

Justice and Correctional Services

13 November 2019

Deputy Public Protector appointment: Adv Kholeka Gcaleka

Mr G Magwanishe Chairperson (ANC): Can you tell us who you are, your value system as well as the experience and skills that you have which you will bring to the Office of the Public Protector

Adv Gcaleka: My name is Kholeka Gcaleka. I am thirty-eight years old. I was born in Johannesburg, however, my umbilical cord is in a village called Mzimkhulu in southern Kwa-Zulu Natal. I grew up in Johannesburg and in Kwa-Zulu Natal in a rural area. My value system is mostly brought together by my upbringing. I was raised in a white family where my mother was a domestic worker. Therefore, for me my identity is of pivotal importance because each time I went home with my parents I always had a problem of not being able to speak my own language. So, in my life my identity is my grounding. Going back to the rural areas, having to experience the impoverished families in those areas; the lack of service delivery; the lack of water and sanitation, which are basic services, has grounded me deeply in humanity: understanding the struggles of people who are not closer to services. Growing up in a Christian family, highly, highly I am embroidered in Christianity. My values are aligned to the values in the Constitution of accountability. At home I also had to account for every action that we had to take. I went to school at Westbury Primary school. I understand the impoverishment of communities in that particular area. I went to high school at Little Flower School, which was a Christian school. Accountability was the virtue; I understand constitutionalism growing up in a democratic society and that is one of the values that is core to me. Furthermore, equity is very important to me, growing up as a young black woman in a society with the past that we are coming from and with all the struggles that it is embroidered with.

I have fifteen years of work experience as Deputy Director of Prosecutions; one year I was acting, the other years I was permanent in the position. Thereafter, I served as a special advisor to the Executive Authority. For 11 months I was on a break, pursuing my studies. I am working again as a special advisor to another Executive Authority. I was working in the South Gauteng Division, which is one of the busiest divisions in the country, I have had to work with a lot of high profile and complex matters. I was highly involved in investigations, thorough investigations. Of the high-profile matters that I have worked with that I can recall, there's only one matter where I had an acquittal. I am also a strong leader and manager. Having grown up in the ranks of the National Prosecuting Authority, dealing with people from all walks of life, you have to develop a certain resilience and grit, which I have developed, especially working with the high-profile cases that I have worked with. I have assisted the police with their investigations from enquiry stages. I have worked on matters of mismanagement by police officers. I have trained police officers in investigations. I have trained doctors on how to complete J88 forms in order for the prosecution to acquire convictions because the biggest problem was how doctors would complete J88 forms about the victim for investigation by the police. So I understand the due diligence, thorough investigations, ensuring that there is fairness in a particular trial. For me, that is the experience I will be bringing.

But also, I have stakeholder management. I chaired several stakeholder forums within the province. I participated in stakeholder forums nationally. I have international exposure. I have facilitated an anti-corruption workshop, organised by Africa Prosecutors Association in 2016. I have strong relations with the public service; the criminal justice system, the governance sector which I am currently working in. I believe that I bring a wealth of litigation experience where I am able to assess a case that is going to court, whether as of first instance or on appeal. What the prospective outcomes are, what the risks are and how to circumvent the particular risks in investigations. I have guided police officers in investigations. I have prosecuted in the High Court since October 2006 until I left the NPA in October 2016. So, I have almost ten years' experience of prosecuting in the high court, and two years' experience of prosecution in the lower court. I have dealt with specialised matters, especially matters of gender-based violence. I have dealt with corruption matters at the lower court. I am also currently serving – on a voluntary basis – in the committee that was established by the MEC of Gauteng for COGTA on the state of affairs of municipalities in the Gauteng province.

Chairperson: Thank you very much. I think something that I forgot to mention, I know Adv Gcaleka as an advisor to the Executive Authority when I was in the Executive. But that is all to it. Adv Gcaleka, can you please confirm your disclosure in the questionnaire, is there anything else you would want the Committee to know?

Adv Gcaleka: There is nothing else, Chairperson, except that there were some issues that were raised when I was nominated so I do not know when I will get the opportunity to clarify those particular issues. But other than that, I have nothing.

Chairperson: I think they might come up during the course of the interview. If they do not, we will give you the opportunity to explain yourself.

Adv Gcaleka: Thank you, Chairperson.

Chairperson: In 2016 the Constitutional Court, in the case of the Economic Freedom Fighters v Speaker of the National Assembly and Others and the Democratic Alliance v Speakers and Others, the court made a judgement which had a fundamental impact on the functioning and the powers of the Public Protector. Can you please explain what that court decision impact had on the functions of the Public Protector?

Adv Gcaleka: Chairperson, there was clearly more clarity on the enforceability of the powers of the Public Protector. Hence in that case, after the Public Protector had issued her remedial action, there were actions by others: the response that the President gave; the National Assembly responded; the Minister of Police responded to the particular matter. But what the Constitutional Court did was to reaffirm the powers of the Public Protector to be enforceable and binding and that they cannot be reviewed by other structures. This case framed the powers of the PP to be subject only to the Constitution and to the law. This case also framed the powers of the Public Protector to be pivotal in facilitating good governance in our democratic dispensation. It enforced the role of the Public Protector in upholding constitutionalism.

Chairperson: Thank you very much. I will now open the space for Honourable Members to ask questions.

Ms Mofokeng: Advocate, I want to go to the questionnaire you have answered and I want to concentrate on employers. I want a clarity, I can see that 2004 until 2016, you have been rising in the NPA, am I right?

Adv Gcaleka: That is correct, Honourable Member.

Ms Mofokeng: Now, from there you joined Home Affairs and for me the indication here is you were four months in that. Am I correct? Following that you joined the Department of Finance and worked there for ten months, am I correct?

Adv Gcaleka: That is correct Honourable Member.

Ms Mofokeng: Then following that you joined the Department of Finance and you were ten months there, am I correct? And lastly, you recently moved to the Department of Home Affairs, and have been there nine months. Am I correct?

