



FW de Klerk

FOUNDATION

South Africa

Beyond State Capture and Corruption

Conference to Commemorate the
28th Anniversary

of FW de Klerk's Speech that
Initiated South Africa's Constitutional
Transformation Process

Presented by the
FW de Klerk Foundation
In conjunction with the
Konrad Adenauer Foundation



**Konrad
Adenauer
Stiftung**

The FW de Klerk Foundation

The FW de Klerk Foundation promotes and preserves FW de Klerk's presidential heritage by supporting the causes for which he worked during his presidency.

The Foundation:

- supports and promotes the Constitution, the Bill of Rights and the Rule of Law through the activities of the Centre for Constitutional Rights;
- promotes unity in diversity by working for cordial inter-community relations and national unity through its Centre for Unity in Diversity;
- supports charities that care for disadvantaged children and children with disabilities;
- provides information on FW de Klerk's presidency and the factors that led to South Africa's transition to a non-racial constitutional democracy.

For more information, visit www.fwdeklerk.org



FW de Klerk
FOUNDATION

Centre for Constitutional Rights (CFCR)

The Centre for Constitutional Rights (CFCR) operates as a unit of the FW de Klerk Foundation and reports to the Foundation's Board. The CFR's mission is to uphold and promote the Constitution.

The CFR's goals are:

- to promote the values, rights and principles in the Constitution;
- to monitor developments - including draft legislation - that might affect the Constitution or constitutional rights;
- to inform people and organisations of their constitutional rights; and
- to assist people and organisations to claim their rights.

For more information, visit www.cfcr.org.za



Centre for
CONSTITUTIONAL
RIGHTS

Centre for Unity in Diversity (CUD)

The Centre for Unity in Diversity (CUD) operates as a unit of the FW de Klerk Foundation. The CUD's aims include promoting the constitutional rights of South Africa's communities to preserve and develop their cultural, religious and linguistic identities within the framework of national unity; and promoting harmonious non-racial relations between all who live in South Africa.

The CUD:

- Supports cultural, religious and linguistic rights, and works for national unity;
- Monitors developments that might affect inter-community relations;
- Opposes discrimination from any quarter;
- Participates in the national debate on inter-community relations and the rights of cultural, religious and linguistic communities.



Centre for
UNITY IN
DIVERSITY

Konrad Adenauer Stiftung (KAS)

Freedom, justice and solidarity are the basic principles underlying the work of the Konrad Adenauer Stiftung (KAS). The KAS is a political foundation, closely associated with the Christian Democratic Union of Germany (CDU). In our European and international cooperation efforts we work for people to be able to live self-determined lives in freedom and dignity. We make a contribution underpinned by values to helping Germany meet its growing responsibilities throughout the world.

We encourage people to lend a hand in shaping the future along these lines. With more than 70 offices abroad and projects in over 120 countries, we make a unique contribution to the promotion of democracy, the Rule of Law and a social market economy.

We cooperate with governmental institutions, political parties, civil society organisations and handpicked elites, building strong partnerships along the way. In particular we seek to intensify political cooperation in the area of development cooperation at the national and international levels on the foundations of our objectives and values. Together with our partners we make a contribution to the creation of an international order that enables every country to develop in freedom and under its own responsibility.

For more information, visit www.kas.de



Konrad
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*Transcribed from recording



Introduction and Welcome

Mr Dave Steward
Chairman of the FW de Klerk Foundation

TO THE FW DE KLERK FOUNDATION CONFERENCE
Cape Town Marriott Hotel Crystal Towers, 2 February 2018

EK WIL ALMAL baie hartlik welkom heet by hierdie konferensie vandag. I would like to welcome everybody to this conference, a really important topic for South Africa - beyond state capture and corruption.

What is state capture? I think the best way of thinking of it is as a cancer that takes over organs that are vital for the continued vitality of the body politic, the alien cells that take over these vital organs like the NPA, the Hawks, the South African Revenue Service. They devour those organs simply to engorge themselves. So, state capture has probably been the greatest threat that has confronted our young democracy and we have got a wonderful line-up of people to discuss this critically important topic today.

To start with I'm afraid I've got bad news - Pravin Gordhan can't be with us. We heard at the last moment that he has been confined to bed by his doctor. Nothing serious but he just simply cannot be here with us today, but we have on very short notice - and we would like to thank him - managed to get Prof Haroon Borhat of the University of Cape Town to speak in his place. Of course, Prof Borhat is an expert on this whole question of the cancer of state capture. So, I think at such short notice we are very, very privileged to have Prof Borhat with us.

Then of course we have perhaps one of the central figures in the state capture story to address us today and

that is Thuli Madonsela. If there is anybody who ever first diagnosed this cancer it was she and the manner in which she courageously examined the evidence relating to state capture and published it, brought it to the national and international attention, she deserves, I think, our deepest, deepest gratitude. So, we are going to have a presentation by Thuli Madonsela.

Then we have Dr Frans Cronje of the Institute of Race Relations, which is perhaps our number one political socio-economic research organisation in South Africa. They do wide-ranging research. They comment on the issues of current importance. Again, Dr Cronje will be able to give us new and important insights into, not only the nature of state capture, but what might happen afterwards and then of course we have our own Chairman *Emeritus*, FW de Klerk, who had a little to do with the drafting of the Constitution that is now under threat and who has some perspectives that he would like to share with you on the road ahead and upon what happens, as the title of the conference indicates, after state capture.

So, I think you will agree that this is an impressive line-up and that we will all emerge from this conference knowing a lot more than we do at the moment about this, this topic that is of critical importance to everyone in this room. Our partners in this conference are the Konrad Adenauer Stiftung of Germany. The Konrad Adenauer Stiftung has been a constant champion of constitutional government in South Africa. They have partnered with us in many, many important initiatives. They are out there on a 24/7 basis, reminding South Africa of the country that we could and should be. I would like to introduce Mr Henning Suhr of the Konrad Adenauer Foundation and ask him just to say a few words as well. Thank you. ●



“What is state capture?
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Introduction and Welcome

Mr Henning Suhr
Country Representative KAS

TO THE FW DE KLERK FOUNDATION ANNUAL CONFERENCE
Cape Town Marriott Hotel Crystal Towers, 2 February 2018



DEAR PRESIDENT DE KLERK, Adv Madonsela, Prof Bhorat, Dr Cronje, friends from the FW de Klerk Foundation, Members of Parliament, Representatives from State institutions, diplomatic missions, from civil society and academia, ladies and gentlemen, all protocol observed.

On behalf of the Konrad Adenauer Foundation I would like to extend a warm welcome to all of you. It is a pleasure to be here today participating in the opening of this prestigious annual event. A special welcome goes to this year's guest speakers, who are without doubt very competent, experienced and demonstrated an exceptional record of integrity throughout their professional life. Therefore, I cannot think of anyone more eligible to speak on the conference's topic which is "South Africa beyond State Capture and Corruption".

Accountability and transparency are two crucial elements of good governance. The fight against corruption is essential in a democratic society. Nonetheless, one has to note that corruption and misuse of public funds is taking place since governments and public administration exist. The Roman statesman and philosopher Cicero already stated - and I quote - "There is no sanctuary so holy that money cannot profane it, no fortress so strong that money cannot take it by storm."

By citing Cicero I do not want to qualify current developments in South Africa as something minor. Rather the contrary: I would like to point out that fighting against corruption and misappropriation of public funds is constant work. In ancient Rome, Cicero fought during his lifetime against those politicians who wanted to take advantage of their power for their individual benefit. Although not successful, Cicero's fight for the *res publica* against the seizure of the total power by Julius Caesar is known in history as one of the first battles against a kind of state capture. But I do not want to bore you with stories from ancient Rome. My father is a former Latin teacher so maybe that is why the historic struggle between Cicero and Caesar first came into my mind when I heard about the so-called "state capture".

The lesson learnt is definitely that a democratic state can only be successful and to the benefit of the majority of the people if there are enough checks and balances: we need a vital, enlightened and well-organised civil society. We need independent and strong institutions which fulfil their constitutional role in the proper way and implement it with sufficient self-confidence. We need a free press which has the proper means to be the real watchdog of society. And we need a Parliament which is aware of its legislative powers and should be the core of the political system whereby MPs are elected directly and represent the will of the people. In this regard the discussion about possible electoral reform is interesting, nevertheless useless if the voters won't hold their elected politicians accountable from one election to the next. It is in the hands of the voters, if they elect MPs who serve the interests of those they represent instead of their own private interests.

A famous quote from the former German Chancellor Konrad Adenauer brings it to the point: "Every political party is there for the people and not for itself". Therefore, the role of a political party is quite clear. But it is the voter's responsibility to sanction the candidates which proved to put private interest first and to reward the candidates who have a clean record and gave priority to the collective interest. A democracy only can self-correct if the people believe in the mechanisms of self-correction, in other terms: they have to believe in the power of their vote and political change by elections.

The great report on "State of Capture", compiled and drafted by Adv Madonsela, is only the tipping point. The great job she has done should remind us that perpetual effort by every citizen is necessary in order to construct the democracy, which President Mandela, President De Klerk and all the other great individuals had in mind during South Africa's historic transition.

The whole world admires South Africa for the manner in which it handled the transition peacefully and drafted such a progressive Constitution. The South Africans can be proud of that and they should defend the constitutional values and principles as much as they can. Although there might be some political developments to worry about at the moment, I am deeply confident that this nation will overcome the challenges they are facing. In the past there have been brave South Africans who fought for the right cause and so there will be many of them in the future. We must just not forget about the vision which the great South African authors of the Constitution were dreaming of: a peaceful, democratic and prosperous society, of which every citizen is part of regardless of his or her background. I am optimistic that the story which South Africa is telling the world is that of how inclusive democracy will succeed and not fail.

Dear ladies and gentlemen, the Konrad Adenauer Foundation - like many other German political foundations and foreign organisations - is promoting democracy in South Africa for many decades. We do so by always taking the partner principle into consideration. That means we do not act on our own, but always work together with local partners, due to the fact that the best and most sustainable ideas are mostly coming from within every society itself and not from the outside. In this regard we are very delighted that one of our partners in South Africa is the FW de Klerk Foundation and I would like to thank President De Klerk, Theuns Eloff and his staff.

Meneer President, baie dankie dat u ons aan boord geneem het vir hierdie groot konferensie. Ons waardeer dit regtig. We really appreciate the cooperation between our two foundations. With these words I would like to conclude my remarks. I wish you all an interesting conference with good thoughts and even better discussions.

Thank you very much for your attention. ●

The Constitution, State Capture and the Way Forward

Former President FW de Klerk
Chairman *Emeritus* of the FW de Klerk Foundation

TO THE FW DE KLERK FOUNDATION ANNUAL CONFERENCE
Cape Town Marriott Hotel Crystal Towers, 2 February 2018

TWENTY-TWO YEARS AGO elected representatives of all the people of South Africa, gathered in Parliament, sitting as a Constituent Assembly, adopted a new Constitution as the supreme law of South Africa.

It is important for us to remind ourselves of their objectives in so-doing. They were:

- to heal the divisions of the past and to build a society based on democratic values, social justice and fundamental human rights;
- to lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- to improve the quality of life of all citizens and free the potential of each person; and
- to build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

The drafters were fully aware of the need for safeguards to ensure that future governments would abide by the provisions of the Constitution and respect the rights and freedoms that it would enshrine.

- They based the Constitution on the principle that it and the Rule of Law would be supreme and that any law or conduct inconsistent with the Constitution would be invalid.
- They established strong and independent courts to uphold and interpret the Constitution. The courts would be independent and subject only to the Constitution, which they would have to apply impartially without fear, favour or prejudice.
- No person or organ of state would be permitted to interfere with the functioning of the courts.
- They also created special institutions to support the Constitution. These included a Public Protector, the South African Human Rights Commission, a Commission for the Promotion of the Rights of Cultural, Religious and Linguistic Communities; a Commission for Gender Equality; an Auditor-General; an Electoral Commission and an Independent Authority to Regulate Broadcasting.
- These institutions would be independent and subject only to the Constitution and the Rule of Law. Like the Courts they would be required to be impartial and would have to exercise their powers and perform their functions without

fear, favour or prejudice.

The Constitution required public administration to maintain and promote a high standard of professionalism and to provide services fairly, equitably and without bias - on the basis of the efficient, economic and effective use of resources.

- When any organ of state contracted for goods and services, it would have to do so in accordance with a system that would be fair, equitable, transparent, competitive and cost-effective.
- The Security Services - including the Defence Force, the Police and the Intelligence Service - would be required to act in accordance with the Constitution and would be prohibited from prejudicing or furthering any political interest.
- There would be a National Prosecuting Authority with the power to institute criminal proceedings on behalf of the state which would exercise its functions without fear, favour or prejudice.
- Finally, the executive power would be carried out by a President with extensive powers who would be required to swear in his oath of office to obey, observe, uphold and maintain the Constitution and all other law of the Republic.

Aye, there's the rub.

The Constitution and all the rights and freedoms that it ensures depend to great extent on the integrity of the President and his willingness to abide by his oath of office.

The viability of the entire constitutional scheme rests on the integrity and ability of the people that the President appoints to the cabinet and to the many other key posts in the state sector that he is empowered by the Constitution to fill. In particular, it rests on their willingness and determination to carry out their functions with integrity, in accordance with the law; and in a manner that is without fear, favour or prejudice.



These posts included the heads of all the Chapter 9 institutions that were intended to support the Constitution. They also included the heads of the Defence Force, the Police and the Intelligence Service - and crucially, the head of the National Prosecuting Authority.

The fact that these enormous powers of appointment can - and have been abused - is the topic of our conference today.

On the one hand, it is acceptable and general practice for the head of any government to appoint to key posts political supporters and associates in whom she or he has confidence.

After 1994 the African National Congress proclaimed, in its *Strategy and Tactics* documents, its intention to strengthen "the hold of the democratic movement (i.e. the ANC) over state power, and to transform the state machinery to serve the cause of social transformation".

According to the ANC "the levers of state power include the legislatures, the executives, the public service, the security forces, the judiciary, parastatals, the public broadcaster, and so on".

So there is nothing new about state capture: however, the ANC's idea was always that the captured state should serve public altruistic purposes - and not private self-enrichment.

As the ANC put it: "Control by democratic forces" meant "that these institutions should operate on the basis of the precepts of the Constitution; they should be guided by new doctrines; they should reflect in their composition the demographics of the country; and they should owe allegiance to the new order."

The idea was not that the levers of state power should be abused for the purposes of amassing immense hordes of private wealth.

But, as other speakers will not doubt point out at this conference, this is exactly what has happened. I will not go into the roots of state corruption, or the sordid and, by now broadly exposed details, of the industrial-scale looting of the state that has occurred.

The question that I would like to address

is how we as a country are going to re-establish a system of governance that is characterised by integrity - with key institutions that operate in the public interest effectively, professionally, efficiently and without fear, favour or prejudice.

Some observers call for changes to the Constitution - or even for the drafting of a new Constitution.

Critics on both the left and the right now charge that it is the Constitution that has failed - and not those who hold power in our system. On the left, radicals charge that the Constitution is an unacceptable impediment to radical economic transformation. On the right, reactionaries are angry that the Constitution has failed to protect the language, cultural, educational and property rights that their representatives negotiated so arduously into the national accord of 1994.

Thomas Jefferson, one of the principal authors of the United States constitution, insisted that each successive generation should draw up a new constitution to meet the requirements of changing times and circumstances. He calculated a generation at 19 years.

According to a study led by Prof Tom Ginsburg of the University of Chicago, there have been more than 900 constitutions throughout the world since 1789. Their average duration is only 17 years - two years shorter than the period prescribed by Jefferson - and five years shorter than the lifespan of our own Constitution. Constitutions last, on average 32 years in Europe, 12.4 years in Latin America and 10.2 years in Africa.

