# INTRODUCTION

1. Good morning chairperson, members of the Committee, Adv Busisiwe Mkhwebane, and to our colleagues.
2. This Committee sits as the first of its kind in South Africa, and so, in that sense, it is sailing in unchartered waters. Even though this is a maiden journey, it is not without beacons, the odd lighthouse and frequent buoys to guide its route. It is also not without a map and a navigation system with which to steer its course.
3. Given that this is the first impeachment process of this nature, it is important for us all to have a common understanding upfront as to what this Committee is, and what it is not.
4. It is not a court of law, nor is it a quasi-judicial process or an adversarial process. It is also not a committee of judges. In regard to the issues with which this Committee is seized, it is as bound by the judgments handed down by courts of law, and which are before this Committee, as is anyone else and it has neither the power, nor is tasked with rewriting those judgments.
5. It is also not tasked to assess a criminal conviction – and these are not criminal proceedings in which there is an accused that has to plead guilt or innocence.
6. The Committee does not have final decision-making powers – that power rests with the National Assembly that adopted rules to create this Committee precisely to deal with the *lacuna* regarding the process of the removal from office of, amongst others, the Public Protector by providing a procedure for considering such removal. A procedure which takes cognisance of the fact that it should be no easy feat to remove a Public Protector.
7. In addition, these procedures confer on the Public Protector (PP) important procedural rights and define the limits of the Committee’s powers and functions, with the ambit of the National Assembly rules.
8. This Committee is tasked to consider **the motion** tabled on 21 February 2020, more than 2 years ago, by the Chief Whip of the Democratic Alliance, Ms Mazzone (“the Motion”) which initiates an enquiry, in terms of section 194 of the Constitution, for the removal of the Public Protector, Adv. Busisiwe Mkhwebane, on the grounds of alleged **incompetence and/or misconduct**. We will in the course of this address elaborate further on the motion itself.
9. In doing so the Committee has to apply itself to the documentary and oral information placed before it with an open mind – open to all possibilities on the information provided. In this exercise, the Committee is not circumscribed by the reasons, recommendations or any conclusions drawn in the report of the Independent Panel.
10. The inquiry that is before this Committee is but one leg of a journey to the inquiry’s final destination – the National Assembly. *En route*, the process encounters various ports into which it has had to dock or forced to anchor, – but we reiterate - the Committee is not the ultimate decision-maker. When it reaches the National Assembly, the Committee performs a reporting function making recommendations to the National Assembly which in turn is empowered to make the decision to remove a Public Protector from office in discharging its constitutional obligations under section 194.
11. The route to be taken is defined – it is plotted with clear co-ordinates –pointing to the grounds and requirements for the removal of a Public Protector.
12. It encompasses a process that must be carried out with integrity and fairness - not only because the rules call for the conduct of the enquiry to take place in a reasonable and procedurally fair manner, but also because the office of the Public Protector is one of fundamental constitutional significance that demands that the incumbent be treated in such a manner. And when we say reasonable and fair this is not only to Advocate Busisiwe Mkhwebane, but to all participants in this inquiry. In conducting this process, it must also be fair to those witnesses who participate in the process to ensure that their voices are heard, and they are treated with dignity and respect.
13. Also to stay on course this Committee has determined terms of reference which permitted the appointment of myself and my colleague, Adv Ncumisa Mayosi. Both of us are practising advocates and we have both had experience in relation to Commissions of Inquiry. I led the evidence in the Khayelitsha Commission of Inquiry investigating allegations of police inefficiency in Khayelitsha and a breakdown in relations between the community and police. Adv Mayosi played an integral role representing the complainant community of Khayelitsha in that inquiry. In addition, I led the evidence in the Mokgoro Enquiry in terms of section 12(6) of the National Prosecuting Act. In addition to commissions of inquiry, we both have extensive experience in a wide range of legal matters.
14. This notwithstanding, this enquiry remains a novel task for us as practising advocates and as the appointed evidence leaders. But it is a novel task not only for us, but also for this Committee and for the National Assembly.
15. What must be understood we are sure of is that we as the evidence leaders are not prosecutors tasked to determine guilt or innocence. We do not represent a client; we do not have a burden of proof to discharge or a case that must be met by a client.
16. This inquiry is of an inquisitorial nature, informed by Parliament’s constitutional oversight mandate, and the principle of fairness.
17. Our primary role as evidence leaders is to present evidence – whether it is of an exculpatory nature or implicating nature - and during the course of these proceedings you are likely to hear both.
18. In our engagements with persons – both those who were willing to assist and make themselves available to give evidence and those adamantly opposed to being part of this process - we endeavoured to clarify that we were neutral. That the purpose of our engagement was to seek information to place before the Committee which could turn out to be either exculpatory or confirming of the Motion. It is our duty as evidence leaders to place both types of information before the Committee.
19. Fairness demands that this Committee view the information and evidence placed before it through this same prism of neutrality, in order to permit a fair, open and unbiased assessment of the merits of the allegations made in the Motion.

