

# How Parliament failed – and Zondo’s respectful advice to our legislators

By Moira Levy

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*Parliament was exposed to state capture as it unfolded before its eyes, and for a long time did nothing about it. The last part of the Zondo Report exposes why Parliament failed to act for so long. MOIRA LEVY outlines the reasons Zondo gives for this and some of his recommendations, including the need for electoral reform – and the introduction*

*of constituency-based (but still proportionally-based) representation.*

**K**udos to those who made their way through all 5,437 pages of the *Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State Report*, otherwise known as the “Zondo report”.

The rest of us can go straight to the last chapters of the final instalment, *Part VI, Vol II, Parliamentary Oversight*, released in June 2022 – pages 287 to 483 to be exact. It is here that Chief Justice

Raymond Zondo and his team explain how Parliament failed us.

These pages are highly readable, the findings are succinct and uncompromising. The Commission spells it out: Parliament’s failure to fulfil its cardinal, and constitutional, duty of oversight over the executive allowed state capture to occur. The actual site of Parliament’s failure was the Portfolio Committee system.

Parliament likes to refer to its Committee system as “the engine” of the legislature, but the way Zondo sees it, this engine packed up. Part VI:2 pp 287-483 is both an attempt to explain this malfunction in the mechanisms

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and machinery of Parliament and an attempt to drive our politicians to set it right.

Zondo’s analysis of this crisis in our democracy is premised on the understanding that the ruling party comprises two distinct factions at war with each other. He understands Parliament’s inconsistent and lacklustre response to the Guptarisation of South Africa in terms of the shifting balance of power within the ruling party.

The Commission’s leading concern in this section of the report is to tackle the question: Why did the ANC take so long to agree to a parliamentary investigation into state capture? He refers to “those allegedly implicated [in state capture] together with their supporters” on the one hand and “those who supported proper parliamentary investigation of the [state capture] allegations” on the other to tease out the consequences of the tension between the two sides, and backs this up with evidence from a number of witnesses, including President Cyril Ramaphosa.

In the report, Zondo quotes the affidavit submitted by President Ramaphosa which stated, “The ability



of any organisation, but especially a political formation to act on allegations of malfeasance relies not only on its formal rules and procedures, but also on the balance of power within its structures.” He also quotes oral evidence by the President in which Ramaphosa said he accepted that the balance of power within ANC structures was the true explanation for Parliament’s apparent hesitation to commit to a full-scale investigation. “Yes, I would say so, this is precisely the point I was making to you, Chairperson,” he told the Commission, and added that he regretted those delays.

At this point Zondo agreed that South Africa would have been spared a lot of anguish – and saved a lot of money – if the legislature had complied with the specifications in the Constitution that spell out its oversight duty and if the Portfolio Committees had done their job.

“The truth of the matter, it seems, is that the ANC ... was unwilling before mid-2017 to initiate or to support a parliamentary inquiry or inquiries into the allegations concerned. The allegations implicated senior ANC leaders, right up to the President, as well as others regarded by the ANC as its cadres and deployees. The leadership of the ANC remained committed to

support President Zuma and these cadres or deployees and was unwilling to expose the allegations of malfeasance to transparent public scrutiny.”

So what happened during 2017 that changed things? The Commission suggests the release of the “Gupta leaks” flipped the balance of power in the party. The faction that supported the need for an investigation was “emboldened,” the term used in oral evidence by then National Assembly Speaker Baleke Mbete.

Zondo takes this further: “If the delay in Parliament taking the decision to institute inquiries into allegations of state capture was attributable to the balance of power within the ANC, then it must mean that the balance of power initially favoured those in the ANC who did not want such inquiries to be held and that there was a change in the balance of power in the ANC in 2017 which favoured those who wanted such inquiries to be held. The two views were held, respectively, by those within the ANC who supported Mr Jacob Zuma and those who supported Mr Ramaphosa.”

He adds that the Gupta leaks may not have been the only factor in the shift in the balance of power. Another important issue was probably the ANC’s pending December elective conference in 2017 in which a new president of ➤

the organisation would be elected. Ramaphosa, as the Deputy President of the ANC, was a likely contender, which was “enough for many within the ANC to seek to position themselves favourably on Mr Ramaphosa’s side”.