The French have had 17 constitutions since the 1789 Revolution - so many that according to one joke the latest constitution was not available at French libraries - because they did not stock periodicals. The oldest, most resilient and most successful constitution is that of the United States - which has survived since 1788.

Ginsberg and his colleagues found that the factors that tended to increase the longevity of constitutions included strong enforcement mechanisms; the ease with which they could be amended; the specificity with which they deal with rights and institutions; and their inclusivity.

The South African Constitution meets these requirements.

- It can be amended with relative ease - by a two-thirds majority for most of its provisions and by a 75% majority for its founding values.
- It spells out with great specificity the rights and freedoms that citizens must enjoy - as well as the legislative, executive and judicial institutions required for successful constitutional governance; and
- It is inclusive - making provision for language, cultural and religious rights of citizens from all South Africa's communities.

More than most constitutions, it defines the new nation that it has helped to create. Its founding provisions represent common values and aspirations to which all South Africans of goodwill can subscribe. It contains the recipe according to which South Africa's historically divided peoples came together to create a new society.

In my opinion, we should not interfere too lightly with a document that was negotiated with such consummate care 22 years ago. Once one opens the Pandora's Box of constitutional amendment, it might easily happen that much of the good might be excised with the bits that some people now dislike.

The exception would perhaps be to implement the electoral reform recommendations of the Van Zyl Slabbert





Commission.

This is a step that would not require any constitutional amendment - since it was always part of the constitutional scheme that there should be a more accountable electoral system.

The present electoral system has proved to be corrosive of core elements in the constitutional scheme - including the requirements that:

- there should be a meaningful separation of powers between the Legislature and the Executive; and that
- the National Assembly should exercise effective oversight over the activities of the Executive.

South Africa's slide into state capture and corruption can be ascribed in part to the lack of proper separation between the Executive and the Legislature, and the absence until quite recently of effective oversight.

It is self-evident that the members of the National Assembly cannot carry out their oversight functions and their duty to hold the Executive accountable if they themselves are *de facto* accountable, not to the electorate, but to those who in effect comprise the Executive.

The political party to which they belong can decide whether - and in what position - they will be included in future electoral lists; whether they will be redeployed to higher office in the state or elsewhere, and, in terms of section 47(3)(c), can effectively dismiss them from Parliament.

Effective oversight - and government by the people - require a relationship between elected representatives and voters in which representatives are more directly accountable to the people who elected them.

So, in my view, we should not lightly interfere with our present hard-won Constitution.

John Adams, the United States' second President, was close to the mark regarding the requirements for successful constitutions when he observed that the survival of constitutional governance depends directly on the integrity of those who hold power. As he put it in a letter to his son in 1776: "Statesmen, my dear Sir, may plan and speculate for Liberty, but it is Religion and Morality alone, which can establish the Principles upon which Freedom can securely stand. The only foundation of a free Constitution is pure Virtue, and if this cannot be inspired into our People in a greater Measure than they have it now, They may change their Rulers and the forms of government, but they will not obtain a lasting Liberty. They will only exchange Tyrants and Tyrannies."

I agree with Adams. We may amend our present Constitution or replace it with a new one. However, success will depend on the genuine commitment of those who hold power to uphold the values, the vision and foundational values on which constitutions should be based.

Advocates of constitutional change betray their ignorance of what constitutions can - and cannot - achieve - when they criticise those who drafted the Constitution for deviations from the vision and values that it proclaimed.

Constitutions may include a perfect recipe for the ideal society - but ultimately it is the chefs who determine how the dinner will turn out. In our constitutional democracy the chefs are those who hold power - and they include:

- the electorate;
- the ruling party;

- opposition parties;
- the government;
- the courts; and
- the institutions of state.

The government of the day has the fullest right and duty to implement the policies that the majority of voters support in free and regular elections. However, it should have neither the power, nor the right, nor the intention to interfere with the institutions that have been created to support the Constitution - including the courts, the Chapter 9 institutions; the security forces and the National Prosecuting Authority.

Those who support constitutional government breathed a huge sigh of relief when Cyril Ramaphosa was elected as the new President of the ANC last December. There was a general perception that a win by his opponent would have further entrenched the system of state capture and corruption that has characterised the presidency of Jacob Zuma.

The key question, as we enter the second month of 2018, is whether Mr Ramaphosa has the power, the will and the intention to restore integrity to the core of government.

- Much will depend on his ability to consolidate his power within the ANC. The reality is that many members of the leadership and senior ranks of the ANC are deeply compromised by state capture - and are fundamentally dependent on the cascading system of patronage that was established by President Zuma. Many have no other means of livelihood. If they are ejected from the gravy train they face a frightening prospect of very radical economic transformation and poverty.
- Secondly, how will Mr Ramaphosa deal with the very sensitive business of dismantling state capture? How effective will the forthcoming commission of enquiry be and how incisively will it cut to the root of the malaise? We cannot afford another Seriti Commission.

And how will the state deal with those who are found guilty of corruption? Will they be treated "with sensitivity"

and let off the hook? And if wrong-doers are not punished, will we not establish a principle of rolling impunity from one administration to the next? On the other hand, what happens to the unity of the ANC if the culprits face the full retribution of the law?

- Finally - and most crucially - what will Mr Ramaphosa do to re-establish the independence of the institutions on which the integrity of governance depends? Will people of unimpeachable character and independence be appointed to head the intelligence services; the police and the Hawks; the Office of the Public Protector; the Human Rights Commission; and the National Prosecuting Authority? Will the government be able to resist the temptation of interfering once again in their activities?

Dealing successfully with these challenges will require immense political skill; perseverance; courage and integrity.

Mr Ramaphosa has begun well.

In the ANC's 8 January message, he acknowledged that the ANC had become "deeply divided through factionalism, patronage, corruption and competition for resources."

He recognised the impact of state capture on state owned enterprises:

"Many of these enterprises have experienced serious governance lapses and poor delivery of their mandate. These challenges have been exacerbated by state capture, through which billions of rand have been illegally diverted to individuals. Governance of these state-owned enterprises has been severely weakened and confidence in the public sector generally has been undermined." He said that government would "act urgently and decisively to improve governance, financial management and performance in all SOEs and protect them from improper interference."

He welcomed the announcement of the establishment of a commission of inquiry in line with the findings of the Public Protector's report on state capture.

Importantly, he called for the restoration of the integrity and legitimacy of the state and for strong and efficient law-enforcement agencies to fight against corruption and crime. He said that the ANC was of the firm view that "the country's intelligence services, the police and prosecutorial authorities should be strengthened and fortified to act with professionalism, and without fear, favour or prejudice".

So, Mr Ramaphosa has been making the right statements about corruption.



But then, so does virtually every new leader in the emerging world. In the first speeches that they make they all promise to root out corruption. Even President Zuma speaks voluminously on the need to combat corruption and recounts the good work that the ANC has been doing in this regard.

The test will lie in Mr Ramaphosa's actions - and not in his words. Again, he has started well with the reconstitution of the Eskom Board and the appointment of the widely respected Jabu Mabuza as its Chairman.

Now we shall have to watch carefully how he deals with other key institutions.

The Hawks and the National Prosecuting Authority seem, at last, to be serious about investing and prosecuting those responsible for state capture. The noose is tightening around the worst offenders.

Some commentators believe that state capture can best be combatted by the establishment of an integrity committee or by a limitation of the power of the President to make key appointments to head constitutionally-independent institutions.

Experience has, however, taught us that the fault most often lies - not in the institutions of governance - but in the character, integrity and intentions of those who hold power.

My own view is that the best guarantee for the future lies in implementing our present Constitution with diligence and integrity.

- We need voters and political parties that refuse to elect known scoundrels to public office;
- We need a President who abides strictly by his oath of office;
- We need a National Assembly - strengthened by the implementation of the Van Zyl Slabbert electoral recommendations - that rigorously carries out its oversight functions;
- We need professional security forces that carry out their duty to protect and defend the public efficiently and impartially;
- We need courts that will continue to assure that legislation and executive action comply with the Constitution - and that act with scrupulous impartiality;
- We need Chapter 9 institutions and a National Prosecuting Authority that carry out their duties without fear, favour or prejudice.

Without integrity among the chefs, it does not matter how well the constitutional recipe is written,

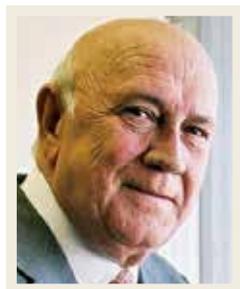
- the first course of good governance will be ruined;
- the second course of national unity will be burned to a cinder; and
- the dessert cake of economic prosperity will end up in the dustbin.

I am confident that the present Constitution will



serve South Africa well deep into the future and that it will far surpass the lifespan of constitutions elsewhere in our continent and in the world.

At the end of the day, I agree with John Adams: if I can paraphrase his views - "The only foundation of a free Constitution is integrity, and if those who hold power cannot be inspired to show greater integrity than they do now, they may change their President and the forms of government, but they will not secure lasting freedom. They will only exchange one set of corrupt leaders and corruption for another." ●



FW de Klerk

During his presidency from September 1989 until May 1994, FW de Klerk dismantled apartheid and initiated and presided over the inclusive negotiations that led to the adoption of South Africa's first fully democratic Constitution in December 1993. Also in 1993, he was awarded the Nobel Peace Prize, together with Nelson Mandela. After the election on 27 April 1994, Mr De Klerk served as one of South Africa's two Executive Deputy Presidents until 1996, when his party withdrew from the Government of National Unity. He retired from active politics in September 1997. In 1999 he published his autobiography, *The Last Trek - A New Beginning* and established the FW de Klerk Foundation. The Foundation upholds the Constitution through the work of its Centre for Constitutional Rights and works for positive relations in multi-cultural societies through the work of its Centre for Unity in Diversity. Mr De Klerk is also the Chairman of the Global Leadership Foundation, established in 2004, whose panel of former presidents, prime ministers and statesmen provides discreet advice to heads of government on issues that concern them.



Betrayal of the Promise - How SA is Being Stolen

Prof Haroon Borat
Professor of Economics & Director:
Development Policy Research Unit at UCT

TO THE FW DE KLERK FOUNDATION ANNUAL CONFERENCE
Cape Town Marriott Hotel Crystal Towers, 2 February 2018

THANK YOU VERY MUCH and thank you for welcoming me nicely, knowing that I'm a relatively poor substitute for who you were prepared for - but when the call comes from the ex-Minister of Finance, it is difficult to say no. My other concession is that this, as you may have obliquely heard from Dr Eloff's attentive introduction: I don't do any political science work. So, this is a very unusual piece of work for me to be associated with, but I think it does represent - and I will go through the details and the background of the Report - a unique period in our history when all of us became activists. What I'm going to try and do is give you my perspective through my lens with respect to the Report. I would urge you to go and read it because this is my take, this is what I have extracted being involved in the project and being involved in the Report. You may, and you will certainly get other pieces of information and other sorts of analytical insights that I may not have.

Firstly, we met secretly at Stellenbosch University - strange as it sounds, almost like the 80s when I was a student activist - over a period of various weekends. It was the first time I had to enter meetings with my cellphone off and I come to that because that's the society we're sort of still living in, but I think we are living in intensely for the last three, four years. To reiterate: this was a multi-university collaborative project and what distinguished what we tried to do analytically, was the idea that we started out thinking as academics but noting that there were two types of conversations happening about state capture.

The first was an important one. Both are important, but they were different from the public discourse. You had the Save-South Africa-campaigns, you had the statements from WUSA and BLSA, you had the South African Council of Churches (SACC) *Unburdening Panel Report* and so on. On the one hand, the sort of very pervasive public knowledge

about state capture or statements about state capture. On the other hand you had the journalists who continuously reported almost case studies of state capture.

The difficulty, with due respect to the journalists, is that they've got to sell stuff. We got so used to racy trips to Dubai and secret hotel rendezvous. We together - some of us were economists - led by the political scientists and the convenor of the group, Mark Swilling, read the stuff. What we tried to do was to step back - thinking about what it was that defined the structure of this corruption that we saw - and say, surely there is a structure to this. You cannot have the kind of reach and the kind of impact on the society that we've seen through state capture without some structure, without some say in which this is an organised form of theft. This is not an opportunistic crime.

This morning I was thinking about the dates that led us from the release of the Public Protector's Report on state capture to the Unburdening Panel of the SACC - and we would like to add our Report, which came directly after the SACC Report - and then the final release of the #GuptaLeaks. Now, I'm not really good with keeping dates but if I look back on it, October 2016 was the release of the Public Protector's Report. By June 2017 we had, if you recall, the *Sunday Times*-splashed headline about President Zuma and his mansion in Dubai. So that is nine months. It is almost, to abuse Charles Dickens, a summer, a spring and a winter of discontent. What you really saw is a period of extreme focus in the public discourse at all levels on state capture.

We thought we were quite fortuitous because our Report comes between the two. It comes between the *Unburdening Panel Report* of the SACC and then the #GuptaLeaks. I would also urge you - and this is part of figuring out solutions and what we can do with state capture - to go and consult the #GuptaLeaks. These are now a public resource and you, in the different worlds that you live in, will pick up different parts of state capture that the journalists haven't even started looking at.

I will give you one quick example. The MultiChoice ANN7 story broke on Twitter. It broke on Twitter because a certain CEO of a company that I'm the Chairman of picked it up and published it on Twitter. That is how the story broke

- she saw it on the email servers that provide you with the #GuptaLeaks.

That is the background. My presentation will have two anchors: one is to give you what I think is the structured form of corruption that we have seen, which will hopefully lead to suggestions about what we can do with state capture or the different levers, how we can fix the levers. President De Klerk alluded to some of those. The second anchor of the presentation is to give you one example of state capture in action and again to give you a sense of how brazen the different actors have been.

The Report suggests that there are five levers of a captured state and these five levers are very deliberate and they work in concert with each other. They are intertwined, they are not independent of each other. I will list them briefly and I'll take you through each of them.

The first is to find out where the funds lay. Let's not forget, state capture and corruption are, simply put, about stealing money. It is about access to resources. It is about taking money from the state or from taxpayers. You need to find the location of those resources, of those funds, and most of those funds sit in state-owned enterprises (SOEs).

The workhorse of institutionalised corruption is SOEs and we will see how we have repurposed them in the South African context. But you need a complimentary system to reinforce the repurposing of the State and to provide portals for corruption. The second and third levers represent that complimentary system - both at the level of Cabinet and at the level of the Intelligence Services, which is the rise of the Shadow State. If successful, it permeates the entire society - we move from petty corruption to a pervasive form in which corruption and corrupt behaviour becomes the norm. The first is the apex of state capture, which is control of the National Treasury, and I will come to that.

The extent to which we have seen state capture is something completely new in the South African context. It is not new globally and please do not think it is an African phenomenon. The most perfect form of state capture exists in Russia. If you want to see a model of state capture and institutionalised corruption, it exists in the largest land surface country-wise in the world, which is Russia but what happened was the repurposing of SOEs.

How did we see the repurposing of SOEs? I want you to think of the dates because a lot of this has to do with the awareness of society. The key event is the appointment of Malusi Gigaba on 1 November 2010. Barbara Hogan was fired as Minister of Public Enterprises and Malusi Gigaba's

appointment is critical in the repurposing of SOEs, because his job is - as we show in the Report - he becomes the patron to the Don.

The political economists have a structure of corruption and as the patron to the President, his job is to ensure that he recalibrates the Boards of all the SOEs so that they become malleable and easily influenced. One of the things you can see are these changes over time, but this was a Report we wrote in two months. Hopefully the Commission will do a far more systematic timeline of how all the Boards of Denel, Transnet and Eskom were reconfigured. The Minister, in controlling and changing the Boards of SOEs, creates potential portals through which a Board Member can commit or facilitate acts of corruption.