# INDEPENDENT PANEL

1. As a precursor to this Committee, the former Speaker of the NA, Ms. B Mbete, acting in terms of NA Rule 129U, established an independent panel to conduct a preliminary inquiry on the Motion. The Panel was tasked solely to determine **whether there is *prima facie* evidence** to show that the holder of a public office –
	1. committed misconduct;
	2. is incapacitated; or
	3. is incompetent.
2. The role of the Panel was limited to a desktop exercise of an assessment of the relevant written and recorded information placed before it by members, or by the holder of a public office, in terms of this Rule. It did not go outside that ambit.
3. The Panel described its functions as –
	1. applying the Constitution, the law and the NA rules impartially and without fear, favour or prejudice;
	2. on the evidence made available, to conduct and finalise **a preliminary assessment** relating to the motion proposing a section 194 enquiry;
	3. to determine whether there is *prima facie* evidence showing that the PP has committed a misconduct or is incompetent;
	4. to exercise its discretion in deciding whether to afford any member an opportunity to place written or recorded information before it within a specified timeframe;
	5. to provide the PP with copies of all information available to it relating to the assessment;
	6. to provide the PP with a reasonable opportunity to respond in writing to all relevant allegations against her;
	7. not to hear oral evidence; and
	8. to make recommendations in its report including reasons for it.
4. The Panel submitted its report on 24 February 2021 and recommended, for the reasons contained in its report, that the charges of incompetence and misconduct be referred to a committee of the NA as provided for in the NA Rules governing removal. [[1]](#footnote-2) Let us be clear that the use of the word “charge” is not to be understood in a criminal context - rather the term “charge” is to be understood as the grounds for averring the removal from office of the holder of a public office.
5. The report served before the NA on 16 March 2021 and it resolved to proceed with a section 194 enquiry establishing this Committee.

