
**AFFIDAVIT IN THE SECTION 194 INQUIRY INTO THE REMOVAL OF THE
PUBLIC PROTECTOR**

I, the undersigned,

PONATSHEGO MOGALADI

do hereby state under oath and say that:

1. I am employed in the office of the Public Protector South Africa (PPSA) as Executive Manager: Investigations.
2. Aspects of this affidavit also relate to Ms Lesedi Sekele, who will file a confirmatory affidavit confirming those parts of the affidavit that relate to her.
3. The facts herein contained fall within my personal knowledge, save where the context otherwise indicates, and are, to the best of my knowledge, understanding of this matter and belief, both true and correct.
4. In Charge 4 of the Motion with which this Committee is concerned, it is alleged that Adv Mkhwebane (the PP) is guilty of misconduct and/or incompetence in that, amongst other things, she has intimidated, harassed and/or victimised staff, alternatively that she has failed to protect staff in the office of the PPSA from intimidation, harassment and/or victimisation by the erstwhile CEO, Mr Vussy Mahlangu, in particular the staff members named in that charge who, it is alleged,



have been threatened with or had disciplinary action taken against them unlawfully and on trump-up charges. Ms Sekele and myself are two of the staff members whose names are listed in paragraph 10 of Charge 4.

5. I have personally been threatened with disciplinary action by the PP for not meeting the deadlines for submitting reports when I was going through traumatic circumstances due to death of an immediate family member; or when I had explained that objectively, based on workload and other factors related to that, the deadline just could not be met. Mr Vussy Mahlangu, acting at the behest of the PP also issued me with an *audi* letter. The PP has previously instructed the then Acting Chief Operations Officer (ACOO), Ms Nthoriseng Motsitsi to take disciplinary steps against me, when I did not meet a deadline in November 2018 and after the PP was not prepared to entertain my explanations as to why the deadline could not be met. In addition, the PP has instructed Mr Mahlangu to take disciplinary steps against the ACOO herself, Mr Abongile Madiba (who passed away in July 2021), and Ms Sekele. I deal with these aspects below, with reference to email correspondence that demonstrates this.
6. In addition to that, Ms Sekele, Mr Madiba and I have had disciplinary proceedings preferred against us by the employer (the PPSA), in the circumstances about which I say more below.

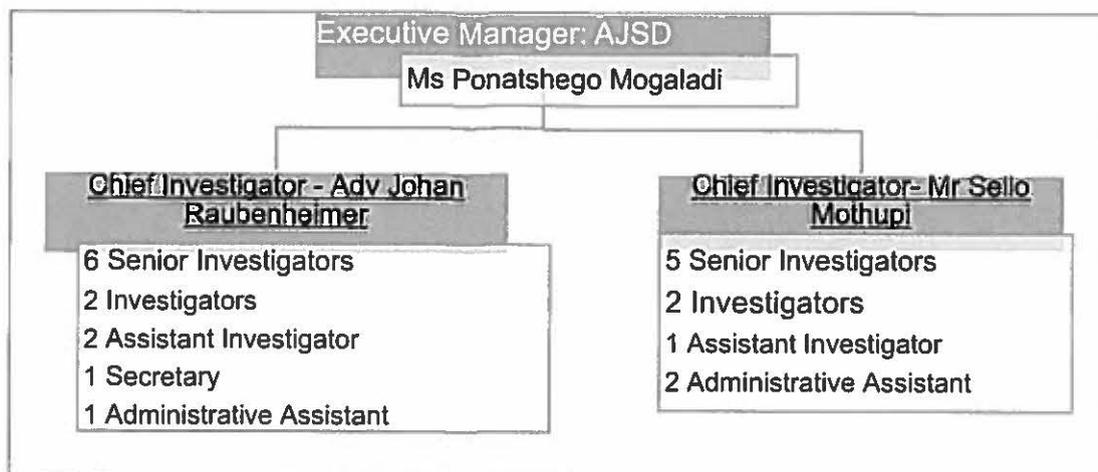
A. BRIEF BACKGROUND

7. I joined the PPSA as a Senior Investigator on 1 December 2000, based at Head Office in Pretoria. As I joined the office in 2000, I have had the opportunity and privilege to serve under all of the leaders of the PPSA.
8. On 1 April 2004, I was appointed to the position of Chief Investigator at the then branch of National Investigations. I also occupied various roles, including Senior Manager: Executive Support in the then Public Protector's private office, and was later transferred to the office of the Chief Executive Officer in the same role of

Senior Manager: Executive Support.

9. I was appointed Executive Manager: Early Resolution as from 1 September 2012. In April 2014, the position was merged with the position of Executive Manager: Service Delivery to form the branch Administrative Justice and Service Delivery (AJSD). Even though two investigation branches were merged, the level of the position and the remuneration remained the same.
10. The function of the AJSD Investigation branch was as follows:
 - 8.1. Conduct investigations into allegations of administrative & service failure (simple and complex investigations);
 - 8.2. Ensure speedy resolution of complaints through mediation, conciliation and negotiation;
 - 8.3. Conduct systemic investigations; and
 - 8.4. Establish response protocols with organs of state
11. These are the investigations that arise from what are referred to as service failure complaints.
12. The structure of the AJSD branch at the time, when I was appointed as EM, was as follows:

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13. In mid-October 2018, I was approached by the then Chief Executive Officer of the PPSA (CEO), Mr Vussy Mahlangu, to assist the office and additionally manage another branch called Good Governance and Integrity (GGI). At the time, Ms Motsitsi, who was the EM: Complaints and Stakeholder Management (CSM), was the Acting Chief Operations Officer (ACOO) and was also acting as the Executive Manager: GGI. I believe she indicated to the PP that she was resigning from additional positions and wanted to revert back to her position as EM: CSM.
14. I was apprehensive about accepting this request to act as EM: GGI, because my own portfolio in AJSD was already under a lot of pressure due to the volume of complaints handled by the branch. AJSD was already burdened with active cases as well as a backlog of cases that were not finalised. I knew that GGI had its own active cases including its own backlog to contend with. Additionally these were complex cases that involved multiple issues and voluminous evidence. I nevertheless acceded to the request, wanting to be of assistance to the organisation.
15. I later received a letter signed by the PP dated 24 October 2018 appointing me to act in the position of Executive Manager: GGI as from 1 November 2018. I acted in this position, whilst also holding my substantive post of EM: AJSD, until I was