That is essentially what we saw in the Transnet case. The Minister of Public Enterprises proposed a certain Iqbal Sharma to become the Chairman of the Board of Transnet. The checks and balances operate initially because Cabinet throws this back to Gigaba; they say he is too lightweight (and it turns out later on that he is a Gupta associate). Iqbal Sharma doesn't get appointed as Chairperson, but he is then pushed onto the Board of Transnet. He becomes the enabler. He is a really critical person at the Board level who is associated with the Guptas and is then able to facilitate acts of corruption. Again, I will show that in detail.

The key thing is that Brian Molefe is appointed as Chief Executive of Transnet in early 2011. So here is a quick pop quiz: who is the CFO of Transnet? Anoj Singh. What we see is the team moves from Transnet onto Eskom. It is a really important development that you then have corrupt individuals both at the Board level and in the executive management of the company. In recalibrating the Boards of the SOEs - and in this particular case the executive management - what you have managed is to create the elements through which you can commit acts of corruption. But that is not enough. You need some kind of deliberate instrument that you can use. It turns out that what they find out at Transnet and then subsequently at Eskom and elsewhere, Denel, is that they were able to bypass the PFMA - the *Public Finance Management Act* - and undertake a whole series of acquisitions or purchases or state procurement without having to report to Parliament and without the oversight and influence of the PFMA.

Why Denel, why Transnet, why Eskom - why state procurement? What I should have said at the outset is that the State and the public sector the world over is the largest procurer, purchaser of goods and services in every part of



the world - developing and developed. If you can control and influence that procurement process, there is a lot of money to be had, potentially by lots of bad people. Things such as tendering processes, and in telecommunications, the auctioning and the licensing process, can be subject to abuse and that is what you want to control.

Through the PFMA we thought hard about the procurement process - but think about other forms of licensing and purchasing through government. How can we provide checks and balances, how can we control those processes?

One obvious thing - not mentioned in the Report - is that ideally, all Board Members of SOEs should go through a public testimony type of process in the way that they have done it in the US. Their CVs are looked at, they do background checks and so on - if you like, Parliament and the opposition then are involved in making sure that Board Members of SOEs are subject to proper scrutiny. That doesn't happen presently and so the PFMA and sort of bypassing the PFMA, becomes the tool through which theft happens within SOEs. In order for this to happen - theft from SOEs to be institutionalised, to be pervasive and for the theft to happen on a grand scale - you need political power to be under your control.

As head of the Cabinet, one of the things you cannot avoid is a difficult Cabinet or a contentious Cabinet. So, both in Free State and in Mpumalanga you saw the rise of the premier leagues, the rise of political power away from the national centre that expresses itself through the ANC structures. That is the first thing. You take a little bit of power away from Luthuli House and away from the Cabinet. The second thing you do, a more common thing that politicians - with due respect - do the world over, is over time you dilute the power of the Cabinet. The purest form of that is to have a kitchen cabinet. That is what we really see in the Zuma era - a growth in the size of the Cabinet but also a growth in those that are more likely to agree with the President. If you are able to do that, you've effectively marginalised your opponents.

It is in the Report, and the political scientists will have far more to say about the generic form which this marginalisation of the opposition within the ANC happens via the President - but that is key. The reason you do that is that you have further control but there are always resources at the end of this political rainbow. It is about access to State funds, it is about access to State resources. It is about corruption and so what we do see is a very clear sense in which the President relies on a weak Cabinet.

I did try and test this. It is not in our Report, the size of the Cabinet story. I promise you this is the only data that I have but as an economist, I have to put some numbers to it, to ask the question - what actually happened to the size of the Cabinet. It turns out that the size of the Cabinet in terms of numbers does grow. We have two new ministries over this period: Small Business and the Department of Women. What is interesting in terms of indicators, is the increase in the number of Deputy Ministers. In my view - and we need to do more detailed analysis of this - it is a function of increased patronage and an attempt to dilute the power of Cabinet. The more people you have in the form of the Deputy Ministers, the more likely you are to push decisions through. If you look at some of the Deputy Ministers, at least in some of the ministries, that has certainly been the case.

Once you have that second lever, once you have Cabinet set up for yourself, the instruments that are available to you are still constricted by regulatory oversight. Cabinets have memos, the Ministers are quite strong, they can push



back, they can refuse to listen to the President at various levels. On contentious issues, if the President wants specific things done, he does need to go through a line ministry. What Zuma does in this period is to create a regulatory innovation, and it is called Inter-Ministerial Committees (IMCs).

These things never existed before, but IMCs become an instrument through which contentious policy decisions can be made by the President. We had the IMC on banks - do you remember that? When the Guptas lost all their bank accounts, when the banks refused to host any of their accounts, immediately the President initiated an IMC on banks, to investigate banks and the regulations that govern them. The Chairman was Zwane, not the Minister of Finance. So, what you had was an attempt to push through a particular decision around banks. Of course, it all fell away because of the public fallout, but the other IMCs are really interesting.

The IMC on communication, managing licences, that is something we did not do enough research on and is worth looking into. Of course, the big one is the IMC on nuclear. If Mark Swilling was here, he would tell you nuclear was the next big thing. That was death's door, fiscally, for South Africa. If we had gone down that line, we would be indebted to the Russians for the next 40 years. So, the IMC on nuclear was the President's attempt to push through a nuclear deal.

And again, if you look at the #GuptaLeaks, if you look at Geoff Budlender's report on Trillian Capital, what you see

is a suggestion that Minister Nene's firing was very closely linked to discussions around nuclear. The extent to which nuclear was part of the President's agenda is important.

What did the IMCs do? They lacked transparency, they don't report to Parliament. So, you can push these decisions through without reporting to Parliament, they are not part of the formal Cabinet structure. Again, it is an attempt to create a parallel doubling structure.

In order to enforce the kind of institutionalised corruption that was developing within a country where the population was becoming vehemently opposed to this form of corruption, he needed to ensure that he controlled the security and intelligence services. One of the co-authors from PARI, Ivor Chipkin, has a wonderful phrase in one of their reports: there was a systematic replacement of good cops with bad cops. So, what you saw was the use of the security and the police services for negative ends. Either in the extreme and linked to SARS, which is at the bottom, which is the focus of Jacques Pauw's book, or to enforce, to protect criminal syndicates, because of their political leanings. If you remember, the cigarette trade is linked to one of President Zuma's sons, so the security services are used in that respect. More importantly, what started happening, very worrying for us as a democracy, is that individuals started being targeted.

During his presentation at UCT, Jacques Pauw said he had a bodyguard for two weeks. A lot of journalists are being followed. The old apartheid ways are coming back, where you start using the security apparatus to suppress democracy. Very dangerous. As soon as it becomes institutionalised you are in trouble as a society, everywhere and always. It is a form of control and suppression.

The way to control the security and the intelligence cluster, is to replace them with loyalists and individuals that go straight to the President and the President's keepers, who can then enforce the law in terms of security and keeping oversight in the form of intelligence. One of the ways in which you do that is to control that apparatus. Not just in the police but also the head of key public institutions. That is why the speaker that will follow me was a deeply

problematic person, because she didn't play ball.

The Hawks is a very good example. One of the questions we often get asked is - because we presented this to different fora - why can't you just arrest the Guptas? That is sort of the standard thing, let's just arrest the Guptas, there are the e-mails. The problem is, we can all march off to the police station now and show the Gupta e-mails, sign an affidavit and say the Guptas are thieves, here is the proof. So is Molefe, so is Iqbal Sharma and so on. What do the police do with that?

By law, they have to give it to the Hawks. The key thing - and Pierre de Vos, a constitutional law expert, always says this - is that the law is not enough. People matter, politics matter. So, you can give it to the Hawks. But if the Hawks are captured, the Hawks will do nothing. No matter what the law says. They will just sort of duck and dive.

Keeping institutions clean, keeping governance clean, keeping people clean, remains critical. I will come back to this but there were four key things that you have got to figure out in fixing and moving beyond state capture and - it gleans off from what President De Klerk says - one is the regulatory architecture. So, you've got to change parts of it. I think you've got to be careful about the Constitution, but you need new regulations, different regulations. Secondly, you need institutions that function optimally. You can't have great regulations and the police services aren't functional because they don't have resources, and you need enforcement. That is the third key thing.

We are not going abide by the law if there is no enforcement. How many of you wear seat belts when you drive? That is the minor example. How many of you actually pay the minimum wage? Because you are unlikely to be enforced, the law is unlikely to be enforced.

The fourth for me is the key one that we always forget: people and values. People will be corrupt if given the chance and the extent to which that matters, and the value system of a society is critical. If you control the entire apparatus through those institutions and you can find the people, you can control those individuals - some of them like Ms Madonsela are very good people and that can tip the balance - the rise of the Shadow State becomes a key and a critical lever. For the Zuma administration in its dark corners of our democracy to actually enforce and allow for institutionalised corruption to occur - and it is important to note that all authors on this Report are small fry - everybody in more senior positions faced extreme scrutiny, to put it mildly, from the security apparatus. That is how institutionalised





corruption had become.

Your fourth lever is that if you set the tone at the level of the State through the Boards, through Ministers and so on, corruption becomes very easy to spread and will easily permeate the rest of the society.

One way that we would characterise this is the Free State dairy farm matter. That is a really good example because there are no SOEs. There was the Premier in a particular province, speaking to the MEC relevant for that portfolio and stealing a farm, and using those proceeds for a wedding. That is a very good example of how you set the tone at the national level and it permeates through the rest of the society. A colleague of mine was saying this is part of the way of life in Egypt, it sets the tone because you don't have a democracy. You have kleptocracy in Egypt - the tone at every level, from processing the equivalent of an ID-document, to getting access to the bridge to take your goods across, you are paying a fee - and so corruption then permeates the entire society.

As an aside: do not think that acts of corruption are everywhere and always correlated with complete state failure. One of the most corrupt societies in the modern world is South Korea. They just jailed the President and the head of Samsung and so the extent to which you got to think about corruption as bad and the context within which the economics of corruption make sense. Foreign investors will come to a corrupt country as long as the environment is stable, as long as they know that the fee is 10%.

One needs to think very carefully about how rent-seeking and corruption sometimes feed off and control the growth agenda. If it controls the economic growth agenda, you will be in trouble in the long run.

Once you have an active rent-seeking state that permeates to local government levels, you have Cabinet control, you have repurposed the SOEs, your one problem is the following: National Treasury, the Minister of Finance, can step in. Pravin Gordhan did step in at the time to say to Denel, to say to Eskom, to say to Transnet - hang on, this deal looks a bit odd... Why are you overpaying for this particular mine, why do you have an arms dealer that has no history in arms but is suddenly becoming an arms supplier to Denel for the Asia region, what is going on here?

Increasingly in this period, the nine months of discontent, National Treasury gets seen as the problem - but at the same time gets seen as the solution. National Treasury is the apex of state capture. A really critical decision - to call back the Minister and the Deputy Minister of Finance and to fire them - then signals the attempt by the entire enterprise, the President of the Republic and the Gupta family and their associates, to capture the National Treasury.

Obviously, if you capture the National Treasury, you can ensure that all deals through SOEs are not blocked by the Chief Procurement Officer, or by the Minister or Deputy Minister. This we are aware of.

What I want to concentrate on is this little thing called the FIC, the Financial Intelligence Centre. If you try and open a bank account abroad and move money abroad - let us assume we are all law-abiding - and it comes through Standard Bank or Absa and it goes abroad, the FIC tracks that. The job of the FIC is to track all financial flows, cross-border in particular. The FIC becomes the ears and the eyes of all illicit financial flows in the country. The sub-apex within Treasury that the Guptas and the Zuma administration wanted to get control of was the FIC, because if they controlled the FIC, they could prevent any knowledge or any public dissemination of information around illicit financial flows.

Now, if you recall the court case that Minister Gordhan and the Deputy Minister were told to attend, the court case against the banks. As an economist, the way I understand it, very simply, is that Minister Gordhan said to the courts, I control financial flow decisions of banks - in other words banks opening and closing accounts - I have jurisdiction over that. Of course, it was a sham.

The banks then said, or the judge then said, that doesn't make any sense - why would you have any kind of control over the banks because of their financial independence. Minister Gordhan said I will show you why. Do you remember what he did? He introduced into evidence all or some, proof of illicit financial flows by the Guptas to Dubai, to Singapore and so on, through a subpoena provided to the FIC. So, the FIC - because this information cannot be made public - was forced by a court of law to show us that the Guptas were actually transferring huge amounts of money. Connect the dots and Lord Haine uses HSBC data to show the extent of illicit financial flows, to give you a sense of the globalisation of this corruption. In essence, if you control the FIC, you can steal and you can shift money abroad and you can launder it back and forth without any oversight from the FIC.

The question is: who is going to run the FIC? Recent attempts by the current Minister of Finance suggest that he is not interested in giving too much power to the FIC and wants to devolve power to the SOEs and other organs of government. Clearly worrying. So, the ears and eyes of illicit financial flows mean that the FIC and the Reserve Bank working together may be lost.

The other attempt - I'm not sure whether it is going to happen - is that the FIC is going to be moved into the Presidency's Security and Intelligence Cluster and that's another change to watch. I'm very positive that with Cyril Ramaphosa as president of the ANC, we are not going to see a move down that road.

Apart from making sure you don't block deals to Eskom and so on and the FIC, the final part is the Chief Procurement Officer. Another problematic individual in National Treasury because he or she blocks any suspicious procurement behaviour by any government department. If you change that individual, you control the office. Again we need to ask the question: if he did this, would that individual be subject to public scrutiny, so that the CPO for example is somebody who is publicly known and very carefully watched by public institutions and Parliament?

In essence, those are your five levers. If you have those five levers of state capture you effectively institutionalise corruption.

Let me show you state capture in action and give you a sense of why the Transnet deal was not some random opportunistic set of crimes, but that it was a very structured way to ensure that you could steal from the state.

I have five steps here. The first two we have discussed. The third is the mechanism for corruption that you need, also discussed. The fourth and fifth are structuring the corruption and every deal, if you look at the Eskom data as well, looks the same. The Transnet case was essentially about the purchase of locomotives from China South Rail but the background was firstly the repurposing of the governance of Transnet. We saw the appointment of Minister Gigaba, very keen to impress the new President, who then reconstitutes the Board.

If they change the Board with an Iqbal Sharma or any other of the Gupta associates, they need to ensure that the Board Members set up systems. So that was what Iqbal Sharma's job was - a very key person at the Board level as he becomes the broker. He is the one who, although rejected as Board Chair, becomes Chairman of the Board Acquisitions and Disposals Committee. That is effectively the third step within the restructuring of the Board of Transnet; you create a sub-committee and through the sub-committee you are able to channel these deals, i.e. tenders all worth more than R2.5 billion.

So, all the tenders worth more than R2.5 billion come to the Board. They have a sub-committee which is chaired by a Gupta associate. At the time the Chairman of the Board is also captured and so the extent to which you have the switch, which is our step three, where you move procurement decisions away from the executive into the Board and then furthermore down into the sub-committee, is a key step in reinforcing acts of corruption. It is at this point when the switch is made that the Gupta family and their associates are significant recipients of Transnet tender opportunities.

So, we look at how corruption was structured and as I said we take the very specific case of the purchase of 1 064 locomotives. It was a R52 billion tender, very small in comparison with the Eskom tenders but it gets adjudicated by Sharma. We are not as sexy as Mr Pauw, who goes to Russia and so on - but we've got documents e-mailed to us anonymously, stuff that just came to us. Picking up bank accounts and movements of funds, you see that the theft through this deal happened through three means, and, as I said if you look at the Eskom story, it is the same pattern.

