Ex parte:

NATIONAL ASSEMBLY COMMITTEE FOR SECTION 194 ENQUIRY

In re:

THE INVESTIGATION INTO THE FITNESS FOR OFFICE OF THE PUBLIC PROTECTOR OF SOUTH AFRICA

OPINION: RECUSAL APPLICATION IN RESPECT OF CERTAIN MEMBERS OF THE SECTION 194 COMMITTEE

Prepared for:

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10 October 2022

BACKGROUND

1. We have been briefed by the State Attorney, Cape Town on behalf of the Committee established in terms of section 194(1)(b) of the Constitution to consider charges of misconduct and or incompetence against the Public Protector, Adv Busisiwe Mkhwebane (**"the Committee"**), to provide an independent opinion on the merits and legal effects of a recusal application brought against Mr Q.R. Dyantyi as the Chairperson of the Committee (**"the Chairperson"**) as well as against Mr K. Mileham, MP (**"Mr Mileham"**) who is a member of the Democratic Alliance (**"DA"**) and serves on the Committee on its behalf.

2. On 19 September 2022 the Public Protector, via her legal representatives, gave notice of her intention to bring a recusal application against the Chairperson and against Mr Mileham. The application was received by the Committee Secretariat on 20 September 2022. Oral submissions in respect of the application were presented to the Committee on 21 September 2022.

3. The Committee met on 23 September 2022 in order to consider the application. It resolved to seek an urgent external legal opinion in order to assess the merits of the application and the legal effects thereof. This is that opinion. Our instructions require us to advise on the following:

    3.1. The applicable legal test for bias in a multi-party process which consists of politicians deliberating on and making a finding and recommendation to the National Assembly on whether the Public Protector has misconducted herself or is otherwise incompetent;

3.2. An assessment of each of the grounds raised in the application *vís a vís* the test to be applied in respect of bias;

3.3. The legal implications of the application including the manner in which it should be processed by the Committee; and

3.4. The effect on the work of the Committee if it finds that there is a reasonable apprehension of bias on the part of the Chairperson or Mr Mileham, and/or if the Chairperson or Mr Mileham recuse themselves.

4. In order to provide this opinion, we have been provided with the documents listed in Appendix **"A"** hereto as also with the transcript of the proceedings before the Committee since the commencement of its hearings. We are instructed that, to date, the Evidence Leaders have presented the evidence of seventeen witnesses and that they intend presenting the evidence of one further witness whereafter the Public Protector will be afforded the opportunity to present evidence. The Evidence Leaders reserve the right to call additional witnesses should the need arise.

5. We have also been provided with an electronic link to the audio-visual recording of the hearings. We have also, where necessary, accessed the Parliamentary Monitoring Group website where the proceedings were not adequately, or at all, covered by the transcript or the audio-visual recording supplied to us.[1]

[1] **https://pmg.org.za/committee-meeting/35526/**

6. We have been provided with a copy of the Terms of Reference in respect of the inquiry, which records that the Committee "agrees to conduct the enquiry in accordance with the provisions of this *(sic)* Terms of Reference which is based on the principle of fairness. The Committee may vary or amend this *(sic)* Terms of Reference provided that the principle of fairness is upheld".

7. We have further been briefed with Directives as to the conduct of the inquiry, issued by the Chairperson in terms of NA Rule 183, dated respectively 14 July 2022 and 28 July 2022.

8. On 1 October 2022 we met with the Evidence Leaders in order to clarify our factual instructions, in particular in relation to the events that transpired on and before 13 September 2022. The Evidence Leaders undertook to furnish us with a memorandum dealing with such factual events, and this was duly provided. We attach a copy of the memorandum hereto as Appendix **"B"**.

9. For the purposes of furnishing this opinion we have also accessed via the Parliamentary website, and had regard to, the report of the independent Panel (**"the Panel"**) which considered the matter prior to its referral by the National Assembly to the Committee.

10. On 21 February 2020 the then Chief Whip of the Official Opposition, Ms N. Mazzone, MP (**"Ms Mazzone"**), on behalf of the DA, submitted a motion in terms of NA Rule 129R. to the Speaker of the National Assembly for an inquiry in terms of section 194(1) of the Constitution to remove Adv. Busisiwe Mkhwebane from the office of the Public Protector on the grounds of misconduct and/or incompetence. The resolution, insofar as is relevant, reads as follows:

"I hereby move on behalf of the Democratic Alliance that the House:

1. … ;

2. …;

3. Resolves to initiate an inquiry in terms of section 194(1) of the Constitution to remove Adv. Busisiwe Mkhwebane from the office of the Public Protector on the grounds of misconduct and/or incompetence in the South African Reserve Bank, Vrede Dairy and other matters, charges of which are set out and substantiated in Annexure A attached hereto."

11. Subsequently, the former Speaker of the National Assembly, Ms. T Modise, acting in terms of NA Rule 129U., established the Panel to conduct a preliminary assessment to determine whether, on the documentary information available, there was *prima facie* evidence showing that the Public Protector had committed misconduct and/or was incompetent.

12. The Panel submitted its report on 24 February 2021 and recommended, for the reasons contained in the report, that the charges of incompetence and misconduct be referred to a committee of the National Assembly as provided for in the NA Rules governing removal. The report served before the National Assembly on 16 March 2021 when it resolved to proceed with a section 194 inquiry. The matter was thereafter referred to the Committee to conduct the inquiry.

THE RELEVANT REGULATORY FRAMEWORK

13. Section 194(1)(b) of the Constitution provides:

"194 (1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on -

(a) the ground of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly; and

(c) the adoption by the Assembly of a resolution calling for that person's removal from office."

14. NA Rule 129R[2]. provides as follows:

"1. Any member of the Assembly may, by way of a notice of a substantive motion in terms of Rule 124(6), initiate proceedings for a section 194(1) enquiry, provided that –

(a) the motion must be limited to a clearly formulated and substantiated charge on the grounds specified in section 194, which must prima facie show that the holder of a public office:

(i) committed misconduct;

(ii) is incapacitated; or

(iii) is incompetent;

(b) the charge must relate to an action performed or conduct ascribed to the holder of a public office in person;

(c) all evidence relied upon in support of the motion must be attached to the motion; and

[2] Prior to 28 November 2019 the NA Rules did not provide for a specific procedure to be utilised in the case of a committee considering the removal of an office-bearer appointed in terms of Chapter 9 of the Constitution. Such rules were adopted by the National Assembly on 28 November 2019, titled Removal of Office-Bearers in Institutions Supporting Constitutional Democracy, ATC 2019. The references to the Rules in connection with the section 194 inquiry are to these new Rules.

(d) the motion is consistent with the Constitution, the law and these rules.

(2) For purposes of proceedings in terms of section 194(1), the term "charge" must be understood as the grounds for averring the removal from office of the holder of a public office."

15. NA Rule 129T. provides as follows:

"When the motion is in order, the Speaker must –

(a) immediately refer the motion, and any supporting documentation provided by the member, to an independent panel appointed by the Speaker for a preliminary assessment of the matter; and

(b) inform the Assembly and the President of such referral without delay."

16. NA Rule 129Z. provides as follows:

"(1) Once the panel has made its recommendations the Speaker must schedule the recommendations for consideration by the Assembly, with due urgency, given the programme of the Assembly.

(2) In the event the Assembly resolves that a section 194 enquiry be proceeded with, the matter must be referred to a committee for a formal enquiry.

(3) The Speaker must inform the President of any action or decision emanating from the recommendations."

17. NA Rule 129AB. provides as follows:

"(1) The committee consists of the number of Assembly members that the Speaker may determine, subject to the provisions of Rule 154.[3]

(2) Notwithstanding Rule 155(2), the members of the committee must be appointed as and when necessary."

18. NA Rule 129AC. provides as follows:

"The committee must elect one of its members as chairperson."

19. NA Rule 129AD. provides as follows:

"(1) The committee must, when the Assembly has approved the recommendations of the independent panel in terms of Rule 129Z proceed to conduct an enquiry and establish the veracity of the charges and report to the Assembly thereon.

(2) The committee must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe.

(3) The committee must afford the holder of a public office the right to be heard in his or her own defence and to be assisted by a legal practitioner or other expert of his or her choice, provided that the legal practitioner or other expert may not participate in the committee.

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[3] NA Rule 154 (9th ed) provides as follows:
"(1) Parties are entitled to be represented in committees in substantially the same proportion as the proportion in which they are represented in the Assembly, except where –
(a) these rules prescribe the composition of the committee; or
(b) the number of members in the committee does not allow for all parties to be represented.
(2) Subject to these rules, the Joint Rules and decisions of the Rules Committee, and where practicably possible, each party is entitled to at least one representative in a committee."

(4) For the purposes of performing its functions, the committee has all the powers applicable to parliamentary committees as provided for in the Constitution, applicable law and these rules."

20. NA Rule 129AE. provides as follows:

"A question before the committee is decided when a quorum in terms of Rule 162(2)[4] is present and there is agreement among the majority of the members present, provided that, when the committee reports, all views, including minority views, expressed in the committee must be included in its report."

21. NA Rule 129AF. provides as follows:

"The report of the committee must contain findings and recommendations including the reasons for such findings and recommendations.

(1) The report must be scheduled for consideration and debate by the Assembly, with due urgency, given the programme of the Assembly.

(2) If the report recommends that the holder of a public office be removed from office, the question must be put to the Assembly directly for a vote in terms of the rules, and if the required majority of the members support the question, the Assembly must convey the decision to the President."

22. Paragraph 3 of the Terms of Reference provides as follows:

"*The objective of the Enquiry is to:*

[4] NA Rule 162 provides as follows:
"(1) A committee at all times requires at least one third of its members to be present for it to conduct any business.
(2) A majority of the members of a committee must be present for it to decide any question.
(3) When a committee has to decide a question and a quorum in terms of Subrule (2) is not present, the chairperson may either suspend business until a quorum is present, or adjourn the meeting."

(a) assess the charges contained in the motion in order to determine whether the PP is incompetent and/or has misconducted herself;

(b) report to the NA on its findings and recommendations."

23. Paragraph 4 thereof provides as follows:

"The Enquiry is a constitutional process to establish, on the basis of evidence presented, whether the PP is incompetent and/or has misconducted herself. It is neither a judicial or quasi-judicial process, nor is it an adversarial process. The Enquiry in (sic) *an inquisitorial process, informed by Parliament's constitutional oversight mandate, and the principle of fairness shall be paramount to the manner in which the Committee conducts the Enquiry."*

24. Paragraph 4.2 provides as follows:

"a. The evidence leader will present the evidence of a witness to the Committee.

b. All members will be given equal opportunity to pose any further questions to witnesses (irrespective of whether the member has voting rights). In the event that members are of the view that a certain witness be recalled for purposes of answering any further questions, it may do so by resolution. In the event that the Committee resolves to pose further questions, it will agree on whether such questions should be posed in writing or whether the identified witness will be invited to respond orally."

25. Paragraph 4.4 provides as follows:

"a. Whilst the Committee is not a judicial tribunal or court of law, it will permit the PP, or her representative, to cross-examine any witnesses, whether identified by the PP or by the Committee.

b. In the event that the PP wishes to call a witness, notice of same, together with a copy of sworn statement (sic) *by the witness, must be provided to the Committee who will provide the PP with a date and time for the appearance. The Evidence Leader and members shall have the right to put any questions to any witness called by the PP, subject to any reasonable restrictions the Chairperson may impose.*

c. The Committee will determine the manner in which it will process evidence and the weight it will attach to evidence, and in doing so may -

i. consider any evidence that is relevant to its mandate;

ii. use its powers of subpoena to gather further evidence if it deems necessary."

26. Paragraph 5 provides as follows:

"The Enquiry is inquisitorial in nature and the Evidence Leader does not act as a prosecutor. The role of the Evidence Leader is limited to presenting the evidence and putting questions to the PP or other witnesses with the aim of empowering the Committee to assess the merits of the evidence in line with its mandate. The format for questioning (whether oral or by way of statement with a view to limiting issues in dispute) will be determined by the Evidence Leader in consultation with the Chairperson.

The use of an Evidence Leader will in no way limit or impede the right of members to put questions of substance or clarity to any witness in the exercise of Parliament's constitutional oversight function, as specifically reflected in section 194 of the Constitution."

27. Paragraph 3 of the Directive issued by the Chairperson on 14 July 2022 provides, insofar as is directly relevant, as follows:

"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.

…

3.6.6 Any challenge to evidence presented to the Committee may be addressed by the Public Protector any time (sic) *before or during its presentation and/or in closing arguments and must be taken into account in the deliberations of the Committee."*

28. Paragraph 6 of the Directive provides, insofar as it is directly relevant, as follows:

"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.

