

IN THE SECTION 194 ENQUIRY

**Affidavit in the Section 194 into the removal of the
Public Protector Adv B Mkhwebane**

I, the undersigned,

BIANCA SINQOBILE MVUYANA

do hereby make oath and say:

1. I am currently employed at the office of the Public Protector as Senior Investigator, Public Protector Free State Provincial Office.
2. The contents of this affidavit are true and correct and fall within my personal knowledge, unless otherwise stated or clear from the content.
3. I have been summoned by the Section 194 Committee, at the request of the Public Protector, to appear as a witness. I emphasise that my testimony is not given on behalf of the Public Protector or the Evidence Leaders but only to assist the Committee in its singular tasks of enquiring into and determining the veracity of the charges, in particular the charge relating to the Public Protector's investigation into, *inter alia*, the alleged establishment of the so called "Rouge Unit" by SARS.
4. I give my testimony in relation to my erstwhile capacity as the Investigator who was responsible for that particular investigation including the Investigation Plan, the gathering of evidence, the identification of role players, the related documentation and notices as well as the compilation of the Report No. 36 of 2019/20: A report on an investigation into allegations of a violation of the Executive Ethics Code by Mr Pravin Gordhan, MP as well as allegations of maladministration, corruption and improper conduct by the South African

Revenue Services (Lead Investigator and Drafter of Section 7(9) and Report).
I was of course involved in several other investigations of different complexities.

A: BACKGROUND

5. I hold a Bachelor of Laws degree (LLB). I joined the Public Protector of South Africa in 2013 as a trainee Investigator, Good Governance and Integrity Unit. Between January 2016 and March 2016, I briefly worked for the Department of Justice-Master of the High Court as an estate controller in the insolvency section. In April 2016 I rejoined the office of the Public Protector as an investigator, my job amongst others included conducting investigations on complaints relating to complex and non-complex matters, all instances of corruption and maladministration within state organs and parastatals, abuse or unjustifiable exercise of power or other improper conduct or undue delay by persons performing a public function and any act or omission by persons in the employ of government which may result in improper prejudice to any person, drafting reports on investigations conducted.
6. I am advised that the relevant charges against the Public Protector which relate to this particular report are based on the adverse remarks made by the High Court in the matter of **Pravin Jamnadas Gordhan v The Public Protector and Others** (Gauteng Division (Pretoria) Case Number 48521/2019) handed down on 7 December 2020, which already forms part of the Enquiry papers. Where necessary I will therefore refer the Committee to that judgment.
7. Although I have not religiously followed the evidence of all the witnesses who have previously testified before this inquiry and who are currently or were previously in the employ of the Office of the Public Protector, I have listened to some of their evidence and/or followed some of the reports in the media in particular the evidence of Mr Pillay and Mr Van Loggerenberg in relation to the issue of the investigation unit which we were probing, also sometimes referred to as the so-called rogue unit.

8. I am of the firm view that some of their evidence has grossly misrepresented the true situation of what transpired during the investigation of the so called "*the Rogue Unit*". I disagree with some of the evidence given in these proceedings as well as some of the material findings of the High Court and/or the factual foundations upon which such disputed findings.
9. It is common cause that the term "*rogue unit*" was first used in the public domain in 2014 when the story of the SARS investigation unit broke out in the Sunday Times. It was not invented, introduced, or exclusively used by the Public Protector and her team. It is the term most commonly used in the public space by those who believe or disbelieve that the alleged existence of the unit was indeed unlawful or "*rogue*".
10. Apart from the Public Protector, various other independent reports found that the establishment and/or operations of the unit were unlawful, because of the alleged nature of its activities. These allegations have been denied by Mr Van Loggerenberg but have never been disproved. Whether they are true or false I cannot say. My only point is that they are out there and were not manufactured by the Public Protector or officials in PPSA.
11. Any criticism of our product, to be valid, must take all these and other relevant considerations into account. Otherwise, such criticism will be inconsistent and deliberately skewed or unfairly targeted at the Public Protector and her team of investigators.