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- suspended from the PPSA on 22 October 2019.
16. The letter requested me to accept the additional responsibilities without an acting allowance as the institution was facing serious budgetary constraints. In essence this meant that my workload and responsibilities doubled.
 17. I accepted the additional responsibility with the following condition which I noted in my own handwriting on the appointment letter:
 - 14.1. *The appointment was accepted on the understanding that the Leadership will support me to deal with the backlog of cases at GGI;*
 - 14.2. *I will be managing two positions that are demanding and accepting the additional responsibility will not be seen as compromising my position but instead I will be supported to ensure the success of the two branches.*
 18. A copy of this letter together with my handwritten note is attached marked **PM1**.
 19. AJSD and GGI were the two main investigation branches at the PPSA head office. AJSD dealt with allegations of service failure and administrative lapses.
 20. GGI was a branch that dealt with complex investigations related to procurement, conduct failure, corruption, violation of the Executive Ethics Code and the majority of these cases are sensitive and receive media attention. These were the investigations which emanated from what are referred to as conduct failure complaints. They included Special Attention Matters, referred to in the office as SAM matters.
 21. In the period when I was suspended from the PPSA – from 22 October 2019 until November 2021 – the AJSD and GGI units were merged into a single unit called Investigations, which I am presently EM of.

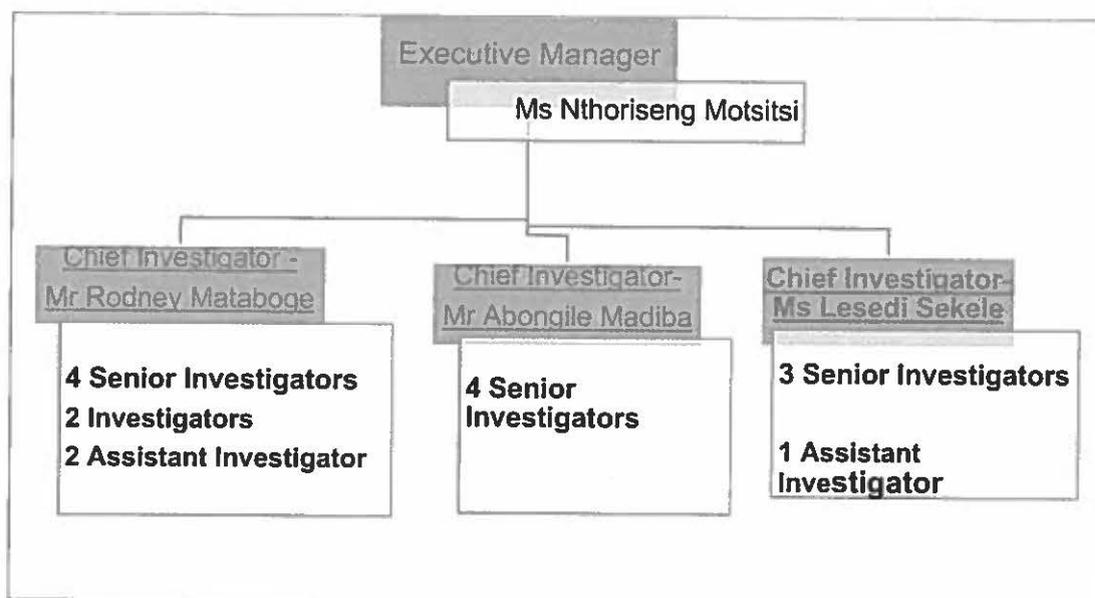


B. MY ROLE AS ACTING EM: GGI AND THE FSCA MATTER

22. I assumed the additional responsibility of acting EM: GGI from 1 November 2018.
23. When I took over the additional responsibility of the GGI branch on 01 November 2018, the workload of the two Investigation branches as at that date was as follows:

SUBJECT	AJSD	GGI
Total Workload	749	209
Cases older than a year	108	52
Cases older than 2 years	25	88

24. It must be borne in mind though that although GGI carried a lesser caseload the matters were far more complex, technical and time consuming.
25. When I took over as acting EM: GGI, that branch was structured as follows:



26. On n 07 April 2017, the PPSA received a complaint from the Commander in Chief

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of the Economic Freedom Fighters (EFF) Mr Julius Malema against the Chief Executive Officer of Financial Sector Conduct Authority (FSCA), Adv Tshidi. The PP allocated the file to Mr Isaac Matlawe in the PP's private office, and personally made the following handwritten inscription on the first page of the letter of complaint:

"Matlawe

Request Intake to register the matter & allocate to you.

Acknowledge receipt & inform them you the Investigator"

27. The investigation was begun from there and according to the investigation plan, the investigation was managed by Mr Futana Tebele and the final report should have been submitted in November 2017. The issues as identified for investigation in this Investigation plan and approved by the Public Protector for investigation were as follows:
- a) Did Mr Tshidi improperly favour Mr Mostert for appointment as curator and disregard Black Economic Empowerment prescripts in various pension funds.
 - b) Does Mr Mostert's appointment as curator and his billing and briefing of his own law firm constitute conflict of interest
28. After taking over as EM: GGI on 01 November 2018, I started to receive emails from the PP indicating that the FSCA s7(9) letter was long overdue and must be submitted immediately. When I followed up, I was informed that the PP had held a meeting on 4 June 2018 whereby she handed over the FSCA investigation files to the following:
- 28.1 Ms Nthoriseng Motsitsi who was the Acting COO and EM: GGI at the time;