…

6.8 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."

29. Paragraph 8 thereof, insofar as is directly relevant, provides as follows:

> *"8.2 In the event there (*sic*) 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* (sic) *such was taken into account in the making of its recommendation to the Assembly."*

THE LEGAL TEST FOR BIAS OR THE REASONABLE APPREHENSION THEREOF

30. Listening fairly to both sides has been described as "a duty lying upon everyone who decides anything".[5]

31. As pointed out by Hoexter, the notion of a fair hearing by an impartial decision-maker is reflected in two ancient common-law principles*, audi alteram partem* (hear the other side) and *nemo iudex in sua causa* (no one should be a judge in his or her own cause).[6]

32. In the pre-constitutional era, the leading case was City and Suburban Transport (Pty) Ltd v Local Board Road Transportation, Johannesburg.[7] In that case Greenberg J said the following:

[5] Board of Education v Rice [1911] AC 179 at 182
[6] Hoexter and Penfold Administrative Law in South Africa 3rd Edition at 502
[7] 32 WLD 100

"*The test appears to be whether the person challenged has so associated himself with one of the two opposing views that there is a real likelihood of bias or that a reasonable person would believe that he would be biased."*[8]

33. As pointed out by Hoexter, the test as formulated by Greenberg J in City and Suburban Transport actually postulated two tests:

    33.1. a 'real likelihood' of bias; and

    33.2. something less, i.e. a 'reasonable suspicion of bias'.

34. This ambivalence was finally determined by the then Appellate Division, in favour of the "reasonable suspicion" test, in BTR Industries South Africa (Pty) Limited v Metal and Allied Workers' Union.[9]

35. In S v Roberts, Howie JA stated the test for bias as follows:

    "1. There must be a suspicion that the judicial officer might (not would) be biased.

    2. The suspicion must be that of a reasonable person in the position of the accused or the litigant.

    3. The suspicion must be based on reasonable grounds.

    4. The suspicion is something that the reasonable person would (not might) have."[10]

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[8] At 106
[9] 1992 (3) SA 673 (A) at 694 G-H
[10] 1999 (4) SA 915 (SCA) at paras 32 and 34

36. With regard to the general approach to the question of bias, the then Appellate Division explained the position thus in S v Malindi:

> "*Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important."*[11]

37. The leading case regarding bias in the post-constitutional era is President of the Republic of South Africa and Others v South African Rugby Football Union and Others,[12] in which the Constitutional Court approved of the reasonable apprehension (the Court preferred 'apprehension' to 'suspicion') of bias test as articulated in the BTR Industries case.[13]

38. The Court went on to mention two further considerations:

    38.1. In considering an application for recusal of a judge, given their legal training and experience, there is a presumption in favour of a judge's impartiality in deciding whether or not a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be

[11] 1990 (1) SA 962 AD at 969 G-I
[12] 1999 (4) SA 147 (CC) at 147 ('SARFU')
[13] At para 38

biased.[14] [This consideration obviously does not find application in the present matter].

38.2. The second consideration referred to in SARFU is that absolute neutrality can hardly ever be achieved. In this regard the Court observed as follows:

> *"It is appropriate for judges to bring their own life experience to the adjudication process."*[15]

38.3. The Court quoted from the judgment of the Canadian Constitutional Court in R v S (RD)[16] where that court stated as follows:

> *"It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, Judges must rely on their background knowledge in fulfilling their adjudicative function."*[17]

38.4. The Court further stated:

> *"In a multicultural, multilingual and multiracial country such as South Africa, it cannot reasonably be expected that judicial officers should share all the views and even the prejudices of those persons who appear before them."*[18]

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[14] At paras 40 to 41
[15] At para 42
[16] (1997) 118 CCC (3d) 353
[17] Ibid
[18] At para 43

38.5. The Court quoted from a judgment of the United States Supreme Court as follows:

> *"Supreme Court Justices are strong-minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way. The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance that should not by itself form a basis for disqualification."*[19]

38.6. In this regard, a full bench of the Cape High Court has held as follows:

> *"It is not bias per se to hold certain tentative views about a matter. It is human nature to have certain prima facie views on any subject. A line must be drawn, however, between mere predispositions or attitudes, on the one hand, and pre-judgment of the issues to be decided, on the other. Bias or partiality occurs when the tribunal approaches a case not with its mind open to persuasion nor conceding that exceptions could be made to its attitudes or opinions, but when it shuts its mind to any submissions made or evidence tendered in support of the case it has to decide. No one can fairly decide a case before him if he has already prejudged it."*[20]

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[19] At para 44 with reference to Laird et al v Tatum et al 409 US 824 (1972) at 836; see also South African Rights Commission obo South African Jewish Board of Deputies v Masuku and Another ('SAHRC') 2022 (4) SA 1 (CC) at paras 63 to 67

[20] Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others 2000 (4) SA 621 (C) at para 627

39. With regard to the application of the test, the Court in SARFU held that the test for a reasonable apprehension of bias is objective and that the onus of establishing it rests upon the applicant.[21]

40. The Constitutional Court has cautioned against attributing to a judicial officer bias on the basis of irritation or impatience displayed during a hearing, unless this establishes a pattern of conduct that dislodges the presumption of impartiality and replaces it with a reasonable perception of bias.[22]

41. Specifically with regard to proceedings of a lay tribunal, as opposed to a court composed of judges, the Supreme Court of Appeal has set out the governing principle as follows:

> *"[T]he present is but one of the many cases in which an administrative body has failed to observe a principle which lawyers regard as elementary and it will be a sad day if, whenever this occurs, the body can be accused or suspected of bias. It is unfortunately one of the facts of life that administrative bodies perform their functions with varying degrees of competence. …*
>
> *[T]he mere fact that audi alteram partem was not observed does not by itself justify an inference of bias."*[23]

42. This approach was endorsed by the Constitutional Court in Public Protector v South African Reserve Bank[24], a case in which the Public Protector had failed

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[21] At para 45
[22] Bernert v ABSA 2011 (3) SA92 (CC) at para 86 - 88
[23] Commissioner, Competition Commissioner v General Council of the Bar of South Africa 2002 (6) SA 606 (SCA) at para 16
[24] 2019 (6) SA 253 (CC) ('SARB')

to allow implicated parties to respond to adverse findings against them. The Court pointed out however that the context in which a public official conducts themselves in a procedurally unfair manner may well indicate bias.[25]

43. This caveat was applied in Gordhan v Public Protector[26] where the Court found bias on the part of the Public Protector insofar as, apart from procedural unfairness, there were numerous other indications in the manner in which she had conducted her investigation that pointed to bias.[27]

44. In South African Human Rights Commission v Masuku[28] the Constitutional Court approved the following dicta and then made the following important observation:

> "*There must be an articulation of a logical connection between the matter and the feared deviation from the course of deciding the case on the merits. The bare assertion that a judge has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making is articulated.*"[29]
>
> *Ultimately, then, the test for reasonable apprehension of bias requires more than mere association with the matter. The relevant connection must call into question the ability of the judge to apply their mind in an impartial manner to the case before them.*"[30]

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[25] At para 170
[26] [2021] 1 All SA 428 (GP) ('Gordhan')
[27] At para 290
[28] 2022 (4) SA 1 (CC) ('SAHRC')
[29] Ex parte Goosen 2020 (1) SA 569 (GJ) at para 29
[30] SAHRC ibid at para 69

45. Finally, *"The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test."*[31]

46. We now turn to the issues in respect of which our opinion is sought.

I. THE APPLICABLE LEGAL TEST FOR BIAS IN A MULTI-PARTY PROCESS CONSISTING OF POLITICIANS DELIBERATING ON AND MAKING A FINDING AND RECOMMENDATION TO THE NATIONAL ASSEMBLY

47. We are required to advise as to the applicable test for bias in the particular circumstances of the section 194 Committee conducting an investigation into the fitness of office of the Public Protector. In our view, the test is the same as that for any other lay body charged with making determinations of fact. We say so for the reasons set out below.

48. Section 194(1)(b) of the Constitution requires, in express terms, "a finding" by a committee of the National Assembly prior to the Assembly adopting a resolution for the removal of a Chapter 9 officer-bearer.

49. "[F]inding" is defined in the Merriman-Webster Online Legal Dictionary as *"a determination resulting from judicial or administrative examination or inquiry (as at trial) especially into matters of fact as embodied in the verdict of a jury or decision of a court, referee, or administrative body or officer".*

[31] SARFU at para 45

50. NA Rule 129AD. (1) requires the Committee to conduct an inquiry and establish the veracity (or accuracy) of the charges.

51. Paragraph 4 of the Terms of Reference requires the Committee to establish, on the basis of evidence presented, whether the Public Protector is incompetent and/or misconducted herself.

52. Paragraph 5 of the Terms of Reference requires the Evidence Leaders to present evidence with the aim of empowering the Committee to assess the merits of the evidence, in line with its mandate.

53. These requirements are mirrored in paragraph 3 of the first Directive issued by the Chairperson, referred to above.

54. It is accordingly clear, in our view, that a section 194 Committee is a fact-finding body, and must base its findings on the evidence presented to it and must provide reasons therefor.

55. In the circumstances, it does not differ in essence from any other lay body which is required to reach conclusions of fact based on the evidence and materials presented to it.

56. The fact that the members of the Committee are politicians belonging to different political parties represented in the National Assembly, does not, in our view, affect the manner in which they must conduct their work and reach their conclusions.

57. The regulatory framework set out in some detail above makes it clear that, although not a court of law, the Committee must observe the fundamental

principles referred to in paragraph 31 above. In particular, paragraph 4 of the Terms of Reference provides that "the principle of fairness shall be paramount to the manner in which the Committee conducts the Enquiry".

58. Members of the Committee may, accordingly, not bring to the fact-finding inquiry their own political views or biases, or those of the various parties which they represent. To do so would be to ignore the principles set out above, and which are of application to the present inquiry.

59. This is not to say that members may not have *prima facie* views as to the fitness of office or otherwise of the Public Protector. That would be an impossible requirement and would ignore the fact that most people, including judges, have predispositions which they bring to their adjudicative function. It is also a matter of public record that most, if not all, of the political parties represented on the Committee have adopted a position one way or the other in respect of the fitness for office of the Public Prosecutor.

60. Provided, however, that they keep an open mind and reach their conclusions based on an honest and fair evaluation of the evidence placed before them, they are not *per se* biased merely because they, or the political parties that they represent, have taken such a view.[32]

61. Accordingly, our view is that the test for bias in the case of Committee members is the same as that for other lay bodies, as set out above.

[32] *SARFU* at para 44

II. ANALYSIS OF THE GROUNDS FOR RECUSAL

62. What follows hereinbelow is an analysis of the grounds upon which the recusal application is brought. First, the grounds in relation to the Chairperson are considered, and thereafter the grounds in relation to Mr Mileham are considered.

First Ground: the scope of the enquiry

63. The complaint is that on 11 July 2022 the Chairperson acted *"unfairly and unreasonably exhibited bias and/or substantial prejudice (*sic) *… by ruling that the enquiry would proceed on the basis of the original motion… dated 21 February 2020, in spite of the substantial and effective amendment of the motion [by] the Independent Panel Report…".*[33]

64. The Public Protector further alleges that this ruling materially prejudices her in that she is called upon to adduce evidence to rebut charges upon which the Panel has ruled that no *prima facie* case exists.[34]

65. The first question to be answered is whether the Panel had the power to amend the Motion tabled by the Chief Whip of the DA on 21 February 2020 which initiated the inquiry in terms of section 194 of the Constitution. In our view it did not, nor did it purport to exercise such a power. To fully appreciate this issue, we summarise the position as follows:

[33] The Public Protector's Recusal Application ("the application") p. 6 para 22
[34] The application p. 6 para 23

65.1. The Rules of the National Assembly provide for a 17-step process for the removal of an officer-bearer such as the Public Protector.[35]

65.2. Once the Speaker finds that there is a compliant motion in terms of section 194 of the Constitution, the Speaker must refer the complaint to an independent panel that she has appointed.[36]

65.3. Rule 129U. indicates that the independent panel conducts a *"preliminary enquiry on a motion initiated in a section 194 enquiry"*. This is reiterated in Rule 129X.(1)(b) where the functions and powers of the panel are recorded as being to *"conduct and finalise a preliminary assessment relating to the motion proposing a section 194 enquiry to determine whether there is prima facie evidence"* for removal.

