

DIRECTIVE

DIRECTIONS, ISSUED BY THE CHAIRPERSON IN TERMS OF ASSEMBLY RULE 183, GOVERNING THE APPEARANCE OF PERSONS IN THE ORAL HEARINGS OF THE S194 ENQUIRY INTO THE REMOVAL OF THE PUBLIC PROTECTOR, ADV B MKHWEBANE

1. Definitions

- 1.1. **'Assembly Rules'** means the Rules of the National Assembly, as amended;
- 1.2. **'day'** means a calendar day;
- 1.3. **'Directive'** means this directive governing the appearance of persons appearing before the Committee for purposes of the oral hearings as contemplated in Assembly Rule 183 as set out herein and as amended or amplified from time to time;
- 1.4. **'Terms of Reference'** means the terms of reference adopted by the Committee on 22 February 2022, as may be amended from time to time;
- 1.5. **'Motion'** means the motion of Mrs NWA Mazzone, MP, dated 21 February 2020, to initiate an enquiry in terms of section 194(1) of the Constitution for the removal of Adv Busisiwe Mkhwebane from the Office of Public Protector South Africa on grounds of misconduct and/or incompetence;
- 1.6. **'Powers Act'** means the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, No 4 of 2004; and
- 1.7. **'Summons'** means a summons issued by the Secretary to Parliament in accordance with section 56 of the Constitution and the procedure set out in section 14 of the Powers Act.

2. Any reference to the Public Protector below, should be read to include any representative, legal or otherwise, that may appear on her behalf, unless the context clearly indicates otherwise.

2.1. The Enquiry shall proceed in accordance with its programme which may be amended from time to time.

2.2. In the light of the duty to discharge all constitutional obligations diligently and without delay, the Committee shall exercise all reasonable effort to adhere to its published schedule for oral hearings.

3. **Evidence**

3.1. All matters of evidence shall be considered in the context of the Committee's function in terms of Assembly Rule 129AD which requires the Committee to establish whether or not Adv Busisiwe Mkhwebane is incompetent and/or has misconducted herself as alleged in the Motion, for purposes of presenting its findings and recommendations to the Assembly.

3.2. Only evidence relevant to determining the veracity of the grounds of incompetence and/or misconduct set out in the Motion should be put before the Committee, and any evidence, not so relevant, that may be placed before the Committee, will be disregarded.

3.3. The Evidence Leaders will present the oral, documentary and other evidence before the Committee in accordance with the Rules of the Assembly, the Terms of Reference, this Directive and any other directives that may be issued by the Chairperson.

3.4. The Public Protector may present evidence of witnesses before the Committee in accordance with the Terms of Reference, this Directive and any other directives that may be so issued. The Evidence Leaders and members may put questions to any witness called by the Public Protector.

- 3.5. At all material times during the proceedings the Chairperson may impose reasonable restrictions on the presentation of oral evidence.
- 3.6. With reference to the collection of documentary evidence and affidavits filed:
 - 3.6.1. All affidavits received must be formatted in sequentially numbered paragraphs and must include an index and subject-matter headings if the affidavit is more than twenty pages long.
 - 3.6.2. The Evidence Leaders and the Public Protector, respectively, shall file with the Secretary of the Committee all affidavits which they intend for the Committee to consider at least 7 days prior to the day on which any deponent to such affidavit is to give evidence. The Secretary shall provide electronic copies to all Members of the Committee, the Evidence Leaders, and the Public Protector either by way of email, or by uploading it to an electronic database, to which the Public Protector's legal representatives will be provided access.
 - 3.6.3. The exception to clause 3.6.2 above relates to witnesses subpoenaed to appear before the Committee as provided for in the Powers Act, who may not have rendered any sworn statement. In relation to such witnesses, the Evidence Leaders shall present the evidence from such witness through questions to the witness, whereafter, and should such be required by the Public Protector, the latter may request that cross-examination, if any, be postponed for a period not exceeding 5 days.
 - 3.6.4. Affidavits and/or evidence presented by the Evidence Leaders which form part of court records may be regarded as being sufficient for its purposes as presented, without oral evidence being led in relation thereto.

- 3.6.5. The Evidence Leaders may agree with the Public Protector that certain evidence is not in dispute, in which case the Evidence Leaders shall present the evidence to the Committee and, where applicable, the Chairperson may dispense with calling any witness to offer oral testimony in respect of the undisputed evidence.
- 3.6.6. Any challenge to evidence presented to the Committee may be addressed by the Public Protector any time before or during its presentation and/or in closing arguments and must be taken into account in the deliberations of the Committee.

4. Opening statements

At the start of the Enquiry the Evidence Leaders followed by the Public Protector, should she elect to do so, may address the Committee orally to give an outline of how the matter will be approached and/or conducted. The Public Protector shall be entitled to present a different and separate opening address before calling her first witness, if any.

