’s’ – to hold public officials to account for maladministration, corruption and abuse of public power. We cannot and must not allow this office to fail.

3. IEC Appointments and the 2019 elections

Along with the Office of the Auditor General, the Electoral Commission, commonly known by its acronym, the IEC, has been a consistent performer among the Chapter Nine Institutions – the others being the PP, HRC, CGE and the Commission on Religious, Cultural & Linguistic Rights or the CRL Commission – the PP and HRC have had chequered histories whereas the other two can be said to have failed to raise themselves above the parapet.

The Electoral Commission is mandated by the Constitution to manage elections, ensure that they are free and fair, and declare election results timeously. They are also responsible for maintaining the voters’ roll and a register of political parties as well as voter education. They

must be commended for having delivered five successful national and provincial elections, five local government elections and numerous by-elections. There has been at least one by-election each month since the August 2016 local government elections. This reflects the more competitive and contested electoral environment taking root in the country.

The glowing reputation of the IEC was somewhat tarnished by the PP Report on the head office lease deal published in 2013. It found that the deal was irregular, there had been maladministration and procurement failings and that the then Chair of the IEC, Adv Pansy Tlakula (herself a former CEO at the IEC) had failed to disclose a conflict of interest. The matter came before the Electoral Court which ruled that Parliament should institute proceedings to remove Adv Tlakula – when she failed to secure leave to appeal this decision to the Constitutional Court, Adv Tlakula resigned from the Commission – she is now the Information Regulator, charged with implementing the Protection of Personal Information Act (POPI).

The PP's report also recommended that disciplinary action should be instituted against the then CEO, Mr Mosotho Moepya, the Deputy CEO, Mr Norman du Plessis and the Manager in the CEO's office, Mr Stephen Langtry. All of them left the employ of the IEC before any disciplinary action could be taken, Mr du Plessis in 2014, Mr Langtry in June 2016 and Mr Moepya last year. Mr Moepya is now seeking to be appointed as a Commissioner at the IEC – an issue to which I now turn.

With this in mind it is critical that the current process of appointing new Commissioners at the IEC is monitored closely. There are three vacancies that arise this year – Judge Thami Makhanya's tenure lapsed in March and Rev Bongani Finca and Mr Terry Tselane's terms of office terminate in November. Rev Finca is eligible for re-appointment and has been nominated again. Should Rev Finca not be re-appointed the Commission will have 5 Commissioners who have not overseen a national election before. Chairperson Glenn Mashinini and Janet Love were in office for the 2016 LGE but not the 2014 general election..

Twenty six candidates have been shortlisted for interviews from 119 initial applicants. The shortlisting and interviews are conducted by a panel comprising the Chief Justice, Mogoeng Mogoeng, the PP, and reps from the HRC and the CGE. This is different from the process followed in appointing Commissioners or heads of other Chapter 9 bodies where Parliament

is the sole selector. In the case of the Electoral Commission, this panel will recommend eight names to the Portfolio Committee of Home Affairs in the National Assembly, for them to select three for approval by the Assembly and then appointment by the President. Names and CV's of the candidates can be found on the CASAC website – unfortunately the deadline for public comment on the shortlisted candidates closed on Monday. But CASAC in partnership with My Vote Counts produced an independent report on the 26 candidates to assist the Chief Justice's panel in assessing the candidates.

There are two issues that arise from a perusal of the 26 candidates that need to be highlighted:

- There are no fewer than 12 candidates who have been employed by the IEC in some capacity before – whilst their institutional knowledge and expertise would be an asset to the Commission, their records of employment will need to be carefully scrutinised to ensure that only the best qualify.
- Secondly, there are five candidates who currently serve or have served in other Chapter Nine institutions. Given the constitutionally guaranteed independence of these institutions and what I said earlier about security of tenure and non-renewable terms this is a concern – there should not be a revolving door for Commissioners in these institutions; it undermines perceptions of their independence.

These three examples I have used demonstrate the importance of institutional integrity and independence in ensuring that constitutional rights are respected. There are many other examples I could refer you to – the SAPS, the Hawks, IPID, the Office of the Inspector General of Intelligence, SARS etc. That's without even looking at state-owned enterprises.

With the Zuma years behind us, the task of rebuilding these institutions is critical, and as civil society, the media and the public at large our work here is not yet done. We need to and must remain eternally vigilant – that is the only armour that will safeguard our hard-won democracy and constitutional order.

THANK YOU.