65.4. The independent panel does not have the power to remove the Public Protector. What it must do *"is to conduct and finalise a preliminary assessment to determine whether there is prima facie evidence to remove [the Public Protector]"*.[37]

65.5. Rule 129X.(1)(c)(v) stipulates that the independent panel *"must include in its report any recommendations, including the reasons for such recommendations, as well as any minority view of any panelist"*.

65.6. The Panel's report is then considered by the National Assembly.[38] If the National Assembly resolves that a section 194 inquiry should be held,

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[35] Speaker of the National Assembly v Public Protector and others 2022 (3) SA 1 (CC) ("NA v PP") at para 16
[36] Ibid at para 17
[37] NA v PP at para 18
[38] In terms of NA Rule 1292

same must, in terms of Rule 129AA., be referred to a committee consisting of members of the National Assembly, for a formal inquiry.[39]

65.7. The distinction between Rule 129Z. and Rule 129AA. is important. In terms of Rule 129Z. the Panel's recommendation is considered by the National Assembly, and if it is resolved to proceed with a section 194 inquiry, the matter must be referred to a Committee for a formal inquiry. However, in terms of Rule 129AA., the Committee is established "to consider motions initiated in terms of section 194 referred to it". The position is thus clear – the National Assembly considers the Independent Panel recommendations and if the matter is referred to a committee, the latter body considers the initiating motion.

65.8. Rule 129AD(1). states that *"[t]he committee must… conduct an enquiry and establish the veracity of the charges and report to the National Assembly thereon."*

65.9. In terms of Rule 129R., "[F]or purposes of proceedings in terms of section 194(1), the term 'charge' must be understood as the grounds for averring the removal from office of the holder of a public office. When regard is had to Rule 129R.(1)(a) it is clear that the charges being referred to relate to the grounds set out in the motion by a member of the Assembly in order to initiate proceedings for a section 194(1) inquiry.

65.10. The Terms of Reference of the section 194 inquiry also make it clear that the Committee is tasked with considering the Motion. At paragraph 3

[39] NA v PP at para 19

thereof it states that the objective of the inquiry is to *"assess the charges contained in the motion in order to determine whether the PP is incompetent and/or has misconducted herself"*.[40] The "Motion" is defined as the motion of 21 February 2020 tabled by the Chief Whip of the DA, Ms Mazzone.[41]

65.11. Accordingly, in our view, it is the Committee that is tasked with assessing the veracity of the charges, i.e. those contained in the Motion tabled on 21 February 2020.

66. In NA v PP[42] the Constitutional Court said the following:

"The High Court held that the National Assembly is obliged to determine whether to remove the Public Protector and it cannot delegate that function to another entity. However, nothing prevents it from taking advice from a panel. The independent panel makes preliminary assessments and submits a report to the National Assembly, but the panel has no powers other than to submit a report."[43] (Emphasis supplied)

67. The fact that the Chairperson might have made a ruling[44] that, in our view, is correct on the law can hardly be said to be evidence of bias or even give rise to a reasonable apprehension of bias. This is not to say that if the ruling was incorrect, as a matter of law, this would indicate bias or give rise to a reasonable

[40] The Terms of Reference of the section 194 enquiry, p. 4 para 3(a). Emphasis added
[41] ibid, p. 2 para 1
[42] ibid
[43] Para 74
[44] We have had regard to the transcript of the proceedings on 11 July 2022 and it is by no means clear to us that such a ruling was in fact made. However, for present purposes, we proceed on the basis that there was a ruling as alleged by the Public Protector in the application.

apprehension thereof. We refer to what we have already said in this regard in our legal analysis above.

68. Finally in this regard, the impugned ruling was made on the first day of the Committee's proceedings. In our view this fortifies the conclusion that the mere fact of a ruling adverse to the Public Protector, at such an early stage of the proceedings, cannot be regarded as an indication of bias, or give rise to a reasonable apprehension thereof in the mind of a reasonable observer.

Second Ground: an alleged unlawful and unilateral amendment of the Directives and the misapplication thereof

69. The heading to this ground suggestions that the Directives were issued: (a) unlawfully; (b) unilaterally; and (c) that the Directives were misapplied.

70. In this regard, the Public Protector further alleges that on 26 August 2022 the Chairperson issued an "addendum" or "amendment" of the Directives

    70.1. "in the middle of the process" and "without any consultation and to the prejudice of the Public Protector";[45] and that

    70.2. the new Directives were retrospectively operative.[46]

71. In a letter dated 6 September 2022, the Public Protector's attorneys objected to the adoption of the 'addendum'. This letter is attached hereto as Appendix **"C".** As appears therefrom, it was contended that:

    71.1. The addendum was irrational, unreasonable and grossly unfair;

[45] Public Protector's recusal application at para 25
[46] Public Protector's recusal application at para 26

71.2. It was not transparently introduced;

71.3. It unlawfully infringed on the Public Protector's right to full legal representation;

71.4. It could not be applied retrospectively;

71.5. It was clearly intended to shield certain witness from accounting for their utterances.

72. It is further contended that, even if the addendum was lawfully introduced, it could not apply to the three witnesses whose evidence was not completed in that their cross-examination was unfinished, *viz.* Messrs van Loggerenberg and Pillay, and Ms Baloyi.

73. We have sought clarity as to the factual circumstances surrounding the addendum and are instructed as follows:

73.1. The proposed addendum that is attached to the Public Protector's application for recusal was never issued or brought into effect. This instruction accords with the fact that annexure **"RA2"** to the Public Protector's recusal application is clearly a draft document, as evidenced by the absence of the Chairperson's signature, as also the word 'insert' where the date should be;

73.2. The proposed addendum was provided to the Public Protector's legal representatives on 1 September 2022. The Public Protector responded thereto as set out in her attorney's letter of 6 September 2022.

73.3. Because the Parliamentary Legal Advisor tasked with dealing with the matter had taken ill, the letter of 6 September 2022 was not responded to before the recusal application was brought.

73.4. As a matter of fact, the addendum has not been brought into effect, and has not been applied, whether retrospectively or otherwise.

74. A perusal of annexure **"RA 2"** indicates that two amendments were envisaged, *viz.* the introduction of a new rule relating to the recalling of witnesses (6A) and the other pertaining to the replacement of Rule 5.9. With regard to the latter, upon a reading of the original rule and its proposed replacement, the latter is clearly procedurally in favour of the Public Protector. In particular, the previous requirement that she had to answer questions put to her by a member of the Committee immediately was replaced with a proviso that this was only required if "the question is one in respect of which she could reasonably be assumed to have immediate and direct knowledge".

75. It seems to us that the proposed introduction of these two amendments can hardly be attributed to an attempt on the part of the Chairperson or the Committee unlawfully and unfairly to undermine the rights of the Public Protector, as alleged in paragraph 9 of annexure **"RA 2"**.

76. In any event, the second ground offered by the Public Protector in support of the recusal application is devoid of facts, except for the attachment of annexures **"RA 1"** and **"RA 2"** thereto. For the rest, this ground consists of assertions, without facts in support thereof, or argument.

77. Implicit in this ground is the assumption that the proposed addendum, and in particular that relating to the recall of witnesses, was deliberately targeted at the Public Protector, and intended by the Chairperson or the Committee to hinder her in the presentation of her case. However, here too, there are no facts proffered by the Public Protector in support of this far-reaching and serious allegation, that impugns the integrity of the Chairperson and the Committee.

78. In assessing the cogency of this ground one must bear in mind that each member of the Committee has sworn an oath or affirmed faithfulness to the Republic and obedience to the Constitution and all other law of the Republic.[47]

79. We are not to be understood as saying that the considerations that are relevant to the presumption of judicial impartiality, which include their oath of office to administer justice impartially[48], apply to members of the Committee, albeit that they have also taken an oath or made an affirmation as set out above.

80. What we do say, however, is that cogent evidence would be required before a finding of bias or the reasonable apprehension thereof could be made.[49]

81. Given the obligation as to onus on the Public Protector we do not consider that the allegations under this ground rise to the level of bias or the reasonable apprehension thereof on the part of the Chairperson or members of the Committee.

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[47] Constitution, s 48 read with Item 4(1) of Schedule 2 thereto.
[48] SARFU, ibid, at para 40
[49] Ibid, with reference to R v S (RD)

Third Ground: refusal to subpoena President Ramaphosa

82. The Public Protector makes the following allegations:

82.1. In August 2022 the Chairperson refused the Public Protector's request to subpoena President Ramaphosa. It is alleged that the evidence of the President is relevant because of "[scathing] remarks against the Public Protector which form part of the impeachment motion, with particular reference to the so-called CR17/BOSASA".[50]

82.2. The Chairperson "unfairly and unreasonably" rejected Mr Herron, MP's proposal to seek further information from the Public Protector regarding the relevance of the President's evidence.[51]

82.3. The Chairperson acted "unreasonably, unfairly and in a manner which exhibited manifest bias against the Public Protector and in favour of [President Ramaphosa] who is also the President of the [ANC] of which the Chairperson is a loyal member".[52]

83. In order to appreciate the complaint, some background is necessary:

83.1. In a letter dated 19 July 2022 the Public Protector's attorneys wrote to the President and requested him to "testify under oath". This letter states that the "most serious" of the charges are those contained in charges 11.3 and 11.4 of the Motion "which relate specifically to the CR17 campaign funding saga also known as the BOSASA case".[53]

[50] Public Protector's recusal application at para 30
[51] Public Protector's recusal application at para 31
[52] Public Protector's recusal application at para 32
[53] Paragraph 4 of the PP's attorney's letter dated 19 July 2022

83.2. The letter also indicates that "in respect of the CR17 matter, the Full Court… plus the 8 Constitutional Court Judges in agreement with the submissions of the President, levelled some of the most scathing accusations against the Public Protector…".[54]

83.3. The letter concludes that the request is made to the President "in order to defend herself against Charges 11.3 and 11.4 of the motion submitted by Honourable Mazzone".[55]

84. Although the Public Protector repeatedly refers to "charges" 11.3 and 11.4, that appears to be an erroneous reference. The Motion refers to only four charges, and thereunder, paragraphs are listed in relation to each of the four charges. The four charges are:

84.1. "Charge 1: Misconduct in South African Reserve Bank matter"

84.2. "Charge 2: Misconduct in the Vrede Dairy matter"

84.3. "Charge 3: Incompetence"

84.4. "Charge 4: Misconduct and/or incompetence"

85. It is under "Charge 4: Misconduct and/or incompetence" that paragraphs 11.3 and 11.4 appear. They read as follows:

> *"11. Adv. Mkwabane has committed misconduct by and/or demonstrated incompetence in the performance of her duties by:*
>
> *…*

[54] Paragraph 7 of the PP's attorney's letter dated 19 July 2022
[55] Paragraph 16 of the PP's attorney's letter dated 19 July 2022

11.3 failing intentionally or in a grossly negligent manner to conduct her investigations and/or make her decisions in a manner that ensures the independent and impartial conduct of investigations; and/or

11.4 by deliberately seeking to avoid making findings against or directing remedial action in respect of certain public officials, while deliberately seeking to reach conclusions of unlawful conduct and impose far-reaching disciplinary measures and remedial action in respect of other officials (even where such conclusions and/or measures and/or remedial action manifestly had no basis in law or in fact).

12. In support of charge 4, I rely on:

…

12.4 <u>The court papers</u> in the matter of President of the Republic of South Africa v Public Protector and Others, Gauteng Division of the High Court, Pretoria, case number 55578/19 – annexure 6

…" (emphasis supplied)

86. The reference to "court papers" in paragraph 12.4 of the Motion is a reference to the affidavits filed in that matter, *viz.* the CR17/BOSASA matter, including those filed by or on behalf of the President.

87. We must point out that clause 3.6.4 of the Directives of the Committee state that:

"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."

The Chairperson's power to subpoena and the constraints on that power

88. The Committee's power to subpoena witnesses (more correctly, to summon any person before the Committee to give evidence or to produce documents) is regulated by the Constitution, the Powers, Privileges and Immunities of Parliaments and Provincial Legislatures Act, 2004 **("the Powers Act"**), the Terms of Reference, and the Directives. We deal with each hereunder.

89. Section 56 of the Constitution provides:

"The National Assembly or any of its committees may-

(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;".

90. Section 14(2) of the Powers Act provides:

"A summons in terms of subsection (1), or section 56(a) or 69(a) of the Constitution, to appear before a House or committee to give evidence or to produce documents must be issued by the Secretary[56] on the instructions of -

(a) the Speaker or the Chairperson[57]; or

[56] Defined as "the Secretary to Parliament"
[57] Defined as the "the Chairperson of the National Council of Provinces"

(b) the chairperson of the committee concerned, acting in accordance with a resolution of the committee and with the concurrence of the Speaker or the Chairperson."