# THE 194 COMMITTEE

1. We emphasise that whilst the Committee has no inherent jurisdiction, it also has all the powers applicable to parliamentary committees as provided for in the Constitution, the applicable law and the rules which it exercises *“[s]ubject only to the Constitution, the law and the [NA] rules”*.[[2]](#footnote-3)
2. The rules governing the process have already passed constitutional muster – that ship has sailed.
3. The function and powers as set out therein include that:
	1. The Committee must “*conduct an enquiry and* ***establish the veracity of the charges*** - that must be the charges in the Motion - *and report to the Assembly thereon*” (129AD(1)).
	2. In the absence of any lawful impediment, this Committee is enjoined to exercise its powers and perform its functions and give effect to its obligations under the Rules of the National Assembly. The Committee must do so based on the information before it within a reasonable time frame, without undue delays and in a procedurally fair manner.
4. The Constitutional Court has also confirmed that Adv Mkhwebane has the right to be heard in her defence and to be assisted by a legal practitioner or other expert of her choice (129AD(3)). The latter may, on her behalf participate, including making opening and closing statements and cross- examine witnesses as well as make written submissions on the findings and recommendations of the Committee in line with the *audi alteram partem* principle of natural justice prior to the report of the Committee being adopted and tabled, and which representations must be considered by the Committee prior to the adoption of the report.
5. To perform its tasks the Committee established terms of reference encapsulating its task as one of:
	1. assessing the charges contained in the Motion in order to determine whether the PP is incompetent and/or has misconducted herself; and
	2. reporting to the NA on its findings and recommendations.
6. And like the Panel, the Committee must perform its tasks with a state of mind that must be neither unduly suspicious, nor unduly believing, but one that simply ascertains whether the information at its disposal is out of place or fits within the parameters of the Motion.
7. Pursuant to an obligatory parliamentary process, written comments were elicited from members of the public. Whilst all these statements serve before the Committee, to be considered in its deliberations in the context of the Motion, only some of those persons who have sought to assist the Committee in its work will be called to provide oral evidence before the Committee. Members of the public who made submissions are thanked for their assistance and contribution.
8. The process to be followed is open and transparent. As evidence leaders, over and above those who had made public submissions, we will also call various witnesses to provide evidence to the Committee and put written evidence before the Committee in relation to which oral evidence may not necessarily follow. In addition, the findings of judgments from various courts, the High Court, Supreme Court of Appeal and Constitutional Court, by which this Committee and all people in South Africa are bound, will be drawn to the attention of the Committee. This Committee, as are all people in South Africa, is bound by these judgements.
9. It bears noting that this exercise is not a comparative one. Adv Mkhwebane was perfectly entitled, when stepping into the role of the Public Protector in October 2016, to determine how she intended to perform her functions and exercise her powers. Whether or not she did so in the same, similar or different manner as her predecessors is of little import in this Enquiry. Adv Mkhwebane had three predecessors - Adv Madonsela, Adv Mushwana and Adv Baqwa.
10. Section 194 of the Constitution sets out the circumstances in which a Public Protector may be removed from office. These grounds are misconduct, incapacity or incompetence.
11. That section requires that there must be a finding to this effect by a committee of the National Assembly, before the National Assembly may adopt a resolution calling for the removal of the incumbent from the office of Public Protector.
12. The starting point of an evaluation of the charges against the current incumbent must be the nature and requirements of the office of the Public Protector.
13. In our view, it serves little to no purpose to the work of this Committee, faced with the complaints with which it must contend against Adv Mkhwebane, to use as a measure of competence and good conduct the performance of her predecessors.
14. We will not in this opening address be setting out the constitutional and legislative framework for the Public Protector as this task will be done by the first witness, Hassen Ebrahim, who has kindly agreed to assist the Committee in respect thereof. Unlike other witnesses, Mr Ebrahim will not be dealing with any of the specific charges as set out in the Motion but will instead traverse the legal foundations underscoring what was created in South Africa and known as the Public Protector.
15. So we limit our opening address in this regard to simply drawing the Committee’s attention to the following:
	1. South Africa established the Public Protector as one of the bastions to fight against corruption, unlawful enrichment, prejudice, impropriety in state affairs, and for the betterment of good governance. It is imperative for the South African public at large to have faith in the integrity of the Office of the Public Protector and its incumbent in order to have faith, trust and give effect to the work rendered by the Public Protector. [**EFF v Speaker of the National Assembly** 2016 (CC) 1 at 59.