5. Witnesses

- 5.1. Witnesses called to give oral evidence must provide that evidence on the dates and within the timeframes specified in the Committee's schedule and any summons issued, if applicable.
- 5.2. The Evidence Leaders shall determine the sequence in which the Committee's witnesses are called to give evidence, whereafter the Public Protector may present evidence.
- 5.3. The Public Protector may, as a measure of last resort and subject to clause 5.4 below, request the Chairperson to summon any person to appear before the Committee to give evidence or to produce documents.

- 5.4. A request in terms of clause 5.3 above must:
 - 5.4.1. be made in writing;
 - 5.4.2. be preceded by –
 - 5.4.2.1. a written request to the person sought to be summoned, on reasonable notice, requesting that person to provide the specified evidence and/or documentation; and
 - 5.4.2.2. a refusal of that person to cooperate with the request;
 - 5.4.3. indicate what steps have been taken to secure the voluntary participation of the witness;
 - 5.4.4. indicate the subject matter on which the witness is to be questioned and/or the documentation the witness has been requested to provide;
 - 5.4.5. provide reasons as to why the testimony or evidence is required for the proper performance of the Committee's functions; and
 - 5.4.6. if a request is made for documentary evidence, such evidence must be sufficiently described.
- 5.5. A request made in terms of clause 5.3 must be submitted to the Committee Chairperson by no later than three days after the need for the evidence in question arose and must thereafter be considered and decided upon by the Committee in terms of the Powers Act.
- 5.6. In the event that the Committee seeks to call any further witness, arising from evidence presented before the Committee, but whose name did not appear on the list provided to the Public Protector, then the latter shall if required, be afforded 5 days, to deal with any evidence to be presented by such person.
- 5.7. In the event that the Committee resolves that any further witnesses should be presented and such arises from evidence presented by the Public Protector, the latter would be afforded a further opportunity to respond to any such evidence, by filing further affidavits and/or presenting further oral evidence, within reasonable time periods and on such terms and conditions as determined by the Chairperson.

- 5.8. As confirmed in paragraph [45] of the *Speaker of the National Assembly v Public Protector and Others; Democratic Alliance v Public Protector and Others* [2022] ZACC 1, a legal representative cannot give evidence on behalf of Adv Mkhwebane.
- 5.9. A Member of the Committee, either directly, or through the Evidence Leaders, may ask Adv Mkhwebane directly to respond to certain questions posed orally, or in writing, including factual disputes that may arise, even if she is not at that time giving evidence. Adv Mkhwebane must respond to such questions immediately, unless she requests a reasonable period of time within which to submit a response, in which case the Chairperson shall determine that reasonable time frame, and must have due regard to any request made by Adv Mkhwebane in this regard and the Chairperson's duty to ensure that the Committee is able to properly fulfil its mandate and carry out its oversight function. All such answers must be made under oath or affirmation as provided for in the Powers Act.
- 5.10. Such responses shall be subject to any privileges recognised by South African law, and further subject to section 16(2) of the Powers Act, and any other applicable law.
- 5.11. The Chairperson may direct any witness, to respond in writing to allegations arising from a witness statement and/or the oral evidence of any witness or any other evidence before the Committee, and to answer in writing specific question put to them by the Chairperson arising from the statement or evidence in question on such time frames as determined by the Chair with due regard to the Committee's mandate and functions. All such answers must be provided to the Secretary of the Committee and shall be under oath or affirmation as provided for in the Powers Act.

6. The questioning of witnesses

- 6.1 All questions put to witnesses must be relevant to the assessment of the Motion. Disputes regarding relevance shall be determined in accordance with clause 8 below.
- 6.2 All questions put to any witness, (whether by the Evidence Leaders, or any member, or the Public Protector) shall have due regard for that witness' right to human dignity. No witness shall be subjected to questions and/or statements that bully, intimidate, harass, gratuitously embarrass and/or deliberately insult the witness.
- 6.3 No person (whether the Evidence Leaders, Member, or the Public Protector), while questioning a witness, shall impugn the character of that witness unless –
- a) he or she has reasonable grounds for doing so;
 - b) the character of the witness is relevant to the evidence, issues and motion;
and
 - c) evidence supporting the claim against the character of the witness (if reliance will be placed on any such evidence) has been filed with the Secretary of the Committee at least 3 days prior to when the witness has been scheduled to give evidence.
 - d) The Chairperson may order any person, whether a member or otherwise, to stop speaking if he or she, despite a warning from the Chairperson, persists in questions and/or statements that contravene clause 6.1, 6.2 and 6.3.
- 6.4 The Chairperson may impose time limits on the questioning of a witness that he considers reasonable in the circumstances, including limiting or putting a stop to irrelevant or repetitive questioning.