You have professional services, what we call insider procurement and information technology. What are professional services? Trillian Capital. It is a really important cash cow. In the financial sense, as an economist, that is what I can understand, it is the cash flow part of the Gupta enterprise. If you buy a mine, cash flow takes a while to get going. You have to pay costs, lenders and so on, but Trillian is a very simple service. I invoice - in this case - Transnet to

say I did advisory and investment services. Who knows what that is. Invoices we have seen from Trillian Capital are two lines. There is no way that could sum up to R170 million, and there is certainly no documentation which shows that amount of work was done; the cash cow in the Eskom case is the same story. You institute a professional and advisory service component to the deal. Trillian becomes the recipient and huge sums of money then flow into Trillian. That is the cash cow.

Tenders given to foreign companies have to involve local providers and China South Rail is a Chinese company. In the locomotive deal, and in every case, there are local content requirements. What the Guptas do is buy a company called VR Lazer. That company is the recipient of much of the local content deals that come through. If you dig a bit deeper, the property on which VR Lazer is owned is called VR Lazer Property and it is owned by Iqbal Sharma, the Chairman of the Acquisitions Sub-committee. Deeply, deeply problematic. What you have done is you created the channel of insider procurement. Go and look at local content deals and see who sits on those Boards, see who owns those companies, see if you know who their associates are.

In the case of the locomotives it was an obvious thing, but in other cases it is a moving target. People will hide associates and links through - in this case - insider procurement opportunities and it is critical that you keep some sort of regular oversight on that. I know the former Public Protector always complained about the lack of resources, but these are the kind of things you need resources for. If you have a regular oversight with well-staffed people that keep an eye on these things, you will pick it up far more quickly. Essentially, insider procurement becomes an important component of the locomotive deal. And I must emphasise, this is just all on one deal.

The third is that a whole series of external providers that are required to provide IT services on the deal. If you look at the deal details, the companies that were involved were SAP and Neotel. So, we would like to claim first mover advantage. We mentioned the SAP story in this Report well before it became public. SAP and Neotel were obvious recipients of the IT services component of the locomotive deal, but what happens is that Sharma and the Guptas go to these two companies and say we will guarantee the deal for a fee. This is the most classic form of corruption in the developing world - the finder's fee, the 10%. I will guarantee you the contract if you give me 10%, but don't give it to me, give it via somebody else's bank account.

Now if you wanted to find the company through which much of the Gupta's proceeds were channelled and funnelled, they used this entity called Homix. Homix is a letterbox company. It doesn't do anything. There is one letterbox that sits in Fordsburg, but it is a key company through which all the illicit proceeds are channelled. In particular, in this case, we pick it up with the fee that SAP and Neotel paid to the Guptas to ensure that they got the IT component of the procurement deal. We estimate in the Report - we don't know if it is true because all of this is sort of cloak and dagger stuff, we don't have formal data - about R100 million was made by Homix on this. Your problem is, you can't sit with the money inside the country, you've got to launder it and so enters the entire industry of cross-border money laundering.

President Mbeki chaired a commission on illicit financial flow. There is global research, which I know a bit about, on illicit financial flows. A lot of it is the big money stuff through mining deals and so on, but this is illicit financial flows.



So, you've got the money through those three mechanisms, which cannot sit in local bank accounts - assume you have them - but you've got to figure out a way to get rid of it and move them abroad. And what we find is extensive laundering in this particular deal of the Gupta funds into three Gupta-linked companies. The ones that we can pick up are Regiments Asia, the Tequesta Group and Morningstar International.

Here the interesting footnote is that Salim Essa, whose name you would have seen in association with Denel in particular, his company shares a Hong Kong address with, and has the same Hong Kong address, as the three Gupta companies. It turns out that the destinations that we can pick up of illicit financial flows in this particular case, will be Hong Kong, Dubai and Singapore.

I am told, again sort of learning on the hoof about illicit financial flows and corruption, that Hong Kong is one of the global centres for money laundering. Coming back to Lord Hain's comments about these accounts and the HSBC, illicit financial flows were linked to that. That was the money he was talking about. It was HSBC bank accounts that had all of the funds of these three Gupta companies and what was clear is that HSBC had flagged this. The interesting question for me is how do we think about the banking system with secrecy laws, and the banking system's role in monitoring illicit financial flows, and then also providing for a recording system back to government?

We haven't given up. As an economist I have to think about models. It is clear to me that we do not have a proper understanding on an appropriate model of corruption. So, this is our future research agenda and we are close.

We do not really understand the economics of corruption. Our simple model says it is always bad. If you permit me some academic licence - don't get too moral on me - but the problem is South Korea. Incredible country, hugely successful. So, forget the moral outrage. There is a very interesting and important economic question about what is going on. It is about incentives and disincentives. The one theory we have about the South African context - and again permit me some academic licence - is that the market for corruption in South Africa became monopolistic.

What happened was that the 50 odd million people didn't take R10 a day. It was five or 10 people that took a billion rand. So, the market for corruption becomes monopolistic. When you have a monopolist, in a market,

people get unhappy. Nobody likes the monopolist and that combines with the moral outrage, because we know this is wrong and it is not dissipated enough. India has equally high levels of corruption, but it is dissipated and that is the interesting question: how do you think about what it was about our model or our particular form of corruption that led to this outrage, because it probably exists far worse in terms of value, far more had been lost to economies around the world from corruption than we have. Yet, our outrage is greater.

So, it is an academic question, but it is an important one in the academic route - to turn the economics of corruption.

A final three points: we do not have an audit of what has been stolen from SOEs. Hopefully with the new dawn we are going to have the books being opened. I think the really important role of the Commission is to make sure that there is a full and proper research agenda around SOEs, so that we can see the extent to which the level of corruption has occurred.

The second last point is the art of money laundering. We really do not understand how this is done. There are lots of middle men and women who take parts of it but if there is any financial transaction, like any, if you look at gangs and the drug trade, there is a structured form of incentives, of disincentives, of paying off people and so on. There is economics at work and we don't understand that.

The really interesting and last point is there have been tremendous gains made by particular associates of Trillian Capital and others in terms of financial markets, both the bond markets and the currency markets, and that has been on the back of insider trading. If you know that the Minister of Finance is going to be fired tomorrow, tomorrow morning you can place a trade in the bond market for a billion rand. You don't put a cent down and when the Minister of Finance is fired at twelve o'clock, you close the trade at five o'clock and you've made your money. That is insider trading and there have clearly been huge bets placed by members of the Gupta enterprise that have resulted in huge illegal gains. We don't even have a clue of the extent to which money has been lost through insider trading. ●



Professor Haroon Bhorat

Haroon Bhorat is Professor of Economics and Director of the Development Policy Research Unit at the University of Cape Town. His research interests cover labour economics, poverty and income distribution. He has co-authored and co-edited a number of books on labour market and poverty issues in Africa. Haroon has published more than 150 academic journal articles, book chapters and working papers. He was recently appointed to the editorial advisory board of the World Bank Economic Review. Haroon has his PhD in Economics through Stellenbosch University in South Africa. He studied at the Massachusetts Institute of Technology and was a Cornell University research fellow. He holds the highly prestigious National Research Chair under the theme of Economic Growth, Poverty and Inequality: Exploring the Interactions for South Africa. Haroon is a Non-resident Senior Fellow at the Brookings Institution affiliated to the Global Economy and Development Program, and the Africa Growth Initiative (AGI), a Research Fellow at IZA, the Institute for the Study of Labour in Bonn, and an Honorary Research Fellow at the Human Sciences Council (HSRC). He sits on the HSRC Board, and is also a Board Member of the UNU World Institute for Development Economics Research (UNU-WIDER). Haroon

consults with international organisations such as the ILO, the UNDP, the World Bank, Ratings Agencies and emerging market fund managers. He was a member of the World Bank's Advisory Board of the Commission on Global Poverty as well as a member of the Program Committee of the 2017 International Economic Association (IEA) World Congress. He sits on the Advisory Committee of the joint United Nations and World Bank Policy Study on the role of Development in the Prevention of Violent Conflict. He is also a member of the UN/WHO's High Level Commission on Health Employment and Economic Growth. Haroon previously served as a member of the UN Commission on Legal Empowerment of the Poor (LEP), and was Head of Research for the UN's High-Level Panel on the Post-2015 Development Agenda. Haroon has undertaken extensive work for several South African government departments - most notably the South African Department of Labour, the Presidency and the National Treasury. Haroon was appointed as an Advisor on the South African Parliament's High Level Panel on Acceleration of Change and Transformation. He served as an economic advisor to two past Ministers of Finance, and previous Presidents Thabo Mbeki and Kgalema Motlanthe, formally serving on the Presidential Economic Advisory Panel.

Reanchoring Democracy in People Power

Adv Thuli Madonsela
Professor of Law at the University of Stellenbosch

TO THE FW DE KLERK FOUNDATION ANNUAL CONFERENCE
Cape Town Marriott Hotel Crystal Towers, 2 February 2018

THANK YOU PHEPHELAPHI, the Director of the De Klerk Foundation. Thank you to President De Klerk and the entire leadership of the Foundation for the opportunity to be with you this morning.

I am currently a Professor of Law at the University of Stellenbosch where my involvement is in the area of social justice. I am the Chair of Social Justice. I'm also involved in a foundation called the Thuma Foundation, which is a democracy leadership support foundation. I thought it was important to mention those two things because both of them were informed by the work I did as the Public Protector.

We are here today to look at life beyond state capture and corruption. I would like us to talk a bit about re-anchoring democracy in people power. I am told that President De Klerk touched on that very issue of democracy and people power. The reason I want to talk about re-anchoring democracy in people power is because I honestly believe that the reason we had the problems that we had was simply because people power has been increasingly eroded, but not just in South Africa - all over the world.

If you look at the time when democracy was invented, if you think about Athenian democracy, it was an optimal expression of people's will. It was really an optimal expression of the will of the people. Over the years we have redefined democracy, reorganised the structures as the world grew bigger, countries grew bigger and the population that needed to be controlled and the resources that needed to be controlled grew bigger, but in the process, I think the people power element of it got lost.

In South Africa, in the quest for the best model regarding inclusive democracy, we went at national level for proportional representation, but what did we lose in the process? People's representatives, public representatives. With due respect to our colleagues in Parliament who are here, they mostly represent their parties, not the people.

I was asked recently by one of my kids about if we have a problem in our area around Lynnwood - and it is a national problem, not a municipal problem - who must we report it to? Maybe somebody has to explain that to me, because I said maybe you could write a petition, and he asked are there no public representatives, somebody who will represent me? Not somebody who represents the

constituency of their party in that area but somebody who the taxpayers from that area can say, "If things go wrong here, you are responsible."

Here in Cape Town we have the problem of water. Who at National Government can you go to and say, "You're paid by our taxes, you are a public representative, what has been done to plan for water since it is a national requirement?"

It all boils down to the fact that we went to proportional representation, and it is basically my experience then that has got me being at two places where I am today. I am at the University of Stellenbosch, where I am Chair of Social Justice as I have indicated. I have accepted this mandate not as payment from Mr Rupert, as Gupta-linked proof suggests. Incidentally, that being said though, where is my payment for not finishing the report on the Gupta landing at Waterkloof base, and not finishing the Vrede Dairy investigation which we now know to be linked to the Guptas? But that aside, I accepted the social justice portfolio because it has always been my concern that if we had to build a South Africa that is stable, if we had to build a world that is sustainable, everyone must feel that they are invested in the community.

They must feel the fortunes of the community improved. We are fortunate to a certain degree, but if there are others that feel left behind or who feel that as society progresses, it means nothing to them, that is a recipe for conflict and you see it is coming in terms of crime and many other social ills. We have seen it last year at the height of the state capture investigation, the moment the investigation started in March, the social justice issue, particularly as it relates to race, was used as an excuse why this investigation should not be done.

The question was, why don't you investigate what happened under apartheid? The question was why are you



investigating this company because it is black? Why don't you go and look for white companies, but the reality was this was a national issue that should have concerned every person, including a grandmother in Lusikisiki, because it wasn't just a grand corruption scheme. It was a question of a minority capturing the heart of government and repurposing the heart of government. Not SOEs, but re-purposing the presidency for acquisition and for personal gain. But because of the reality of injustice, the reality of systemic disparities, there were some of our people who were persuaded that this is the least of their concerns. Whether there is state capture or there is no state capture, I will have no food, so why should I care.

Then of course in the space that we had, there wasn't enough opportunity for a public narrative that says part of the reason you don't have food, and you probably will not have it for the next 20 years, is this very problem of state capture. My colleague spoke earlier about what is the difference between the South African model of corruption and the global problem of corruption.

For me it was captured at a conference I attended in Nigeria in 2010. You find corruption in Europe - they mostly are going to steal about 5% or so. Then you find corruption in Asia. They are most likely to steal about 10%. You also find corruption in Africa - he had a story for us, that an African minister went to Asia and found his colleague living in a luxurious house and said, how can you afford this, because our salaries are not good? And the minister said well, you see that road? 20%. Two years later the Asian minister comes to Africa. The African minister lives in a palace now, not a luxurious home, a palace. The minister asked, you said you are poorer than me, why is it that you live in a palace? And this one says, you see that hospital, and the other minister looks and there was no hospital. Like yourselves, I laughed. This was in the beginning of 2010. I was about three months into office. Today I don't find it funny because I have come across cases where nothing was built.

RDP housing in North West, there was a case where R400 million was paid. One RDP house was built. It was the show house and they paid R400 million. Vrede Dairy

that we are talking about now, if the evidence in the public domain is correct, what was spent was about R2 million, that was spent on the project, and the rest of the R200 plus million gone, somewhere else.

So that is a model that is meant for disaster. Apart from the monopoly of corruption, if you are sitting in Lusikisiki as a grandmother Dlamini, you're complaining about infrastructure in terms of roads. You have no school days because of corruption. Your children are sitting without desks, without chairs. You have a hospital that is 400km away from you. If you are pregnant you are likely to die along the way or to deliver the baby along the way. One of you may die, or you may have complications that lead to disabilities. All of that money is lost through corruption.

In our report as Public Protector, we spoke about overbilling, overpricing, false dealing and scope creep. So, there is a link between social justice and corruption, and for me, if we are going to make progress in South Africa on the question of corruption, we will have to look at the social justice issue. Just apart from levelling the playing field from the point of view of business, there is also the real factor that the poor suffer more from corruption and this is grand corruption that I'm talking about.

Just coming for an ID you have to pay extra to this person who is doing their own job. Licensing, one young person told me, I was saying to them why don't you go to the nearest licensing station which is close to Lynnwood and they said no, they can't go there. Their licence instructor says you can't get your licence without paying a bribe. To some of us maybe that bribe can be change, but to many people that's going to be three months' work just to pay a bribe. So that is a social justice issue.

The second part I'm involved in, the Foundation, which is a Democracy Leadership Support, is really about reanchoring democracy in the people. What I learned as the Public Protector was that we looked at strengthening democracy in terms of strengthening institutions, such as the Public Protector operating to re-enforce public accountability, Auditor-General doing that, the Courts doing that, but without the people, all of that crumbles. We saw that with Nkandla. Until the people stood up and said no, it looked for a moment that there was not going to be repayment.

In state capture, the people played a major role - not only in just marching, but also in making sure that they exercise social accountability, and social accountability includes whistleblowing. People finding the information and throwing it there into big data so that we now know what we know. Therefore, going forward I think those are going to be



two areas that would have to strengthen.

But what I've seen in the last few weeks in this country is nothing but hope, am I right? There is just this splash of hope and that hope is based on the fact that the governing party changed leadership, or at least the top leader changed and the rand responded positively, among many things. In *Rapport* and *City Press*, I was saying it is true that the temperature of the body is set from the top and therefore the change of leadership, having a leader who is committed to integrity, he is committed to the purpose for which government power is assigned, is an excellent thing - but that is not enough.