Adv Gcaleka: That is correct Honourable Member.

Ms Mofokeng: And the last one you have been to the Home Affairs again, and then you have been there for nine months, am I correct?

Adv Gcaleka: That is correct Honourable Member.

Ms Mofokeng: Thank you very much. With that, noting that you want to be in the Office of the Public Protector, do you think that you can be there longer – if this is the perception I am having about this?

Adv Gcaleka: I started on 1 November 2016, as a special director to the Executive Authority, Mr Malusi Gigaba, who was the Minister of Home Affairs. He was then redeployed after the four months. I went there to the Department of Finance. After that – I think its ten to eleven months – he was then redeployed to Home Affairs again, and I left with him through all these departments. After he was removed from Cabinet, my contract with him ended, hence the fragmented periods in between the departments

Ms Mofokeng: Thank you very much for that clarification. Now what is your understanding of what it means to be an anti-corruption champion?

Adv Gcaleka: My understanding is that you need to be somebody who understands the causes of corruption. And you need to understand the system within which it operates. And you need to be well embroidered in good governance. You need to be well embroidered in the rule of law. You need to be ethical; you need to have integrity; you need to be an individual who can take independent decisions. You need to be an individual who can act without any fear, favour or prejudice of any person. You need to be an impartial person. That is my understanding.

Ms Mofokeng: Thank you very much. What more can be done to promote an ethical culture in government,

noting all the challenges that we've been having in the country?

Adv Gcaleka: Firstly, our systems need to be well-grounded; but also, the individuals who are operating those systems need to be individuals with capability and the capacity. And they need to have a good understanding of the environment in which they work in. For me ethical conduct, more than anything, is consciousness. If we breed South Africans who are conscious that this is their land. Whatever act they do that is contrary to a prescript, it doesn't affect them only as individuals, but it will affect generations to come. We can put in rules, as much rules as we have done in the past, but still there is corruption. But, as well, on the part of government, there also needs to be more action on the part of lifestyle audits. We need to know the lifestyle, especially of public servants, especially those who work within the supply chain departments. Also, in my view, keeping one person in one position forever, especially positions of that sort, it really does not assist. We need to have a risk-based system, continually assessing our systems; that they are able to pick up any malfeasance and also continue assessing our employees

Ms Mofokeng: Thank you. I think you understand section 182 on the Public Protector and I am sure that you understand that for you to get things going for yourself, working with the Public Protector, you need to be assigned responsibilities by her, the current one. But now if it happens that these don't come your way, I am saying this noting the challenges that are there now in the Office with the current one, what will you do?

Adv Gcaleka: Firstly, building a good rapport – an interpersonal relationship with the person who supervises you is very important. I will try by all means to have good relations with my supervisor. But if that does not yield any results, I will have a discussion with her. The position of Deputy Public Protector is a position within the construct of the Public Protector. And you report to her, she needs to assign duties to you. If that does not happen, I will raise the issue in EXCO. If it does not yield any results, I will try and exhaust any other mechanisms available. And if that doesn't yield any results, I will bring the issue before this Committee because it is also not a new issue to this Committee. In the annual report, this Committee raised the issue with the Public Protector, so she is also conscious that the assigning of responsibilities or delegating to the Deputy Public Protector, is actually a matter of public knowledge and it is a priority to this Committee.

Ms Mofokeng: Thank you, Advocate.

Ms Newhoudt-Druchen: Hello, I am Newhoudt-Druchen; voicing for me is my sign-language interpreter, Trudy. Can you explain to us your understanding of the role of the Chapter 9 institutions within the constitutional architecture.

Adv Gcaleka: The Constitution sets out the role of the Chapter 9 institutions. The Chapter 9 institutions are meant to serve as the guardians of the public against the government. They are meant to be the body that ensures that the obligations of the government enshrined in the Constitution are being carried out by the government. And not just being carried out but they are being carried out with due diligence and they are being carried out within a specific timeframe, that there is no undue delay in providing services to the people. But they are also there as a mechanism, where the people who are not happy with the government are able to raise their complaints and their complaints can be attended to – particularly this position that I have been nominated for. The role of the Office of the Public Protector is to investigate any public affairs, government organs, or any administration within government that has done their work in a manner that is improper or may cause any impropriety or any prejudice to any person. To report on that particular conduct and to take appropriate remedial action.

Ms Newhoudt-Druchen: Thank you. Looking at the mandate of the Public Protector, sometimes we see duplication or overlapping of functions with other Chapter 9 institutions, like the Public Service Commission or the SIU. Now, if you should be appointed as the Deputy Public Protector, how would you envisage avoiding duplication or overlapping?

Adv Gcaleka: Starting from my previous work as a Senior Deputy Director of Public Prosecutions, when dealing with the anti-corruption agencies it is very important to collaborate and cooperate with each other. It is very important to have memorandums of understanding where necessary. But more importantly, it is important to share knowledge amongst each other, so that you know who is dealing with which case, and what is it that they are dealing with to ensure that there is no duplication in the work. Building relations within the anti-corruption agencies is important so that you can assist each other in dealing with the matters and working on the matters consistently.

Ms Newhoudt-Druchen: Thank you Chair.

Chairperson: Thank you very much. Honourable Ngola.

Mr Nqola: Thank you very much Chair. Adv Gcaleka, you have been an employee of DPSA, Home Affairs and the NPA. Have you ever been called in for a disciplinary hearing, even if you were acquitted or the charges left derelict or you were found not guilty? Have you ever faced such a situation in all the three departments?

Adv Gcaleka: No, Honourable Member, I have never.

Mr Nqola: Whilst in the employ of the three departments, have you ever been charged by a state security agency of any malfeasance, corruption and other related charges. Even if you were later acquitted or the charges were struck off the roll?

Adv Gcaleka: No, Honourable Member, I have never. I have never even received a verbal warning.