91. Paragraph 4.1(b) of the Terms of Reference provides:

"In the event that an invited witness refuses to submit a sworn statement and/or avail themselves as requested, the Committee may use its power of subpoena as provided for in [the Powers Act]." (Emphasis supplied)

92. Paragraph 5 of Directive 1 provides as follows insofar as is relevant:

"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.

…

5.5 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." (Emphasis supplied)

93. A number of aspects arise from the aforesaid regulatory framework:

93.1. First, the Chairperson has no power to authorise or issue a summons for a member to appear before the Committee;

93.2. Secondly, only the Secretary may issue a summons upon the instruction of the Chairperson of the Committee, and then only after compliance with section 14(2)(b) of the Powers Act;

93.3. Thirdly, the Chairperson has no power to issue such instruction unilaterally. He may only do so after the Committee has so resolved;

93.4. Fourthly, the instruction may only be given after the Speaker has agreed with the Committee's resolution.

94. In light of the regulatory framework it is difficult to see how bias can be attributed to the Chairperson for the fact that the President was not summoned to appear before the Committee.

95. We accordingly sought factual instructions as to this aspect and were instructed as follows:

95.1. The Committee indeed deliberated on the request by the Public Protector to summon the President;

95.2. Before doing so a legal opinion was obtained from Parliament's Legal Advisor;

95.3. During the Committee's deliberations, Mr Herron, MP proposed that further information and details be obtained from the Public Protector as to the basis for the request. This proposal did not find favour with a majority of members;

95.4. Accordingly, the Committee refused the request.

96. Where a non-judicial body is granted the power to issue a subpoena or summon a witness, such power is to be construed restrictively. In Government Employees Medical Scheme and Others v Public Protector and Others[58] the Supreme Court of Appeal said the following in this regard:

> *"Because subpoena powers are extraordinary coercive powers, they 'are generally reserved for courts'. This means that where the power is granted to a body other than a court, the power should be interpreted restrictively. Subpoenas should accordingly only be used where 'there is an appreciable risk, to be judged objectively' that the evidence cannot be obtained by following a less invasive route."*[59]

97. In President of the RSA v SARFU[60] the Constitutional Court said the following:

> *"[243] We are of the view that there are two aspects of the public interest which might conflict in cases where a decision must be made as to whether the President ought to be ordered to give evidence. On the one hand, there is the public interest in ensuring that the dignity and status of the President is preserved and protected, that the efficiency of the Executive is not impeded and that a robust and open discussion takes place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed. Careful consideration must therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The Judiciary must exercise appropriate restraint in such cases, sensitive to the*

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[58] 2021 (2) SA 114 (SCA)
[59] At para 44
[60] 2000 (1) SA 1 (CC) ("SARFU 2")

status of the head of State and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that courts are not impeded in the administration of justice.

[244] The Judge says that he earnestly considered whether the President ought to be ordered to subject himself to cross-examination in the light of his constitutional status. But nowhere in the judgment is there any indication of the factors which were taken into account by him in giving the matter that consideration. Moreover, there is nothing on the papers or in the evidence from which we can conclude that the administration of justice would have been injured in any way if the President had not been ordered to submit himself to cross-examination but, instead, the decision to do so or not had been left to him. In the circumstances, we conclude that the Judge erred in making that order.

[245] Even when exceptional circumstances require the President to give evidence, the special dignity and status of the President, together with his busy schedule and the importance of his work must be taken into account. …"

98. Two observations need to be made in light of the above authority and which are relevant to the question of whether it was appropriate to summon the President to appear before the Committee:

98.1. First, we have already referred to the fact that all the affidavits in the CR17/BOSASA matter were before the Committee, inasmuch as they were referred to in, and attached to, the Motion. There is no indication that the Public Protector, either in the recusal application or in the oral

submissions on her behalf, motivated why such evidence would not suffice in order for her to present her case. In the absence of such motivation it would, in our view, have been a reasonable decision for the Committee to refuse the request.

98.2. Secondly, the request to summon the President demonstrates no sensitivity to the special dignity and status of the President, or regard for his busy schedule and the importance of his work, as referred to in SARFU 2. In these circumstances, once again, the decision of the Committee not to approve the request appears to us to have been a reasonable one.

99. Even if we are incorrect in these conclusions, given the fact that it was not for the Chairperson to permit or refuse the Public Protector's request, the refusal cannot constitute a ground for alleging bias on behalf of the Chairperson, or even give rise to a reasonable apprehension thereof.

100. It accordingly follows that there is no merit in this ground for the Chairperson's recusal.

Fourth Ground: allegedly unduly favouring the evidence leaders and unwarranted proximity to collusion with them and generally adopting an oppositional posture towards the public protector and/or her representatives

101. We must point at the outset that this ground of the application is made in the broadest and vaguest of terms, and that few, if any, details are provided in substantiation of the various allegations levelled at the Chairperson. It is, accordingly, difficult to assess the weight to attach to these allegations, save

for considering the transcript of the hearings and viewing the audio-visual recording thereof. Given the length of the proceedings, and thus the recording, it was not possible to view all of the material.

102. In what follows, we deal with the various allegations in the aforesaid context and subject to those constraints.

103. In so doing, regard must be had to the requirements in *SARFU,* referred to above, *viz.* that the applicant for recusal bears the onus, and that the application must be determined on the correct facts. It is evident that mere allegations, devoid of factual support, would rarely, if ever, meet the test.

104. The first allegation, in paragraph 33.1 of the application, is that the Chairperson rejected "almost all" of the Public Protector's objections, whilst entertaining the objections of the Evidence Leaders. Only one example is provided, of a witness who is not named, but it is mentioned that allegations of sexual harassment had been levelled against him in the context of disciplinary proceedings.

105. From a viewing of the recording, it appears that this witness is Mr Ndou. Prior to lead counsel for the Public Protector, Adv Mpofu SC, commencing cross-examination of the witness on such allegations, the Evidence Leaders requested that cross-examination relating to allegations of sexual harassment, if it be permitted at all, be done in a closed session.

106. After an adjournment Mr Ndou's evidence proceeded in an open session and no further rulings were sought from, or made by, the Chairperson in regard thereto.

107. It is indeed so that many objections were made on behalf of the Public Protector and many were overruled. The Evidence Leaders in contrast made relatively few objections. Having considered the transcript, we cannot say that the manner in which the Chairperson dealt with the Public Protector's objections was indicative of bias. Many of the objections were, in our view, without merit.

108. Objections by the Evidence Leaders were also overruled. One such objection related to the cross-examination of Mr van Loggerenberg as to State capture.

109. As to the allegations in paragraph 33.2 of the application, that the Evidence Leaders were allowed to lead witnesses for any duration that they liked, whilst the Public Protector's cross-examination was unduly curtailed, this certainly does not accord with our perusal of the record and our viewing of the audio-visual recording. In fact, the record and audio-visual recording indicate that the Public Protector's counsel in almost every case had taken the same, and in most instances, more, time to cross-examine witnesses than the time taken to lead those witnesses by the Evidence Leaders.

110. With regard to the allegation in paragraph 33.3 of the application, that the Chairperson had conferred with the Evidence Leaders regarding formal "requests" made by the Public Protector, to the exclusion of her and/or her legal team, no facts whatsoever are provided in this regard. It is accordingly impossible for us to assess this allegation, inasmuch as there does not appear to be any reference in the record to such practise or objections thereto, if they in fact occurred, on the part of the Public Protector.

111. We must again point out that, in terms of the Terms of Reference and the Directives, the inquiry is an inquisitorial one, where, accordingly, not all requirements of a strict adversarial process need be complied with, provided that the overarching requirement of fairness is maintained.

112. The mere fact that the Evidence Leaders may have conferred with the Chairperson with regard to unspecified "formal requests" by the Public Protector is not necessarily indicative of bias or such as to give rise to a reasonable apprehension thereof. Relevant in this regard would be at least the following:

112.1. The nature of the requests;

112.2. Whether the Public Protector requested or expected to be part of the resultant conferrals; and

112.3. How often the Public Protector or her legal team have been excluded from such conferrals.

113. None of these facts have been dealt with in the application.

114. Finally, in this regard, we point out that paragraph 5 of the Terms of Reference makes express provision for certain procedural issues to be determined by the Evidence Leaders in consultation with the Chairperson.

115. Regarding the allegation in paragraph 33.4 of the application that there was undue collusion between the Chairperson and the Evidence Leaders in relation to the correspondence preceding 13 September 2022, this too lacks sufficient particularity to be objectively assessed. The same can be said for

the allegation that such collusion “was not happening for the first or even the last time”.

116. When regard is had to paragraphs 34 and 35 of Appendix “B” hereto, the Evidence Leaders have given a factual account as to why there was input from them in the letter prepared by Adv Jenkins on behalf of the Committee and sent to the Public Protector’s attorney on 12 September 2022. They further explain that the allegations of collusion were addressed by them at the hearing of the recusal application on 21 September 2022.

117. With regard to the allegations of “hostility”, including the allegations of undue levels of impatience, shouting at, and suppression of the Public Protector’s legal representatives, in paragraph 33.5 of the application, once again no specific instances at all are referred to. Once again we have had to have regard to the transcript and the audio-visual recording to assess this complaint.

118. It is apparent that tempers have frayed during what has been a protracted and difficult, indeed unique, process. Same has been exacerbated by the large number of persons participating in the hearings, and the need for the Chairperson to maintain control of proceedings.

119. While it is indeed so that Adv Mpofu has accused the Chairperson of shouting at him, we have not observed any instance where this was indeed the case. While there have been some occasions where the Chairperson has raised his voice when addressing Adv Mpofu, this was sometimes, and not always, when counsel appeared to be disrespecting or insulting witnesses or where he was

attempting to interrupt when he had not been recognised by the Chairperson, and the Chairperson was attempting to make himself heard.

120. The cross-examination of Mr van Loggerenberg by Adv Mpofu was particularly heated and acrimonious and at one point the Chairperson warned counsel not to shout at him or be aggressive or disrespectful to one of the members of the Committee.

121. In another instance, after an attempt by the Chairperson to bring Adv Mpofu to order, the latter responded saying to the Chairperson that he (Adv Mpofu) was the Chairperson's senior in many respects, not only in age, or words to that effect. He also said that the Chairperson would "pay for his conduct". In our view, the Chairperson acted with commendable restraint in dealing with these unfortunate and unwarranted remarks, which reaction is entirely irreconcilable with the notion that he was antagonistic or hostile to Adv Mpofu.

122. In making this observation, we must point out that apparent personal animus towards the legal representative of a party whose case one must determine, would not necessarily be indicative of bias against such a party. Whatever conclusions can be drawn from the existence of such apparent personal animus would always have to be circumstance-specific.

123. With regard to the allegation in paragraph 33.6 of the application that the Chairperson has instinctively rejected any proposals made by the Public Protector unless they have the support of the Evidence Leaders or a member of the Committee, only one example has been raised, in relation to Mr Pillay's evidence, where someone was supposedly whispering to him while he was testifying.

124. When first raised by Adv Mpofu, the Chairperson indicated that he had not heard anything. After Mr Herron confirmed that he had heard someone whispering to the witness, the Chairperson dealt with the matter and the witness gave an explanation. This single example does not, in our view, establish that the Chairperson habitually dismissed proposals by the Public Protector.

125. Regarding the remaining complaints under this ground, contained in paragraphs 34, 35, 36 and 37, the thrust is that there was a so-called "gentleman's agreement" between the Evidence Leaders and the Public Protector's legal team regarding the period which would be afforded the latter to call their first witness after the Evidence Leaders had called their last witness. The allegation is further made that the Chairperson "reneged on the arrangement" and now wishes to give the Public Protector's legal team one working day to call their first witness. In this regard, we make the following observations:

125.1. The high-water mark of the complaint is that there was a so-called "gentleman's agreement". This suggests something less than a firm and binding agreement.

125.2. It is alleged that the arrangement was communicated to the Chairperson, but not that he agreed thereto. We have difficulty understanding how the Chairperson can be accused of reneging on an "arrangement" to which he was not even alleged to have been a party.

125.3. In any event, we find nothing in the Terms of Reference or Directives which would oblige the Chairperson or the Committee to agree to any arrangement reached between the Evidence Leaders and the Public Protector's legal team, to which they had not been privy and to which they had not given their prior consent.

125.4. In fact, paragraph 4.4(b) of the Terms of Reference provides that "in the event that the PP wishes to call a witness, notice of same, together with a copy of sworn statement (sic) by the witness, must be provided to the Committee who will provide the PP with a date and time for the appearance".