You need democracy to be rooted in people power and I think those who are teaching politics will tell us that democracy is a Greek word, "demos" the people, "cratos" power. So, democracy is supposed to be people's power but something that I've learned, and I'm told that President FW de Klerk spoke about, is that democracy is regulated by a Constitution and many instruments such as legislation. I found that a lot of people that are supposed to drive democracy as number one, have never discussed the concepts of democracy.

Two, many have never read the Constitution. However, to use the metaphor that was used this morning, you have a cook, you have a recipe, but the cook has never read the recipe, but he is supposed to do that. So that is part of the reason we have this Democracy Leadership Foundation. It is just to start discussions around what is democracy, because you've got people for example who say, oh courts are making a decision, that is not democracy, and then you say really, because in a constitutional democracy the ultimate guardians of democracy are the courts. A lot of people think that democracy is ordinary people elect public representatives indirectly, because proportional representation really requires you to elect public representatives indirectly, and the municipality has an option to elect some of them directly, and then thereafter you leave it to them to determine what is good for you, but is that it? Is that the best way for democracy? It can't be. Former President Nelson Mandela once said, even the most benevolent of governments are made up of people with propensities for human failure.

When things were going wrong in South Africa after the second administration post democracy, a lot of you, a lot of us, are like the mice in Spencer Johnson's book, where we had the cheese nicely packed. If you know the book it is about these mice that found cheese, they don't know who put it there, but they think okay, there is cheese and they eat it every day. They start thinking it is their cheese and eventually they even build their homes next to the cheese, until one day the cheese is gone. Some of them then engage in a discussion who moved my cheese and they stayed cheeseless, and then some move somewhere else to look for some cheese and they live happily ever after.

In our own democracy after we built a nice Constitution, we thought everything was fine. We thought that we will have the right politicians that are purpose-driven, that are ethical as required by the Constitution, that are conscious of the impact of their decisions, and that are committed to service - and maybe they were. Maybe most of them were, but as former President Nelson Mandela says, even the most benevolent of governments are made up with people with propensities for human failure and that is the part that we needed to know.

We then thought okay, that loophole is going to be fixed by the Public Protector but even the most benevolent of Public Protectors are humans with propensities for human

failures. So, no institution is a silver bullet for societal ills. After investigating Nkandla, it took a while to make sure that there was accountability, there was implementation. State capture, we are only now going to have the commission of inquiry start to work. That's two years after the first whistle was blown and do you think the wrongdoers have been sitting with evidence in their offices? By this time documents have been shredded, computers have been thrown away and staff had been moved from one place to another.

The only thing that is going to help us is going to be a little bit of cellphone records, but even those when we did this state capture investigation, we discovered that they don't keep them forever. Miss Mentor's story for example, we couldn't verify, we couldn't do the triangulation of their cellphones to confirm their presence there, and so we had to use other methods to confirm their presence. It's going to be very difficult. All I'm saying is that institutions, strong institutions are good, but they are not enough.

Good leaders, as we just celebrated, are not enough but, also, I think there is another thing that we are forgetting as South Africans. None of the leaders that had been elected was not involved in endorsing some of these decisions that led us here. None of leaders that have just been elected has never been to defend the wrongdoing. People will still have to be necessary to keep people on their toes. If that doesn't happen, we revert to where we came from.

I think the point being made here, dear colleagues, is that it takes more than strong institutions to push against the perversion of democracy, and state capture is one way through which democracy is perverted. But grand scale corruption also does pervert democracy. With state capture, we're talking about the difference between ordinary corruption and state capture. In state capture we are talking about evidence that shows that people were involved in appointing people who were going to look after their interest. In other words, the person has identified from outside, when they're going to that institution they already go with a perverted mission, which is not the kind of mission that the institution is supposed to be responsible for.

We saw earlier when we were talking about how Board Members were appointed. At the moment that is what the evidence points toward but of course the state capture Judge and Judges in the criminal matters will confirm whether the evidence we have is correct or not. So, despite strong institutions that happened. We have one of the best Judiciaries in the entire world. A Judiciary venerated time and again, our Chief Justice just won an award for the work they have done. From the moment we had the Constitutional Court under Justice Mahomed, then Justice Chaskalson, that Court has never failed us in terms of being the ultimate guardian of the Constitution. But that is not enough.

People remind us that Ms Grootboom died without a home, despite the socio-economic rights drive at the Constitutional Court. That boils down to lead to the question of what we have learned and how do we use those lessons. What I learnt as the Public Protector is, instead of for us for example being the Public Protector, regarding ourselves as an umbrella, as a tree under which the people should come and find their shade, or regarding ourselves as the Makhadzi and the voice of people, what worked better was giving people their voices back, getting people to understand that they have the power, getting people to remember that when



democracy was first invented, civil society meant political society.

Today politicians tell us, if you speak politics, do you want to be a politician? It has been professionalised and there are people who have accepted it, but the reality is no, every person should be a political animal, because politics is about how our collective power as a society is exercised. Our collective resources are controlled and all of that should be done in accordance with the will of the people, as expressed in the Constitution, and whatever other instruments the people endorsed at the time of election.

So, politics, the average person should know what democracy is. The average person should know what is required of them 365 and a quarter days. Not just once at the ballot box, but just on a day-to-day basis. I would say going forward, if we are going to have a sustainable democracy where state capture never happens again, we will have to make sure that every person who is capable of being taught about democracy is taught about democracy. Just the concept of democracy and the role of everyone in a democracy, and the purpose of democracy; that every person knows what they can do in their own little space to advance democracy and to hold public representatives accountable.

But thirdly I would want to say we will have to make sure that every person in the country must help advance social justice. Never again should social justice be used as an excuse for corruption, where our own people are galvanised to act against their own interest because they are told whoever is speaking against corruption has no right to speak about corruption because of their historical advantage or the advantage by the way of class.

Ultimately, the people should be their own liberators and those of us who can, the only way we can help them is to make sure that we let them be aware of what is democracy, what institutions are available for them to engage meaningfully with the democratic system. In the absence of the people, I honestly believe that there is no democracy.

So, in ending, I would like to read the following words that are quoted from a book titled "Confronting the

Corrupt." Its author is sitting there at the back of the room and it says the following: "A conception of democracy which is committed to a notion of freedom and dignity, self-rule and self-respect, must entail a commitment to a form of political practice that guarantees to each person the basic social conditions required for the fulfilment of these conditions."

These words were uttered by Judge Dennis Davis and were quoted by Adv Paul Hoffman in "Confronting the Corrupt".

What are these conditions that we can think about? Part of those conditions are a corruption-free society. With corruption there is no democracy. With corruption there is no social justice, because apart from state capture, when there is corruption we are not having a situation whereby our collective affairs are regulated in such a way that we all have a say and all of interests are taken care of.

What happens in corruption is that the corrupt are queue jumpers. At the front of the queue they do as they please, but that is not just the perversion of social justice, it is also a perversion of democracy. My call to everyone in this room and elsewhere is because we surrendered democracy to politicians, lawyers and Judges, we nearly lost democracy. Going forward we still need upright politicians who do their job. We still need upright lawyers who do their job. We still need Judges who do their job. We still need Chapter 9 institutions that are upright, competent and do their job, but to complete the look, we need the people. Then the people can hold everyone to account, but more than anything else, they can exercise what the World Bank calls social accountability, which we have seen in the state capture emerging - where each person finds information and they throw it into some database, but we need that to happen on a regular basis, instead of us finding five years down the line that at Vrede Dairy nobody received their benefits.

Under social accountability those people should be empowered to know what scheme is in place, what are their benefits and there should be a transparent system that assists them to monitor it. One of the things we can leverage is IT. We can leverage the opportunities presented by the fourth industrial revolution to ensure that there is transparency in these things and everyone is involved in everything that concerns them and I honestly just think that it is now a time to stand up and lead. A little less complaining and more of doing something, but I do know that more people are doing something.

You are here in this room because you already are doing something, and in this case, I'm preaching to the choir, but what we can do is go back to society and tell everyone else that don't believe that just because you can do very little then you should nothing. That very little that you can do can make a difference. With very little just start from making sure that you, yourself, are not part of corruption.

The second thing is, don't look the other way if somebody does it. If you love them and you don't want to report them, tell them to stop it, but if it is something major and you think it should be reported, report it - and you can report it anonymously. But also do something in the area of skilling government. One of the reasons it also happened was not that everyone is corrupt. It was there were fault lines.

Why would you give a farming license in Vrede Dairy to somebody who has never farmed before? So that is just an administrative fault line that procedures are not followed. The Swifambo case in PRASA, we discovered that Swifambo, the company had been formed about a week or so before the tender; I didn't complete that investigation. A week before, when they were doing payments, somebody was paid R100 million for consultancy services, yet it wasn't



in the business plan originally. It was just simple fault lines administratively that could be checked. If those of you in institutions can help people in municipalities to see the red flags and to stop them and those of us in the community, if we suddenly see people driving cars that they shouldn't be driving, red flags. Report that.

Just in ending I would say these are the following things that I would suggest we do: let's make sure that we chose the right people as public representatives, because if someone was not upright before they were entrusted with enormous power, they are not likely to be upright now that they were given power. In fact, they are going to be worse, but secondly, chose people who are skilled, because if you have all the good intentions without the right skills, you are not going to be able to make a difference.

Those of us who can skill others, those who have been in the system will have knowledge, can we skill others, and for me it is just starting with those who are politicians. Those are our cooks. A lot of them had never, ever had a discussion on what is democracy, what is the purpose of democracy and what should be delivered by a functional democracy. How do you safeguard democracy? For us at the University where I am, in Stellenbosch, we are going to be creating a course on democracy to get people who are guardians of democracy to understand what it is and therefore what is it supposed to achieve, when is it in danger, and what are the consequences of a dysfunctional democracy.

Strengthen systems, strengthen values, especially in the area of ethics, those of you who can assist with ethics, starting with pre-schoolers, because to say we are going to strengthen the criminal justice system is a lost cause. Many years ago, I attended a conference like this where a colleague from Sweden told us that there are very few people who are going to stop doing things just because of the criminal justice system. You need to have a critical mass of people who are going to do the right thing, the right way, because it is the right thing to do.

Can you imagine a society that just depends on policing? The interesting thing, section 195 of the Constitution requires that people who work for the public sector should exercise their highest level of professional ethics, meaning that you must recruit those who have already displayed that kind of background and then those who are already in the system, we will need to train them on ethics. Not the criminal justice system, about ethics.

I was listening to Minister Ben Martins and I was shocked. I was just shocked when it was clear that this lovely human being is not in the space of ethics. He is in the space of criminal justice. If it is worth a crime, it is doable. He doesn't see that there is anything wrong when somebody is complaining about a tender. You go and organise a meeting at your house, home ground advantage at your house, and

you bring this person to that, you bring the person who is complaining about a tender with the CEO of an institution. How much courage is required from the CEO to say no to whatever is being discussed? And the Minister's demeanour seems to suggest he really didn't think there was any wrong with it. So, we need to teach people about ethics. I'm not suggesting that that CEO himself is clean, we did investigations, I'm not in that area.

Social accountability, let's play our role in building social accountability. Social justice, whistle blower protection. The original whistle-blower from Trillian is still jobless to date. The one young lady who called me out of the country, flew at her own expense and said I need to tell you this: I knew that Minister Nhlanhla Nene was going to be fired. I knew what was going to happen. Here are e-mails, she gave me the documents. She is still jobless today in a society where we want to build a society that is based on integrity. We then need to put our actions where our interests are so that where people genuinely, genuinely stick their necks out, they don't suffer the consequences alone with their families.

Brand management, part of our troubles is because managing our brand, people think brand management is about hiding improprieties. Steinhoff, and when I investigated CEIX, the same issues came up about. Now if you investigate this matter, it is going to blow up and South Africa is going to be seen as a corrupt country. I don't think so. I think if all of these things are handled with integrity, they have to be investigated, they have to be dealt with, because whatever you don't deal with eventually becomes a mess. I think there is an American Indian saying that says, if you don't fix the hem of your dress, you will soon be without a dress. And that is all I can say. Just from a brand management point of view that sometimes we think it is going to damage the brand, we accept the problem and then you are providing a blanket that will allow corruption to flourish.

Lastly, I would just say that we need to address the fault lines, particularly the public procurement system. The President has suggested that that could be done in the state capture investigation. I don't think so. I think you need a huge task team, a commission-like task team, to look at just where are the fault lines in our public procurement system, how do we address them, and how do we close the gap.

Thank you for this opportunity. Thank you for your commitment to making sure that we never have state capture again, and secondly to making sure that we reduce corruption drastically and hopefully end it in our lifetime. ●



Thuli Madonsela

Thulisile Nomkhosi "Thuli" Madonsela was born in Soweto and obtained the degrees BA (Law) and LLB from the universities of Swaziland and the Witwatersrand, respectively. After teaching at secondary schools for a number of years, she served in various positions in the trade union movement in the mid to late 1980s. In the 1990s she moved to higher education and worked at the University of the Witwatersrand in applied legal studies. She served as technical expert in the drafting of the Constitution before working in the Department of Justice, *inter alia* as Chief Director Transformation and Equity. She served as a full-time member of the South African Law Reform Commission from 2007 to 2009. In 2009 she was appointed as South Africa's third Public Protector, her term ending on 14 October 2016. Adv Madonsela holds honorary doctorates in law from the universities of Stellenbosch, Cape Town and Fort Hare and Rhodes University. She has also been the recipient of a number of prestigious awards such as the Law Society of South Africa's inaugural Truth and Justice Award; the German Africa Foundation's annual prize; Transparency International's prestigious Integrity Award in 2014; and, also in 2014, she was listed as one of *TIME Magazine's* top 100 most influential people in

the world. Adv Madonsela officially took up a new position as Chair in Social Justice in the Law Faculty of Stellenbosch University (SU) on 10 January 2018.

South Africa State of the Nation in 2018: Prognosis for Reform

Dr Frans Cronje

Chief Executive Officer, Institute of Race Relations

TO THE FW DE KLERK FOUNDATION ANNUAL CONFERENCE

Cape Town Marriott Hotel Crystal Towers, 2 February 2018

OBSERVERS MUST WATCH the right markers in order to determine whether South Africa is now on a reformist trajectory. One set of markers relates to the Rule of Law, corruption and accountable government. These are getting the bulk of analyst attention. But the second set are even more important and relate to policy reform in areas of empowerment, the labour market, property rights, and education.

Our thesis is this; that the initial post-1994 economic recovery, born of equal measures of good fortune and some sensible policy, made possible a far greater improvement in living standards than is commonly understood. That trajectory was broken in the aftermath of the 2007 Polokwane conference and later global financial crisis. Public frustration (measured in polling and voting data) born of now unmet expectations frightened ruling party politicians who tried to counter the trend with equal measures of ideological dogma and populist policy. The response was wholly counter-productive and stalled South Africa's post-crisis recovery, even as other emerging markets grew out of the crisis. The ensuing weak economic performance triggered a significant loss of confidence in the ruling party which in turn triggered deepening populism - and hence the slow turning of a dangerous negative spiral was set in motion. This is essentially where South Africa came to stand in November of last year.

Subsequently, a degree of political realignment has taken place in the ruling party. Whether this realignment will be sufficient to break out of the spiral via an economic recovery sufficient to meet popular expectations is the question this analysis seeks to address.

Meeting popular expectations is essentially a challenge of labour market access. If you conduct a polling exercise and ask South Africans what they most want, what is necessary above all else to improve living standards and build thriving communities, the answer, every time, is employment. Many analysts and politicians argue that South Africa has experienced two decades of jobless growth - but this is not true.