Mr Nqola: Thank you. As the questionnaire sent by Parliament to candidates asking about circumstances, financial or otherwise, that may cast doubt on you. That is question 2.1. Another question is do you have any relevant matters which concern your honesty or integrity? And in both you have responded no. In the series of information we have been receiving as the Committee, there are some concerns coming from Corruption Watch. Do you know what Corruption Watch is?

Adv Gcaleka: Yes, I do, Honourable Member.

Mr Nqola: They have a concern on matters relating to comments you have made in the NPA at the time when, I forgot the name of the person in charge then... Simelane, about the restructuring of NPA as an institution. They are equally tagging some issues relating to you when you were in the employ of both Home Affairs and DPSA. If you have knowledge of such occurrences, do you mind expanding for the benefit of this Committee and for the benefit of South Africans in general?

Adv Gcaleka: I will start with the first issue. I have also read about in the media about a statement I issued in 2010 when I was the chairperson of the Society of State Advocates. Now Honourable Members I want to paint a picture of this, and it is very important that I do so. The NPA does not operate on its own or in silos. It is a part of the country within which we live. It is a part of public institutions. Therefore, matters that were of concern in the public sector in this country, in the private sector in this country, matters of transformation were of great concern to the NPA. Prior to my appointment as the chairperson of the Society of State Advocates, I was appointed as the deputy chairperson of the transformation committee in the South Gauteng division, which is the division I served at the time as a senior state advocate. The advocates first raised the issue of remuneration. Advocates did not earn the same salary. The salary varied according to racial lines. Advocates were not being allocated the same kinds of cases; complex and big matters were hardly allocated to black advocates. The concern was that when it came time for performance bonuses, people who received the performance bonuses are the people who did the complex and big cases; who could account for their performance during that period. When it came to promotion, the people who could be promoted were the people who were doing complex cases and this did not apply to the majority of black advocates. As a result, we had a meeting with the then Acting National Director, Adv Mokotedi Mpshe, who came to our office to hear what the advocates were saying. In that meeting he then decided that we would inform the transformation committee, that I became a part of that would make recommendations to management on how to go about transformation.

Part of the issues that advocates raised, was that for example we have the Specialised Commercial Crime Unit, which according to the NPA Act, they prosecute on behalf of the Director of Public Prosecutions. There must be consultations between the Director of Public Prosecutions and the Special Director of Public Prosecutions, who is responsible for the Specialised Commercial Crime Unit (SCCU). Yet there is no confidante between the two units within one institution. There is the Asset Forfeiture Unit, advocates would do cases and would not be motivated to refer these cases to the Asset Forfeiture Unit when it came to the confiscation orders in terms of section 18 of POCA. So even the AFU used to complain that they are not receiving sufficient referrals. These silos did not only affect individuals, they affected efficiency of the work with the National Prosecuting Authority which in itself is an important corruption-fighting institution. You can't in an institution like that have units which do not talk to each other. When Adv Simelane was appointed as the National Director of Public Prosecutions, these issues were already in the pipeline. After my election as the chairperson of the Society of State Advocates, I then issued a statement in support of inputs that Adv Simelane had given the Society of State Advocates at our AGM where he gave us a synopsis of how he intends to transform the NPA. We supported that, we wanted that. As a result, today there are dotted reporting lines between the SSCU and the Director of Public Prosecutions in divisions. Today advocates in

the SSCU appear in the high court and do their own appeals and also do some of the high court matters. Today, advocates in the DPP office actually do their own section 18 matters. It's important that I raise this, Honourable Member. The issue of not having proper conjunction between the reporting and the NPA Act, actually played itself in the enquiry of Adv Breytenbach, where the NPA was severely embarrassed in that inquiry, where the special director did not consult the DPP when he took the decision. Also, in the matter of Freedom Under Law which took Mr Lawrence Mrwebi to court, the court emphasised these reporting lines.

Chairperson: Sorry Adv Gcaleka, I am inclined to propose the following, so that we don't eat into your time. At the same time, we think that this is a matter of serious importance because these were the matters that were raised, and we thought that they need to be ventilated seriously in this Committee. Now can I propose that we give the next 10 minutes so that you can cover everything? It will not be reflecting on your time. You may proceed.

Adv Gcaleka: Thank you, Chairperson. I just want to get clarity when covering everything because there were other matters that were raised in the media that I read of. Should I cover all those matters as well?

Chairperson: Yes.

Adv Gcaleka: Thank you, Chairperson. In finalising this, Honourable Members, I at no stage – I am in possession of that statement, I can have it emailed to the Committee – I at no stage supported the closure of the two units. The support was for the transformation in principle, because the management of the NPA was still going to convene and decide how the structure must be formed. Secondly, I am not aware of anything regarding the Department of Home Affairs and DPSA. I have just joined the DPSA, it's been a month. At Home Affairs I am not aware of anything.

I am however aware that I was assigned to the Agliotti matter. I honestly, Honourable Members, cannot fathom how that can be an offence or be unethical. I didn't read of any act on my part that was said to be improper in that particular case. We were assigned as the second team on the case. We were a team of three. I was junior on the case. Yes, the accused was acquitted in the case but lawyers lose cases all the time. In my view, I feel that it is a matter that nine years later can still be reported to the authorities if there was any wrongdoing on our part that led to acquittal or any corrupt act or so forth.

There is also the Richard Mdluli matter. Quite a contentious matter, Chairperson. I was assigned this particular matter in 2010. It was still at investigation stage. I really did not know who the matter was about. I guided the police investigation in the matter. After three months, I got to know who we are dealing. I reported to the acting director, giving feedback as I regularly did. And I requested assistance of another advocate because the work was mounting but also it was very clear that it is going to be an extensively heavy matter. I was assigned Adv Barnard. We continued with investigations. We were ready to arrest; in fact, not only on the assault, the attempted murder and the murder charges. We also had the information on the corruption and the fraud charges. At that stage we had not clearly established the jurisdictions. I signed the warrants of arrest. We briefed the national director of public prosecutions, who supported us. There were a lot of other things; however we managed to have the accused arrested. He presented himself in court. We thereafter held the bail application. Issues were raised of conspiracy; that was the defence. We continued with the case. At some point, charges were withdrawn. We were referred to the inquest court to do an inquest, which in our view was not necessary. We felt that we had sufficient evidence to proceed with prosecutions. However, we took instructions. In the inquest court, for some reason the magistrate overreached his powers and cleared Mr Mdluli in the case.