28.2 Mr Abongile Madiba (he has since passed on), Chief Investigator GGI;
and

28.3 Ms Carina van Eeden, Senior Investigator GGI.

29. The investigation was therefore removed from Mr Matlawe by the PP, and it was transferred to the above individuals. The reasons for removing the matter from Mr Matlawe were not recorded on the file and there was no handing over report even though Mr Matlawe was still at the PPSA and only left at the end of December 2018.
30. I was therefore not yet responsible for the GGI branch in my acting capacity during much of the time that the investigation of the FSCA matter was underway, from the date of receipt of the complaint from the EFF on 07 April 2017, to 01 November 2018. Moreover, I did not receive a handover report regarding the matter when I took over as Acting EM: GGI on 1 November 2018. Nor, as I have stated above, was there a handover report on the file when the matter was removed from Mr Matlawe and transferred to Mr Madiba.
31. Soon after I took over – on or about 05 November 2018 - Ms Carina van Eeden sent me an email requesting that her reporting lines be changed due to issues that she had with the late Mr Madiba, who was her supervisor in the FSCA investigation. Their professional relationship had become strained and, gleaned from available records, Ms Van Eeden had on several occasions formally requested transfer to Provinces, specifically the North West. I accepted the request in the interest of productivity and to improve the working relations in the GGI branch.
32. When I took over the additional responsibility of managing GGI on 1 November 2018, the FSCA s7(9) letter was long overdue. As stated above, the PP handed over the files to Mr Madiba and Ms Van Eeden on 4 June 2018. As far back as 11 June 2018, from what I could gather from the records, the PP was already making



enquiries to them about when the s7(9) letter would be ready. The initial deadline for Ms Van Eeden was July 2018. Then Mr Madiba personally took over after a Dashboard meeting with the PP on 17 July 2018, in an effort to progress the matter. The FSCA s7(9) letter should have been submitted to the PP by 2 November 2018. Notably this is a day after I took over the additional responsibility of managing the GGI branch.

33. I was not given the opportunity and time to familiarise myself with the extra work that I was taking over as EM: GGI, in addition to my responsibilities as EM: AJSD, but found myself in a situation where on my third working day in GGI I was already receiving emails about the submission of the FSCA s7(9) notice. Needless to say, I was not as yet familiar with the matter.
34. I expressed my frustration with the CEO and pointed out that I have not received any handing over report and was still trying to familiarise myself with GGI cases. I had discussions with the CEO, but this did not help much as he indicated that notices and reports were long overdue even before I took over and the PP wanted them.
35. On 2 November 2018, Mr Madiba submitted a memorandum to PP regarding the submission of the S7(9) of the FSCA and Mbalula matters. A copy of his memorandum is attached marked **PM2**. In paragraph 2.3, Mr Madiba confirmed that Ms Carina Van Eeden was responsible for the investigation of the FSCA matter. The memorandum was signed by the PP.
36. In the remainder of his memo to the PP, Mr Madiba highlighted in detail the challenges that he was experiencing with meeting the deadlines in both matters. He requested an extension until Friday 9 November 2018 to allow him to apply his mind fully to the two matters and submit the section 7(9) notices.
37. The PP, however, did not accept the challenges raised by Mr Madiba. In a handwritten note made by her on the memo, she indicated, amongst other things, that she was not accepting Mr Madiba's explanation.



38. The PP stated as follows: *'Madiba your explanation is not accepted and feel undermined by just indicating that if not satisfied must re-allocate (that means there must be consequences against you) same to those I took the FSB matter from'*.
39. The PP issued an instruction to the ACOO that: *'Madiba is to be issued with a verbal warning & Ms Sekele for not meeting the target set to submit the 2 sec 7(9)'s.'* The PP did not approve the week's extension requested by Mr Madiba.
40. Mr Madiba finished drafting the FSCA s7(9) notice on 21 November 2018. The draft FSCA s7(9) notice as received from Mr Madiba was sent to the PP on 22 November 2018 at 04h33 in the morning to avoid wasting any more time as it was long overdue, and the PP had already indicated that she felt undermined by the delays and was no longer accepting any explanations or request for extensions.
41. I sent the FSCA draft s7(9) notice to the PP. I indicated the following (PM2A):
- 34.1. *Mr Madiba submitted the draft with reservations and was concerned that we may be challenged in court;*
- 34.2. *I have just taken over in GGI and need to review the files and the court judgements before I can express an opinion and requested an opportunity to consult with Legal services.*
42. The email was copied to the CEO Mr Vussy Mahlangu, ACOO Ms Nthoriseng Motsitsi and the Senior Manager: Legal Services Mr Ntsumbedzeni Nemasisi.
43. Unfortunately, I did not get any response from the PP but was later informed that the PP had signed the draft FSCA s7(9) on 26 November 2018.
44. I followed up and consulted with the Senior Manager Legal Services, Mr Nemasisi, and he indicated that the PP had forwarded my email of 22 November 2018 to him on Saturday 24 November 2018. She made the following enquiry to him:

“Nemasisi can you check the concerns they have on the judgement. No court judgement was investigated but it was referred to because it was a matter pending between the parties (attorneys of the complainant and the eff were told we cannot intervene on those) you were part of the meeting

Adv Busisiwe Mkhwebane”

45. I was not copied on this email and was not aware of this communication until I met with the Senior Manager: Legal Services, following up on my concerns. He indicated that he provided PP with his inputs on 27 November 2018. However, this is a day after the PP signed the s7(9) notice of 26 November 2018, and so by the time his inputs were received by her, the notice was a *fait accompli*.
46. I did not draft the section 7(9) notice that was submitted to the PP on 22 November 2018, under the reservations expressed and to which I have referred above. Nor did I supervise its drafting or have sufficient knowledge at that point to even check it, as I was not part of the investigation and had not as yet had time to familiarise myself with it. I simply had not been in the GGI unit long enough and had not yet the time to be sufficiently steeped in many matters, including the FSCA matter at that stage, and all documents relevant to the matter, to have formed my own views. This is why I expressed the reservation that I did when I sent the section 7(9) notice to the PP.
47. On the 29 January 2019, the PP was served with an application for an urgent interdict from Mr Mostert who was one of the parties that was issued with the s7(9) notice in the FSCA matter.
48. In his application, Mr Mostert sought an order interdicting and restraining the PPSA, the EFF and Mr Simon John Nash from publishing, causing to be published or in any other manner disseminating or causing to be disseminated to any person or to the public, whether in media and/or on social media platforms or otherwise, the section 7(9) notice, pending the final determination of an action or application



to be instituted by Mr Mostert within 30 court days from the date of order.