# COURTS AND JUDGMENTS

1. With reference to the court judgments to be considered during these proceedings. As many of the reports that are the subject matter of this enquiry were considered by different courts. As such it is informative to briefly consider the hierarchy of courts in our country and the binding nature of precedent on lower courts.
2. The judicial authority of the Republic vests in the courts which are independent, subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. Their function should not be interfered with and other organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
3. Most important is that an order or decision issued by a court binds all persons and organs of state to whom it applies.
4. There is also a hierarchy of courts.
5. The decisions of the Constitutional Court are binding on the Supreme Court of Appeal. The Supreme Court of Appeal and the Constitutional Court are similarly binding on lesser Courts and the decision of the High Court are binding on Magistrates’ Courts within their areas.
6. Final judgments, in the event of appeals, are those of the Constitutional Court or the Supreme Court of Appeal and the Divisions of the High Court when there is no longer a possibility of an appeal, and where no appeal has been pursued to either the SCA or the Constitutional Court hence High Court judgments too are binding.
7. In the main, a number of the issues raised before this Committee relate to several cases which the Courts have already considered and pronounced on. There are several cases that were pertinently considered by the Panel. These will, among others, be referred to as the hearings proceed.
8. These would include the judgments relating to
	1. the South African Reserve Bank / ABSA Lifeboat Report;
	2. the judgment related to the Vrede Dairy Project;
	3. the judgment related to the Financial Sector Conduct Authority (“*FSCA*”);
	4. the judgment in the dispute in respect of Ms Basani Baloyi;
	5. the judgment related to the CR17 campaign;
	6. the judgments in relation to the investigations of Minister Gordhan and in which Mr Pillay and Mr Van Loggerenberg prominently feature – both of the latter have made themselves available to provide evidence to this Committee.
	7. The judgment in relation to the Commission of the South African Revenue Services pertaining to confidential taxpayer information and the Public Protector’s subpoena powers; and
	8. the matter involving the Government Employees’ Medical Scheme.
9. The legal principle of *stare decisis* is a juridical command to the Courts to respect decisions already made in a given area of the law. The practical application of the principle means that Courts are bound by their previous judicial decisions, as well as decisions of the Court superior to them.
10. The adherence to the principle of *stare decisis* by our courts permits *‘[C]ertainty, predictability, reliability, equality, uniformity, convenience*’*. The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. It is not simply a matter of respect for courts of higher authority, but a manifestation of the rule of law itself. This we all know is one of the founding values of the Constitution.’* (**Camps Bay Ratepayers’ and Residents’ Association & Another v Harrison v Another** 2011 (4) SA 42 (CC) at paras 28 – 30 (per Brand AJ))
11. We are all bound by these decisions. Where the courts have reviewed and set aside those reports, they no longer have any legal efficacy. It is not for this Committee to second guess the decisions of the courts, and what is already established law in this country. They form part of the evidence presented in support of the allegations made in the Motion.
12. So, for example, the CIEX Report, the initial Vrede Dairy Report, the reports in relation to the investigations into Minister Gordhan, and which will form the evidence of Mr Pillay and Mr Van Loggerenberg, these have already been finally reviewed and set aside and have no legal efficacy. Of relevance is what the courts found in these cases in relation to the conduct of the Public Protector.
13. This procedure commonly underlies all the judgements involving the Public Protector. Whilst we will refer this Committee to the *dicta* or, in ordinary parlance the pronouncements of a number of judgments, during the course of these proceedings, it must be borne in mind that this takes place in the context of either review, interdict, or appeal proceedings. Most of which in some way of another relate to a report that had been issued by the Public Protector, directly or indirectly – indirectly we mean that the whilst the litigation may have commenced with a review of a report or to stop the remedial action from being enforced by the time it reaches the appeal stage all that is left, is the issue of costs.
14. In the normal course of events, in applications to court, a case is brought with a litigant relying on a founding affidavit. A respondent has an opportunity to file answering affidavits to deal with all the allegations set out in the founding affidavit by the applicant/s (the party who brought the case). Then there are replying affidavits, - which affords the applicant an opportunity to respond to allegations made in the answering affidavit. In some cases, a party may file an explanatory affidavit in lieu of opposition – in order to assist the court.
15. If the allegations in the founding affidavits filed by an applicant are not dealt with in the answering papers filed by the PP (if any such answer is filed), then the applicant’s version in the founding affidavit stands undisputed. Where the respondent (the PP) in the judgements before this Committee) substantively answers and denies the allegations made in a founding affidavit, the applicant has the opportunity to deal with that denial in a replying affidavit. The respondent’s response – where one is given – will prevail and where it results in a *bona fide* dispute of fact, a litigant must refer it to oral evidence.
16. This is what lawyers call the tried and tested Plascon Evans rule. explained simply. This is how the courts deal with evidence in application proceedings (where all the evidence is in affidavits). So in the main, the judgments on which the Motion relies emerges from affidavits already filed in which certain allegations are made. The Public Protector has already responded thereto under oath and a court or courts have pronounced thereon – it is not this Committee’s function to revisit those or to second-guess the judicial process.
17. We raise this because in the course of these proceedings we will refer to a category of judgments that are underscored by applications in which the litigants – be it the Public Protector or the litigants who have sought to challenge the report of the Public Protector – were afforded an opportunity to file such affidavits before the Courts. In none of the matters were there any referrals to oral evidence. A second category of cases relation to labour matters arising in the context of persons who had or remain in the employ of the office of the Public Protector and they will come and apprise the Committee of their experiences.
18. It is useful to consider the test applied by the Courts when evaluation such reports:

“The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Rationality review also covers the process by which the decision is made. So, both the process by which the decision is made and the decision itself must be rational. If a failure to take into account relevant material is inconsistent with the purpose for which the power was conferred there can be no rational relationship between the means employed and the purpose.”

1. So, it is not the task of this Committee whether the reports were factually correct or not, but it is about how the reports were arrived at and whether these reports were prepared without fear, favour, and with no real or apparent bias, reflective of the correct law and in accordance with the prescripts of the Constitution, the PP Act and other relevant laws, including the common law – and in this context make a determination as to whether it gives rise to misconduct and/or incompetence.
2. We do not intend at this juncture to set out the context of each and every report, but as a subject matter is introduced by a witness, during the course of such evidence we shall endeavour to draw the relevant portions of the judgments to the Committee’s attention.
3. We do so in that under scrutiny in the Motion - in the context of the reports of the Public Protect that have been reviewed and set aside – is the manner, the process and the steps taken by the Public Protector in the context of the compilation of those reports.
4. We reiterate that the issues before this Committee are whether what is contained in the Motion constitute misconduct and incompetence on the part of the Public Protector, and part of that inquiry will be to look at whether in that assessment the judgments either reflect or do not reflect misconduct and/or incompetence - it is not for this Committee to make any determination as to the correctness of the judgment in the process of doing so.