We wanted to review the matter; we were not allowed to review the matter. Again, the issue of a conspiracy was continuing. At some point they even said that the prosecutors were involved in the conspiracy. Now we didn't want to jeopardise this case, it is a case that we had to ensure that justice takes place. It is a case where the family had waited for twelve years to see justice being done. I then approached the acting director of public prosecutions and I requested that we get another senior advocate, who was not involved throughout the other proceedings, in order to dispel the issue of the conspiracy. Zeiss Van Zyl SC was then assigned to the matter. At that stage, when Zeiss Van Zyl was assigned, we had not consulted much with witnesses but what we did was to record each and every consultation. There were contentious witnesses, there were previous police officers who had worked with Mr Richard Mdluli, who were contradicting the dockets, the work that they had done previously, at the time of consultation. Now, we continued with the matter, fortunately Freedom Under Law took the NPA to court. The matter had to be reinstated, we then went for trial. The conspiracy defence continued. The matter went on for many years. In 2016, I received the offer to be an advisor and I resigned from the NPA. I had been on that matter for six years. But it was close to the end of the state's case. Now when I resigned, the defence then brought this witness, whom we had consulted with, but we had decided that we will not call him. The witness then said to court that I had

coerced and bullied him to implicate Mr Mdluli. The defence then wanted the State to call me as a witness. Now, if you have prosecuted, you would know what the trick is. The state handed in the recordings; the court found them to be authentic and admitted them as evidence in court. And the court ruled that there was no reason for me to be called as a witness. In fact, Mr Mdluli has been convicted on some of those charges. The court has assessed that evidence and he has rejected that evidence as being false and as a fabrication of that particular witness.

The last issue, Chairperson, I can remember is whilst I and other advisors of Mr Gigaba were at National Treasury received the report on the Tegeta coal mine matter, which implicated the Gupta family. Now, Chairperson, the first time I learned of this matter was in a meeting where the chief procurement officer, Mr Schalk Human, was briefing the Minister. In the meeting, there were officials from the Ministry and officials from the Department. After he had presented his briefing on the preliminary report in the matter there was consensus in the meeting that the matter justified forensic investigation and should also be referred to the Hawks. I received the final report, after being signed and recommended by the Director General, which the Minister approved, signed and referred it to SCOPA in Parliament. From the allegation, I can't see any allegation of impropriety or wrong conduct I did except for it being said that I received the document before the Director General, which is false. But even if I had, what would I have done about it? The matter was referred; the forensic investigations happened; the matter was referred to the Hawks, which was the consensus. Chair, that is all I am aware of. If there is anything else, I am willing to respond to it.

Chairperson: Thank you very much, Adv Gcaleka. Honourable Nqola.

Mr Nqola: Thank you very much Chairperson. Adv Gcaleka, let us go back to the Economic Freedom Fighters / DA cases against the Speaker of the National Assembly but in a different context this time. Yes, we agree it has reaffirmed the enforceability of the Public Protector's remedial action but there is now another discussion triggered in society. When remedial action is established against you by the Public Protector, you have the right to take it on review by a court of law. Now, that goes back to a discussion on what then becomes the status of the enforceability of that remedial action. Some argue that when it is taken on judicial review by the affected person, the remedial action ceases to be enforceable until the court pronounces itself on the matter. That the sub judice rule applies. Some are convinced that whether you go for judicial review or not, the remedial action is still applicable and enforceable even at the time when the court has not yet pronounced on it. What is your view?

Adv Gcaleka: My view is that remedial action is enforceable until the pronouncement by the court. What many people, like Mr Gordhan, have done is to interdict the enforceability. For me, that is the way to go. If you do not want it to be enforced immediately because you are bringing an application to review the findings or the remedial action of the Public Protector, without an interdict, it is enforceable.

Mr Nqola: Section 2 of the Public Protector Act says that the Deputy Public Protector acts in accordance with what has been delegated by the Public Protector. As things stand now there has been a lot of losing of cases and legal cases being adjudicated against the Office and the Public Protector in person. Let's say you are in a scenario where you are appointed as the Deputy Public Protector, and there is no delegation framework yet given to you, and you see that there is something that is going wrong in the Office, what would you do?

Adv Gcaleka: Honourable Member, I would obviously approach the Public Protector. I cannot assign functions myself. Before when you enter an office, before you perform any work, there is a performance contract that is signed between the supervisor and the employee. It is from that performance contract that I would negotiate my duties but also wait to be assigned matters. However, I would advise the Public Protector. Whether she takes my advice or not, I mean with the experience that I have on how to approach such cases, it would be quite beneficial for her. I would still advise her – whether she takes the advice or not. But also, as I have responded previously, if she doesn't take the advice, you know, looking at what is happening – well, we have become a very litigious society. The Public Protector's Office is highly affected by that so it is a very serious matter; and considering her budget constraints and all of that; serious interventions are needed in that respect. If no advice is being taken, I will again approach this particular committee on the issue.

Chairperson: Thank you very much. Honourable Horn.

Mr Horn: Thank you Chair. Good afternoon. You, in your introductory remarks, said that there was only ever one acquittal in cases you dealt with. Then later on you referred to the acquittal in the Agliotti matter, is that the one acquittal?

Adv Gcaleka: Honourable member I said it was one acquittal in the high-profile cases that I had dealt with.

And, yes, I was referring to the Agliotti matter.

Mr Horn: Thank you. Now in respect of your work as special advisor to Minister Malusi Gigaba. Am I correct in concluding that you were in fact a legal advisor? That was the nature of the work you were given.

Adv Gcaleka: That is correct, Honourable Member.