125.5. We are also unable to find in the record or the recording any reference to a ruling or indication by the Chairperson that the Public Protector's legal team would only be afforded one day to prepare to call their first witness. Any such ruling or indication would, in our view, be manifestly unreasonable, given the complexity of the proceedings. As we say, however, in the absence of further detail in this regard we cannot assess the cogency or correctness of this allegation.

126. In light of the above, we are of the view that no conclusion of bias or the reasonable apprehension thereof arises from the Chairperson's conduct, viewed as a whole, in respect of this ground.

Fifth Ground: undue comments and interference in High Court litigation

127. Under this ground the Public Protector alleges that the Chairperson "instructed the lawyers representing the National Assembly and the Committee" to bring

to the attention of the Western Cape High Court a Constitutional Court order dismissing the Public Protector's application for the rescission of an order in a matter relating to the proceedings before the Committee.

128. The Public Protector further alleges that on the same day "the National Assembly and/or the Chairperson" issued a media statement celebrating and supporting the order of personal costs against the Public Protector".

129. These assertions are either incorrect, or at best, misleading. The correct facts are as follows:

129.1. The Constitutional Court order was handed down on 24 August 2022.

129.2. On the same day, Mr Leon Manuel of the State Attorney, Cape Town filed a Notice, and an affidavit deposed to by him, in support of an application to place the Constitutional Court order before the Western Cape High Court, in case number WCHC 8500/2022.

129.3. The first respondent in that matter is the Speaker of the National Assembly, while the second respondent is the Chairperson. Mr Manuel acts for both.

129.4. It is not apparent from the document filed at court whether both the Speaker and the Chairperson, or only one of them, instructed Mr Manuel to file the Constitutional Court order.

129.5. Regardless of whether the Chairperson did instruct Mr Manuel, his conduct in this regard cannot be regarded as improper. This is because the order was relevant to the proceedings before the

Western Cape High Court, or at least potentially so, and the Chairperson was cited as a respondent in such proceedings.

129.6. Furthermore, any Court in the Republic is entitled, and indeed obliged, to take cognisance of orders and judgments of the Constitutional Court, however these come to its attention.

129.7. The fact that the Western Cape High Court declined to accept Mr Manuel's affidavit, for reasons not known to us, does not alter the aforesaid position.

130. For the aforesaid reasons we are of the view that no case of bias or the reasonable apprehension thereof is made out in respect of these allegations.

131. Regarding the issuing of the media statement, it is clear from paragraph 41 of the recusal application that the Public Protector is uncertain whether the statement was issued by Parliament or by the Chairperson. We have accessed the media statement via Parliament's website, and it is apparent that it was issued on behalf of the Speaker by the Parliament of the Republic of South Africa, and that enquiries in that regard were to be directed to the Spokesperson of Parliament, Mr Mothapo.

132. On the correct facts, there is, accordingly, no basis for this complaint.

Sixth Ground: rulings related to cross-examination and/or re-examination

133. This complaint appears to have four bases:

133.1. The Chairperson has unduly dismissed an objection related to the direct questioning of the Public Protector at the end of witnesses' evidence.

133.2. The Chairperson has twice allowed members to put their questions to the Public Protector before the end of cross-examination.

133.3. The Chairperson has thrice permitted members to question a witness before their cross-examination is concluded or even commenced. This occurred in the cases of Messrs van Loggerenberg and Pillay, and Ms Thejane. In his oral submissions Adv Mpofu also raised this complaint in respect of Ms Baloyi.

133.4. On 8 August 2022, the Chairperson permitted the Evidence Leaders to cross-examine Mr Sithole, a witness prepared and called by the Evidence Leaders.

134. We deal with each of the above complaints in turn.

135. Regarding the first complaint, on either version of paragraph 5.9 of the Directives, the Public Protector may be asked questions by members, whether proposed orally or in writing, even if at that time she is not giving evidence. Although, as we have pointed out above, the procedure in the two versions differ, the upshot is the same, *viz.* she is required to provide answers to the questions so posed.

136. Even though the Public Protector ultimately rejected the Directives in their entirety, and indicated that she was participating in the Committee proceedings under protest, she has not sought to challenge the Directives in

court. It is thus not open to her to accuse the Chairperson of bias when he applies the Directives.

137. Regarding the second and third complaints, paragraphs 6.7, 6.8 and 6.9 of the Directives provide for the ordinary sequence of the questioning of a witness, *viz.* the presentation thereof, including leading questions if necessary, by the Evidence Leaders, cross-examination by the Public Protector, and thereafter questions by the members.

138. We have already referred on a number of occasions to the fact that the proceedings before the Committee are inquisitorial in nature, not adversarial, and that the overarching requirement is one of fairness.

139. South African courts have long considered fairness to be fact-specific, depending on the circumstances of a given case. The position has been stated as follows :

> *"Fairness must be decided on the circumstances of each case; it may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness."*[61]

140. In the case of Mr van Loggerenberg, after concluding his cross-examination, Adv Mpofu indicated that he reserved the right to recall the witness, if necessary. Thereafter, the members put their questions to the witness. There

[61] Metro Projects CC v Klerksdorp Local Municipality 2004 (1) SA 16 (SCA) at para 13

was no departure from the Directives nor was the process followed unfair to the Public Protector.

141. In respect of Mr Pillay, the witness testified virtually from the Netherlands and was only available on the one day. The Chairperson accordingly allocated time for the Evidence Leaders, the Public Protector and the members to pose questions to the witness. Although the opportunity for questions was accordingly restricted, this was because of the circumstances surrounding the availability of this particular witness. Such restrictions applied to all the parties. It can hardly be regarded as indicative of bias against the Public Protector.

142. In the case of Ms Baloyi, Adv Mpofu far exceeded the time allocated to cross-examine the witness. The Chairperson eventually directed that members would be allowed to ask questions.

143. In the case of Ms Thejane, the Chairperson allowed members to question the witness on 13 September 2022, as Adv Mpofu indicated that he was not in a position to proceed with the witness' cross-examination.

144. Although Adv Mpofu requested a postponement on that day, as further discussed below, the Chairperson ruled that, inasmuch as the witness was available, that members should proceed with their questions.

145. Given that the Public Protector's legal team would have had access to the transcript of the proceedings of 13 September 2022 (and the audio-visual recording) we do not understand how the resultant questioning of Ms Thejane could have been unfair to the Public Protector or prejudiced her in any way. In fact, the opportunity for the Public Protector to ask questions after the

members had asked their questions would, if anything, appear to us to be advantageous to her. In fact, this is a right which she contends for in the next complaint that we deal with immediately hereafter.

146. The next complaint is that the Public Protector, unlike the Evidence Leaders, is not permitted as of right to ask questions arising out of the questions asked by members. The following aspects appear to us to be relevant in this regard:

146.1. Although these are not adversarial proceedings, it is the usual practise that a party who leads a witness is allowed to re-examine the witness after cross-examination. The Evidence Leaders' right to ask questions arising from the Member's questions, afforded by the Directives, must be seen in this light.

146.2. The Public Protector, having cross-examined a witness, would not ordinarily have a further right to ask questions, whether arising from the witness' original evidence and cross-examination, or the members' questioning.

146.3. Nothing, however, prevents the Public Protector, where appropriate or desired, seeking leave from the Chairperson to do so.

147. Regarding the Evidence Leaders' alleged cross-examination of one of their own witnesses, Mr Sithole, the following aspects are relevant:

147.1. Paragraph 6.7 of the Directives permits the Evidence Leaders to ask leading questions in the course of presenting their evidence [Leading questions are generally not allowed when leading one's own witnesses, but are allowed in cross-examination].

147.2. The presentation of evidence by the Evidence Leaders is not in all respects akin to that of a lawyer leading his or her client in chief. The principal purpose of the presentation is not to win the case, but to empower the Committee to assess the merits of the evidence in line with its mandate.[62]

147.3. Accordingly, and to the extent that questioning by the Evidence Leaders might on occasion resemble cross-examination, this is mandated by the Directives, and intended to assist the Committee in the discharge of its function.

148. Accordingly, in our view, none of these complaints can give rise to a conclusion of bias or the reasonable apprehension thereof on the part of the Chairperson.

Seventh Ground: rulings related to the concept of relevance

149. The Public Protector complains that there has been a "skewed and unfair application and abuse of the Chairperson's powers conferred in terms of paragraphs 6.1 and 8 of the Directives".[63]

150. The Public Protector lists the following examples where allegedly irrelevant evidence was allowed by the Chairperson: (a) in relation to what is referred to as "human resources grievances that have no bearing on the charges";[64] (b)

[62] Terms of Reference para 5
[63] Application at para 49
[64] Application at para 50

the relevance of invoices of the Public Protector's legal representatives;[65] and (c) that there was a valid objection that the members should not be permitted to "ask irrelevant questions in respect of the very question with which the Committee is seized, namely whether or not the Public Protector is guilty of misconduct".[66]

151. In relation to the "human resources grievances" the Public Protector does not provide any detail thereof. Nonetheless we point out that the Motion does make reference to these aspects. For example, paragraphs 10 and 11.1 read:

> *"10. Adv Mkhwebane is guilty of misconduct in that [she] has intimidated, harassed and/or victimised staff, alternatively has failed to protect staff… from intimidation, harassment and/or victimisation by the erstwhile CEO of the Office of the Public Protector… in particular the following staff members who have been threatened with or had disciplinary action taken against them unlawfully and on trumped-up charges…."*
>
> *"11.1 failing intentionally or in a grossly negligent manner to manage the internal capacity and resources of management staff, investigators and outreach officers in the Office of the Public Protector effectively and efficiently."*

152. In relation to the Public Protector's legal costs, that too appears to us to be relevant. In this regard the Motion refers to:

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[65] Application at para 56
[66] Application at para 53

"11.2 failing intentionally or in a grossly negligent manner to prevent fruitless and wasteful and/or unauthorized public expenditure in legal costs."

153. With regard to the third complaint under this head, that witnesses were asked irrelevant questions by members as to the very question that the Committee had to determine, this is again unsupported by any facts, including the identities of the members. In the absence thereof, it is impossible for us to assess the cogency of this complaint.

154. We would however point out that, given that the members are laypersons, it would be understandable were the Chairperson to give them some leeway in the questions that they were permitted to ask. This is especially so in light of the Committee's residual power to consider finally all questions of admissibility and relevance once it has heard all the evidence and the submissions of the parties. This is dealt with immediately below.

155. The Public Protector also alleges that the "[t]he Chairperson's refrain that these rulings will be revisited at the time of deliberations are inappropriate and highly prejudicial to the Public Protector".[67]

156. In our view, allowing the evidence on the basis that he has done, does not amount to bias on behalf of the Chairperson. This is so because the Chairperson is empowered to take that approach by virtue of paragraph 8.2 of the Directives, which reads:

[67] Public Protector's recusal application at para 51

> *"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 evidence in full and closing arguments, if any, the Committee in its deliberations may make a final determination regarding such evidence and/or submission and indicate … in its report whether such was taken into account in the making of its recommendations to the Assembly."*

157. Accordingly, allowing the evidence to proceed on the basis that has been done, does not in our view amount to bias or give rise to a reasonable apprehension thereof on behalf of the Chairperson.

158. In the circumstances, none of the grounds raised herein, in our view, amount to bias or give rise to a reasonable apprehension thereof, requiring the recusal of the Chairperson.

Eighth Ground: previous utterances made by the Chairperson prejudging the issues

159. The Public Protector alleges that, prior to the establishment of the inquiry, in July 2019, the Chairperson made statements to her which exhibit bias on his part.[68]

160. The statements are recorded as:

[68] Public Protector's recusal application at paras 58 - 59

"Here we have to budget for incompetence. I will use that word. You said you are being called incompetent and on the basis of the facts before us I think I can venture into that."

161. In our view these statements, which were made before the initiation of the section 194 removal process, do not exhibit bias or give rise to a reasonable apprehension thereof on behalf of the Chairperson.

162. In our view a reasonable observer, if aware of these statements, would consider that they were made two years before the commencement of the Committee's hearings. Such observer would also be aware of the fact that the remarks were made, not in the context of the inquiry, but in parliamentary proceedings where the Public Protector was there to table her office's annual performance plan and its budget plans.

163. They would also bear in mind the principles we have already referred to in respect of judges and laypersons regarding 'absolute neutrality'. As long as the decision-maker keeps an open mind and is prepared to be guided and informed by the evidence and submissions, he or she is not disqualified merely because they have articulated a particular view at some time in the past.

164. In our view, in these circumstances, the principles referred to above, in SAHRC and Goosen, are of application and there is no connection between the Chairperson's statements and the subject matter of the present inquiry.