- 6.5 The Chairperson may require the Public Protector to indicate **within a period of five days of such request** which paragraphs of an affidavit deposed to by any witness is agreed to for purposes of limiting the oral evidence required and the Evidence Leaders and Public Protector's legal advisers may agree to a mechanism for the use of common cause evidence.
- 6.6 In the event that the Evidence Leaders, the Public Protector or any member intend to rely on any document in the questioning of a witness, which document is not already in the Committee's record of documentary evidence, the Secretary of the Committee shall be provided with such document, at least 3 days prior to the day on which such witness is to appear and such shall be uploaded to the electronic database. The Secretary shall per email inform the Committee, the Evidence Leaders and the Public Protector thereof.
- 6.7 The Evidence Leaders may in presenting evidence, ask any questions, including leading questions, of any witness.
- 6.8 After the Evidence Leaders have presented the evidence of a witness, the Public Protector may cross-examine that witness.
- 6.9 Thereafter Members of the Committee shall, subject to the directives below, indicate to the Chairperson whether they wish to pose any question to the witness.
- 6.10 The Chairperson shall determine the order and manner in which members shall put their questions to the witness and the duration of time permitted for such questions.
- 6.11 Members may not repeat questions already asked, whether by other members, the Evidence Leaders or the Public Protector.
- 6.12 Members shall not, for purposes of the hearing, make speeches, or present argument to the Committee, but shall limit their questions to establishing

facts in respect of the grounds of incompetence and/or misconduct set out in the Motion. Such arguments and speeches may form part of and may be reserved for the later deliberations of the Committee.

- 6.13 A member shall address the witness in question for no more than **five minutes** in total; provided that the Chairperson may, on good cause shown, grant a member an extension of up to **three additional minutes**.
- 6.14 Notwithstanding clause 6.13, a member posing questions shall only be afforded one opportunity to address questions to a witness, irrespective of whether that opportunity utilises the member's full-time allocation; provided that the Chairperson may, on good cause shown, grant a member one additional opportunity to address a follow-up question or a question of clarity to a witness.
- 6.15 If a dispute arises, the Chairperson's determination of whether a particular member has exhausted his or her permitted time, or complied with this Procedure, shall be final.
- 6.16 After members have posed questions the Evidence Leaders may ask any questions arising or seek clarity from the witness in relation to questions posed to such witness, whereafter the Chairperson shall excuse the witness from the Hearings.
- 6.17 In relation to any witnesses called by the Public Protector, the Evidence Leaders may put any questions, relevant to the grounds in the Motion, to such witness, subject to any reasonable restrictions, including time restrictions, the Chairperson may impose.
- 6.18 Notwithstanding a witness having been excused by the Chairperson, the Committee may recall a witness if it is necessary to obtain further evidence, or clarification, from that witness.

7. Documents

- 7.1. The record of proceedings that served before the Independent Panel is before the Committee.
- 7.2. The Committee may consider affidavits and evidence that have been filed in other proceedings and/or before other bodies, provided that the Evidence Leaders and/or the Public Protector shall be permitted to put forward evidence and/or submissions contextualising the affidavits or evidence in question and such is relevant to the Motion before the Committee.
- 7.3. Documentary evidence shall be put before the Committee in accordance with clause 3.6 above. All evidence before the Committee is to be provided to the Secretary of the Committee.
- 7.4. The Secretary of the Committee shall ensure that a paginated record of all such documentary evidence is kept, and shall maintain an accompanying index, which must be updated from time to time. Members and the Public Protector must be provided with access thereto.

8. Relevance

- 8.1. Only questions, evidence and submissions relevant to the issues of incompetence and/or misconduct as alleged in the Motion shall be asked, led or made during the oral hearings of the Committee.
- 8.2. In the event there is any objection as to relevance of evidence the Chairperson shall make an immediate determination as to the admissibility thereof. The Chairperson may make a provisional determination that the question and/or evidence and/or submission is relevant and, once the Committee has heard the evidence in full and closing arguments, if any, the Committee in its deliberation may make a final determination regarding such evidence and/or submission and indicate whether in its report whether



such was taken into account in the making of its recommendation to the Assembly.

9. Closing statements

9.1. Once all of the evidence has been led, the Public Protector will be afforded an opportunity to address the Committee orally in closing argument.

9.2. Any address or submissions in terms of this clause shall be subject to the relevance requirement set out in clause 8 above and any dispute regarding relevance shall be dealt with in terms of that clause.

10. General

10.1. As required, further and/or amended directives may be issued regarding the oral hearings before the Committee.

10.2. Any person wishing to make an application to the Committee which is not otherwise provided for in this Procedure, or in the Assembly Rules, must do so in writing to the Chairperson.

10.3. The Chairperson may condone any non-compliance with this Directive, or extend any time provided for therein, on good cause shown or if he is satisfied that it would be in the interests of fairness to do so.

ISSUED BY THE CHAIRPERSON : COMMITTEE FOR SECTION 194 ENQUIRY

DATE: 14 JULY 2022

Mr QR Dyantyi, MP