49. In the application which he intended to institute, Mr Mostert sought the following orders-
- a) That the PP does not have the power to investigate the subject matter of the complaint;
 - b) Reviewing and setting aside the decision of the PP to investigate the complaint;
 - c) Reviewing and setting aside the PP's section 7(9) notice dated 26th November 2018;
 - d) That the PP should be interdicted and restrained from further investigating the complaint; and
 - e) Finally interdicting the PP from publishing the findings in respect of the complaint.
50. According to the notice of motion, the matter was set down for 12 February 2019. It was later postponed to 19 February 2019. The parties later agreed that Mr Mostert would be given an opportunity to respond to the s7(9) notice on 01 March 2019.
51. Following the urgent court application that was launched by Mr Mostert in January 2019, Ms Van Eeden alerted us in an email dated 1 February 2019 to the fact that we might have a problem, because: "*We make findings against the Board, but seemingly did not serve the section 7(9) on the Board.*"
52. Furthermore, there were discussions with the Senior Manager: Legal Services in a meeting regarding issuing a s7(9) notice against the Board as it came to our attention that the Board was not initially served with the notice issued on 26 November 2018.

53. These discussions were taking place in the midst of the pending urgent application that sought to interdict the PP from further disseminating the s7(9) notice and we had to keep on changing our strategies.
54. Ms Van Eeden alerted me to an email from Mr Madiba, wherein she indicated that: *"He seemingly requested information from the EFF and now there is an undertaking to submit only by 15 March"*, together with a request that the PP does not release her report in the meantime. According to the Investigator, this information was submitted on 25 March 2019, just after 16h30.
55. In brief these new developments about the additional documents from the EFF's Attorneys meant that we could not do anything on the matter whilst waiting for additional evidence from the EFF's Attorneys.
56. On 26 March 2019, we received a directive from the PP that the report must be finalised and be part of the reports that were going to be issued during the media briefing on 28 March 2019. I alerted the PP through an email sent on 26 March at 22h26 that the EFF's attorneys had delivered 4 arch lever files the day before (meaning on 25 March 2019) at 16h30.
57. The PP responded later as follows:

"Good Evening

I said to Coe the report must be finalized, you need to peruse the documents submitted and compare with the evidence we had already.

Why was I not answered as to what additional information Madiba wanted from the attorneys of EFF so I can advice? he did not give specific answer which i am still awaiting ?"

58. A copy of this email is attached marked **PM3**.

59. Ms Sekele and I then spent the night in the office completing the drafting of the report so that it could be finalised by the PP and issued by her. The report was finalised on 26 March 2019 with a report No. 46/2019 signed and released at a press conference by the PP.

C. MS SEKELE AND THE FSCA INVESTIGATION

60. For her part, Ms Sekele joined the PPSA in April 1999 as a Senior Investigator. She was subsequently promoted in a permanent position as a Senior Manager in the Complaints and Stakeholder Management (CSM) branch, a position she occupied from 2013.
61. In April 2018, she received a letter signed by the PP dated 28 April 2018 transferring her, retrospectively from 1 April 2018, to the GGI investigation branch as Chief Investigator.
62. In GGI, Ms Sekele worked with four senior investigators who reported to her. Ms Van Eeden joined her group in November 2018 after she was re-assigned from Mr Madiba's supervision, as a result of their difficult working relationship. At this time, she had been in GGI for about seven months.
63. The investigation was at an advanced stage as the section 7(9) notice had already been approved by the PP and issued to Mr Tshidi, the CEO of FSCA and responses were expected to be received by 14 December 2018. In addition to not being involved in the drafting of the 7(9) notice in the FSCA matter, Ms Sekele was not part of any of the important stages of the investigation process, such as:
- 63.1. Formulating and adopting an investigation strategy;
- 63.2. Investigation Planning;

- 63.3. Collection of evidence;
- 63.4. Identifying witnesses;
- 63.5. Conducting interviews;
- 63.6. Analysis and evaluation of evidence as it was obtained; and
- 63.7. Management of information and records such as audio recordings, documents acquired during the investigation.

64. Ms Sekele was not involved in the FSCA investigation. She became involved when the investigation was at an advanced stage, from about December 2018, in what was a complex matter.

D. THE FSCA AND RABIE LITIGATION

65. The FSCA was aggrieved by the report, and it initiated review proceedings in the North Gauteng High Court seeking the following relief:

1. *The Report of the Public Protector No 46 of 2018/19("the Report") is reviewed and set aside, and declared constitutionally invalid, for lack of jurisdiction.*
2. *In the alternative to paragraph 1:*
 - 2.1 *The conclusions and findings in paragraphs 5.1.38 to 5.1.39, 5.2.22, 5.3.28 to 5.3.29, 5.4.74 and 6.1 and 6.4 of the Report , and the summary thereof in paragraphs (x) (a) to (d) of the Report , are viewed set aside and declared invalid , unlawful and unconstitutional; and*
 - 2.2 *The remedial action in paragraphs 7.1 and 7.3 of the Report, and the summary thereof in paragraphs xi (AA) and (cc) of the Report, are reviewed, set aside and declared invalid, unlawful and unconstitutional.*

66. PP sought a legal opinion from Adv H Smit SC who advised, in the main, that the PP will not be able to successfully defend the relief sought by the applicants in the pending review application.
67. The main ground of the review application by the FSCA and the CEO was that the PP did not have jurisdiction to investigate the complaint. Only in the alternative did they seek to attack paragraphs in the Report, such as the jurisdiction issue, which was a matter that could not be cured by either the defective section 7(9) notice or the difficulties with the Rule 53 Record, as the PP had already taken the decision to investigate on 7 April 2017 when she did not have the jurisdiction to do so.
68. The FSCA contended that the Report should be set aside in its entirety for lack jurisdiction. The complaints concerned matters that dated back more than two years. No special circumstances existed to justify the exercise of the PP's discretion under section 6(9) of the Public Protector Act and it was found that the exercise of that discretion was in the circumstances irrational.
69. It should be noted that the PP defended the main ground of review of the reports due to lack of jurisdiction. In the answering affidavit of the PP in the FSCA report, deposed to on 29 November 2019, PP states as follows:

Paragraph 18:

"Notwithstanding the fact that any future report may be published, will be premised on its own jurisdictional facts, the current report delineates the special circumstance justifying my investigation into the complaint even though it was older than two years".

Paragraph 19:

"I exercised my discretion on the grounds as recorded in paragraph 3.8.2 of the report".

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70. PP further stated in paragraph 30 of the affidavit that:

I have sufficiently addressed the special circumstances as envisaged in terms of section 6(9) of the Act. The applicants have failed to establish that I have acted unlawfully or in contravention of the Act by entertaining the matter that is older than two years. The Act empowers me to do exactly that. No irregularities or unlawfulness have been established by the applicants to justify the attack in the manner in which I have exercised my discretion to entertain the complaint.