# MOTION

1. It remains for us to address the motion, and the four composite charges set out therein, in brief, but before doing so we wish to address the role of the courts and the judgments handed down by the courts.
2. The first charge is that Adv Mkhwebane is guilty of misconduct in her investigation and report into allegations of failure by the South African Government to implement the CIEX Report and recover public funds from ABSA Bank. For ease of reference I will call it the CIEX matter.
3. The allegations relate to the **“dismissive, high-handed, biased and procedurally irrational and unfair approach”** in the conduct of the investigation, including that:
	1. she met with the Presidency and the SSA secretly;
	2. she broadened the scope of the investigation without notice and explanation;
	3. she altered the remedial action on the instruction and/or advice of the Presidency and/or SSA;
	4. she failed to give affected persons notice and opportunity to comment on the proposed remedial action;
	5. she failed to honour an agreement to make the final report available to the Reserve Bank 5 days before its release and
	6. she failed to refer to the submissions made by the Reserve Bank, inter alia, in response to the provisional report.
4. she is also alleged to have committed misconduct or shown incompetence in respect of her evidence in litigation relating to her report.
5. The second charge relates to the in her investigation and report into allegations of maladministration against the Free State Department of Agriculture in the Vrede Integrated Dairy Project – the Vrede Dairy matter.
6. She is alleged to have misconducted herself in that:
	1. She narrowed the scope of the investigation without rational and proper explanation.
	2. She failed to investigate at all the third complaint submitted by the DA without rational or proper explanation.
	3. The steps taken in the conduct of the investigation were wholly inadequate considering the magnitude and importance of the complaints raised.
	4. She materially altered the remedial action proposed in the provisional report without rational or proper explanation.
	5. in statements made under oath in the litigation challenging the Public Protector’s report 31 of 2017/18, Adv. Mkhwebane gave directly contradictory explanations for her failure to investigate.
7. The third charge is one of incompetence in that she has a demonstrated and **sustained lack of knowledge to carry out, and ability or skill to perform, her duties effectively and efficiently**. This charge relates to the Reserve Bank matter, the Vrede Dairy matter and the ‘Report into allegations of maladministration, abuse of power and improper conduct by the former Executive Officer of the Financial Services Board, Adv. D.P. Tshidi, as well as systemic corporate governance deficiencies at the Financial Services Board’).
8. The Motion sets out the allegations in full and I will not repeat them here save to note that Adv Mkhwebane, *inter alia*, is alleged to have:
	1. grossly overreached and exceeded the bounds of her authority (the Reserve Bank matter),
	2. demonstrated a failure to appreciate her legal duty to come to the aid of the vulnerable and marginalised members of society, and her legal ineptitude in her ability to comprehend and accept the appropriateness of her proposed remedial action (in the Vrede Dairy Report);
	3. In respect of the report on the Financial Services Board conceded that irrationality, forensic weakness and misunderstanding and/or misapplication of legal principles is demonstrated in such report; and demonstrated a failure to appreciate the Public Protector’s heightened duty towards the court as a public litigant.
	4. She demonstrated irrationality, forensic weakness, incoherence, confusion and misunderstanding of the applicable contractual, constitutional and administrative law principles.
	5. She demonstrated that she does not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice.
9. The final charge is also one of misconduct./ incompetence:
	1. In that Adv. Mkhwebane has intimidated, harassed and/or victimised staff, alternatively has failed to protect staff in the office of the Public Protector from intimidation, harassment and/or victimisation by the erstwhile CEO of the Office of the Public Protector and
	2. has committed misconduct by and/or demonstrated incompetence in the performance of her duties **in failing to manage internal capacity and resources, including staff; failing to prevent fruitless and wasteful and /or unauthorised expenditure in legal costs;**
	3. failed to conduct her investigations and/or **make her decisions in a manner that ensures the independent and impartial conduct of investigations; and/or avoided making findings against certain public officials while deliberately seeking to reach conclusions of unlawful conduct and impose far reaching remedial measures in respect of other officials without basis.**

# CONCLUSION

1. We have earmarked several witnesses, however, at this juncture it is not anticipated that all the witnesses will be called to provide oral evidence. In fact, there may well be an agreement with the legal representatives that some of that evidence based solely on affidavit will be accepted. And in other instances, it may well not be necessary for such oral evidence to be placed before this Committee at all.
2. As we at the outset of this address we pointed out that this is a distinctly novel process. It is at the best of times intimidating for any witness to appear before one judge. It is seldom so that a witness gives evidence before a Full Bench of three judges, and it must be appreciated that in the context of this enquiry, there is a Committee of numerous eminent members of Parliament. It is no easy feat for any witness to appear before this Committee. It takes considerable courage to do so. Given the nature of this process, it must be appreciated that the witnesses who do come forward to give evidence of whatsoever nature are ordinarily people who have either been requested to assist the Committee – or who may well have been subpoenaed to do so – and that in doing what a number regard as their responsibility to come before this Committee and provide their insights they should be treated respectfully and be able to leave this process, with dignity. Fundamental to this process is respect for the Public Protector if and when Adv Mkhwebane elects to give evidence that she be treated with dignity.
3. We have encountered a significant level of concern, fear and even cynicism at this process in our engagements. Cognisance should be taken thereof. To appear in this forum is daunting in itself and questions should be relevant to the Motion on hand, asked respectfully and with adherence to the basic values entrenched in our Constitution. To do otherwise would undermine the integrity of this entire process.
1. The report can be accessed at the following web address: [KMBT\_C554e-20210224165225 (parliament.gov.za)](https://www.parliament.gov.za/storage/app/media/Pages/2021/march/01-03-2021_Report_of_the_independent_Panel_on_the_Public_Protector/FINAL_REPORT_OF_THE_INDEPENDENT_PANEL_EST_i.t.o_NA_RULE_129U_AND_Sect_194_OF_CONSTITUTION.pdf) [↑](#footnote-ref-2)
2. Rule 129X(1)(a). [↑](#footnote-ref-3)