B: BROAD OVERVIEW OF THE INVESTIGATION AND THE REPORTING LINES

12. At the time of the investigation, I was an Investigator in the GGI. I reported to Mr Rodney Mataboge who was and still is a Chief Investigator.
13. Mr Mataboge reported to Ms Ponatshego Mogaladi the Executive Manager. Ms Mogaladi in her capacity as the Executive Manager who reported to the Acting Chief Operations Officer. The ACOO reported to the Public Protector. After the

suspension of Ms Mogaladi there was no Executive Manager. During that period, Mr Mataboge and I reported directly to the Public Protector. I must mention that the Public Protector was not involved in the investigation process (i.e. analyzing of information and drafting). Mr Mataboge in his capacity as a Chief Investigator managed the investigation.

14. As this was an important investigation, it was subsequently broken into two parts. Namely:
 - 14.1 an investigation into allegations of the violation of the Executive Ethics Code by Mr Pravin Gordhan as well as certain allegations against SARS/Mr Gordhan; and
 - 14.2 the alleged improper conduct of the South African Revenue Services and other ancillary questions identified in the report.
15. The reason for breaking the investigation into two parts was that EMEA matters are inherently urgent and ought to be finalised in 30 days or within a reasonable time thereafter.
16. Mr Gordhan played a central role in the investigation due to the fact that as a Minister he was the only person who could be subjected to the Executive Members Ethics Act (EMEA) as well as being the former Accounting Officer of SARS. His conduct was therefore the primary focus of the investigation, especially Part 1 which was the subject matter of the relevant report and judgment which forms part of the charge or Motion.
17. The names of Messrs Pillay and Magashula also appeared as the secondary players. Mr Van Loggerenberg was certainly not a subject of the investigation even though his name appeared on various documents that we analysed. As a result of his name appearing in various documents a decision was taken to subpoena information and documentation from Mr Van Loggerenberg. However, PPSA did not have the address of Mr Van Loggerenberg for the

purposes of effecting service of the subpoena. The SARS human resources department was contacted to assist with the address of Mr Van Loggerenberg.

18. The narrative that Mr Van Loggerenberg was an implicated person, in that he committed wrongdoing in relation to the EMEA specific or Part 1 investigation, is totally false.
19. On two occasions the messenger for the Public Protector office Mr Linda attempted to serve the subpoena on the address supplied by the SARS human resource department. Apparently, a caretaker of the complex informed Mr Linda that Mr Van Loggerenberg had moved out and that his unit was standing empty. I am advised that Mr Linda has submitted a statement for the Committee regarding his efforts to serve the subpoena on Mr van Loggerenberg. Subject to further details which may emanate from the evidence of Mr Mataboge as the person with whom Mr Linda directly interacted on the issue of service, I can only confirm that Mr Linda informed both Mr Mataboge and I the attempts made in tracing Mr van Loggerenberg were unsuccessful. It was not the first or the last time that we fail to trace a particular individual but still proceed with the investigation, taking into account the inability to get all the required information. Any investigation sometimes had to deal with such realities.
20. It has also subsequently come to my attention that Mr Van Loggerenberg sometimes deliberately misspelt his surname, probably to avoid detection. This too might have made efforts to find him more difficult than usual.
21. In any event, the Public Protector played no part in tracing witnesses or serving documents. At her level she would place total reliance on people like Mr Mataboge, me and/or Mr Linda. Even the Executive Manager would not ordinarily play any role in the performance of such a task, let alone the Deputy Public Protector or the Public Protector herself.

C: THE INVESTIGATION PROCESS

22. Information was required and received from SARS. The information received from SARS included the Sikhakhane report and the KPMG report. We were also aware of the Nugent report, a copy which was googled and obtained. Over and above these reports, we had access to internal SARS documents relating to the various allegations put to SARS in the document request letter. We also had access to a written opinion prepared by Trengove SC for SARS on the establishment of the Intelligence unit. Once the information obtained was analysed subpoenas were issued to the identified role players. I pause here to state that all the documentation including the reports that we analysed were discovered as part of the Rule 53 record when the review application was launched against the Public Protector. The court that ruled on the matter had all the documentation that we relied on and analysed for the purposes of the investigation and the report.
23. After attempts to serve the subpoena on Mr Van Loggerenberg had failed, a decision was taken to proceed with the investigation into the alleged conduct of Messrs Gordhan, Pillay and Magashula.
24. I again pause to explain that although the Sikhakhane and KPMG reports came to our attention during the investigation, we were never influenced by their outcome and conclusions. Nor did we proceed to cut and paste those reports or regurgitate their findings without relying on our own independent assessment of the evidence. We treated the Nugent Report in the same way as all the other reports. None of these reports is superior to the other. All of them have their critics, as to be expected. The PPSA investigations were independently conducted which resulted in their own conclusions based on the evidence and information before the PPSA investigation. It is also important to state that the Nugent report dealt with a separate issue altogether and had its own Terms of Reference. The PPSA investigation focused on the alleged lawfulness of the establishment of the intelligence unit within SARS, whether there was any law that authorizes SARS to have its own intelligence unit. Judge Nugent however dealt with these matters peripherally and in passing. It is so that he expressed some doubts about some of the findings which he said were not clear to him.