Mr Horn: During his tenure as the Minister of Home Affairs, there was the Fireblade Aviation matter, in which ultimately first the High Court and later confirmed on appeal, found that he deliberately told certain untruths under oath. To what extent were you involved, as his legal advisor, in dealing with the finalisation of those statements under oath?

Adv Gcaleka: Firstly, Honourable Members, I must place it on record I joined the Department of Home affairs as a special advisor, a legal advisor, to Mr Malusi on 1 November 2016. The Fireblade matter had been going on for years preceding that. When I arrived, there was counsel on the matter. Documents were being concluded. I was never part of any meetings that had taken place prior to that. So, on the factual basis of that case, I had no knowledge, as I was not his advisor at the time.

Mr Horn: Thank you. Turning to your questionnaire. In dealing with the second question on the challenges facing our country and what you could add or bring to the party if you are appointed as the Deputy Public Protector, you make the interesting comment that it's very important for the Office of the Public Protector in its investigations "not to pander to the interests of lobby groups". Now we all know the Act says it is subject only to the Constitution and the law and must act without fear, favour or prejudice. Given its history and your perceptions of the Office of the Public Protector, what led you to make that specific comment that one must be careful not to pander to lobby groups and other interests.

Adv Gcaleka: Honourable Member, the Public Protector's Office has become a very big point of interest to a lot of interest and lobby groups. I mean, it is common cause that you would find different organisations, NPOs, wanting to say how the Public Protector must perform her functions, which decision is wrong, which decision is not. You find political parties also involving themselves on which decision is right, against whom. Who must be investigated? So, it is against that background that I made the particular point that the Public Protector must be at all times independent and work in accordance with the Act and the Constitution

Mr Horn: There is also a view, specifically in more recent times, that the factional battles of the governing party, which you in government have served as a special advisor, play out in the matters referred to the Public Protector to deal with. So, if you are appointed, how will you ensure that you steer clear of settling factional scores?

Adv Gcaleka: I was an advisor to Mr Gigaba for two years. I am now an advisor to Mr Senzo Mchunu MP. I have advised two different persons who are members of the governing party. My advice to them is on the facts and on the law and not on the politics. I am not a political advisor. I am professional, Honourable Members. I have worked in the professional sector, under the NPA, for many, many years. And what is important is to uphold the rule of law, and constitutionalism and stay clear of any factions.

Chairperson: Honourable Glynnis Breytenbach.

Ms: Breytenbach: Thank you Mr Chair. Good afternoon.

Adv Gcaleka: Good Afternoon, Honourable Member.

Ms Breytenbach: You have spoken at some length about independence, and the need for that. Can you tell me why you regard that as such an important quality in the Office of the Public Protector and how would you guarantee to this Committee that you would be independent?

Adv Gcaleka: The fact that the Constitution expressly states the independence of this Office, it is clearly an important factor because it serves the interest of the people of South Africa. So in exercising the powers given to this Office, it is important that they can be exercised independently, without any external influence, besides the facts, the evidence before me and what the law says, taking into consideration most importantly the complainant but also ensuring that there is fairness on the other side. How I would ensure that I exercise that independence, is to stick to the rules of the law. It is to ensure that the work that I do is transparent, there is openness. I am able to account for the work that I do. But also, that I don't flounder with procedures and processes because at the level of a Deputy Public Protector, as it is in the NPA for example, if it is not a representation, at that senior level you do not receive a matter at first instance. The matter would start with

investigations. Whoever would oversee the person doing the investigations; receive recommendations and upwards; and I would really ensure that I look at the matter in line with the law.

Ms Breytenbach: Thank you. May I ask you to try and keep your answers a little more brief, we all have a time constraint. You have also mentioned the rule of law quite often now. Could you tell me, what is the rule of law? What is due process?

Adv Gcaleka: What I understand by the rule of law, it's the constraints that are provided by the prescribed laws or legislation to individuals or institutions on their powers and action.

Ms Breytenbach: And due process?

Adv Gcaleka: What I understand by due process is ensuring that there is fair treatment of how you deal and process a particular matter. For example, in the Office of the Public Protector, ensuring that when you receive a complaint, you phone the other party and provide them with the complaint. And where there are instances the complainant must remain anonymous, you remove those particular details. But there is clarity for the other person on what the complaint is; providing them with sufficient time; informing them of your provisional reports and of your final reports, in order to properly hear what the other side's story is. And where there is no evidence, to be able to say that there is no evidence. But where there is evidence, you know that you have followed due process and the decision you have taken is covered.

Ms Breytenbach: Thank you. Then let's talk a little about your time at the National Prosecuting Authority. Menzi Simelane was a wrecking ball in the National Prosecuting Authority. The architect of dismantling the specialist units in the NPA and he decimated their ability to oppose State Capture. You supported him vociferously. You stated as the head of the Society of State Advocates that you supported the courageous transformation agenda of Simelane. Now I know that you explained why you did it. I need a little a bit more. I don't buy your explanation. He was subsequently removed from office as unfit to hold that office by a court. Why did you support him? Why did you not fight as the head of the Society of State Advocates for the independence of the prosecutors? Why didn't you fight for the rule of law?

Adv Gcaleka: In my knowledge, there was no instance where Adv Simelane had suppressed any prosecutions. In fact, I gave an example of the Mdluli matter, he supported the team in the prosecution of the Mdluli matter. Now I am speaking in accordance with my experience. The dismantling of the units, I am not aware of. It is the principle that he had made inputs to us about, that we supported. But supporting the dismantling of units, I never supported. My statement is very clear, it doesn't state so. And the other point is, every person has got an idea but the NPA is a strong institution that had a management of the institution at the time. Hence, if indeed he wanted to dismantle the institution, it did not happen. The institutions were not dismantled. If he had the intention to do so, clearly the NPA had the management to stop that particular act from happening. I supported a principle. There was no way I would have taken office of Society of State Advocates when state advocates had so many grievances and were at loggerheads with the National Director of Prosecutions when we required his support on the well-being of prosecutors.

Ms Breytenbach: Thank you.