71. In a judgment delivered on 9 October 2020, the FSCA report was reviewed and set aside, and declared constitutionally invalid for lack of jurisdiction. The PP was also ordered to pay the costs of the application.
72. This in my view confirms that notwithstanding the other defects, the report would have still been set aside due to lack of jurisdiction. It is important to note that the existence of jurisdiction is a preliminary issue that must be determined immediately upon receipt of a complaint. In this matter, the PP exercised this discretion in April 2017.
73. One of the issues that arose in the case was the preparation of the Rule 53 record in the matter, in that an incomplete record was filed. The incomplete record related to 7 arch lever files that were handed to the Investigators in June 2018 when they took over the investigation. I only heard of the existence of these files during the litigation when the PP confirmed to the Investigator that the files were handed over to her. I was also alerted by Legal services of the incomplete record on 21 August 2019 and this was after the initial record was filed.

E. THE DISCIPLINARY PROCEEDINGS AGAINST ME AND MS SEKELE

74. In October 2019, the then CEO Mr Vussy Mahlangu, initiated disciplinary steps against myself, Ms Sekele and Mr Abongile Madiba on allegations of misconduct

relating to the aforementioned investigation of the FSCA matter, and Report No. 46/2019, as well as the Rabie matter.

75. On 10 October 2019, I received a letter from Mr Mahlangu, requesting me to make representations on the intended disciplinary action. The letter related only to the intended disciplinary action and did not indicate that the CEO intended to suspend me.
76. I responded to the letter from the CEO on 22 October 2019 and was then suspended by the former CEO on the same day, about 2 hours after receiving my representations on why disciplinary action should not be taken against me. A copy of my suspension letter is attached marked **PM4**.
77. Ms Sekele received a letter from the former CEO requesting her, likewise, to make representations on the intended disciplinary action. She responded to the letter from the former CEO on 18 October 2019 and was then suspended by the former CEO on the 22 October 2019. Ms Semele's suspension letter is attached marked **PM5**.
78. We were both served with our respective charges on 14 November 2019, the matter was set down for hearing on 4 December 2019, and however, the hearing did not take place. On 24 January 2020, I was served with a notice to attend the hearing scheduled for 4 February 2020. The hearing was postponed, and I later received reformulated charges on 20 February 2020.
79. As for Mr Madiba, he too suspended and charged. A copy of the charges preferred against him is attached marked **PM6**. Initially our disciplinary hearings were consolidated. On the date on which the hearing was supposed to proceed in July 2020, Mr Madiba had been hospitalised. Our legal representative asked for a postponement of the hearing. The employer was not inclined to grant one. I was agreed that Mr Madiba's disciplinary process should be separated from ours, and his was then presided over by a different chairperson. He was dismissed around

June 2021. He passed away about one month after he was dismissed – I about July 2021.

F. THE CHARGES AGAINST US

80. I faced the following six main charges in the disciplinary hearing.

80.1 Charges 1 to 4: for gross negligence or recklessness in the performance of my duties and/or failure to effectively manage subordinates in relation to the FSCA matter. There were four sub-charges which fell under this main charge.

80.1.1 Sub-charge 1 alleged that I had taken no action against Mr Madiba for abandoning his role as the Chief Investigator and/or his failure to perform a proper and diligent handover of files, information received from the FSCA.

80.1.2 Sub-charge 2 stated that in performing my supervisory roles, I ought to have been aware that the section 7(9) notice was defective for various reasons, stated more fully in that charge.

80.1.3 Sub-charge 3 stated that in performing my supervisory role, I failed or refused to ensure that the defects in the section 7(9) notice articulated in sub-charge 2 were not repeated in the FSCA Report which I authorised and approved and presented to the PP for signature. It was said that as a result of this, the FSCA Report suffered from defects, and rendered it indefensible in the review application instituted by the FSCA.

80.1.4 Sub-charge 4 stated that when the application for the reviewing and setting aside of the FSCA Report was launched, I failed or refused to ensure that a complete Rule 53 and comprehensive

record was served and filed, and that as a consequence the Rule 53 record did not include material evidence and information.

80.2 Charge 5: was for unprofessional conduct and/or conduct unbecoming of an executive manager in the office of the Public Protector.

80.2.1 Under this charge, it was alleged that during consultation with the PPSA's counsel in August 2019 I expressed and/or supported the view that I had my own concerns and doubts as to the veracity of the complaint and the FSCA Report.

80.2.2 It was further alleged that my comments and/or attitude conveyed to counsel that I had no faith and confidence in the investigation that culminated in the FSCA Report and that in the circumstances my conduct constituted, amongst other things, unprofessional conduct and seriously undermined the reputation and office of the PPSA.

80.3 Charge 6: was for gross reckless dereliction of duty, alternatively, gross misconduct. This charge arose from the Rabie matter.

A copy of the final charges against me is attached marked **PM7**.

81. All but the sixth charge in my case arose from the FSCA matter. The sixth charge related to the matter of Mr Rabie. As stated above, I was not involved in the investigation of the FSCA matter; nor was I the acting EM: GGI during the period when it was investigated. It was not allocated to me initially when the complaint was received in 2017. The matter was not allocated to me when it was removed from Mr Matlawe in the PP's private office in June 2018. I have explained above my involvement in the matter, at the end and only in viewing the section 7(9) notice sent to me by Mr Madiba, and in writing the report.

82. Ms Sekele faced the following five charges:
- 82.1. Charges 1 to 3: gross negligence or recklessness in the performance of her duties. This main charge consisted of three sub-charges.
 - 82.2. Charge 4: for unprofessional conduct and/or conduct unbecoming of a chief investigator in the PPSA; and
 - 82.3. Charge 5: gross or reckless dereliction of duty alternatively, gross misconduct.
83. On 4 March 2021 the Chairperson made a ruling on guilt without furnishing his reasons.
84. On 9 March 2021 the Chairperson delivered his ruling on guilt, this time with full reasons.
85. The Chairperson found me guilty of Charges 2, 3, 4 and 6. I was found not guilty in respect of Charges 1 and 5.
86. The Chairperson found Ms Sekele guilty in respect of Charges 2, 3 and 5, and not guilty of charges 1 and 4.
87. On 11 March 2021, the Chairperson requested me and Ms Sekele, as well as the PP to submit mitigating and aggravating factors for his consideration on sanction.
88. On 9 April 2021, the Chairperson wrote a letter to our attorneys of record, advising them that he had issued his Ruling on Sanction, that he had furnished it to the instructing attorneys of the PPSA as directed by the Disciplinary Code, and that the PPSA would make the Ruling available to us.
89. We were not informed of the sanction, however, until Friday 7 May 2021, when we received an email from the Human Resources: Manager in the PPSA, enclosing

the decision of the Chairperson: Ruling on Sanction (PM7) as well as a letter the PP dated 6 May 2021 (PM9).