- In fact, since 1994, the number of South Africans with a job has doubled from nearly eight million to just over 16 million today.
- The number of black people with jobs has more than doubled.
- The labour market participation rate (a rate that measures

what proportion of people of working age work or look for work) increased by almost 30% for black people.

- The dependency ratio that measures how many people depend on every 100 who work has fallen from 380 to 251.

[Be aware that an unemployment rate may remain high, or even increase, even as the dependency rate falls as a result of an increase in the rate of labour market participation].

All the above trends brought about great improvements in the lives and circumstances of millions of people across hundreds of thousands of households.

That the extent of labour market expansion surprises many people reveals a problem of a country (and a government) that has, at times, got it wrong in communicating the fine balance that must be struck in any accounting of socio-economic progress or failure.

If labour market data reveals the problem, then service delivery trends establish its extent. It is widely accepted that service delivery has failed, but the data tells a different story:

- In 1996, there were an estimated 5.8 million families living in a formal house. That number has more than doubled to over 13 million today. In 1996, 64% of families lived in a formal house, but now the figure is almost 80%.
- Similar numbers are true for water and electricity delivery. For example, the number of families cooking with electricity (an excellent indicator of living standards) has increased from just over 4 million in to just under 13 million today - or from less than 50% to more than 80%.
- The number of families with access to clean water has doubled.

Even in areas associated with almost complete failure, such as in schools and education, there has been pleasing progress - the extent of which is brought out most starkly by sketching some historical context:

- In 1955, for example, only 259 black children passed



matric. Twenty years later, in 1975, the number was just above 5 000. In 1990 it was slightly over 100 000. Today, it has risen to just under 400 000.

- In 1995, less than half the university class was black, but today the figure is more than 70%, and the number of people being afforded the opportunity of university study has almost tripled since 1990.
- In 1990, there were more than 40 white engineers graduating for every black engineer. Now there are roughly twice as many black as white engineering graduates - even though the number of white graduates has not declined.

In healthcare:

- The number of public sector nurses has increased by almost 50% since 2000.
- The number of public sector doctors has increased by over 60% over the same period.
- The number of new HIV infections has been cut in half since 1999.
- The still-birth rate (a very useful measure of living standards and public health) has fallen by roughly a quarter over the past 15 years.

Violent crime takes a terrible toll on South African communities and the quality of policing is very far from what it should be. But the murder rate, per 100 000 people, has fallen from 67 in 1994 to 34 today - a decline of almost 50%.

We could go on to examine trends that stretch from vehicle ownership rates, to property purchase patterns, and junior school enrolment levels - all the way to trends on the ownership of fridges and vacuum cleaners (the hard measures of middle class expansion), commercial farm land, and the ownership of shares in companies listed on the stock exchange - but all those numbers will point to the same place; a country that is a fundamentally better place to live in than it was 28 years ago - and, considering what might have been, an end that was never assured.

Because of the progress made, and the democratic dividend that has

accrued for many millions of people, relations between South Africans are better than many people understand. Contrary to the fearmongering, polling reveals that a comfortable 80%+ of the population believe that different class and race groups need one another if they are to realise the country's potential - while a comfortable majority believe that relations between South Africans are better, or have suffered no deterioration, than was the case in the heady days of 1994. The social fabric of the country remains sound, albeit under strain - but, of course, no complacency is warranted on this remaining true.

Why it is important to emphasise the story of South Africa's progress is because it is first and foremost the truth - and secondly because it is good for South Africa to know it, along with those who watch the country from abroad. Thirdly, and most usefully, the data on progress, and the trends that flowed from it, contain critical information we need to accurately anticipate what will occur over the decade ahead. Most critical of all is the insight of a crisis of rising expectations - that the successes bred new and ever increasing demands for further improvement and that if these demands are not now met the ruling party may soon find itself in the same trouble it was in just a few weeks ago - and for the same reasons.

Central to meeting initial expectations was the economic stabilisation, secured in the Mandela and Mbeki eras, that allowed for a much-improved economic growth performance between 1994 and 2007 relative to what had occurred in the 1980s and the first three years of the 1990s.

Success in politics requires some good fortune and, admittedly, Mr Mandela and his de-facto prime minister came to power amidst a great deal of that. Interest rates that peaked at over 20% in 1996 would be cut in half. In the 1990s, consumer debt levels (a measure of untapped spending potential), sat at 25 percentage points below where they are today. Bond yields would be cut in half. There was considerable cheap and surplus electricity - and Mr Mbeki would govern through the steepest commodity price cycle the world had ever seen.

Matched with some of the good sense in the thinking underpinning the second iteration of the RDP policy and the GEAR policy of 1996, the data tells the story of what happened next:

- The year-on-year change in levels of fixed investment peaked between 2003 and 2008.
- The year-on-year change in consumer expenditure also peaked in the 2004 to 2007 window. Such expenditure is equivalent to around 60% of GDP and is therefore important in giving direction to the economic growth rate.
- The two above trends conspired to ensure that the economic growth rate recovered from averaging levels of 0% or below for 40% of the 1980s to average around 3% into 2003 before, for four brief years between 2004 and 2007, averaging 5% - incredibly, the first time it had sustained such an average for that number of years since 1970.

It was still a too modest performance and, given the context, much higher levels of economic growth might have been attained. But those criticisms would soon be forgotten as the picture changed very quickly for the worse in late 2007:

- The growth rate sank in the aftermath of the ANC conference at Polokwane, bottomed out in the global financial crisis



year, rallied into 2010 and 2011 (as fixed investment and consumer spending rallied) and then declined year after year to a very low 0.3% in 2016.

- Fixed investment levels fell through a deep trough into the global financial crisis, rallied in 2010 and 2011, and subsequently fell flat.
- Consumer confidence and expenditure numbers dived with the fixed investment data into the financial crisis, then rallied briefly off the low base effect and delayed purchasing decisions of 2009, and then fell flat.

The consequences were best read against the global economic growth rate. Having parted ways through the 1980s, South Africa's economic growth rate again showed a high degree of coincidence with the global rate from 1994 to the peak of 2007, through the financial crisis, and back out of the crisis - but only to 2012. From 2013, as the fragile global recovery saw the world's growth rate increase year after year, South Africa's growth rate peeled away on a sharply downward trajectory.

The reasons for the divergence, particularly after 2013, related in the main to counter-productive domestic policy. Threats to nationalise industries from mines to banks were made. Rafts of new expropriation legislation were drafted. The infamous Mining Charter was introduced. The era was summed up best by the *Licensing of Businesses Bill*, that promised to send scores of start-up entrepreneurs to jail.

There is an American politician, in Pennsylvania, a Republican, by the name of Stephen Bloom, who is credited with the wonderful statement that "economics is to politics what gravity is to jumping".

As confidence and investment levels dipped, and as Mr Bloom's warning suggested, the government and the ruling party were in for a very harsh awakening.

Perhaps the greatest economic policy success of the ANC in government had been the relationship between the budget deficit and the debt-to-GDP ratio. Between 1994 and roughly 2007, debt levels were cut in half (and the saving on the interest bill was sufficient to finance the initial rollout of the social grants net) while the deficit was reduced from a level of around -4% in 1994 to record a small surplus 13 years later. If you plot the two indicators over time they produce an X effect of a narrowing deficit across a falling debt level - and that effect was central to the ANC's initial political success.

But everything was to change. By last year, debt levels had doubled to exceed apartheid-era highs and the budget deficit was forecast to remain at levels last seen pre-1994. At a multiple of the economic growth rate, the deficit was leading the government into a fiscal crisis.

One after another, the key indicators that had been central to South Africa's initial successes in raising living standards began to slow. The rate of formal private sector job creation - given its strong relationship with economic growth and the growth rate's relationship to fixed investment - plateaued after 2007. The rate of increase in welfare extension slowed sharply. Per capita GDP, which in 2006 had for the first time exceeded the previous 1981 high point, plateaued, and, in real terms, has declined since 2014.

For the government and the ruling party the political ramifications were almost instantaneous.

If you overlay the economic and jobs and welfare data with polling information, a remarkable degree of coincidence is revealed. Popular confidence in the future of the country, and by extension the government, peaked in the 2004 to 2007 window (as fixed investment, economic



growth, and formal sector job creation peaked). However, such confidence fell by almost 40 percentage points over much of the subsequent decade in near unison with the year-on-year changes in real household income levels. Those income levels in turn show a close inverse correlation to levels of violent anti-government protest action.

You can extend the correlations to voting data. In 2006, at South Africa's post-1994 economic peak, and 18 months before the fateful Polokwane conference, the ANC secured over 66% of the vote in a local government poll - close on the heels of its record 69% showing in the national election two years before that, a moment at which it performed more strongly than when Mr Mandela had led the party a decade earlier. But the post-2007 economic reversal triggered a spectacular reversal in the party's support levels to below 54% in the 2016 local poll - with a like comparative drop of over ten percentage points for the decade. Newspapers warned of a 2019 sub-50% shock for the ruling party (a stick used by the media and his critics to beat Mr Zuma with, but somewhat too sensational, as reliable polling last year suggested the ANC - still pre-Ramaphosa - was on track to get 58% in the 2019 poll, and we would now upgrade that number by a considerable extent).

While it was less sensational than had been reported, a turn in voter support against the ANC had undoubtedly occurred which, as we have established, was preceded by the post-2008 dip in popular confidence in the future of the

country which in turn coincided very neatly with changes in household income levels - and, in turn, with protest levels. So good and strong are these patterns and relationships between the economic, social, and political markers that we are confident the information exists to anticipate exactly where to from here for South Africa, its economy, and its political parties - based on the policy decisions that will be taken over the year ahead.

A complete command of the data and correlations is the essential ingredient to making long-term strategy for South Africa - but in our experience very few people have that command.

The years of weak economic performance had left South Africa vulnerable to populist incitement. It was alarming to see the extent to which absolute nonsense such as the 'rogue unit' story and the 'white monopoly capital' argument gained mainstream traction that was nearly sufficient to so distort public perceptions away from the real challenges facing the country that the state capture project almost survived, and in December last year South Africa came within 200 votes, cast by ordinary men and women, of what would have been a very dangerous situation.

In 2013, five years after Polokwane and five years before today, we developed a skeletal scenario set called New Dawn - Dark Night.

- New Dawn spoke of an internal ANC reformation that we compared to the experience of the verligte-Afrikaners and predicted that "reformists within the party, building largely on the blueprint laid down in the National Development Plan, [will] seize policy control of the ANC and bring about a series of initially unpopular changes..."
- Dark Night set out the implications of accelerated racial nationalist fervour amidst worsening investment and economic indicators warning that "an obstinate ruling party and government [may] press ahead with failed interventionist policy despite all evidence suggesting that such interventions are doing more harm than good". In that case, we said the ANC will see "its electoral majority slip to below 60% in 2019, leading to the party's losing the 2024 election".

Our confidence in predicting that the ruling party would not survive a further decade of misrule was established in the work we had done on the correlations between South Africa's economic performance and the sentiment of ANC supporters.

That insight may remain a heartening realisation for many South Africans - that a government that strays too far for too long from the path of economic righteousness will probably not retain a national majority for very long. The country may have an immunity to long-term misgovernment built into its voting DNA - a powerful countervailing force in favour of South Africa's long-term success.

We presented the scenario set to leaders of political parties. One side of the divide dismissed the New Dawn outcome out of hand - that it could never occur, they were emphatic. But there were leaders on the other side of the divide who showed interest in the scenario and in the reforms that would underpin it. It was in part on the tentative strength of that experience that we built the Wide Road scenario in 2014 and the Rise of the Rainbow in 2017 - both of which suggested that the ruling party might reform to survive.

It is too early yet to say with any confidence whether that is what has happened over the past six weeks - and whether our upside scenarios are now firmly in play. Whether that will be the case hinges on how the new administration, which may be led by Mr Ramaphosa, addresses two fundamental questions:

- The first is the restoration of the Rule of Law. It is a month into the year, and the signs so far are promising. But the test will be to see if these early actions translate into a raft of successful prosecutions - an important catharsis and marker that the paradigm has indeed shifted.
- The second is economic policy reform and, here, the obstacles are very great. There are three that must specifically be overcome and that are each so important that failure in any one of them will see the reformation stall - even if Mr Ramaphosa manages to take confident control of his party, deals effectively with corruption and malfeasance, and re-establishes the Rule of Law.

The first is the budget deficit. The deepening deficit since 2008 mirrors perfectly a falloff in company tax as a share of GDP. Yet both government revenue and expenditure as a share of GDP have continued to rise sharply - financed in part through the borrowing that doubled the debt-to-GDP ratio and through placing a now near intolerable burden on individual income tax payers. We estimate that in the region





of half a million individuals, out of an adult population of near 30 million people, contribute over 60% of individual income tax. It must alarm any observer that the revenue paid by individuals as a share of GDP has increased by more than two percentage points since 2007, while the total revenue-to-GDP ratio is advancing on a two decade high point.

Mr Ramaphosa's new administration may not, as a consequence, immediately have the money it needs to develop the infrastructure needed to support an economic recovery while also delivering on the welfare and service delivery demands of several million households. The antidote is growth, but our forecasts are that growth rates will this year underperform emerging market averages by around 70%. It worries us that policy makers are talking of taking the economic growth rate up to 2%.

That is nowhere near the watershed level for breaking the structural unemployment crisis - the second major obstacle the government faces. Roughly, South Africa creates 100 000 net new jobs per point of GDP growth per year. To reduce the black unemployment rate to the white rate, which is competitive with developed economy norms, will require the creation of around one million net new jobs per year over the next decade. An economic growth rate of 5% will get South Africa halfway there. Short of that, the ruling party may not sufficiently deliver on popular expectations to secure a decade-long 60% mandate. We sense this because of polling showing that people too young to have a lived experience of apartheid are considerably more sceptical of the ruling party than those who remember the time - an age-bracket trend that further correlates to unemployment rates. Fail to address that scepticism through employment, and popular opinion among young people will progressively swing against the ruling party, opening a new door for opposition politicians - although not, perhaps, to the extent that the door was thrown open over the past decade.

Remember, too, that Mr Ramaphosa sets about his task without the same measure of good economic fortune that was the case for Mr Mbeki. Most notably, consumer debt levels today are too high to allow for a domestic consumer-driven recovery - fixed foreign and domestic investment numbers will be a key lead indicator for the growth rate.

The third hurdle is in education. An assessment we conducted of the Grade-10 class of 2014 found that just over 50% of that cohort progressed to matric in 2016. Around 14% of the cohort qualified for university study at a standard set so low as to be useless to any serious analysis. Less than 3% of the cohort passed matric maths with a grade of 60% or higher - a qualification that offers a young person the reasonable prospect of ascending to the middle classes within a decade.

There is a strong correlation between levels of education and labour market absorption - so much so that only among university graduates does South Africa display an absorption rate on a par with its emerging market peers. This insight in turn correlates with data on the changing structure of both GDP and the labour market. Without doubling the number of maths passes in matric every five years (there are so few such passes as things stand that the target could be reached) it will be very difficult for the government to deliver on demands for middle class access.

Reflecting on these three policy challenges will temper the expectations of even the most fervent South Africa bulls. The events of the past six weeks are very welcome but meeting popular expectations is a much greater challenge than the bulk of the writing on South Africa this past week has suggested - and a challenge that extends well beyond the problem of state capture.

Why is there any doubt that the government will move more swiftly towards these reforms?

There are three reasons.

- One is that the balance of power in the leadership of the ruling party does not align perfectly with public opinion - a key reason for the party's recent weakness. Polling suggests that people may be more open to reform in the three critical policy areas above, and others, than some senior leaders in the government and the ruling party are.
- The second, and related reason is the crippling effect of ideological dogma that regards markets, investors, property rights, entrepreneurs, free speech, independent institutions, constitutional safeguards, and the Rule of Law as the impediments that stand between people and the realisation of their aspirations to a better life. The dogma must, and can, be overcome.
- Finally there is the question of competence - reform is very difficult and even with the right intentions a reformist agenda will fail if the people who must drive it at ground level are not up to the job.