165. Furthermore, we must point out that it is not the Chairperson who is the decision-maker. The Committee, as a whole, deliberates on the evidence presented, and then conveys its conclusions to the National Assembly.

Ninth Ground: refusal to postpone on 13 September 2022 (availability of legal representatives)

166. The Public Protector alleges that on 13 September 2022 the Chairperson *"unreasonably and unfairly refused to entertain and/or grant a postponement of the proceedings despite a reasonable request based on the non-availability of the Public Protector's legal team as a result of a related emergency playing itself out in the courts"*.[69]

167. The Public Protector further alleges that "[T]he biased and unreasonable ruling on this issue resulted in gross prejudice to the Public Protector and a denial of her fairness rights".[70]

168. Because the events of 13 September 2022 appear to be central to the Public Protector's complaints, we set out a chronological background thereto to place the issue in context. In so doing, we rely on documents in the public domain, on Appendix B hereto, as also on a transcript of the address by the Chairperson on 21 September 2022. Same is attached hereto as Appendix **"D"**.

The background to the events of 13 September 2022

169. On Friday 9 September 2022 the Western Cape High Court handed down judgment in the matter of *"B Mkhwebane & 1 other v Speaker of National Assembly and Others – case number 850/22"*. That same evening the

[69] Application at para 60
[70] Application at para 61

Democratic Alliance filed an application for leave to appeal directly to the Constitutional Court.

170. In response thereto the Public Protector launched urgent proceedings in the Western Cape High Court to enforce the High Court judgment pending the appeal (this application was brought in terms of section 18 of the Superior Courts Act 10 of 2013 ("the urgent application").

171. On Saturday 10 September 2022, the Public Protector initiated her urgent application. That application was set down for hearing on 13 September 2022.

172. At the close of the proceedings on 10 September 2022 the following exchange occurred:[71]

> *"Chairperson:* *Thank you Adv Ncumisa Mayosi, the time is exactly 18:00. It would be unfair for me to proceed and ask that we start cross-examination. I would love to do that but I have to think for everybody else. At this point, colleagues, we are going to pause with our work today. We started at nine o'clock. Then we'll continue with cross-examination led by Adv Mpofu and then questions by Members. We're going to meet therefore on Tuesday and the last witness for phase 1 on Wednesday. On that note, I want to thank you Ms Thejane for now, you're not done yet. We just led evidence for today.*
>
> *Adv Mpofu:* *Chair?*

[71] The above exchange does not appear from the transcript that we were provided with, but appears from the Parliamentary Monitoring Group website: **https://pmg.org.za/committee-meeting/35526/**

Chairperson: *I am told your team is losing, so you want to announce that?*

Adv Mpofu: *Don't tell me Chair. Thank you, Chair. I was saying I have no problem with the pause. But there is a problem that I just want to raise. We don't have to resolve it now, we might resolve it in the so-called backroom*[72] *… But I am raising it here so that the Members are aware of it. We might have a problem, Chair, particularly with Tuesday but… in fact, next week we might have a problem. We have to be in court for… I think on Tuesday, on some urgent matter related to this. Let's just leave it there, Chair, I'll be in touch with the Evidence Leaders. If it is insurmountable. Oh no. I am in the dark.*

Chairperson: *You are very good in the dark. That's fine. We heard you. I thought you had finished putting the matter on the table?*

Adv Mpofu: *Can you hear me now, Chair? Yeah, so there is a real possibility of not being able to do anything this week. At worst, maybe we can squeeze in Wednesday. It is a matter beyond our control. I will discuss with the Evidence Leaders, and you, Chair, at the earliest convenience.*

Chairperson: *That's fine. Thank you, Adv Mpofu. Adv Bawa, if you want to say anything. But for now we are saying I'm closing the meeting on the note of a Tuesday and Wednesday meeting, subject to that discussion that you're going to have in the backroom.*

Adv Mpofu: *I see the thumbs up from Adv Bawa. Now she says* ***iAfrika*** *or something.*

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[72] This appears to be a reference by the Chairperson to informal meetings between the Evidence Leaders and the Public Protector's legal team which occurred outside the presence of the Committee and which was sometimes attended by members of the Parliamentary legal support staff. The purpose of these backroom discussions appears to be for the parties to practically regulate the conduct of the Committee's proceedings and then to convey their proposals to the Chairperson.

Adv Bawa: *Can you hear me Chair?*

Chairperson: *Yes, someone is strangling you there. I am worried because Adv Mpofu is not there. Just use Mayosi's device. You are in the same space… in the Public Protector's Office. Adv Bawa?*

Adv Bawa: *(Inaudible).*

Chairperson: *We can't hear you Adv Bawa.*

Adv Bawa: *I'm saying that the planned programme was for us to finish up this week, to allow for Adv Mpofu's team to have two weeks to line up their witnesses and to then resume around the 27th. We are going to be throwing that entire programme into some disarray because we have several full days at the beginning of October for him to do that. So we are in your hands, Chair. We will endeavour to speak to Adv Mpofu about this. It is also quite undesirable for this witness to have to wait for cross-examination for such a lengthy period which isn't quite ideal as well. I'm hoping we can reach some arrangement on this.*

Chairperson: *We are not going to discuss this here. All you need to know is that we leave this meeting with the arrangement standing for Tuesday 13 September and Wednesday. As the Chair, I will hear from you how you sort things out between now and then. Members will leave here knowing we are set for Tuesday and Wednesday but we will allow the backroom to have that discussion.*

Adv Mpofu: *Thank you, Chair. I am happy with that.*

Chairperson: *Thank you Members."*

173. On Sunday, 11 September 2022, the State Attorney (acting on behalf of the President) wrote a letter wherein the following is recorded:

173.1. They were in the process of preparing an application for leave to appeal to the Constitutional Court in terms of Rule 16(2), alternatively Rule 19. That application was intended to be delivered on Monday, 12 September 2022.

173.2. A request was made that the urgent application not be heard on 13 September 2022, but rather on 16 September 2022.

173.3. On 11 September 2022, Minde Shapiro & Smith attorneys (acting on behalf of the DA) wrote a letter wherein it was recorded that:

173.3.1. The DA intended to oppose the urgent application; and

173.3.2. It was impractical to hear the matter on Tuesday, 13 September 2022 and that they supported the suggestion that the matter rather proceed on 16 September 2022.

174. On 12 September 2022 the Public Protector's attorney wrote a letter to the Chairperson requesting a postponement of the proceedings (scheduled to continue the following day).

175. The letter indicated as follows:

"2. As we indicated on Saturday and as you may be aware from the public domain the Public Protector has been drawn into urgent litigation necessitated by the reaction of the DA and subsequently the President

and the Deputy Public Protector, to the court judgment delivered last Friday setting aside her suspension.

3. … It will be impossible for the Public Protector to consult her legal team and at the same time honour her obligation to attend the enquiry."

176. What had been stated on the preceding Saturday is referred to above. The urgent litigation referred to was in fact an application brought by the Public Protector herself which she set down on Tuesday, 13 September 2022, in order to implement the High Court's order insofar as it related to the PP's reinstatement in office. The DA's application and that of the President were to the Constitutional Court and had not been set down as yet. The effect of these applications was, however, to suspend the WCHC order.

177. The Seanego letter also indicated the following:

177.1. The resultant litigation would take place that week and involve numerous parties on both sides;

177.2. It would be impossible for the Public Protector to consult her legal team and honour her obligations to attend to the inquiry that week (and not only on 13 September 2022);

177.3. Disappointment by the report received from the Evidence Leaders that the Chairperson had rejected the proposal for the adjustment of the program to "*accommodate the unforeseeable clash of dates which was caused by the failure of the Evidence Leaders to finish their case on the first agreed [sic] of 26 August 2022 and even on the extended date of Saturday, 10 September*".

178. On the basis of the Public Protector's abovementioned urgent application, the Public Protector sought a postponement of the section 194 proceedings.

179. In response the Chairperson wrote a letter dated 12 September 2022, wherein the following was *inter alia* recorded:

179.1. That everyone knew by 9 September that the witnesses' evidence would not be completed by 10 September.

179.2. That the State Attorney had indicated that the Western Cape High Court has "*in any event indicated its willingness and availability to hear the Public Protector's urgent application only on Friday 16 September, and not on Tuesday 13 September or Wednesday 14 September. There therefore appeared to be no impediment to the Inquiry proceeding as planned tomorrow until the lunch adjournment, and then proceeding on Wednesday*".

180. As can be seen from the abovementioned letters, the Public Protector had chosen the date of 13 September 2022 for her urgent application, knowing that the Committee was meant to proceed with its business on that day; and that the High Court had indicated that it would only hear the application on Friday, 16 September 2022.

181. Nonetheless, the Public Protector's legal representatives persisted with an application for postponement on the basis of the "*non-availability of the Public Protector's legal team*". However, as demonstrated, those were not the correct facts – the Public Protector's legal team was in fact available on 13 September

2022 because the urgent application was only going to be heard on 16 September 2022.

182. It accordingly follows in our view that this ground of recusal must similarly fail.

Tenth Ground: refusal to postpone on 13 September 2022 (temporary medical unfitness)

183. The Public Protector alleges that the "*refusal of the Chairperson to listen to aspects of the application (for a postponement) and for the submission of the relevant evidence to members was grossly unreasonable, unfair, insensitive, cruel and malicious*".[73]

184. The Public Protector further alleges that the "unacceptable, unlawful, unconstitutional and patriarchal conduct was only underscored by the subsequent and unilateral about-turn by the Chairperson when he (unilaterally) postponed the proceedings scheduled by him for 14 September 2022".[74] The annexure referred at "RA 5" is an email from the Chairperson dated 13 September 2022 at 16h16 which records:

> *"the meeting scheduled for Wednesday 14 September 2022 has been postponed to Monday 19 September 2022.*
>
> *…*

[73] Public Protector's recusal application at para 63
[74] Public Protector's recusal application at para 64

On behalf of the Committee, allow me to wish Adv. Mkhwebane a speedy recovery.

Hereunder is a link to today's proceedings for her attention …"

185. On 21 September 2022, and at the commencement of the proceedings, the Chairperson also addressed the Committee regarding the production of a medical certificate on behalf of the Public Protector at the meeting of 13 September 2022. This is also contained in Appendix **"D"**.

186. In our view, the abovementioned address provides a complete answer to the challenge. Clearly no bias or reasonable apprehension thereof could be attributed to the Chairperson in light of the detailed and considered steps that were taken under these circumstances.

Eleventh Ground: rejection of requests by members to be consulted

187. The Public Protector alleges that, related to the ninth and tenth grounds, is the issue of the Chairperson's conduct in relation to how he has handled requests by certain members of the Committee to consult. She alleges that this amounts to bias on his behalf.[75]

188. The complaint appears to be actual bias. This is evident from the phrases "dictatorial tendencies", "manifest bias", and lacking "impartiality and ethical conduct".[76]

189. In our view the following considerations are relevant to this complaint:

[75] Application at para 65 - 66
[76] Application at para 66

189.1. NA Rule 129AD.(2) provides that the Committee must ensure that the inquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe.

189.2. That the Chairperson is aware of this requirement and has sought to conduct proceedings in light thereof is apparent from the transcript of the Chairperson's address to the Committee on 21 September 2022, Appendix **"D"** hereto.

189.3. There is no express provision in the NA Rules, the Terms of Reference or the Directives regulating requests by individual members to be allowed the opportunity to consult with other Committee members or even with the Committee as a whole.

189.4. The NA Rules, insofar as they may relate to this issue are dealt with hereunder.

189.5. NA Rule 162(2) provides as follows:

> *"A majority of the members of a committee must be present for it to decide any question."*

189.6. NA Rule 164 provides as follows:

> *"The chairperson of a committee –*
>
> *(a) may interrupt or suspend the proceedings or adjourn the meeting; and*

(b) may change the date for the resumption of business, provided reasonable notice is given."

190. It is not apparent from this complaint that the members concerned had the support of other members of the Committee, let alone a majority, in respect of the requests to consult that it is alleged were ignored or refused.

191. However, given the Chairperson's overall authority to perform his functions, tasks and duties, as envisaged in NA Rule 158(2)(c), the Chairperson would, in our view, be fully within his rights to refuse such a request were same not properly motivated or if same did not have the support of a majority of the members of the Committee. We emphasise however that this is not the complaint that is made by the Public Protector under this heading.

Twelfth Ground: misrepresentations made in the public domain

192. The gravamen of this complaint is that, in interviews with Newsroom Afrika and SABC News television channels, the Chairperson called for an investigation by the Legal Practice Council into the conduct of Adv Mpofu during the hearings.