90. In relation to me, the Chairperson recommended the following sanction for implementation: that I be suspended without pay for a period of three months coupled with a Final Written Warning for six months and such final written warning to commence after expiry of the suspension.
91. The sanction recommended against Ms Sekele was that she be suspended for two months without pay together with a Final Written Warning of two months and such final written warning to commence after expiry of the suspension.
92. It was apparent, however, from the PP's letter (PM9) that she disagreed with the sanction imposed by the Chairperson. For the convenience of the Committee, I set out below the full text of the PP's letter:

'OUTCOME OF THE DISCIPLINARY PROCEEDINGS

1. *The above matter, the findings of the chairperson of the disciplinary proceedings, and the sanctions imposed therein refers.*
2. *As you are aware, the chairperson delivered his verdict and the reasons thereof on 9 March 2021.*
3. *In his reasoning, he highlighted the gravity of the misconduct by which you were charged and found guilty. I will not repeat these herein suffice to emphasize the egregious nature and the implications of such findings.*
4. *The chairperson issued his sanction on 9 April 2021 The sanction, the contents of which are self-explanatory, is attached hereto marked 'BM1'.*



5. *Having considered the findings (on evidence) of the Chairperson, and the subsequent sanction imposed I have decided not to implement the sanction imposed by the Chairperson. I am of the strong view that the sanction imposed by the Chairperson is not appropriate apropos the charge, the nature of the misconduct, the guilty verdict, and the breakdown of the relationship of trust between the employer and yourself. Thus, I am hereby imposing a sanction of dismissal with immediate effect, subject to receipt of your representation as stated below.*
6. *It is apparent from the findings of the chairperson that the trust relationship between the employer and yourself has irretrievably broken down.*
7. *To this end, I am affording you an opportunity to make representations on why a sanction of a dismissal would not be appropriate under the circumstances.*
8. *You are requested to provide your representations on or before 18 May 2021.*
9. *Best regards,*

Advocate Busisiwe Mkhwebane

The Public Protector of South Africa'

93. In paragraphs 5 and 6 of her letter to us, the PP purported to invite us to make representations to her, whilst she was also imposing a sanction of dismissal with immediate effect Ms Sekele and I approached the Labour Court in Johannesburg on an urgent basis on 14 May 2021, seeking an order interdicting the PP from invoking



what we viewed as a new disciplinary process on sanction in contravention of the PPSA's applicable Disciplinary Code and Procedure Clause 9(4)(a) empowers the chairperson to pronounce on the appropriate final sanction, in the following terms-

"The chairperson shall submit a report containing the final sanction of the disciplinary hearing to the Chief Executive Officer in respect in respect of employees on level 1-12 and to the Public Protector in respect of employees on Senior Management Services (13-16) for implementation."

94. We also sought an order directing the PP, with immediate effect, to implement and comply with the sanction pronounced by the Chairperson issued on 9 April 2021.
95. The Court granted the relief that we sought and made the following main orders:
- 95.1. The PP was interdicted from invoking a secondary disciplinary process as she intended to do by her letter to us dated 6 May 2021.
- 95.2. The PP was ordered, with immediate effect, to implement and comply with the final sanction imposed by the Chairperson of the disciplinary hearing dated 8 April 2021.
- 95.3. The parties were to bear their own costs.
96. A copy of the court's judgement is attached hereto marked **PM11**.
97. On 21 June 2021, PPSA served us with a notice of application for leave to appeal to the Labour Appeal court against the whole judgement and order granted by Tlhotlhalemaje J delivered on 28 May 2021. The application for leave to appeal was dismissed with costs on 24 July 2021. A copy of the court's judgement is attached hereto marked **PM12**.
98. On 10 August 2021, the PP addressed letters to Ms Sekele and me advising us that

she was implementing the sanction imposed by the chairperson of the disciplinary process as directed by the Labour Court on 28 May 2021. The letter addressed to me is attached marked **PM13**. She also informed us in these letters of her intention to review the sanction of the chairperson in the Labour Court.

99. On 18 August 2021, PPSA filed an application that the decision issued by the Chairperson of the disciplinary hearing on 09 April 2021 be reviewed and set aside and the decision be substituted with an order that Ms Sekele and I be dismissed from the PPSA's employment.
100. All affidavits in the matter have been filed, including the parties' heads of argument. We have been awaiting a date for the Labour Court.
101. After serving out our respective sanctions from the disciplinary process Ms Sekele and I returned to the PPSA to resume our jobs, where we have been ever since. Ms Sekele returned to work on 12 October 2021, whilst I returned on 12 November 2021.
102. On 27 July 2022, Ms Sekele and I received a notice of withdrawal of the review proceedings, with a tender of our costs. A copy of the notice of withdrawal is attached marked **PM14**.

G. THE UNHEALTHY WORKING ENVIRONMENT AT THE PPSA

103. The problem of the backlog of investigations is a major issue in the PPSA. It is an issue with which the EMs of the relevant units are concerned, because it is not ideal in terms of the mandate of the PPSA for there to be any backlog at all, let alone backlogs to the extent that the PPSA has to contend with. In my experience, backlogs have always been an issue at the PPSA.
104. The eradication of the backlogs and preventing the accumulation of further backlogs

is therefore a priority for the PP, as it should be for any responsible executive authority.

I can attest that it is also a priority for EMs and COOs. The main reason for the backlog is a lack of sufficient human resource capacity in Investigations, this is a fact that is well known as the current and previous PPs have consistently been raising this issue and requesting additional funding from National Treasury and Parliament. The issue is also reflected in the various Annual reports of PPSA.