Chairperson: Thank you very much. Honourable Jele.

Ms Maseko-Jele: Good afternoon Adv Gcaleka.

Adv Gcaleka: Good afternoon Honourable Member.

Ms Maseko-Jele: Yes, I just want to know, as an individual, considering the period you have worked with these different individuals: Adv Simelane, Mr Gigaba, Mr Mdluli and the situations or the shenanigans of the whole situation, I just want to find out, do you think it is fair that you are judged based on all those things that people might think they have done wrong?

Adv Gcaleka: Firstly, I prosecuted Mr Mdluli. I was really surprised when he was presented as a victim in the newspapers, when everybody else in the society at large wanted him to be prosecuted and wanted justice to be done. I worked with Adv Simelane; I was a senior deputy director of public prosecutions in the South Gauteng region. I did not work in his office. I am one of many prosecutors.

Ms Maseko-Jele: Sorry, Chair, sorry for disturbance. I just wanted to know is it fair how she has been judged individually? Just give me this, is it fair that you are judged based on whatever had happened?

Adv Gcaleka: I believe that it is highly unfair.

Ms Maseko-Jele: Thank you. My other question is maybe you can share with this Committee what you have learned in the whole situation as a person?

Adv Gcaleka: What I have learned is that it is important to uphold values. It is important to act in line with the law. It is important to be an independent individual, with your own views. It is important to stay professional if you are professional. And it is important to ensure that justice is done where justice should be done.

Ms Maseko-Jele: With all the challenges that the Office of the Public Protector is experiencing, be it legally, be it perceptions or all that she is facing and the Office is facing right now, what value will you be taking to that Office, if we employ you?

Adv Gcaleka: Firstly, I have strong litigation skills, as I have alluded to previously. I have that eye to be able to look at a matter, to assess what the gaps are. So, the most important value I will be bringing is ensuring there are thorough investigations. I also have mediation skills – ensuring that matters that do not require investigations are speedily finalised through other available mechanisms. But also, having worked with a high load of matters in the National Prosecuting Authority, case management and dealing with backlogs. Also ensuring that you build an environment where people work together as a team, building a capable team, enhancing the skills of the team. I am trained to train. I have trained prosecutors, police, doctors. Also ensuring that the remedial actions are in line with the law, having practiced the law for so many years, and that they can stand the test of time.

Ms Maseko-Jele: In your assessment, in what areas has the Public Protector successfully done its mandate?

Adv Gcaleka: I think on the administration programme, they had quite a good audit outcome, as well as having the courage to take up matters of people from the highest of offices. And I'm not speaking about the Public Protector as an individual but I am speaking about the Office. And I think that what that Office has done to the mandate of the Public Protector, it has lifted it. For us even today to have a judgement which says that the remedial actions of that Office are binding and enforceable. That for me is the courage of what came out of that particular Office and it has done really well for the country and for the people of this country.

Ms Maseko-Jele: What would you do to address a situation where an organ of state ignores or refuses to implement the remedial action of the Public Protector?

Adv Gcaleka: I would take the matter to court, for an application for the remedial action to be enforceable. If they still do not enforce it, then they would have contravened the court order. Thus I would apply for remedial actions to become an order of court.

Chairperson: Thank you very much. Honourable Dyantyi, Ndlozi, and Hishaam Mohamed are still to ask questions. Let us agree that Honourable Hishaam will be the last one. We all agree, yes? Alright.

Mr Dyantyi: Adv Gcaleka, in your submission in the questionnaire, your special advisor role touches now three departments: Home Affairs, Finance, back to Home Affairs and DPSA. Yet the Chair indicated that where he was before, you were a special advisor – which was not in those three departments.

Chairperson: Can I correct it?

Mr Dyantyi: Ok, correct it.

Chairperson: I say when I was in the Executive, I knew her as a special advisor to one of the Executive Members.

Mr Dyantyi: Thank you, Chair, for clarifying that matter. What's your view, you have spoken a lot about it, the remedial action is binding, is it absolute?

Adv Gcaleka: It is not absolute; it is binding at the time it is made. The fact that it is reviewable through the judicial system makes it not to be absolute.

Mr Dyantyi: Thank you. Have you done some research on the Public Protector's Office that you want to be a part of?

Adv Gcaleka: I have done so Honourable Member.

Mr Dyantyi: What is the budget of that Office?

Adv Gcaleka: The budget of the Office is R320 million. Out of the R320 million, R250 million is only for the compensation of the employees.

Mr Dyantyi: Thank you. How many programmes do you have in that department?

Adv Gcaleka: What I have read in the Annual Plan is that there are three programmes: mainly Administration, Investigations and Stakeholder Management.

Mr Dyantyi: Pause there. Having done that research, hopefully you have read the Annual Reports and the Annual Performance Plans (APPs), I hope? Can you give me just two major weaknesses that you have picked up, that if you are successful here, will be your first task as part of your support and advice? What are those two weaknesses of that Office? I am not talking perceptions now; I am talking based on the research you have done.

Adv Gcaleka: Based on the research I have done, I have realised that considering the financial restraints, there is insufficient cooperation and corroboration with other anti-corruption agencies, for example, ensuring there is no duplication of matters. Also ensuring that if a matter has a criminal impact, then the Public Protector, considering its constraints can rather refer that matter to the Hawks for investigation. This is because in any event the final remedial action on what happens to the matter does not lie with her. That would be my first assessment on the matter. Secondly it is the turnaround of senior management in the Office. It is important to build capacity and skills that can be retained in that particular Office. What I would do is find out what are the issues. The Public Protector, I think the last time when she presented the Annual Report, she raised low morale amongst the staff. It is important to build that amongst the staff.

Mr Dyantyi: Thank you. Hold it right there, I only have five minutes. In the same Annual Report, we raised the ballooning, exorbitant litigation costs. I don't know if you come across that. Firstly, what do you think is the cause of that and how would you assist to remedy that?