25. Not only were these remarks by Judge Nugent taken into account by us but they were specifically quoted in some of the relevant documents exchanged between the Public Protector and Mr. Gordhan.
26. Through the investigation process and after thorough analysis of the evidence and information at our disposal it transpired that the KPMG and Sikhakane findings corroborated and made findings similar to the PPSA's findings or vice versa. This was not just a happy coincidence but proof that the conclusions reached by the Public Protector team were not outrageous.
27. The KPMG, Sikhakhane reports and the PPSA report had a common denominator in that they made a finding that the establishment of the intelligence unit without a mandate was unlawful and in contravention or breach of section 209 of the Constitution and the relevant statute. It was clear from the evidence analysed that SARS was aware that the unit could only be established if there was a law authorizing for its establishment nevertheless, they had sought permission and funding from the then Minister of Finance, Mr Trevor Manuel. For the specific reason of funding and detailed that, *inter alia*, SARS lacked the intelligence capabilities entrusted to NIA indicating therefore that SARS was aware of the lack of legislative powers on their part to carry out the intended activities of the unit including surveillance and interception of communications.
28. Mr Gordhan (the then commissioner of SARS) as the accounting officer was central to the establishment of the intelligence unit. He even submitted and signed the memorandum that resulted in the establishment of the intelligence unit within SARS. Like some of the other reports, our report was specifically based on the apparent incredibility of the conclusion that, in spite of the objective evidence available, it could be said that Mr Gordhan had no knowledge of the unlawful establishment of the unit. Secondly I wish to state categorically that, even if that conclusion was incorrect, it was certainly not based on malice or some kind of vendetta or witchhunt against Mr Gordhan or any of his associates on the SARS reporting line.

29. The PPSA investigation was thorough in that it went as far as identifying the spying equipments that were used by the intelligent unit in conducting its alleged unlawful operations. This raised a new issue of procurement as it was not clear whether the procurement legal prescripts had been followed in purchasing the equipments. I am advised that SARS subsequently stored the equipment at the request of the Public Protector.
30. The investigation focused on the key players namely Messrs Gordhan, Pillay and Magashula, in that order. As such during the investigation process a section 7(9) notice was served on all three of them. This is a statutory notice served after the preliminary findings to afford the other side a chance to respond before an adverse finding could be made. Their responses were incorporated in the final report. The response can either confirm the adverse findings to be made or can be used to exonerate a person under investigation. There was also ample evidence that Mr Pillay irregularly instructed and/or permitted a certain Mr Lombard and Van Rensburg to intercept information/ communication within the offices of the DSO and the NPA. The evidence was made available to us in the form of audio recordings whose authenticity was never challenged at the time.
31. In the present investigation all three responded to the section 7(9) notice. Although I must say that Mr Gordhan had also taken the technical issue of why we were still pursuing an investigation which according to him was an old matter. SARS though fully cooperated with the investigation on the issues they believed the PPSA had jurisdiction.
32. It is also certainly not true that the PPSA "*ignored*" the evidence from Mr Pillay. The evidence from Pillay was incorporated into the final report. I personally engaged with his responses with all the seriousness they deserved. I believe that Mr Mataboge and the Public Protector did so too. Other than his affidavit and response to the section 7(9) notice no further or additional information was received from Mr Pillay. Mr Van Loggerenberg on the other hand was not implicated and as such the section 7(9) notice was not served on him. Even the final report did not implicate him because we were acutely aware that he had

not been successfully traced so as to properly afford him his right to put his side of the story. His name was only referred to in so far as the evidence referred to him as a participant but not as a perpetrator.