105. Additionally factors such as volume, complexity and the technical nature of the complaints contribute to the backlog.
106. In order to deal with the backlog and move investigations along from time to time various mechanisms have been embarked upon.
107. Initially in Dashboard meetings EMs would present their unit's performance on matters that were older than two years. This dashboard intervention was designed to look at what strides could be made to deal with the backlog of cases, i.e., matters the investigation and completion of which did not occur within the ideal turn-around times set out in the PPSA's service standards, which were:
 - 107.1. 36 months for complex GGI matters;
 - 107.2. 24 months for GGI matters;
 - 107.3. 12 months for service delivery matters;
 - 107.4. 6 months for early resolution matters; and
 - 107.5. 30 days for EMEA cases– being matters arising from contraventions of

the Executive Members Ethics Act.

108. These turn-around times mean that the investigation of a particular matter must be completed within the set period, calculated from the date of receipt of the complaint by the OPP. Backlog matters are therefore matters in which those turnaround times have been exceeded and the investigations have not been completed within those times.
109. At Dashboard meetings as an EM you would present your unit's performance on matters that were older than two years (in the case of GGI matters), and also present what strides would be made to deal with this backlog of cases. EMs would give an overall picture of their unit's performance as well as report on how many cases were received by each of the provinces under their supervision; how many cases were closed; how many cases have exceeded their turnaround times and set specific milestones and timeframes for dealing with the backlog matters.
110. When I came back from suspension I noted during these meetings, the focus was only in the answers to the following two questions:
- 110.1. *"What product is expected?"* By 'product', the PP meant what outcome, for example, an allegations letter, or a discretionary notice, or a section 7(9) notice.
- 110.2. *"By when?"*

111. An EM will then respond to the PP and say, by way of illustration, the product is an allegations letter, and that this product will be issued within 30 days. The answer of the EM is typically informed by the information available to the EM including, amongst other issues, the stage at which an investigation is; its complexity; the resources available to conduct that investigation, and constraints presenting in the investigation.
112. The PP demonstrated no interest in these factors, all of which were relevant. If she was of the mind that 30 days is too long for the product, the PP will typically impose her own deadline. She will say, again by way of illustration, that she wants the product within 15 days. If you seek to explain to her that it cannot be done in this timeframe and for these reasons, the PP will refuse to hear or listen to your explanation, and rigidly insist on the product being produced on the date that she has set no matter how unreasonable in the circumstances.
113. I have experienced the PP's inflexibility on this score a number of occasions. I set out below an instance when I have experienced this.
114. I attach hereto marked **PM15**, an email trail regarding reports that were to be completed by the various units and submitted to the PP on or by 25 October 2018. On 31 October, I submitted an explanation to the acting COO (ACOO), Ms Motsitsi regarding why some reports from my unit had not been submitted. The PP's response on 13 November 2018, after the ACOO furnished her with my explanation, speaks for itself.

115. She instructed the ACOO to issue a warning letter to me regarding the matter.
116. This occurred during the period when I had just taken over the additional portfolio of Acting EM: GGI, in addition to my portfolio of AJSD. I was some two weeks into the additional portfolio.
117. It should be noted that I was also under pressure to submit notices relating to AJSD branch and these were matters that I was personally dealing with as a way of ensuring that the deadlines are met. Some of these matters are complex matters where the issues being investigated were also pending in court. These included the matter of:
- 117.1. Siphon Dube against the Chief Master- a matter was pending in the Constitutional Court, relating to the issuing of a s7(9) notice and the Minister indicated that he will revert back to the Public Protector once the Constitutional Court made a ruling on the matter;
- 117.2. Freedom Front Plus complaint relating to the awarding of smart prepaid meters by the City of Tshwane. The matter was pending in the High court, an order was issued setting aside the contract that was the subject of our investigation but a full judgement was reserved.
118. Notably the Public Protector decided that I should be issued with a written warning for the delay to finalise these matters. This was at the same time that I was assigned the additional responsibility of managing GGI.



119. On 16 November 2018, I addressed an explanatory email to the PP, setting out the challenges we had experienced in the the awarding of smart prepaid meters by the City of Tshwane matter, and requesting an extension of the time to submit the required documents to the PP. This email trail is attached marked **PM16**.
120. The PP responded shortly thereafter, on the same day, making it clear that my request for an extension was refused.
121. On 19 November 2018, she wrote the following email to the former CEO, Mr Vussy Mahlangu, instructing him to issue warning letters to me and the ACOO.

*'From: Advocate Busisiwe Mkhwebane (Public Protector)
Sent: Monday, 19 November 2018 09:20
To: Vussy Mahlangu; Nthoriseng Motsitsi
Subject: Fwd: SUBMISSION OF PEU*

CEO

This undermining but the executives has reached a point where I cannot tolerate

The section 7(9) was not sent by Friday, can the final written warning or warning be served on the Executive Manager AJSD and ACOO for not also ensuring that as supervisor that is done per my instruction

I want to see the warning letter by 15:00 this afternoon.'

122. This email also appears on the email trail marked **PM16**.

123. The combination of the immense pressure to produce reports; not being heard; and threats to one's livelihood made for a very difficult environment to work productively in pursuit of the very targets we were committed to meeting. It reached a level of pressure and frustration that contribute to the unhealthy environment. The environment was punitive and made what was an already challenging task even more so. The issue of *audi* letters being issued following instructions from the PP issued in meetings was common.
124. On 20 November 2018, I sought legal advice from Mr Nemasisi regarding the challenges I was facing in the PEU matter that the PP was enquiring about. The email trail of discussions between us, which also included the ACOO regarding the matter is attached marked **PM17**.
125. On 20 November 2018, Mr Mahlangu issued me with the letter, a copy of which is attached marked **PM18**. It is what we call in the office an *audi* letter. I was asked to explain why I had not adhered to the PP's instruction to submit the PEU documents by 16 November 2018, and was informed that my response would determine whether further action was to be taken against me.
126. I also experienced the PP's rigidity during at traumatic period when I lost my niece. I phoned the PP immediately that I had to travel to Polokwane because my niece collapsed on Sunday 13 April 2018 and the doctors had to perform an urgent surgery that evening. I sent a WhatsApp message to the PP on Monday updating her and detailing the condition and explaining to her that whilst she was my niece she was a little sister to me as she was raised by my Mother.