If these obstacles are overcome, and they can be, what would a sufficiently ambitious and effective reformist agenda entail?

We brief many firms on the likely trajectory of the country, and the briefings are a useful barometer of investor sentiment towards current government policy which time and again reveal three areas of investment disincentives.

The first of these is empowerment policy - as it has come to be practised. There is never any doubt that effective ways of ensuring accelerated rates of economic inclusion are necessary and desirable. However, as it is practised, the policy is often seen as a tax on investment and an attempt to extract wealth on behalf of a small political elite. Very few, perhaps none, of the firms we brief will state this in public for fear of the political consequences. But our experience is sufficient to suggest that unless fundamental changes are made to empowerment policy, South Africa will not succeed in becoming a competitive investment destination again.

We would encourage the government to consider that current empowerment policy be turned on its head to focus on the inputs (education and entrepreneurship being key) that are necessary to accelerate disadvantaged people into the mainstream economy - while the beneficiaries of the policy are selected on the grounds of established socio-economic disadvantage, the same basis that made the social grants system so effective in securing a degree of socio-economic upliftment. Critics of the latter proposal say it cannot be done because race must remain the founding basis of empowerment policy. But the distinction between what we propose and the approach of the government is not as great as that critique suggests - and there is much common ground on the importance of ensuring that black people benefit. Our response to the critics would be to say that under our approach the beneficiaries will be black, almost all of them, as a function of the inequalities in our society. But they will have benefited not because of their race but because their circumstances are such that it is right and good that they are supported to enter the mainstream (circumstances that can easily be established via a means test that may, for example, determine if your parents went to university or owned property above a certain value). We will also remind our critics that under the policy of the government, the beneficiaries are not always black (we

have scandalous data in our possession) while often the beneficiaries are already firmly established in business and the middle classes - and the policy seldom reaches as deep into poor communities as an empowerment policy should.

The second area of investor concern is threats to property rights. From the cancellation of investment treaties to the undermining of intellectual property rights and the recent resolution on expropriation without compensation, the conclusion is inescapable that South Africa is not a country in which your investment is as safe as it might be in other competing jurisdictions. It is futile to entertain the idea that diluting the protections on offer in section 25 of the Constitution can be done in a manner that does not raise alarm among investors - the drift across emerging markets is towards stronger property rights, not away from them. Nor is there a way out of that conundrum by limiting any dilution to agricultural land. With the precedent set, policy creep means that similar dilution will in time be expanded to other economic sectors - and the risk will for decades affix a flashing red light above the gateway to the economy. The manner in which the new Mining Charter put the brakes on fixed investment in that industry, by essentially threatening the property rights of shareholders, is a perfect example of the problem.

Property rights must be sacrosanct if we are to attract the investment we need, and to allow poor households to start accumulating assets. Title to their homes would be a good start, as would title and proper financing for emerging farmers. Land reform, as one controversial area of policy, does not fail because of property rights - it fails because emerging farmers are not allowed the advantages of ownership that are central to the model of agricultural production in South Africa. Eliminate freehold title in favour of leases, for example, and you wipe hundreds of billions of rands off the balance sheet of the agricultural economy forever, stunting capital investment and innovation and sabotaging the hopes and dreams of emerging producers.

The third is labour market policy that prices poor people out of work, thereby reducing South Africa's domestic competitiveness and stunting the domestic consumer market

- a frustration for many firms who have exhausted South Africa's consumer base. Arguments in favour of ideas such as 'decent work', and the 'outing' and public (and often social media-based) 'shaming' of firms that are seen as 'exploitative', have the further effect of scaring firms off the idea of employing what may be seen as relatively low-wage and therefore often entry-level labour. This fear, exacerbated by already low investment levels, in turn serves to underpin South Africa's very low levels of labour market absorption. Far from protecting the most vulnerable South Africans from exploitation, the consequence of South Africa's labour regulatory regime is often to exclude poor people from the most important avenue to social and economic advancement ... and the dots back to the ANC's electoral performance connect themselves.

Our advice is that market access needs to be simplified by, for example, a system of private voluntary contracts, so that unskilled people can get onto the first step of the labour market ladder where they will learn the skills denied to them in South Africa's weak school system and earn the income that will rise to rival and then exceed their welfare income as their skills and therefore productive capacity grow.

Reforms to all three areas of policy are necessary if South Africa is to draw the investment to make possible the growth which will, in turn, lead to higher levels of employment. This is especially true for small and start-up businesses. Large firms can to an extent overcome even serious policy obstacles, or pass the costs onto consumers, and may even, perversely, exploit bad policy to freeze out smaller competitors.

Yet, even though the case for reform is compelling, we wrote earlier this year in the media that, "all three areas of reform attract needless controversy through ... the fallacious argument that reform would advantage only the elites in society and further disadvantage the poor".

South Africa's own track record of the past 20 years, and the correlations between investment and growth and living standards and popular confidence in the ANC that underpin that record, dismisses more powerfully than anything else the fallacy that there is a binary trade-off to be made in policy between the interests of the established middle classes and investors on the one hand and the poor on the other.

There is a fourth area of reform that relates to education in schools. The single most impactful policy shift the government can make would be to embrace a hybrid schools system combining the best elements of charter,



contract, and voucher schools - it does not matter which - that has the effect of giving parents far greater influence over the management of the schools their children are in. Communities must own their schools and run them as they see fit - to standards set by regulators. Yet the drift of current education policy is in the opposite direction - to reduce parental choice and involvement in favour of dirigisme. It is an approach to policy that may work in other jurisdictions, and in less free societies, but it has not and will not work here. Parents can be trusted to make better decisions about the future of their children than bureaucrats and politicians. No less a figure than a former Minister of Education made this clear when the opposition called her out for sending her children to an independent school. Her response, quite rightly, was that it has nothing to do with politicians how parents decide to educate their children. The government must afford all parents that same privilege.

Match that change in education policy with the very welcome idea announced by Mr Zuma in December, that qualifying children from poor households will not face financial exclusion from higher education, and South Africa's education outcomes will become much better very quickly. It is quite mad that a country that talks so much about empowerment will maintain a status quo in which, year after year, universities, and the politicians that oversee them, will turn away thousands of young black people who, if given the chance, would help to build the country. That there has been any criticism of Mr Zuma's announcement reveals a remarkable ignorance of the force for good that his proposal will be.

When we are asked why necessary reforms are not adopted, our answer is firstly that policy makers are unlikely to move against the drift of popular media opinion (as distinct from public opinion) - even if the long-term benefits of reform are apparent. A senior politician, for example, asked us how to square our proposals with the 'revolutionary agenda' of his party - an agenda that finds much favour with mainstream commentators and many newspapers. It is not difficult, but ultimately of little use, to convince a politician of the need for reform if he or she cannot at the same time be convinced that policy reform will be met with immediate media and commentator adulation.

We take that answer further to say that a necessary step towards reform, and in direct support of those who might take reformist decisions, is to invest more time and money in tackling, in public, the fallacious arguments that underpin the current policy malaise in the country - or, in fewer words, to fight and win what Thabo Mbeki understood so well as the battle of ideas. The fallacies that empowerment policy as currently practised is the only effective strategy for ensuring meaningful black economic participation, that current levels of labour market regulation are in the best interests of the poor, that giving more power to officials will finally solve problems of access to high quality schools, and that the property clauses of the constitution are to blame for the dearth of black commercial farmers - must be defeated before reform can be expected to occur. You dare not doubt this.

The battle of ideas, then, is ultimately what the terrain of struggle, to use a revolutionary term, must be reduced to. But the fallacies are very powerful and it does not take much to appreciate that in the end it may be the fallacies, and the grip they exercise, that will perhaps prove the most formidable obstacle to policy reform of all.

Will the reforms happen?

We hold out four scenarios for South Africa.

The first, Rise of the Right, suggests that civil rights



in South Africa will have to be eroded in order to create the space for a dramatic state-driven economic reformation to position South Africa as a high-growth emerging market. That model of authoritarian capitalism and a 'guided democracy' will then become the definitive precedent shaping the evolution of similar high-growth economies across the continent. Think Asian-Tigers - just decades later, and in a different global context. Economic growth would return to levels above 6% over the next decade, the unemployment rate would be cut in half, and South Africans would surrender civil liberties for the promise of prosperity and stability.

The second is the Tyranny of the Left. Poverty and inequality would feed populist anger and incitement. Property rights will be eroded, opening the way for mass nationalisation and asset-stripping at the hands of a cruel political elite. Civil rights and the Rule of Law will fall away. Investment flight, rapid currency depreciation, a multi-year recession, and hyper-inflation will erode all the progress the country has made - before triggering a cataclysmic drop in living standards.

The third is the Break-up of South Africa. Here, an out-of-touch and corrupt government would grow ever more distant from South Africa's people. Counter-productive policy would undermine investment and entrepreneurship. The fiscal deficit would deepen and service delivery, public education and healthcare would suffer as the government's



coffers run dry. Repelled by their politicians, South Africans would withdraw into enclaves - some prosperous and others urban slums and rural backwaters. South Africa would continue to underperform comparable to emerging markets on almost every measure.

We have been there for the past several years.

But now South Africa has an opportunity to realise the fourth scenario - the Rise of the Rainbow. In this outcome a reformed ruling party, with or without the support of the opposition parties (we had originally considered a coalition built around ANC reformers - but it appears now that ANC reformers may not require such an encumbrance), will introduce a series of reforms to restore the Rule of Law and position South Africa as a competitive investment destination. Economic growth would exceed 5% by 2029 and the unemployment rate would be cut in half. South Africa would turn from the brink of disaster to become one of the world's most exciting emerging markets.

There is not enough evidence to make the call yet. But within six months to a year we ought to have enough to say whether we are likely to continue in the Break-up or whether South Africa will change paradigms and enter the era of the Rise of the Rainbow.

To make that call we use 10 qualitative and 10 quantitative measures or markers that will lead us around the scenario game-board - these range from the resignation of Jacob Zuma and the taking of firm action on state capture to labour market reform, the consumer confidence index, and the labour market absorption rate.

But, to be clear, to upgrade the scenario will require the right markers going up on two broad fronts:

- The first front is populated by those markers that deal with accountable governance, parastatal reform, state capture, the Rule of Law and business and popular confidence - and they look a lot better than they did a year ago.
- But the second front is populated by those that deal with policy reform in areas of the labour market, empowerment policy, property rights, and education - the odds of which hinge, almost entirely, on the balance of forces in the battle of ideas.

If we make the upgrade it means we will be confident that economic growth rates will rise to around 4% by 2024 and to over 5% by 2029. The unemployment rate will fall to below 15% over the same period. South Africa will quadruple the number of young people passing maths in matric. There will be no doubt about property rights or the Rule of Law. ●



Frans Cronje

Frans Cronje is CEO of the IRR. He was educated at St Johns College in Houghton and the University of the Witwatersrand and holds a PHD in scenario planning from North-West University. He served with the South African police, worked as a horse-riding instructor and later logger in the United States, and completed a year-long expedition that crossed the African continent from Cape Town to Cairo. He joined the IRR in 2004 and established its Centre For Risk Analysis which specialises in using scenarios to help business and government leaders make decisions about investment and policy in South Africa. He has presented scenarios to over 100 South African corporations and foreign investors. He is the author of *A Time Traveller's Guide To Our Next Ten Years* (Tafelberg 2014) and *A Time Traveller's Guide To South Africa 2030* (Tafelberg April 2017). Over the past two years his scenarios have been presented to an estimated 20000 people across three continents and have been influential in shaping investor perception towards South Africa. His work has been widely cited in the media from the *Volksblad* to the *Wall Street Journal*. He writes a column for *Rapport* newspaper.

Panel Discussion with Speakers

Chaired by Mrs Raenette Taljaard
Independent Consultant and Analyst

TO THE FW DE KLERK FOUNDATION ANNUAL CONFERENCE
Cape Town Marriott Hotel Crystal Towers, 2 February 2018

I HAVE TO SAY that it is a unique honour to be chairing a panel with the esteemed former Public Protector, Thuli Madonsela, and Frans Cronje who I've known for many, many years as one of the successors to my great friend Helen Suzman, in an environment that mattered to her greatly at the South African Institute of Race Relations. So Thuli, it is an honour.

I also would like to reflect on that fact that Pravin Gordhan isn't with us, to remind ourselves that - as much as we intellectualise - state capture has a human face and a human cost. I think that if one looked at Haroon Borhat's presentation, what struck me as well, is how many good men and women in South Africa had to bear the burden of the human cost of state capture. I think it is important to remember that.

We must not forget the human cost of what we have seen in the slide presentations, of what we see evolving in Parliament, of what we see happening in the lives of good men and women who tried to be troublesome individuals for all the right reasons and I think that it is appropriate that we reflect on them as well, not simply on the headlines in the news.

So, without any further ado, I think the way that we can kick off this panel is to ask our two panellists whether they believe - mindful of some of the comments they've already made - that we have truly moved beyond state capture? Or where would they locate the needle of where we find ourselves right in this moment, with a week to go before the State of the Nation Address... Two, three weeks to go before the tabling of the Budget and the possibilities of anxious markets watching the Budget with a view to possible further downgrades. Where would they position us at present, and then as a follow-up, whether or not they would have three key priorities that they would immediately act on if they were in the position of some of the key role players that are currently confronted with these complexities?

I will start with Adv Madonsela.

ADV THULI MADONSELA

Thank you, Raenette, and greetings to everyone. I like the use of the concept, where is the needle. The needle has moved when it comes to state capture, and in the last two years it has moved significantly. The most important part is that we have transcended the stage of denial. Secondly, there is a lot of undeniable evidence of what has happened,

but we are still captured because what is happening is that we have prosecutions that are impending. We have the commission that will start its job soon and we have the Eskom Parliamentary Committee that is doing great work in bringing up some of the realities of state capture. It will take time to extricate us out of state capture and some of the people that were elected in the governing party in December are implicated in state capture. So, there is still a long way to go but a lot of good ground has been covered.

DR FRANS CRONJE

I think it is a dangerous moment if people start to think that we might be escaping - it provides the cover that takes away the political pressure that has been so important and shining the light onto state capture. Many of the people who were complicit in state capture last year and previous years are sitting in exactly the same jobs, institutions they were in before. We will need to see a considerable number of successful prosecutions. It's one thing for the Hawks to visit your office, it's a different thing to stand in the dock and be found guilty.



We need to go that far, and I don't think we will ever escape the risk of state capture. Surely that's the lesson of what has happened here in the past decade. If you consider where we were in that 2004 to 2007 window, when Thabo Mbeki was leading the country... economic growth was 5%, the ANC had record majorities. Three, four years after that the tentacles of state capture have firmly established themselves and the warning of that of course is of internal vigilance.

Has the needle moved? Well, it has. It becomes very difficult in what we do to brief a client now on where South Africa is headed... What we compare it to is a river flowing into the sea. There is that moment as tides change when if you sat there for a while you can see the direction of the flow and then there is that moment where you can't quite perceive whether the water is coming in, that's the moment of opportunity and it is at that moment when you've got to pursue it to the death to make sure that the thing you're trying to get out of your society is eradicated.

So, the fact that we have this moment, this window, there are no grounds at all for any measure of complacency that we maybe in a different paradigm already.

ADV THULI MADONSELA

Regarding the priorities, I think I would say I shared some of them earlier, but just to add that the prosecutions should proceed with speed. I did not like what happened in the media where the media says so and so, and so and so, are about to be apprehended. I know the media likes to be the first with the news.

