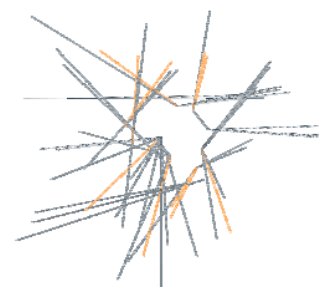


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CC: The Honourable Mr Justice Zondo

The Chairman of the Judicial Commission of Inquiry into
Allegations of State Capture, Corruption and Fraud in the Public
Sector Including Organs of State

By email:

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GeneralOffice@concourt.org.za;
mathiba@concourt.org.za

Your reference

Our reference

Date

D Milo / L Pillay

27 February 2018

Dear Sir

Regulations for the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

1. We act on behalf of Media Monitoring Africa ("**our client**"), a non-profit organisation which promotes ethical and fair journalism that supports democracy and human rights. Our client seeks to protect the constitutional right to freedom of expression and the media and advocates for the free flow of information to the public on matters of public interest.
2. Our client is aware that the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State ("**the State Capture Commission**") is due to begin imminently. Our client has had sight of the Regulations for the State Capture Commission published in *Government Gazette* 41436 of 9 February 2018 ("**the Regulations**") and is deeply concerned by certain clauses which

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appear to limit media freedom, the right to freedom of expression and the right to access information.

3. Clause 11(3) of the Regulations provides that:

"No person shall without the written permission of the Chairperson

(a) disseminate any document submitted to the Commission by any person in connection with the inquiry or publish the contents or any portion of the contents of such document; or

(b) peruse any document, including any statement, which is destined to be submitted to the Chairperson or intercept such document while it is being taken or forwarded to the Chairperson."

4. However, in terms of section 4 of the Commissions Act 8 of 1947 -

"All the evidence and addresses heard by a commission shall be heard in public: Provided that the chairman of the commission may, in his discretion, exclude from the place where such evidence is to be given or such address is to be delivered any class of persons or all persons whose presence at the hearing of such evidence or address is, in his opinion not necessary or desirable" (own emphasis).

5. It is our client's view that clause 11(3) of the Regulations will have the effect of unreasonably imposing a blanket prohibition on the media (who are permitted by section 4 of the Commissions Act to attend the State Capture Commission) from publishing, reporting and commenting on any document which serves before the State Capture Commission without first obtaining the written permission of the Chairperson. This amounts to a prior restraint on publication and hinders, rather than promotes, accurate reportage in the public interest.
6. The principle of open justice applies to the State Capture Commission as a quasi-judicial enquiry of extraordinary national importance. The publicity of judicial and quasi-judicial proceedings guarantees that matters will be determined fairly, independently, impartially and in a manner that promotes the values of openness and accountability. Furthermore, it is in the interests of the State Capture Commission that its proceedings be seen to be conducted openly, transparently and fairly, so as to ensure that the public's confidence in such commissions (and, in fact, in government as a whole) is enhanced.
7. In relation to prior restraints, the Supreme Court of Appeal has recently held that:
- "there is a strong default position in our law against prior restraints on publication. Prior restraints 'should only be ordered where there is a substantial risk of grave injustice'. A blanket rule can hardly, without more, meet that high threshold ... The blanket and default prior restraint on publication, as well, could hardly pass constitutional muster."*¹

¹ Cape Town City v South African National Roads Authority and Others 2015 (3) SA 386 (SCA) at para 44.

8. In the *Print Media* case², the Constitutional Court held that legislation which required a person seeking to publish certain material to first request permission to publish from an administrative body placed an unconstitutional prior restraint on publication and unjustifiably limited the right to freedom of expression, as there were less restrictive means for achieving the purpose of the legislation.³ Similarly, clause 11(3) of the Regulations constitutes an unconstitutional prior restraint on publication, as there are far less restrictive means to achieve the purpose of the clause. Such means include allowing parties to make a request to the chairperson to restrict access to certain documents where general access to such documents will cause harm. The chairperson would of course have the discretion to do so.
9. It follows that all documents before the State Capture Commission ought to be accessible by the media. We submit that the requirement that the media be required to request permission to access such documents amounts to a patently unreasonable and unconstitutional prior restraint on publication. It cannot be said that such prior restraint on publication is necessary to prevent a "grave injustice", particularly as a vast majority of the documents which will be before the State Capture Commission is already in the public domain as a result of the extensive reportage and evidence on State Capture already available to the public.
10. As the courts have said repeatedly, to the extent that laws encroach upon media freedom, so too do they limit the public's right to access to information. The ability of each citizen to be a responsible and effective member of society depends upon the manner in which the media are able to perform their constitutional mandate of providing citizens with accurate information, particularly information of national importance. Our courts have recognised that "*to report accurately, the media must be able to access information*".⁴
11. Our client therefore respectfully submits that the default position is that the media has the right to access and report on any document which comes before the State Capture Commission, in the interests of free speech, media freedom, access to information, accountability and open justice.
12. Our client therefore requests that clause 11(3) of the Regulations as it currently stands be deleted and replaced with a clause which reads as follows:

The proceedings of the Commission are open to the public. All documents submitted to the Commission shall be publicly available, unless the Chairperson orders otherwise.
13. We thank you for considering our client's request and look forward to your response.

²*Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) ("**Print Media**").

³ *Print media* at para 72.

⁴ *Cape Town City v South African National Roads Authority and Others* 2015 (3) SA 386 (SCA) at para 20.

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Yours faithfully

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