As anyone knows if you try to lead a donkey in different directions it probably won’t move at all, and that is exactly what eventually happened with Parliament’s investigation into the allegations of state capture.

### **PARLIAMENT DECLINES INQUIRY INTO STATE CAPTURE IN SOES**

The Zondo report meticulously traces the legislature’s internal struggle over its role in any parliamentary investigation and the shifting balance of power that caused the changes in political direction.

Parliament’s entry into the fracas began back in April 2016 with a suggestion by opposition member of the Portfolio Committee on Public Enterprises (PCPE), Ms Natasha Mazzone, that the PCPE conduct an inquiry “into the capture of SOE’s by the Guptas”.

Committee chairperson at the time (and former Minister of State Security) Ms Dipuo Letsatsi-Duba declined, asserting that in terms of National Assembly Rule 138 only the House could authorise such an investigation. Mazzone hit back with National Assembly Rules 138 and 201, pointing out that read with section 56 of the Constitution they empowered the Committee to summon members of the Gupta family to answer its questions without any need of a National Assembly resolution.

Section 56 of the Constitution provides that “the National Assembly or any of its committees may (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; (b) require any person or institution to report to it; (c) compel, in terms of national legislation or the rules and orders, any person or

institution to comply with a summons or requirement in terms of paragraph (a) or (b); and (d) receive petitions, representations or submissions from any interested persons or institutions.”

In her oral submission to a hearing of the Zondo Commission Letsatsi-Duba back peddled furiously. Yes, she agreed the Committee had the power to summon whoever it wished, added that perhaps she had been misunderstood by the legal advisors, and anyway she didn’t agree with the legal advice she had received. In fact, according to the Zondo report, “she agreed with Ms Mazzone that the inquiry she had requested did not happen because the majority of members on the PCPE did not support it”. The report then goes on to state, in parentheses, “It must of course be borne in mind that the majority of the PCPE, like the majority of every parliamentary committee, comprise ANC MPs” (RSA VI II, 2022: para 710).

And just like that, by implication, Zondo introduces the notion that there were at the time certain members of the ANC who were dead set on avoiding an investigation of this sort. It is this point that he builds his argument on.

At that hearing Commission evidence leader Advocate Alec Freund went for the gap. In the report, the exchange that followed went like this:

“ADV FREUND SC: Yes, because I take it, Ms Letsatsi-Duba that you, as a citizen, like me as a citizen, had been reading in the newspapers for years from 2011 onwards a series of quite serious allegations about the manner in which the SOEs were being run and the series of allegations that there was improper influence being exercised over the leadership of those SOEs. Am I correct? You were aware of those allegations

MS LETSATSI-DUBA: We were aware of those allegations.

ADV FREUND SC: And would it be correct to say that in your own opinion the Portfolio Committee on Public Enterprises did not effectively exercise

its oversight powers with a view to trying to probe those allegations and trying to ensure that the appropriate necessary remedial measures were taken?

MS LETSATSI-DUBA: That I fully agree with that statement. *We failed to exercise our oversight.”*

That was on day 349 of the Commission hearings and there it was, in the words of the Committee Chairperson: the Portfolio Committee had failed to deliver on its constitutional mandate.

But as we now know that wasn’t the end of it. In fact it was just the start, because only months later Letsatsi-Duba was replaced as Committee Chairperson by Ms Zukiswa Rantho and in a surprise move the PCPE suddenly announced that it was going to launch an investigation after all, at least into Eskom.

The Zondo report describes this as “a complete *volte face* by the PCPE from its previous position and a welcome development” (RSA VI II, 2022: para 728).

Rantho told the Commission she knew at the time that this “would probably be a career limiting move” (RSA VI II, 2022: para 748). In time she was proved correct; she was removed from the ANC party list in the next election, thus losing her seat in the House. Only two of the ANC’s 2014-2019 PCPE study group members are still MPs.

“Whilst members of the ANC’s PCPE ‘study group’ supported the idea of instituting an inquiry, there was a push to scupper the inquiry from a substantial number of members in the ANC parliamentary caucus, who argued that the inquiry would cause divisions and would taint the integrity of the ANC. Of particular concern to some members of the caucus was the risk to the reputation of the party. These views were openly communicated to me in clear and emphatic terms,” Rantho told the Commission (para 750).