Handwritten signature and initials, possibly 'AM' and 'MK', in the bottom right corner of the page.

127. The PP was supportive and sent a comforting scriptural message (PM18A). The following morning, my niece passed on. I updated the PP and once again she sent condolences to me and the family and sent a comforting scriptural message. The message ended by asking the date of the funeral (PM18B).

128. Sadly, the following day after death, I received a WhatsApp message from the PP stating thus:

"Pona can I have all the letters and reports pending:

1. Kgomo

2. Masibi

3. Gems letter

4. Makwakwa update

5. Ngidi update

6. Letter Saunders and Afriforum

129. Another message followed stating as follows:

"If I don't get the Kgomo report today I will have no option but request ACEO to initiate disciplinary process.

The others I want tomorrow by 14:00 and if nothing is delivered I will also take action"

130. My niece passed on Tuesday 17 April 2018 and these messages were sent on Thursday 19 April 2018 16: 03 as I was preparing to drive back to Polokwane for the funeral that was happening on Saturday. This was a traumatic period as we lost a young person due to a sudden illness.
131. Another incident related to the late Abongile Madiba, who was partially disabled due to a stroke that he suffered in December 2017. He was a skilled and hardworking person who was committed to the office and produced excellent reports that withstood judicial scrutiny. The PP was fully aware of Madiba's medical condition and notwithstanding this, he was charged when he was ill, suspended and ultimately dismissed. He passed on a sad and broken man a month after his dismissal, no support or mercy was shown towards Mr Madiba. He was too sick to defend himself and had to rely on his son to support him throughout the hearing.
132. I have therefore experienced first-hand, the PP's unbending rigidity, and Mr Mahlangu directly implementing the PP's instructions. It bears reminding that as an EM, I reported to the ACOO, not the CEO but it was nevertheless him whom issued me with an *audi* letter, on the PP's instructions.
133. I am advised that the evidence have recordings of some of the meetings where the PP displayed this attitude.

H. OTHER INVESTIGATIONS

134. As part of my acting in GGI I was involved in the following investigations:

- 134.1. The Bosasa/CR 17 investigation;
- 134.2. Mr Pillay Pensions investigation; and
- 134.3. The Minister Gordhan/Sars Unit investigation.
135. In relation to Bosasa investigation I accompanied the PP and others to a meeting with the President and I also dealt with some correspondence. I was also present during some of the meetings/interviews in the course of this investigation.
136. In relation to the Pensions investigation relating to Mr Pillay's pension pay-out I was part of the meeting of Minister Gordham in early 2019 and will be able to elaborate on the extent of my involvement in evidence.
137. In relation to the SARS unit investigation I met with the complainant on 8 December 2018. The investigators who were responsible for conducting that investigation were Mr Rodney Mataboge (he was the Chief Investigator) and Ms Bianca Mvuyana.
138. To the best of my recollection I had scant involvement in this investigation. I was at the time acting as the EM: GGI. When I started acting in that capacity on 1 November 2018, I found the investigation of allegations of maladministration and impropriety at SARS already underway. I was not involved in that investigation, and as it progressed the investigators did not report to me about it. I understood that Mr Mataboge and Ms Mvuyana reported directly to the PP regarding its

progress. As from 1 June 2019, Mr Mataboge and his team (which included Ms Mvuyana) reported to Ms Motsitsi, not to me.

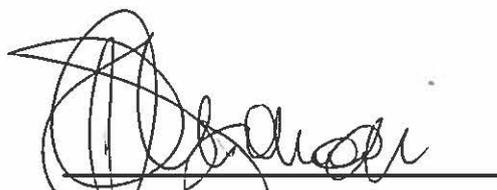
139. I also attended the meeting with the IGI on 31 January 2019. I had in fact forgotten about the meeting with the IGI until it was raised before this Committee and it was pointed out that I was present. I have since listened to the recording.
140. After consulting with the evidence leaders and for the sake of completeness and transparency I further set out the following.
141. As far as the meeting with the complainant is concerned, I was reminded thereof by the evidence leaders and provided with an email that had been sent to me pursuant to that meeting. I recalled that Mr Mataboge, and I met with the complainant on 8 December 2018. I am not sure if Ms Bianca Mvuyana was also present. The meeting followed a request for a meeting from the complainant. The meeting was initially supposed to be chaired by the PP, however I was informed by the investigators that she not available. I have not been able to find the recording of the meeting. During the meeting however, the complainant sent me a copy of the classified 2014 IGI Report via WhatsApp text. This was followed with an email with the same attached.
142. I could not read the Whatsapp message but on receipt of the email I recall opening it and there was a cover page. I read the first page thereafter at which point I realised that it was a secret classified report. I just closed it and did not go back to it. I did not print it, nor did I disseminate it. I must admit that at the time I did

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MK AM -

not consider it beyond that, as I thought it was a report relating to the State Security Agency (SSA) and not pertaining to the SARS investigation with which the PPSA was seized with.

143. I was included in some of the emails relating to the IGI Report including an email dated 20 February 2019, which indicated that the Minister of State Security, Ms D Letsatsi-Duba delivered a letter to the PP expressing the Minister's sentiments regarding the PP's possession of the classified IGI report.

144. I understood from the PP's instruction to the Legal Services Manager later that day, in response to the SSA Minister's letter, that people with access to the classified IGI report that the PP had, were Mr Mataboge, the Chief of Staff who was then Mr Sibusiso Nyembe (he has since passed on), the PP herself and her PA Ephraim Kabinde. A copy of the PP's emailed response to the Legal Services Manager is attached marked **PM19**.



PONATSHEGO MOGALADI

I certify that the above signature is the true signature of the deponent and that she has acknowledged that she knows and understands the contents of this affidavit which affidavit was signed and sworn to before me in my presence at Tohunyanya on this 21 day of **AUGUST 2022**, in accordance with Government Notice No R1258 dated 21 July 1972, as amended by Government Notice No R1648 dated 19 August 1977, as further amended by Government Notice No R1428 dated 11 July 1980, and by Government Notice No R774 of 23 April 1982.



COMMISSIONER OF OATHS

.....	
Commissioner of Oaths ex officio	
Advocate	<u>Mkhosi Khosla</u>
Advocate of the High Court of South Africa	
1A Protea Place Sandown	
Date	<u>21 August 2022</u>