Adv Gcaleka: The courts are the final arbiters on any matter and up until constitutional matters, the courts have raised concerns with the quality of investigations. The fact that the remedial action is easily reviewable. We have seen a number of cases, high profile cases, where the review has been successful. So, it tells you that there is a gap in the investigations. With my experience, that is where I would strengthen the Office of the Public Protector; but also ensure that punitive measures are always the last measure you take and under really needed circumstances. If a matter can be resolved in any other way, let us go for that particular way rather than have a matter where we conclude having spent a lot of money in systematic investigations and then again pay for more costs in litigation. I mean, I have seen this ranging from R9 million.

Mr Dyantyi: Ok, pause there. As I wrap up, I just want to read you a sentence from the last Constitutional Court judgement on that Office. It reads from section 207: "The Public Protector's entire model of investigation was flawed. She was not honest about her engagement during the investigation. In addition, she failed to engage with the parties directly affected by her new remedial action". This is damning, amongst other things raised there. And the investigation is the major component. What value do you think you will bring given your own experience in the NPA, put aside the advisory because I regard that as sabbatical? But let's get into this.

Adv Gcaleka: Having done a lot of appeals before judges in the High Court, I know what judges look for when they review a matter. I have also done reviews before the High Court. So when you do your investigations, I receive the matter, I already have in mind what questions the judges will be raising, should the matter be sent for review. And if we do not have those answers, or are not absolute on the law or the evidence, we'd rather deal with the matter than to proceed with remedial action that is going on review and be set aside.

Mr Dyantyi: Thank you. My last point, Chair. Just share what is your understanding of judicial ethics? And where a judicial officer fails to adhere to them, what should be the consequences for the judicial officer.

Adv Gcaleka: Judicial ethics is almost the same for the Public Protector or any other public office which is enshrined in the Constitution. Being ethical is doing your work in line with the facts that are before you; applying the law applicable; coming up with a judgment that is in line with the law and the facts; working independently, impartially without any fear or favour. Now if there is a challenge of judicial ethics, there is the Judicial Service Commission where you are able to report matters of impropriety or unethical conduct. But

also the mechanism within the judiciary of an appeal process, there is a review process up until the Constitutional Court. So whatever judgement is done by one judge, there is the next step with another judge or judges, a full bench, to have a look into the particular matter.

Mr Dyantyi: Thank you very much.

Chairperson: Thank you very much. Dr Ndlozi.

Dr Ndlozi: Thanks Chairperson. I want to follow this line of questioning on ethics. So when you worked in the departments as a legal advisor, in essence you are not working for those departments, you are working for the Minister. Am I right?

Adv Gcaleka: That is correct. I am an advisor to the Minister.

Dr Ndlozi: That is why you move with him, am I right?

Adv Gcaleka: That is correct.

Dr Ndlozi: You are working for this guy at his personal discretion that they need your advice, am I right?

Adv Gcaleka: Not at his personal discretion. Section 12A of the Public Service Act sets out that a special advisor's duties are to advise the Minister, or the Executive Authority, so it's in his capacity as the Executive Authority on his powers and on his duties.

Dr Ndlozi: It seems to me whether you get hired or not is at his discretion. That's my point. Even if you are executing those things, even if you are moving with him, you are working for him as an Executive Authority, that's my point.

Adv Gcaleka: As the Executive Authority, I agree, Honourable Member.

Dr Ndlozi: Yes. Now, why did you continue working for him after the court said he lied under oath?

Adv Gcaleka: I had no reason not to work for him.

Dr Ndlozi: So, you were prepared to work at that level for a person that a court of law said lied under oath. That's fine. Is there no ethical conflict in you?

Adv Gcaleka: There is none, Honourable Member.

Dr Ndlozi: Excellent. So, let's go back, why did you leave the NPA to advise Ministers, if you are so passionate about fighting for justice? It seems to me, pursuing criminals at the NPA, finding justice in particular this high-profile case you were involved in; then leaving it for a lucrative job, doesn't pose you as a person who is passionate about justice. What's your reaction to that?

Adv Gcaleka: Honourable Member, at the time and I think if you could take notice of reports, the NPA was very volatile. There were many threats on my life; as a result I had VIP protection. We were not seeing eye to eye with management on the Mdluli case. And as I have alluded to before, the matter was taken to court by Freedom Under Law and that is why we ended up prosecuting the matter.

Dr Ndlozi: I don't have time, so.

Adv Gcaleka: Also, the reason that I left, at a young age...

Dr Ndlozi: No, wait. Just one second. I am interrupting you because I only have five minutes. I am not being rude. You left because your life was under the threat, what are you saying?

Adv Gcaleka: No.

Dr Ndlozi: Why did you leave the NPA to be an advisor to the Minister? Your answer is my life was under threat. Did I hear you properly?

Adv Gcaleka: It is a component of my answer, Honourable Member. May I kindly explain further please?

Dr Ndlozi: Ok.

Adv Gcaleka: So, at a young age I took up a very senior position in the NPA. I had served in that position for five years at the time. Like any other young person, I had other ambitions to grow. Now in the environment I was in, under the circumstances, I had no provision to grow further and I had realised that. That is why I took up the other position.

Dr Ndlozi: So you left, part of it is that your life was under threat and that made you leave. You are still young. Your life may be under threat in the NPA; in the Public Protector's Office – that's even worse. That's higher, that's the highest call. So how do we know you won't run away again?

Adv Gcaleka: Honourable Member, the threats on my life were in 2010 proceeded up until 2014, I think. By the time I left, we no longer had VIP protection, so there was no longer any imminent threat at the time, hence I am saying my answer cannot be broken down. It is an accumulation of issues.

Dr Ndlozi: So, there are two things. Why did you tell me about your life under threat if it doesn't matter, I don't understand? So, let me concentrate on growing. Now the trajectory seems to be, you are leaving this fight for justice in the NPA, to be an advisor. There is no fight for justice there. So, it's about career?

Adv Gcaleka: A fight for justice doesn't only mean you have to stand in court. However, advising a Minister on issues of governance, strategy, administration, for me it is also a fight for social justice. A lot of the people of South Africa are not receiving services. The minister is in a position to take decisions. So, if I can advise...