Mazzone made the following observation about the Committee’s decision in her evidence to the Commission: “In my view the

explanation for this lies in the shifting balance of factional forces within the ANC. The faction opposed to President Zuma seized this opportunity to expose the corruption and impropriety that they knew to be going on, believing that they finally had enough support to carry this off” (RSA VI II, 2022: para 729).

### THE ‘FROLICK LETTERS’

It is well worth reading the section of the Zondo report headlined “the Gupta leaks and the ‘Frolick letters’” – a reference to an intervention on or about 15 June 2017 by ANC MP Cedric Frolick, the Chairperson of Committees. (Here it is worth a mention that Frolick, who still holds this position in July 2022, has been fingered in the Zondo report for taking bribes linked to state capture. He may face charges of corruption, tax fraud and money laundering. Mr Frolick has denied any wrong-doing.)

Frolick was instructed to send a letter to four Portfolio Committees – Home Affairs, Mineral Resources, Public Enterprises and Transport – requesting them to urgently probe the allegations of state capture linked to emails involving a number of Ministers. The Committees were told to follow up with the Ministers concerned and to report back to the National Assembly.

What isn’t clear to the Commission is exactly who gave these instructions. According to Frolick, he was away dealing with constituency matters when the decision was made. We do know that the opposition Democratic Alliance (DA) had been persistently calling for a parliamentary intervention, including the establishment of an Ad Hoc Committee. On 12 May 2017 the indomitable Mazzone addressed a letter to Frolick in which she motivated, and asked him to approve, the launch of a full-scale parliamentary inquiry by the PCPE into Eskom. The DA’s efforts unsurprisingly came to naught, so we are left to assume that the ruling party’s decision had to have come from whoever was in the ascendant in the

ANC at that time.

In paragraph 340 of the report it appears Zondo agrees: “[T]his tends to suggest that the decision to direct portfolio committees to inquire into the state capture allegations was a matter of no small political moment. It seems unlikely, to say the least, that such a decision would have been taken without political support at a high level.”

Be that as it may, Zondo reports at length on the outcome of the Frolick letters. After whingeing – briefly – about the Committee’s lack of resources and capacity to conduct an investigation of this magnitude, the PCPE kicked into gear. In an unusual move for parliamentary committees it mobilised extra-parliamentary legal, academic and civil society expertise and, showing unprecedented cross-party unity, launched into a protracted investigation that only stalled when Messrs Duduzane Zuma, Rajesh “Tony” Gupta, Atul Gupta and Ajay Gupta ignored invitations served on them requesting that they testify before the Committee.

But by then the PCPE investigation had amassed impressive evidence that it handed over to the official independent Zondo Commission, which was starting up at the time, giving it a significant head start – for which the Chief Justice in his report extended his warm appreciation.

Of the other three Portfolio Committees, the Zondo report had this to say in its summing up:

“The Portfolio Committee on Transport failed to conduct any inquiry. It may not even have been informed by its chairperson of Mr Frolick’s letter.

“The Portfolio Committee on Home Affairs did not demonstrate much willingness to proceed with due expedition. Although it did ultimately conduct an effective enquiry, it acted far too slowly (RSA VI II, 2022: para 459).

“The Portfolio Committee on Mineral Resources failed to hold an adequate inquiry, initially due to evasive conduct on the part of Minister [Mosebenzi] Zwane and thereafter

because of (i) a failure [by Parliament itself] to provide required resources when the committee finally decided that it wanted to hold a formal inquiry ... Terms of reference for this inquiry were finalized at a meeting on 25 April 2018. It was agreed that the inquiry would focus, *inter alia*, on ... an alleged conflict of interest on the part of the Minister; and whether officials had been subject to outside influence.

“This inquiry never got off the ground ... This also raises a concern as to how committed Mr Frolick and the ANC’s parliamentary leadership really were to the investigative process sought in Mr Frolick’s letters of June 2017 ... the ‘bottom line’ is that very little of substance occurred within the PCM by way of parliamentary oversight as a consequence of the letter of 15 June 2017” (RSA VI II, 2022: paras 920-926).

