

January 19, 2004

Dear Judge Hefer,

Thank you very much for the Report of the Hefer Commission of Inquiry into Allegations of Spying Against the National Director of Public Prosecutions, Mr B.T. Ngcuka. The Minister of Justice gave me the report four days ago.

I would also like to thank you most sincerely for acceding to my request to conduct the inquiry, despite the short notice we gave you. I must also express my deep appreciation for the expedition and thoroughness with which you carried it out.

I fully accept the Main Findings you arrived at in response to the terms of reference of the Hefer Commission.

have directed that the Report should be made public with immediate effect

I would also like to comment on some of the issues you raise in the Report. Obviously, I am not asking that you do anything about these. Rather, they indicate some of the things we will have to do to respond to your observations.

We will seek legal opinion to determine whether the government needs to do anything to avoid a possible repetition in future of the problem that arose when you sought access to documents held by the state intelligence agencies.

This seems necessary in the light of the observations you make that the refusal to grant you access to these documents created an "insufferable" situation and might have had to be resolved by the courts.

I have also noted your observation that the person(s) responsible for the "leak" which led to the complaint lodged by Mr Maharaj has/have as yet not been identified. I agree with you "such a state of affairs cannot be tolerated". We will therefore follow up this matter.

I note that attorneys representing Ms Patricia De Lille MP, wrote to you to say “she is unfortunately not in a position to assist the commission in any manner with matters relevant to (the Commission’s) terms of reference...”

I trust that the National Assembly will follow up this matter, since she made the spying allegations against Minister Maduna and, other Ministers, in the Assembly. I have been very concerned about her allegations ever since she made them, especially because they related to serving Ministers of State.

I also fully agree with you that “anything which may discredit either the institution or the office of the National Director or the person holding the office, is manifestly of constitutional significance and indubitably of public importance.”

I have taken a similar position with regard to Ministers of State. This is why the Hon De Lille’s accusations have such grave implications for our government, our democratic system of governance, and therefore the country.

Given the public controversy that had broken out around the spy allegations, I thought it absolutely critical that this matter be dealt with as speedily as possible to enable us to act on the matter without undue delay. It was clear that to delay action on the matter would cause a lot of damage. This required that the truth about the allegations should be determined without delay.

I thought that the best way to address this requirement would be to appoint a Judicial Commission of Inquiry. I remain convinced that this was the correct way to proceed. Like you, I therefore did not, and do not accept the observations made by some that the inquiry was irrelevant, was of interest only to the ANC, and so on.

One of the allegations levelled against the National Director of Public Prosecutions was that because of his continuing obligations to his former handlers, Mr Ngcuka had caused the appointment into the National Directorate of Public Prosecutions or “the Scorpions”, of former functionaries of the apartheid state.

It was alleged that these people were determined opponents of our democratic system, who would work to undermine and destabilise it.

In this regard, I must also mention that the Kebble’s had sent me copies of letters they had written to the Minister of Justice alleging misuse of office by both the Minister of Justice and the National Director, as I understood these letters. I was also mindful of the allegations that had been made by Ms De Lille regarding the Minister of Justice.

For these reasons, it seemed clear to me that the Commission gave us an opportunity to address the matter of misuse of office by both the Minister and the

National Director. It was for this reason that I amended the terms of reference to give the Commission the possibility to investigate this matter.

When I was later informed that both the Kebble's and De Lille would not be approaching the Commission to pursue their allegations, it became clear that it would be irresponsible on my part to leave the second term of reference unchanged, given that only the Kebble's and Maharaj had formally approached me to lodge a complaint concerning misuse of office.

Accordingly, I amended the second term of reference to exclude any reference to Minister Maduna. This also affected the first term of reference. This was because we were now left with the situation that only Mr Maharaj and Mr Shaik had both made the allegation that the National Director had been an apartheid spy, and were ready to provide the Commission with such information as they had.

It therefore seemed only natural that we should not leave the first term of reference as broad and open-ended as I had originally phrased it, for the purpose of allowing everybody who had made the spy allegation to approach the Commission. I therefore decided to amend it.

I would like to convey my belated apologies to you if these changes inconvenienced you in any way in your work.

I also noted both your report and observations arising out of your interaction with Deputy President Jacob Zuma. In this regard, I agree fully with you that "it would be a sad day if, for fear of incurring the wrath of a political organisation to which he belongs, the holder of one of the highest offices of State were to consider ignoring a subpoena issued by a commission appointed by the President under a power vested in him by the Constitution."

My attention was brought to the sentiments expressed by the Deputy President at the time.

On inquiry from senior officials of the ANC, I was informed that the ANC had received two letters from the Commission and that it had responded to both honestly. The senior officials also told me that the ANC stated its willingness to cooperate with the Commission and would have done so if the Commission had required it to supply information at its disposal.

They assured me that had any subpoena been served on them or other members of the ANC, based on their membership of the organisation, they would have obeyed the law.

They presume that Deputy President Zuma made his comments concerning possible disrespect of the subpoena because he felt that events beyond his control had placed him between the devil and the deep blue sea

The ANC had informed the Commission that any documentation it might have received from him when he was the organisation's Chief of Intelligence, had been handed to the new state intelligence agencies. If he was served with a subpoena, he would be obliged to give the Commission such information as he could remember, which had come into the privileged possession of the ANC, and later, the state.

Since the ANC would object to any submission based on reconstruction from memory, of a report submitted in 1989, 14 years earlier, this placed him in the invidious position that he would be obliged to defy either the Commission or the ANC.

As I have indicated, the senior officials of the ANC informed me that had a subpoena(s) been served on the persons I have mentioned, it would have acted according to the law.

Naturally, this would have affected the response of the Deputy President, given that he had informed you that that he would "not be of any assistance to the Commission without the permission or instruction of my organisation."

Let me thank you most sincerely for the sterling work you have done once more, in the interests of our country and its still new democratic system.

Please accept my best wishes for your continued good health.

Yours sincerely,

THABO MBEKI

The Hon Judge J.J.F. Hefer,
c/o Minister of Justice & Constitutional Development,
PRETORIA.