Dr Ndlozi: Then he started lying under oath. And you still worked for him. The court says this man is a liar and then you still worked for him. I'm not sure about your ethical compass. This is a Chapter 9 institution. Shouldn't this highest call require the highest demonstration of ethics?

Chairperson: You have one minute.

Adv Gcaleka: Honourable member, my ethical conduct cannot be questioned on the decisions I have taken from being the lowest prosecutor up until a senior position.

Dr Ndlozi: Sorry, I am not talking about those. I am talking about the decision to stay working for a person that the court said lied under oath.

Adv Gcaleka: By the way, Honourable Member...

Dr Ndlozi: Why can't I question your decision to stay and work for a person that lied under oath?

Adv Gcaleka: By the way, Honourable Member, when the Constitutional Court pronounced itself on that decision, 14 days later former Minister Gigaba resigned. So there is no period that can be said that I then stayed and worked for that particular man.

Dr Ndlozi: Oh, for even for 14 days, it's not a period. Ok. Are you a member of the ANC? Have you ever been a member of the ANC?

Adv Gcaleka: I am currently not a member of any political party. I have been a member of the ANC. I grew up in the ranks of the ANC Youth League. I have led in the ANC Youth League. I have however not had membership of any political party, I think, for about eight years now.

Dr Ndlozi: Eight years?

Adv Gcaleka: I think. I am not accurate. But it has been a couple of years.

Dr Ndlozi: So why didn't you tell us about this important fact about your struggle credentials?

Adv Gcaleka: Honourable Member, I am not going to carry out a function where my struggle credentials are required. However, my struggle credentials are known. There was nothing to hide.

Chairperson: Honourable Ndlozi, this is the last one.

Dr Ndlozi: Well I didn't know them. The last question. This is the last one Chair, the last one. Please indulge me. Thank you. I appreciate it and will remember this. The last question. You see when a court decided and

it has to do again with the remedial action. The enforceability of remedial actions. When that ruling of the Constitutional Court in relation to the EFF's case, it seems to me that we can read as, the remedial action of the Public Protector are binding until set aside by court of law. Why do they still need a court to enforce them? It doesn't seem quite creative because if a person ignores them, they have already been declared as binding until a review. Other creative ways that these remedial actions can be enforceable when ignored by powerful people who are even prepared to lie at a court. That is my final question.

Adv Gcaleka: Honourable Member, the creative ways can be cooperation. For example, if it is a Minister who has done that particular act, the Minister is answerable to Parliament. Then the Public Protector can then approach Parliament to ensure that their remedial actions are being adhered to. But also, what normally happens with Members of the Executive, Members of Parliament when the Public Protector passes the remedial action, it will also be referred to the Ethics Committee, to accordingly deal with that particular matter. So that is the other angle of dealing with those matters, other than going to enforce it in the particular court.

Dr Ndlozi: Thank you Adv Gcaleka, thank you.

Chairperson: Honourable Hishaam Mohammed.

Mr Mohammed: Adv Gcaleka, two short questions. Moving forward in the future. With regard to the term of the Public Protector, the Office itself, share with the Committee your strategic vision for this Office.

Adv Gcaleka: My strategic vision, which of course will have to be aligned with the vision of the Public Protector, because mine is to be a deputy. Firstly, it is to work to uplift the integrity of the Office of the Public Protector and in so doing, ensure that we increase the quality of investigations on the matters the Public Protector is dealing with. For me, that is of paramount importance because the integrity of the Office, the dignity of the Office and the confidence which the public has in the Office, derives from the quality of the matters the Office is dealing with. And we get quality results out of the court judgements for those matters that actually go on review. That for me is the primary strategic vision. Secondly, it is to ensure that there is a proper case flow management. It can ensure, not only the due diligence, but also there is a systematic way in which all parties involved in the chain of that case engage in that particular case. Also, the coordination and the cooperation with other stakeholders are of utmost importance to the mandate of the Public Protector.

Mr Mohammed: Relating to the previous question of one of my colleagues here, in the Annual Report, you would have seen the litigation costs for the Office is a sizeable amount, R10 million and more. Given the judgement that all decisions are binding, what is your perspective? Do you expect those costs to rise because people would challenge the remedial action or how else can one bring it down?

Adv Gcaleka: Honourable member, I think considering the judgements that are there, any reasonable person that is in the position of the Public Protector, will introspect. The Office will introspect; it has to introspect to see what it has been doing wrong. Rectify, put in mechanisms to rectify the wrong that has been done to bring down the litigation fees. What shouldn't happen is for the Office of the Public Protector to fear taking decisions because of litigation costs. If the decisions are supported by the rule of law, by the evidence, and they are decisions which have been thoroughly assessed, decisions must be taken and the rule of law must prevail.

Mr Mohammed: Thank you very much.

Chairperson: Thank you very much Honourable Members. Thank you very much Adv Gcaleka. Thank you for coming to this interview. For wanting to serve our nation. Thank you very much. One question that I have: what is your impression of this interview process? Do you think it was fair?

Adv Gcaleka: Thank you, Chairperson. I must really thank the Committee. I think the interview was fair. If a person is to be appointed as a Deputy Public Protector, they need to account. And accountability starts with me on the decisions that I have taken so that the Committee can be confident that indeed I am the person that they can possibly appoint as a Public Protector. If there was no interrogation, the Committee wouldn't know. The people of South Africa must have confidence and know that the person who would be appointed as a Public Protector is a person who is willing to account and can be held accountable. I think this is exactly what this Committee has done. Thank you.

Chairperson: Thank you very much. Our intention is to conclude this process before we rise; we are rising on 6th December. We are pushing that the House must make a decision before that. In a few weeks' time you will know your fate. And the country will know who is going to be the next Deputy Public Protector. We only

have a few weeks. We will communicate our decision.

Adv Gcaleka: Thank you Chairperson

Chairperson: You are excused.