193. Given the exchanges between the two, and in particular the statement by Adv Mpofu that the Chairperson would "pay" for his conduct, which could, in our view, reasonably be construed as a threat, we do not believe that the call for an investigation by the Legal Practice Council is, in itself, improper.

194. It is unclear to us whether the allegation is to be understood as suggesting that the Chairperson has actually laid a complaint with the Legal Practice Council regarding Adv Mpofu's conduct. No such express allegation is made

in the complaint. We accordingly do not comment further in respect of such a factual scenario.

195. However, insofar as the Chairperson may have simply referred to what occurred during the hearings and said that the Legal Practice Council may well wish to investigate Adv Mpofu's conduct, this cannot, in the circumstances, in our view, be objectionable.

THE RECUSAL APPLICATION IN RESPECT OF MR MILEHAM, MP

196. Bias or the reasonable apprehension thereof is alleged in respect of Mr Mileham on three bases:

196.1. He suffers from a conflict of interest inasmuch as he is married to "the complainant", Ms Mazzone, MP and thus has predetermined the outcome of the proceedings.[77]

196.2. Mr Mileham has made, via Twitter, "gratuitous unsolicited and unwarranted attacks on lead counsel for the Public Protector", *viz.* Adv Mpofu. This evidences his "poisoned and biased mind".[78]

196.3. Mr Mileham has associated himself with various statements and conduct on the part of the DA thereby evidencing his bias in these proceedings.[79]

197. We deal with each of these in turn.

[77] Application at paras 75 and 76
[78] Application at paras 77 and78
[79] Application at paras 79 and 81

198. On Sunday, 9 October 2022 we were furnished by the Parliamentary Legal Advisor with a copy of a letter dated 26 September 2022 from Mr Mileham addressed to the Chairperson in relation to the application for his recusal. We shall refer to such letter, where necessary, in this part of the opinion. In paragraph 1 thereof, Mr Mileham advises the Chairperson that he has no intention of recusing himself from the proceedings.

The alleged conflict of interest

199. The following facts are relevant in this regard:

199.1. Mr Mileham and Ms Mazzone have been married since 10 July 2017.

199.2. Their marriage has been and is declared annually in the Register of Members' Interests.

199.3. Their marriage was celebrated in Parliament, during a sitting of the House in August 2017, by the then Speaker. This is on record in Hansard.[80]

199.4. Ms Mazzone, in her capacity as Chief Whip of the DA, submitted the motion for the Public Protector's removal to the National Assembly on 21 February 2020.

199.5. The introduction to the motion reads as follows:

> "*I hereby move <u>on behalf of the Democratic Alliance</u> that the House:" (Emphasis supplied)*

[80] The above facts are contained in Mr Mileham's letter

199.6. Ms Mazzone is no longer the Chief Whip of the DA.

200. Mr Mileham states in his letter that he will consider the evidence before him at the conclusion of the inquiry, and at that point will draw his own conclusions. He also refers to one of the Twitter messages in which he says that he has an open mind, has not yet reached a conclusion and will wait and see what argument and evidence is still to be presented before deciding how he will proceed.

201. There is no reason, in our view, to ignore or dismiss these assertions on behalf of Mr Mileham.

202. In any event, the mere fact that Mr Mileham is married to the person who proposed the motion in her official capacity as the then Chief Whip, cannot, in our view, justify the inference that Mr Mileham has predetermined the outcome of the matter. Such an assumption is not only devoid of facts in support thereof, but is also logically unsustainable. We refer to the principles in SAHRC and Goosen above.

203. Although there has been acrimony in the exchanges between Adv Mpofu and Mr Mileham, these, on our viewing of the recording, cannot be ascribed to bias on the part of the latter. We have not observed any evidence, whether in the transcript or the recording, that indicates that Mr Mileham has made up his mind in relation to the fitness for office of the Public Protector.

204. We are accordingly of the view that the mere fact that Mr Mileham and Ms Mazzone are married, is not sufficient to give rise to a reasonable

apprehension of bias, let alone a conclusion that Mr Mileham is actually biased in this matter.

Twitter attacks

205. The factual basis for this allegation is to be found in annexure **"RS6"** to the recusal application. Same consists of a series of Tweets or postings to Twitter, mainly by Mr Mileham, but on occasion by another person to whom he responds.

206. Having read the Tweets it appears that Mr Mileham's primary concern, as expressed in annexure **"RA6"**, is what he perceives as Adv Mpofu's disrespectful manner of conduct during the proceedings and his refusal to follow the rules and decorum required in the hearings of a Parliamentary Committee. In one of the Tweets he says that Adv Mpofu told him to "shut up" and addressed him by his surname.

207. Mr Mileham does also state that he has not made up his mind in respect of the matter and will wait for all the evidence and argument before doing so.

208. We have already referred to the fact that personal animus between a member of the Committee and one or more of the legal representatives of a party is not, in our view, enough to indicate bias or even given rise to the reasonable apprehension thereof on the part of such member.

209. In our view, and given the generally acrimonious exchanges that have occurred in this matter between Mr Mileham and Adv Mpofu, the fact that Mr Mileham views Adv Mpofu's conduct in this vein, is a view that may well be

shared by other members of the public and, for that matter, other members of the Committee.

210. We are aware that certain of Adv Mpofu's remarks, or his conduct, during the proceeds has garnered widespread media attention and has been the subject of public comment.

211. We do not refer to these facts for purposes of finding that Adv Mpofu has indeed acted in an unacceptable or unprofessional manner. We do not need to do so for purposes of this opinion. What we do however say is that for someone to draw such a conclusion, and then to give expression thereto on social media, does not, in our view, rise to the level of either bias or the reasonable apprehension thereof.

Association with public statements and public conduct of the DA

212. In paragraph 79 of the application it is stated that the factors referred to under this complaint "affect other members of the DA", but it is also contended that it "provides aggravation" in the case of Mr Mileham when read in conjunction with his other conduct.

213. We are not clear what is meant to be conveyed in this paragraph. To the extent that the factual allegations made under this head pertain to the statements or conduct of other members of the DA, we fail to see how these can be attributed to Mr Mileham, and can form a basis for forming the view either that he is biased or that there is a reasonable apprehension that he may be so.

214. In paragraph 80 reference is made to statements by the DA leader, Mr John Steenhuisen, on national television to the effect that members of the DA were popping champagne at the news that the Public Protector had been suspended by the President on 9 June 2022 [the paragraph, presumably incorrectly, refers to a subpoena by the President].

215. There is no allegation that Mr Mileham participated in such celebration, and, accordingly, in our view there is no case for him to answer in this regard. We make the same comment in relation to bias as we have made in respect of the allegation in paragraph 79 of the application.

216. In paragraph 81 of the application there are two factual allegations:

216.1. That the DA committed gross misconduct by attaching witness statements in the section 194 proceedings to court papers;

216.2. That the DA attached the Public Protector's confidential witness list which had only been rendered to the Chairperson of the Committee.

217. Neither of these complaints can, on their face, be attributed to Mr Mileham, and no connection to him is alleged therein.

218. In the first case, it is alleged that the DA committed gross misconduct by attaching witness statements to court papers. There is no allegation that Mr Mileham facilitated this or was even aware thereof. He has no case to answer.

219. The second allegation is that the Public Protector's confidential witness list had only been rendered to the Chairperson yet the DA also attached this, presumably to its court papers, although this is not stated expressly. Here too

there is no allegation, either that Mr Mileham in some way was involved, or even aware of, the furnishing of the list to the DA, or of its being attached to the DA's court papers. In the absence of such allegations, once again, there is no case for Mr Mileham to answer.

Conclusion as to the accusation of bias or the reasonable apprehension thereof

220. As we have indicated above, our conclusion is that none of the various grounds relied upon by the Public Protector in support of her application for the recusal of either the Chairperson or Mr Mileham has merit. We are, however, aware that the required approach is to also consider whether, even if taken on its own, none of the allegations make out a case for recusal, when weighed together or cumulatively, recusal is not warranted.

221. In SARFU the Constitutional Court said the following:

"Counsel for the fourth respondent based his argument on the cumulative effect of the facts and complaints made against the Judge concerned. He submitted that each of them might not in itself may be a cause of the apprehension but that each that should be placed in a 'basket' and weighed together in the determination of the reasonableness of the apprehension. We have no difficulty with that approach subject to the 'basket' only receiving those facts which are correct and may contribute to a reasonable apprehension of bias."

222. In our view, even taken cumulatively, the allegations against the Chairperson do not rise to the level of bias or the reasonable apprehension thereof. Apart from the absence of factual content to many of the allegations, they appear to

be premised on a conception of the proceedings that they are conventional legal proceedings. This is, however, not the case, for the reasons we have dealt with above.

223. On any dispassionate review of the proceedings thusfar, the Chairperson has not displayed conduct that demonstrates that he has prejudged the matter, and that his mind is closed to any submissions or evidence to the contrary. That, ultimately, is the test for bias or the reasonable apprehension thereof.

III. THE LEGAL IMPLICATIONS OF THE APPLICATION AND THE MANNER IN WHICH IT SHOULD BE PROCESSED BY THE COMMITTEE

224. As appears from the above, we are instructed by the State Attorney to provide an independent external opinion to the Committee as to the merits and legal effects of the recusal application brought against the Chairperson and Mr Mileham. No other member of the Committee is the subject of such application.

225. Section 34 of the Constitution provides as follows:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

226. In SARFU[81] the Court said the following:

[81] Ibid

"[30] A Judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that such judge might be biased, acts in a matter that is inconsistent with s34 of the Constitution, and in breach of the requirements of s165(2) and the prescribed oath of office.

….

[31] …. If one or more of its members is disqualified from sitting in a particular case, this Court is under a duty to say so, and to take such steps as may be necessary to ensure that the disqualified member does not participate in the adjudication of the case."

227. In SARFU counsel who moved the application for recusal stated the applicant's position as follows:

"In the first place we submit it is an individual decision of the particular Presiding Officer concerned. Only in the event of a particular Presiding Officer against whom the application is aimed or directed, deciding not to recuse himself, we submit, does it become a matter for the Court as a whole to objectively determine whether on the objective test he ought to recuse himself."[82]

[82] At para 33

228. Counsel for the respondent had a different view. He submitted that if a particular Judge were to place on record that he or she was in fact biased in favour of one of the litigants, there would be an obligation on such Judge to withdraw from the case. If, however, the case was concerned only with a reasonable apprehension of bias, the decision should be the decision of the Court and not the individual Judge.[83]

229. In weighing these contentions the Court held as follows:

> *"It is not necessary to decide what the position would have been in the present case if one or more of the Judges whose recusal was sought took the view that no grounds existed for his recusal, but the majority of the Court took a different view. Counsel were in agreement that the whole Court should participate in the hearing and that the Judges should consider the application individually and collectively. This is how the matter was dealt with and in the result the Judges whose recusal was sought, and the remainder who were asked to look to their conscience, considered their own positions individually, and also considered the application as a whole, collectively, and concluded unanimously that none should be recused."*[84]

230. Arising from the aforesaid, we are of the view that the following principles can be gleaned and are of application:

230.1. When faced with an application for his or her recusal, the individual Judge or other decision-maker should consider her or his own

[83] Ibid
[84] Ibid at para 34

conscience and decide whether she or he is indeed biased, or has given the impression to the reasonable observer that he or she is biased. If so, they should recuse themselves.

230.2. If they do not recuse themselves, the remaining judges or decision-makers must consider the matter and reach their own conclusion as to whether or not the decision-maker whose recusal is sought, is either biased or has so conducted herself or himself that the reasonable observer might believe this to be the case.

230.3. Where, as is the case here, the body tasked with reaching such conclusion is one that must take decisions by a majority vote, such vote would determine the course to be taken, not the views of the individual members.

230.4. If they conclude that such decision-maker is neither biased nor has reasonably given the impression that he or she is biased that is the end of the matter. As in SARFU, they may well be called upon to give a ruling or judgment to such effect.

230.5. If, however, they conclude that the decision-maker whose recusal is sought is either biased, or has so conducted herself or himself that a reasonable apprehension exists that she or he might be biased, they must take steps to ensure that such member does not continue to participate in proceedings.

231. Applying these principles to the facts of the present matter, our view is as follows as to the legal implication of the application and the manner in which it should be processed by the Committee:

231.1. The legal effects of the application have been explained above.

231.2. Given that we have been instructed by the State Attorney on behalf of the Committee, our opinion will be furnished to the State Attorney, who will furnish it to the Committee's Legal Advisor.

231.3. We assume that the opinion will thereafter be circulated among Committee members, including the Chairperson and Mr Mileham.