The problem with that, with investigating crime, is that you give prior warning to people and the whole thing of then hiding information, cleaning up your house... by the time they go to some of the people's houses - because they don't go to people's offices - people would have lost their gadgets miraculously, but they need to prosecute urgently those that need to be prosecuted or start the process.

The second thing that needs to happen is the Commission of Inquiry hopefully will get adequate resources and will start its work. I like the Commission of Inquiry

because it doesn't have the same restrictions as the criminal justice process. Secondly, with regard to the Commission of Inquiry, we are not only looking at crime, we are also looking at unethical conduct and maladministration and therefore it can co-exist with the prosecutions.

The third thing that they may want to consider are some of those people who are still sitting in strategic jobs, where their own staff members need to provide evidence against them. They may have to ask some of them to take long leave. Thank you.

RAENETTE TALJAARD

Adv Madonsela, you certainly alerted us often to the complications in investigating and how difficult that was. Particularly, you highlighted a host of areas in the Nkandla Report when you reported to the nation on your findings and recommendations. It also shows the level to which intelligence agencies were utilised, the level to which we saw concerns about the personal safety of people. During the campaign for the leadership of the ANC, there was access to an e-mail of Cyril Ramaphosa. I personally had over 30 000 of my own e-mails as a Commissioner simply disappear. So, they certainly are challenged in showing that the kind of evidentiary trail that one would need to have access to, would perhaps be as traceable. Do you foresee any challenges in this climate along the lines of what Prof Borat also shared, and what we saw play out vis-à-vis the former Finance Minister? Do you foresee difficulties in this space, in this period?

ADV THULI MADONSELA

There certainly will be problems with regards to the investigation. Some of the trails are cold by now and then the fact that the intelligence services had been involved, they may have helped with erasing some of the information. I'm just wondering whether the NPA and the Deputy Chief Justice may want to have a TRC process for some people? Such disclosures are recognised internationally as one way of uncovering the truth.

Certainly, I can confirm that the intelligence services had been corrupted in the process. I am a victim of three stupid intelligence reports and there was nothing intelligent, incidentally, by anybody. Honestly, my kids were fairly young at the time. They said, Mommy, we could have framed you much better. Literally, one government had three intelligence reports about me that didn't talk to each other.

The one was saying I had been a spy since I was a student and the person who recruited me got to the University of Swaziland two years after I had left Swaziland. Just a simple intelligence issue but they should have looked at the fact that that person arrived two years later and couldn't have been my handler. Then they even include in the report - just for control as my kids would say - that this person arranged for me to get my degree. That means I was that stupid that I couldn't even get my degree, but it was an intelligence report that was believed. Then in that first one, there was even a Judge who writes my reports and had softened the Nkandla judgment.

The second intelligence report was saying a member of one of the opposition parties in Parliament is my handler. This report had nothing to do with the Swazi one, the one where I was CIA since I was in Swaziland. In this second one I am supposed to be CIA and MI6. Again, in this second report they included a conversation between me, a Judge, and my supposed handler and none of us can speak English.



We speak English as if it is our fourth language or something like that, but it just shows you the quality of the person who created the report and obviously pitched our grammar at the level of the report writer.

The third one was the one, for whatever strange reason, government decided this is a credible one, this is one we are going to tell the whole world that we are going to investigate. This is the one where some Twitter account emerged out of the blue for four days. It claimed that I was a spy, spying for the American government against African presidents. So, the American government would want a person sitting in Pretoria spying against African presidents and, wait for this, using other public protectors. What is the purpose of the mission to find out which of those African presidents don't like America? That's the one our government thought would be the most credible one to investigate. The Minister of Intelligence then announced to the whole world that based on this intelligence report, I was going to be investigated. The government is now investigating whether or not I'm a spy.

RAENETTE TALJAARD

I have to say I'm very pleased that you shared as much of this with us because it does speak to the human cost of this time in our history and also to the challenges that FW shared with us this morning in terms of entrenching a system of constitutional democracy and ensuring that key and critical institutions of state remain independent.

Frans, do you think that we are at the moment where what we see emerging around state capture, what we see emerging around corruption in the private sector, creates a moment for a revisitation on the discourse on values in South Africa in very fundamental ways that could be potentially unifying?

DR FRANS CRONJE

I don't know. I think the polling again is such a valuable thing to have, if the values are all there. The ordinary guy in the street's values are extremely sensible, moderate, middle of the road. So, I think it exists. The disconnect I think is just somewhere else but translating that popular opinion, popular sentiment about the country, people want to live in the manner in which the country is governed and I think the way around that is a more direct link between people and their government. That was the Van Zyl Slabbert option and others. There is perhaps a simpler one: cut Parliament into two houses, an upper and a lower, 200 members each, one elected through PR, the second through constituency so that exactly as you say, if I go, I would love to know who the MP is who is responsible for where I live and to actually bring and show that person a specific thing. And the two houses have to agree on policy and if they can't, you create some mechanism as a tiebreaker. It is a simple thought. It preserves the advantages of both systems and that MP who is elected by his constituency dare not act at odds with the values of his community. If the values of the community are sound, which I have no doubt they are, we feed that right into the manner in which the country is governed and we will be 50% further down the road than we are at the moment, or on the way to success, halfway there.

RAENETTE TALJAARD

Indeed. Adv Madonsela, when I was a young Member of Parliament, it was a very interesting experience to be

deployed to a constituency. When you wanted to go on a school visit, people would immediately question your legitimacy, or they would say well, we also had a visit from this MP or from that MP, because in that the parties assigned constituencies to the Member of Parliament, they often assign constituencies that coincide in boundaries and there is absolutely no conversation amongst MPs about who is where or amongst parties, or political parties.

This morning FW also reminded us of the reforms in the Van Zyl Slabbert Commission Report and our colleague from Konrad Adenauer did the same, in terms of broader discussions on relevance of electoral reform, right political moments for conversations on electoral reform. You touched on this as well, in terms of the kind of public representation that really entrenches democracy. Would you like to say something more about that?

ADV THULI MADONSELA

Well certainly, we do need to revisit proportional representation. It was a good idea to be inclusive. It has brought more people to Parliament, particularly women and people with disabilities. I like what Frans is suggesting, where you could have may be 50% directly elected and 50% PR.

Already in municipalities we have this dual system, ward councillors and PR councillor. It is working relatively better than national. At least people know which councillor to go to. Just to confirm what you said Raenette, they do assign people constituencies, but those people are party representatives, as opposed to government representatives. If you were directly elected by a particular constituency, you become a representative of everyone, including the people who didn't vote for you and you become accountable to everyone from that locality, even if they didn't vote for you. But more importantly what I have noticed with the governing party - I'm not sure with the other parties - is that people are not assigned to constituencies and places where they live. Somebody would be told that your constituency is in Piet Retief, but you come from Soweto. So how do these people hold you accountable? When I was still a member of what became SANCO, the Soweto Civic Association, people used to come to my house at times to request assistance or to ask questions. Now if you live in Joburg and you only visit once every quarter, how do people engage with you meaningfully all the time? More importantly, how do you know about the real problems that confront that community?

RAENETTE TALJAARD

And, again using the needle analogy and I will ask one more question. How do you think the country's temperature is on social cohesion? We are marking 28 years of the anniversary of The Speech that marked significant historical changes in South Africa. We have discourses around state capture, radical economic transformation, how are we doing on social cohesion as a nation?

ADV THULI MADONSELA

I was amazed when, was it you Frans this morning who said what you have done? The situation is fairly good, eight out of 10 people feel positive about race relations. My lived





experience gives me a sense that things are worse than that, that the white monopoly capital campaign did a lot of damage. We thought, even as it was happening, that it would do a lot of damage and I remember every time I took a platform I alerted people to the fact that we will have to bear the cost of this. I think we need to repair the damage that was done, but it's not just the white monopoly capital. It's the reality of containing racialised inequality, racialised poverty and then with political expediency, that explain these things in a personalised way.

During apartheid we fought the system, we didn't fight white people. The people who fought side by side with each other were black and white people. I know that when my son grew up and finally realised that Joe Slovo was white, he was totally shocked. He speaks openly about this, because he had always just assumed that Joe Slovo was black, because there was this song about Joe Slovo being in the forest and training soldiers and fighting. It just showed that the issue there was fighting racism, it wasn't about black people. The same about gender, it's not about women fighting men. It is about good men or women fighting sexism, but I think the language has been distorted. As part of our healing the divisions of the past campaign and social justice campaign, we want to heal the narrative, whilst also playing our part in reducing inequality.

In fact, on 20 February we will be launching an M-plan for social justice. The architecture is based on the original Marshall Plan that followed World War II and it's not my original idea. It came from some lady from England when I was in Austria. I was presenting my social justice project, which is focused on law and policy reform, and looking at general policies and helping to make sure that those policies don't create unintended inequalities. This lady said but why don't you look at the possibility of a Marshall Plan for South Africa and ultimately Africa. Mobilise civil society to play whatever part they can play to advance social justice in terms of reducing inequality and reducing poverty. We will be appealing to supermarkets to find out whether they can do something similar to KFC, where they have a social justice fund and ask the question, do you want to donate R1 to the social justice fund? We are going to be asking people of integrity to look after the money, because even though we will be collecting R1 from a person, it is still important that it goes to people who are credible and then the money should go into helping communities to be enterprising.

You said something remarkable this morning about if we want to heal the economy we should focus on entrepreneurship - we should focus on entrepreneurship. That is one of the things that we are looking at; that that fund could support education for this, but also community entrepreneurship initiatives.

RAENETTE TALJAARD

Thank you. Frans?

DR FRANS CRONJE

There are a few things. The first one I think is misconstrued, did we set ourselves in some respects the wrong path 20 years ago, to defeat racism and discrimination? If we have done that we would be the first society to have achieved it. As a result, whenever we are thrown back by some terrible incident, if I take a call perhaps from a young journalist and she should ask me, based on this incident, has everything you have aspired to do failed, and I say of course it hasn't failed.

The test in fact is not whether there will be incidents or not, it's how the society will manage it when they happen. I think for the most part we manage them relatively well and relativism is important. I have spent time in Washington and it is uncanny how often, if I'm there, Baltimore seems to explode in what approaches a race riot, requiring almost the deployment of the national guard to instil order. My American colleagues would say to me, how are things in South Africa and I say well, it seems to be great deal better at times than the problems you have here.

So, I think there will be serious incidents and there will be problems, and the test is how we manage them. I think we do pretty well at that most of the time and I don't think the series of incidents that may occur should be taken as to open the door to the question, have we failed.

Then we go back, and we ask people what do they think? We ask a lot of questions and were surprised initially at the answers we started getting back. You can put two drunk men in a bar and they will hit each other and say terrible things. That will be filmed, and it will appear on the front page of the news websites, and it creates a certain impression. If you follow it on social media, this impression is created for you day, after day, after day.

Go back in the calm of people's own homes. Don't ask them, do you think race relations are good - ask the deeper questions. Do you care what the race of the teacher of your child is, on what ground would you like to see the Springbok rugby team selected? What comes through quite strongly I think, is there is a remarkably broad middle ground of sensible people, who respect each other across the lines of race and class. It's not to say racism is not a problem, it's to say that this sensible majority sits there, but they are not people who are going to jump onto Twitter and *gaan tekere*. They are not people who are going to phone into radio chat shows and the like and I think it is important whenever this question is asked to say yes, there are problems. It doesn't make us unique in the world, listen to that silent majority who are good people and who have the right to ideas and opinions of each other. ●

Conclusion

Dr Theuns Eloff
Executive Director of the FW de Klerk Foundation

TO THE FW DE KLERK FOUNDATION ANNUAL CONFERENCE
Cape Town Marriott Hotel Crystal Towers, 2 February 2018

LADIES AND GENTLEMEN, if I may very briefly share with you the take-away in conclusion. FW de Klerk gave me two. The one is there is nothing wrong with the Constitution. If the chefs ruin the meal, don't blame the recipe, and Thuli made the same point. Secondly, that he is cautiously optimistic and supportive of what Cyril Ramaphosa is trying to do.

Haroon Borat, I think, gave a very extensive overview of the structure and the nature of state capture and corruption. I think most of us learnt a lot. Actually, I don't like reading too much, but I would like to read the Report. State capture is systematically planned and diabolical. He showed it very clearly.

Thuli Madonsela made a few very strong points. She went as far as to say we need more than a Constitution, we need more than institutions, we need more than leadership... We need all those things, but we also need people democracy. I think that was a very, very strong point. Finally, she said that ordinary South Africans must stand up and lead. Also on this question of corruption - and someone asked me this morning what would I see as the success of the conference, and that's exactly one of the things I would have said. When we leave here as individuals, say I'm going to fight corruption, I'm going to stand up against it - but not commit it in the small things, like going over a red light or paying that R50 to the traffic cop.

Frans, a good story. I would agree with him. I've often said that, but I think the good story dwindled out, as he said, towards 2009. Now a new economic recovery is paramount. I think that is very, very important. Other reforms that he mentioned were economic reform, the youth's scepticism and education.

So overall for me, five take-aways. The one is how do we get beyond state capture and corruption? Although it wasn't mentioned often, I think it is true and realistic that the Zondo Commission will make a contribution. It will take a bit of time, it won't be quick. Perhaps if they do it in phases, they'll make a contribution faster than we think. I think Zondo is important.

Secondly, political action by Cyril Ramaphosa - whether he is President of the country or president of the ANC - in starting a clean-up process. With a clean-up process I mean not just sort of looking at Shaun and saying

“I think there is still a lot of good work, hard work to be done around the Constitution.”

Shaun, you better do your job otherwise you will get fired, but also literally making sure that people get replaced in the next number of months. That is the second one.

Thirdly, state capacity to be improved and that the institutions are better managed and governed. Not just the Chapter 9 institutions, but also our SOEs, because if our SOEs don't come right, then economic recovery is just an illusion.

The fourth one is that prosecutions must be ongoing. Many of our speakers said today that unless the Hawks and others have the political will and the administrative will to take the testimony that they have, to take the facts, and to build cases, then I think we won't get beyond the state capture and corruption.

And then fifth - something that initially I thought wow, how does this fit? That's Frans's point, that in a certain sense one of the more sustainable ways to make sure that we get beyond state capture and corruption is to start economic growth, inclusive growth, economic recovery and address the inequalities of our society. That would be a long-term, surefire way of making sure that we get beyond that.

Then finally on a sort of personal note, I also gathered that the FW de Klerk Foundation cannot yet close its doors. I think there is still a lot of good work, hard work to be done around the Constitution. ●





FW de Klerk
FOUNDATION

FW de Klerk Foundation

E-mail: info@fwdeklerk.org

Website: www.fwdeklerk.org

 **Facebook:** www.facebook.com/FWdeKlerkFoun

 **Twitter:** @FWdeKlerkFoun

Zeezicht Building, Tygerberg Park,
163 Uys Krige Drive, Platteklouf,
Cape Town, 7500,
South Africa

PO Box 15785, Panorama, 7506,
South Africa

Tel: +27 (0) 21 930 3622

Fax: +27 (0) 21 930 3898

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**Konrad
Adenauer
Stiftung**

Konrad Adenauer Stiftung South Africa Office

60 Hume Road, Dunkeld,
Johannesburg, 2196

PO Box 55012,
Northlands, Johannesburg, 2116
Republic of South Africa

Tel: +27 (0)11 214 2900,

Fax: +27 (0)11 214 2913

E-mail: info.johannesburg@kas.de

Website: www.kas.de

KAS Cape Town Liaison Office

36 Long Street, 6th floor,
PO Box 5294,
Cape Town, 8000

Tel: +27 (0)21 422 3844,

Fax: +27 (0)21 422 1733

E-mail: info.kapstadt@kas.de

Website: www.kas.de