From this we learn two things: firstly, that the Portfolio Committee system can indeed work; and, secondly, that more often than not it doesn’t.

For example, the Zondo report draws attention to the following features of our electoral and parliamentary system that discourage oversight by Parliament:

- In terms of South Africa’s party list, proportional representation system, Members are accountable to their parties, not to constituencies. Zondo quoted several witnesses who attested to “fear” of what the ruling party could do if they took an independent stance, not least of which was the concern of losing their seats. We know what happened to PCPE Chairperson Rantho, and she is by no means the only one. Rantho and members of her family received anonymous threats and lived in fear during the investigation, she told Zondo.
- The ANC members of Portfolio Committees are members of ANC “study groups” that ➤

discuss Portfolio Committee matters in advance of their meetings. Ministers (and government officials) may attend these private gatherings, which open the way for executive interference in the Committees. They may also be seen as forums for lobbying and reaching party consensus in advance of Committee debates.

- The ANC's parliamentary majority means all Portfolio Committees have a majority of ANC members. They can use their majority power to stop other MPs from pursuing inquiries into executive action.
- Zondo stresses the potential conflict for Members between the demands of party discipline and the oversight obligations of MPs determined by the Constitution. "Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. Nowhere does the supreme law provide for them to swear allegiance to their political parties ... The difficulty is that MPs can find themselves in a situation where, in their own judgement, their loyalty to their party – and their duty to comply with decisions by the party – conflicts with their duty, in terms of their oath or affirmation of office, to 'be faithful to the Republic of South Africa' and to 'obey, respect and uphold the Constitution and all other law of the Republic'" (RSA VI II, 2022: paras 863-864).
- Portfolio Committees and their Members are under-skilled and under-resourced. The then Speaker of the National Assembly, Ms Thandi Modise, explained: "Chair, if I could, I would really get resources to

enable a member of parliament to really understand the portfolios they are overseeing ... because of our history, in other countries they do not have the disadvantage of education that we have ... So if I could, I would increase capacity around the member, enable this member to have at their fingertips the things that would enable them to understand and to apply their mind. We are unable to do this ..."

- A constant refrain in the evidence of MPs was that Parliament's budget for conducting oversight is inadequate. The Commission was told that, out of its total budget of more than R2 billion Parliament allocates R50-R60 million for all the financial requirements of Portfolio Committees, including their regular meetings, advertisements, invitations for public comment on legislation (30-40 bills are considered per year with each advertisement costing at least a quarter of a million rand), oversight visits (including travel and accommodation costs, hall hire and refreshments), etc (RSA VI II, 2022: paras 1009-1010).

Then there is the principle that is fundamental to South African law, and to democracy generally, of the separation of powers between the legislative and executive branches of government. This implies the legislative branch must refrain from exercising executive authority, the report states. "[A]ll that Parliament can do is to raise the concern in its report to the National Assembly. Under the current practice, Parliament and/or the legislature can only persuade and not instruct nor micromanage the department or the

Executive Authority" (RSA VI II, 2022: paras 991-994). The report quotes Frolick's testimony that, "there is this view in terms of the separation of powers between the judiciary, the executive and the legislature, that the legislature has a more junior role to those other two arms of state," a view that the report makes clear is not shared by the Commission (RSA VI II, 2022: para 911).

If the above leaves us with no idea of how the Portfolio Committees can even be expected to perform their constitutional duty, nor indeed how this can be addressed, we need to turn to Zondo's recommendations. After all, we know there are good and competent people in the Committees, although perhaps not enough of them. But even the finest Members cannot make the Portfolio Committee system work as long as the ANC asserts its majority in Parliament and its authority over its party Members.

### **Recommendations for Parliament's consideration**

Among the Commission's recommendations for consideration is whether more chairpersons should be selected from opposition parties. Traditionally only the Standing Committee on Public Accounts (SCOPA) is chaired by an opposition MP. Several witnesses suggested that chairpersons should be appointed from the different parties according to the proportion of party representation.

One of the chief concerns that comes up repeatedly in the report is that the ANC has held the majority in Parliament since 1994. "This is a fact of fundamental importance when analysing the practical implementation of parliamentary oversight, since the ANC has, throughout the democratic era, had the power to determine the stance adopted by every structure of Parliament, including the National Assembly, portfolio committees, joint



committees, and *ad hoc* committees” (RSA VI II, 2022: para 762).