33. The evidence which Mr van Loggerenberg claims he had left for the attention of the previous Public Protector or her staff in early 2016 was never made available to us. Upon my enquiries after his evidence, I have still not been able to find such alleged “reams” of evidence. Nobody knows about such evidence or its whereabouts. As far as I could gather the earlier investigation was not directly focused on the so-called “rogue unit” but more on the allegations about the related HR or employment issues. I stand corrected on this point since I have never laid my eyes on the alleged reams of evidence. I did have sight of the 2012 file as a point of reference after being referred to it by SARS. Whatever relevant information was found in that file was taken into account by me. I cannot now remember the nature and extent of such information.
34. From what I remember the earlier investigation was initiated by Mr Manyike as the complainant.

D: THE OIGI REPORT

35. There is also an issue of the Office of the Inspector General for Intelligence (OIGI) report which I understand to have recommended that criminal charges be investigated against Pillay, van Loggerenberg and Richer for their respective roles in the establishment and involvement in the covert intelligence unit in SARS. As in the case of the Sikhakhane, KPMG and Nugent Reports, Mr Van Loggerenberg had apparently been given the opportunity to participate in the OIGI Investigation.
36. I am advised that the OIGI report seems to be a backbone of the alleged “dishonesty” findings against the Public Protector. As explained below this finding seems to be based on the demonstrably inaccurate premise that the Public Protector stated in her report that she had not seen the OIGI Report which was anonymously dropped at our offices. However nowhere in the report

does the PP ever say she did not see the OIGI Report. It was common knowledge that the report, or a version of it, had been anonymously dropped at the offices of the PPSA. In fact this was openly disclosed in correspondence with the Minister and other leadership of NIA.

37. Although I reiterate that each report was based on its own independent assessment of basically the same evidence, it is difficult to understand the singling out of our report as “*dishonest*” or “*biased*” without giving the same levels to the following independent institutions which at some stage or another made adverse findings to similar effect as the Public Protector report, namely that the unit had been unlawfully established and/or operated. Such independent institutions include:-

37.1 The Kanyane Panel (Attorneys);

37.2 The Sikhakhane Panel (3 independent advocates);

37.3 The KPMG Report (Big 5 auditing firm);

37.4 The Brassey SC Panel (3 independent advocates)

37.5 The Kroon Panel (7 members, chaired by retired Judge);

37.6 The Office of the Inspector General for Intelligence (Commissioned by the Minister of Intelligence);

37.7 The National Prosecuting Authority (per Adv Pretorius SC);

37.8 The Sunday Times Newspaper (Largest South African newspaper).

38. As indicated above it is also common cause that the Nugent Report cast doubt on the findings of some of the above reports.

39. I was aware that the OIGI Report was available. However, I never physically saw it as it was classified, and I did not have the necessary security clearance. The NIA was engaged to declassify the report. In our team only Mr Mataboge

and the Public Protector had the necessary security clearance status. At no stage did the Public Protector claim that she did not see the report, as repeatedly and wrongly asserted in the High Court Judgment, especially at paragraphs 113 to 119 thereof. The dishonesty finding based on this incorrect assumption can therefore not be used as a ground to impeach the Public Protector.

D1: Alleged Bias and Dishonesty: The Public Protector's involvement in the investigation

40. I understand that the court in its judgment accuses the Public Protector of bias against Messer's Gordhan and Pillay as well as dishonesty in claiming that she had not seen the OIGI Report and yet referring to its findings. In this regard, I wish the Committee to consider the following factors and make its own assessment:

40.1 The Public Protector received a complaint (there is no allegation that she influences people to manufacture and or submit false complaints).

40.2 Once the complaint is registered, the Intake and Assessment Unit assessed the file. Once it is assessed it gets allocated to the specific unit (in this case GGI) and the Chief Investigator than allocates to a senior or investigator. Allocation is done in consideration of the case load and complexity of the matter.

40.3 In this particular instance I received the file, went through the allegations, and then discussed the file with the chief investigator, Rodney Mataboge and on how we would proceed. The EMEA oversight was necessary because protocol was to be done by the chief investigator. The complainant in this regard was Mr Shivambu, the EFF Deputy President who was already demanding a meeting with the PPSA. Ms Mogaladi, the Executive Manager, Rodney and I met with him. We confirmed that the PPSA had jurisdiction to investigate his complaint. We indicated which matters were already under the purview of the Public Protector South

Africa (i.e. already under investigation) for an example the SARS IT Tender/Mordenisation. He was very passionate and aggrieved by what he saw as the flagrant multiple violations of the law and the Constitution. The complaint could not be ignored by PPSA.