The Commission recommends that Parliament should consider passing legislation that protects Members of Parliament from losing their party membership (and therefore their seats in Parliament) “merely for exercising their oversight duties reasonably and in good faith” (RSA VI II, 2022: para 380).

It favourably cites the 1999 “Corder Report on Parliamentary Oversight and Accountability” and the evidence to the Commission of its lead author, Professor Hugh Corder. He said legislative reform is needed to “flesh out the skeleton” of the provisions in the Constitution for parliamentary oversight and accountability and suggested the legislation should provide for “amendatory accountability”, which “refers to the duty, inherent in the concept of accountability, to rectify or make good any shortcoming or mistake that is uncovered.

“This Act should give strong effect to the constitutional requirements of accountability. Presently there is no effective machinery by which Parliament can compel the executive or an organ of state to answer to it” (RSA VI II, 2022: para 434).

The Commission further recommends that should Parliament decline to enact new legislation, or revise existing law, it could instead amend its own rules, for example, to sanction Cabinet members for lack of punctuality or absence from Committee meetings and general non-compliance. It further says Committees should refuse to accept shoddy or late reports from the executive and cautions against “overdependence on material produced by the overseen entity [which] is one of the reasons why better training of MPs and better resourced and trained research and technical assistance is necessary.

“A repeated refrain heard from frustrated MP’s is that presentations are often submitted late, not infrequently

at the very meeting at which they are then presented. That obviously makes it impossible for the MPs to read and consider the reports and is clearly unsatisfactory. The apparent frequency with which this occurs makes one wonder whether it is sometimes done deliberately, precisely in order to obstruct proper oversight” (RSA VI II, 2022: paras 444).

The Commission urges Parliament to make it clear that this type of practice will not be tolerated and asserts, “It is up to the portfolio committees to choose how they want to be treated” (RSA VI II, 2022: para 444).

If necessary, argues the Commission, Parliament should consider legislating on the issue of reporting by the executive and the non-appearance of Ministers scheduled to attend committee meetings.

These are all very fine recommendations, but in the end the Zondo Commission appears to agree that Parliament’s failure to assert effective oversight comes down to a lack of political will and strong, ethical leadership within the ruling party.

It quotes University of Cape Town’s Associate Professor Richard Calland who argued in his submission that, “Instead of encouraging obsequious political fidelity and blind loyalty from MPs deployed to positions of parliamentary responsibility, the political leadership needs to encourage a culture of independent-mindedness not in an ‘oppositional paradigm’ but in the spirit of ensuring that the executive remains loyal to the mandate given to it by the electorate. This requires real leadership and a profound commitment to the Constitution and its system of accountability.

“First of all, there is the overarching disposition of the ruling party – does the party leadership create an ‘atmosphere’ in which oversight is encouraged or at least not actively discouraged or obstructed?”

Calland’s submission is worth quoting at some length. “To my mind, this is the primary, pivotal challenge to confront and address: how best to insulate a backbench MP of a ruling party from partisan political pressure, applied in general by the leadership of his or her own party? One short answer is: leadership. Where the leaders of the political party concerned are willing to set the tone and define a set of principles of accountability that parliamentarians, including backbench members of his or her own party, can freely enjoy. Such leadership will provide the political space for individual MPs to ask difficult questions of the executive without prejudice, and in the realistic expectation that they will be taken seriously and answered by the executive branch of government” (RSA VI II, 2022: paras 1004-1005).

The Commission agreed with the professor. “Sound leadership facilitates proper oversight and accountability. Conversely, where the leadership of a governing party is threatening or unsupportive, this cannot but discourage Members of Parliament who are subordinate to party structures dominated by the leadership from carrying out their constitutionally mandated task of holding the executive to account” (RSA VI II, 2022: para 1008).

The Zondo Report concludes that structural reform in the parliamentary system is needed to ensure that Portfolio Committees effectively hold the executive accountable and execute their constitutional oversight duty. Structural reform in this context refers to electoral reform, specifically the introduction of constituency-based (but still proportionally-based) representation.

#### REFERENCE

RSA, 2022. *Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State Report*, Part VI, Vol 2.

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