- 40.4 It is also often ignored that there was a second and separate complaint lodged by an anonymous complainant. Although I never discovered the identity of the second complainant, he or she in supplying information from time to time using the disguised identity of "scaredwhistleblower" and sending such information *via* email. I did not know the identity of this complainant.
- 40.5 Like in all instances, the Executive Manager and the team then determined if there was merit in the complaint. The investigation was approved and commenced at this point. The Public Protector played no role whatsoever.
- 40.6 Next thing we wrote to the President to inform him that we had an EMEA matter involving a Minister. At the same time, we wrote to Mr Gordhan who was being accused of being in violation of the EMEA as well as misconduct as an accounting officer whilst he was still the Commissioner of SARS.
- 40.7 A letter were also sent to Mr Mark Kingon, the former Acting Commissioner of SARS.
- 40.8 Letters are submitted via the Chief Investigator, the Executive Manager, the COO to Public Protector. The Chief Investigator, the Executive Manager and COO quality assures the letters and gets to the point of what the investigation is all about.
- 40.9 Once the letters were sent out to The President, Mr Gordhan and SARS we awaited for responses. SARS and Mr Gordhan requested extensions

which was requested and duly granted. He responded to the EMEA issue but had reservations on why such an old matter was being investigated.

- 40.10 After all the preliminaries were done, we started considering the information received from SARS and Mr Gordhan. In all of this I have to follow the investigation plan and be mindful of the timelines I have set for myself as per the investigation plan, service standards and manual.
41. The Public Protector plays no active role during the investigation as I have demonstrated above even at the assessment of the merit of the complaint. I myself a person who investigated and produced the report had no relationship or sympathies with Mr Shivambu the Complainant. He was treated like any other complainant. The Public Protector did not interfere with the investigation neither did she try to influence the outcome of the investigation including the findings as contained in the report.
42. I am also not aware of any decision taken by the Public Protector or the Chief Investigator which was not based on an honest opinion and unsupported by the facts.
43. I never got any impression of any undue influence by the Public Protector neither did I get an impression that she was forcing the team towards a particular outcome.
44. I can also confirm that the Public Protector had nothing whatsoever to do with the compilation of Rule 53 records. That task is not even performed at the level of the Executive Manager. It is performed by the Investigator as the person on the ground with the assistance of the Legal Department or external attorneys.
45. It is therefore my testimony that the allegations contained in charges 11.3 and/or 11.4 of the charge sheet have no factual or evidential basis in so far as they relate to the so-called rogue unit investigation and report which was conducted, honestly and impartially, irrespective of whether one agrees or disagrees with the findings and/or remedial action. Neither the Public Protector

nor any of her subordinates involved in the matter, including me, acted improperly or maliciously or even negligently in carrying out our respective official duties. The allegations to the contrary made by Mr Gordhan and the others were therefore unfounded.

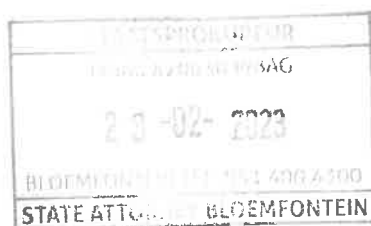
46. It is therefore clear that the factual bases of the judicial criticism which led to these charges cannot survive a proper and impartial enquiry.

D2: Human Resources Issues

47. To the extent that the Public Protector, the CEO, the COO and some of the Executive Managers all demanded extra effort and/or performance from investigators to achieve the good outcomes which were achieved, this was not done in any manner which was calculated to be undignified or disrespectful of any person.
48. I also wish to confirm categorically that the vast majority of the deadlines which were being monitored in meetings such as Dashboard, which I also attended, were self-imposed by the persons being monitored. In respect of every investigation, the very first set of deadlines are contained in an Investigation Plan in which all the deadlines are populated by the author of the plan and not imposed from outside or above.
49. Even when new deadlines are set following the failure to meet the original ones, these are almost invariably done after discussion with the affected investigators or official and never done in a rude or demeaning manner. The aim in all cases is to assist the public.
50. This has been my honest and personal experience in the institution. I am certainly not aware of any culture or prevalence of intimidation, harassment or victimisation in the organisation.


DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was **SIGNED AND SWORN TO** before me at Bloemfontein on this the 23 day of **FEBRUARY 2023**, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



Handwritten: OJ OERTEL
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