231.4. Mr Mileham has already indicated that he does not intend recusing himself. His position is thus known.

231.5. We are not aware that the Chairperson has, similarly, made his position clear, and his attitude is accordingly not, as yet, known.

231.6. In the event that either the Chairperson or Mr Mileham decide ultimately to recuse themselves, that will be the end of the matter, in respect of that member.

231.7. Should either the Chairperson or Mr Mileham refuse to recuse themselves, the Committee will have to consider the matter and reach its own conclusions as to the recusal application.

231.8. If it too is of the view that the application is without merit, no further steps need to be taken by the Committee.

231.9. If, however, a majority of Committee members are of the view, contrary to the view set out in this opinion, that either the Chairperson or Mr Mileham should recuse themselves, the Committee would have to address the issue.

231.10. In such event, the matter would have to be resolved in terms of the NA Rules, or ultimately, by the National Assembly itself.

231.11. We have already referred to NA Rule 154 which deals with the composition of Committees.

231.12. NA Rule 155(1) provides as follows:

> *"Unless these rules provide otherwise, the parties appoint the members of a committee and advise the Speaker accordingly".*

231.13. NA Rule 156 deals with Alternates. It provides as follows:

> *"(1) Alternates may be appointed for one or more specific members of a committee.*
>
> *(2) An alternate acts as a member when the member for which the alternate was appointed -*
>
> *(a) is absent; or*
>
> *(b) has vacated office, until the vacancy is filled."*

231.14. *NA Rule 157, dealing with the term of office of members of the Committee, provides as follows:*

> *"(1) Subject to Section 49(4) of the Constitution, members of a committee and alternates for members are appointed until the Assembly's term expires or the Assembly is dissolved, whichever occurs first.*
>
> *(2) A member of a committee ceases to be a member and an alternate for a member ceases to be an alternate if a whip of the party to which that member or alternate belongs, or a designated representative of that party, gives notice to the Speaker, in writing, that the member or alternate is to be replaced or withdrawn."*

232. Accordingly, and should the position arise that the majority of the members believe that the Chairperson or Mr Mileham should recuse themselves but they refuse to do so, it would appear that recourse would have to be had to the whip system in order to secure the member's removal from the Committee and his replacement by an alternate, in the event that same has been appointed by the party concerned.

233. In the event that no alternate has been appointed, the only course open would appear to be the appointment of a new member to the Committee.

IV. THE EFFECT ON THE WORK OF THE COMMITTEE IF IT FINDS THAT THERE IS A REASONABLE APPREHENSION OF BIAS ON THE PART OF THE CHAIRPERSON OR MR MILEHAM, OR IF EITHER RECUSE THEMSELVES

234. In either of the events postulated under this section, as we have said, an alternate, or possibly a new member, would have to replace the Chairperson or Mr Mileham.

235. In the event that an alternate is available, and he or she has attended the Committee's proceedings thusfar, this should not present a difficulty. If however, the alternate member has not attended the Committee's proceedings, or if an entirely new member of the Committee has to be appointed, a number of considerations arise.

236. The general principle is that where powers are conferred on a statutory body, such body must be properly constituted in order to exercise its powers validly. The principle has been stated thus:

> *"When several persons are appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together; there can only be one adjudication, and that must be the adjudication of the entire body. … and the same rule would apply whenever a number of individuals were empowered by Statute to deal with any matter as one body; the action taken would have to be the joint action of all of them…, for otherwise they would not be acting in accordance with the provisions of the Statute."*[85]

237. Inasmuch as, in the present matter, a quorum is provided for, the Committee would, in the absence of the Chairperson or Mr Mileham, be able to proceed with its work provided that the required quorum was at all times met.

---

[85] Schierhout v Union Government (Minister of Justice) 1919 AD 30 at 44

238. In the event of the Chairperson being disqualified, a new Chairperson would obviously have to be appointed.

CONCLUSION

239. For the aforesaid reasons we conclude as regards the four questions that we have been asked to address as follows:

239.1. As to the first question, i.e. the applicable legal test for bias in a multi-party process, we refer to what we have stated above.

239.2. With regard to the various grounds raised in the application for the recusal of, respectively, the Chairperson and Mr Mileham, we refer to what we have said in relation to each of the grounds. We conclude that, whether viewed in isolation or cumulatively, neither application demonstrates conduct on the part of either the Chairperson or Mr Mileham which indicates bias or which would give rise to a reasonable apprehension thereof. Neither member is, accordingly, required to recuse themselves.

239.3. With regard to the legal implications of the application, and the manner in which it should be processed, we advise as set out above.

239.4. With regard to the effect on the work of the Committee in the event that it finds that there is a reasonable apprehension of bias on the part of the Chairperson or Mr Mileham, or if either recuse themselves, we refer to what we have set out above.

240. We so advise.

ISMAIL JAMIE SC
ADIEL NACERODIEN
Chambers
Cape Town
10 October 2022

“A”

Committee for Section 194 Enquiry

Correspondence and relevant documents for briefing

Date	DESCRIPTION	
28 November 2019	1. Announcements, Tabling and Committee Reports – 28 November 2019	
22 February 2022	2. Terms of Reference In Respect of The Section 194 Enquiry – 22 February 2022	
14 July 2022	3. Directives: Signed – 14 July 2022	
17 July 2022	4. Letter from EFF to Speaker: Abuse of Power and Unreasonable Treatment of Member of the Committee on Section 194 Enquiry - 17 July 2022	
16 July 2022	5. Letter to Seanego: Member’s Questions to the Public Protector – 16 July 2022	
17 July 2022	6. MEMO to members: Witness 3 Mr Tebogo Kholofelo Kekana: 17 July 2022	
18 July 2022	7. Letter from Seanego: Issues of Concern for Tabling Before the Section 194(1) Committee – 18 July 2022	

19 July 2022	8. Letter from Seanego to President – 19 July 2022	
20 July 2022	9. Parliamentary Legal Opinion: Conflict of interest of Member/Spouse – 20 July 2022	
21 July 2022	10. MEMO to Chairperson: Alleged Conflict of interest in respect of Hon Mileham – 21 July 2022	
22 July 2022	11. Letter to Seanego: Response to Letter of 18 July 2022 - 22 July 2022	
22 July 2022	12. Letter to Thembinkosi – 22 July 2022	
25 July 2022	13. Public Protector's Answers to Members' Questions – 25 July 2022	
28 July 2022	14. Directives (Amended): Signed – 28 July 2022	
28 July 2022	15. Letter from DPP: Waiver – 28 July 2022	
29 July 2022	16. Letter to the Public Protector – 29 July 2022 (signed)	
1 August 2022	17. Letter from EFF: Questions to Loggerenberg – 1 August 2022	
4 August 2022	18. Active Citizen Movement: Open Letter – 4 August 2022	
5 August 2022	19. Letter from EFF: Conduct Evidence Leaders – 5 August 2022	
8 August 2022	20. Letter from Seanego: Summoning of President – 8 August 2022	
9 August 2022	21. Letter to Werkmans Attorneys: Request for Information – 9 August 2022	
9 August 2022	22. Letter to Malatji Attorneys: Request for Information – 9 August 2022	
9 August 2022	23. Letter to Savage, Jooste & Adams Attorneys: Request for Information – 9 August 2022	

9 August 2022	24. Letter to Legal Resource Centre: Request for Information – 9 August 2022	
9 August 2022	25. Letter to RW Attorneys: Request for Information – 9 August 2022	
9 August 2022	26. Letter to Minde, Schapiro & Smith Attorneys: Request for Information – 9 August 2022	
9 August 2022	27. Letter to Webber Wentzel: Request for Information – 9 August 2022	
10 August 2022	28. Letter from Seanego: Cross-examination – 10 August 2022	
10 August 2022	29. Letter from Werkmans Attorneys – 10 August 2022	
10 August 2022	30. Letter from RW Attorneys – 10 August 2022	
11 August 2022	31. Letter to PPSA CEO: Emails on server – 11 August 2022	
15 August 2022	32. Letter to PPSA CEO – 15 August 2022	
15 August 2022	33. Committee for Section 194 Enquiry: Legal Opinion – 15 August 2022	
15 August 2022	34. Letter from Werksmans: Cross-examination –15 August 2022	
15 August 2022	35. Letter to Basani Baloyi: Request to appear before Committee – 15 August 2022	
16 August 2022	36. Letter to Seanego: Response to President Summoning – 16 August 2022	
16 August 2022	37. Letter from Malatji Attorneys: Request for Information – 16 August 2022	
19 August 2022	38. Letter from Seanego: Response Letter – 19 August 2022	
24 August 2022	39. Rule 6(5)(a) application to the WCHC – 24 August 2022	
24 August 2022	40. Letter from Seanego: Provisional Witness List – 24 August 2022	

25 August 2022	41. Letter to Seanego: Attorneys – 25 August 2022	
31 August 2022	42. Letter from Seanego: 4 Witnesses – 31 August 2022	
2 September 2022	43. Letter to Seanego: Granting Extension – 2 September 2022	
5 September 2022	44. Responding Affidavit: EFF Questions – 5 September 2022	
6 September 2022	45. Letter from Seanego: Rejecting Addendum Recall Witnesses – 6 September 2022	
12 September 2022	46. Letter to Seanego – 12 September 2022	
12 September 2022	47. Letter from Seanego: Adjustments Programme – 12 September 2022	
12 September 2022	48. Letter to Seanego: Adjustments Programme – 12 September 2022	
12 September 2022	49. Letter to Mr Holomisa: Postponement – 12 September 2022	
12 September 2022	50. Letter from UDM: Postponement – 12 September 2022	
14 September 2022	51. Letter to Seanego: Confirmation of Attendance – 14 September 2022	
15 September 2022	52. Letter from Seanego: Confirming Attendance – 15 September 2022	
16 September 2022	53. Letter to Seanego: Recusal Postponement – 16 September 2022	
16 August 2022	54. Letter to Seanego: Summonsing of President – 16 September 2022	
19 September 2022	55. Letter to Mr Hlatshwayo – 19 September 2022	
20 September 2022	56. Letter to Heller and Seepe: Request for Information – 20 September 2022	
20 September 2022	57. Recusal Application: Seanego – 20 September 2022	

20 September 2022	58. Letter to Wekunene BS – 20 September 2022	
20 September 2022	59. Annexures to letter to Wekunene BS – 20 September 2022	
20 September 2022	60. Letter to Werksmans Attorneys – 20 September 2022	
20 September 2022	61. Letter to Ms Basani Baloyi – 20 September 2022	
20 September 2022	62. Letter to Mr Ngobeni: Request for Information – 20 September 2022	
20 September 2022	63. Letter to Seanego: Request/application for adjustment of programme – 20 September 2022	
	64. Time utilization table: Approximate time allocated for, - Issues for the record - Evidence leading - Cross examination - Members' Q&A	

“B”

INFORMATION PROVDED BY THE EVIDENCE LEADERS

1. Pursuant to a meeting attended with Adv Jamie SC and Adv Nacerodien on Saturday, 1 October (10h00-11h15) for the purposes of advising as to the events that transpired prior to 13 September 2022, the Evidence Leaders indicated that they would prepare a note reflecting the factual background pertaining to what they relayed orally at the meeting, so as to avoid any dispute or allegations of collusion as to what information the evidence leaders are providing the counsel briefed to advise the Committee on the recusal application.

2. This is that Note.

3. During the course of the proceedings - in the week of 29 August 2022 - Adv Bawa SC and Adv Mpofu SC, in consultation with the Chairperson, agreed that there would be an attempt to conclude oral evidence of the remaining four witnesses, being the evidence of Mr Sithole, the Manager: Legal Services, the two Executive Managers, Ms Motsitsi and Ms Thejane, as well as the evidence of the Senior Manager: Legal Services, Mr Van der Merwe on 8, 9 and 10 September 2022.

4. Adv Bawa SC expressed her reservations that these witnesses could be completed within three days. Her view was based on an estimation of how much time had been taken with up to that point. Even where witness statements were not lengthy, the evidence of a single witness took longer than expected. Mostly, the Committee had been unable to complete more than one witness per day and the witness statements

of the Executive Managers – still to testify - were longer than a number of the other statements.

5. By end of Friday, 9 September 2022 the cross examination of Ms Motsitsi has not been completed, and it was clear that the evidence of the remaining witnesses would not be concluded on 10 September 2022 as had been hoped. Apart from Saturday, the evidence leaders were of the view that a further 2 days would be required, realistically, to complete their evidence.

6. As a Committee meeting had been scheduled for Wednesday, 14 September 2022 members would be available as well as the PP's legal team. This was known as it had previously been discussed that that date could be used for hearings.

7. The evidence leaders' assessment was that one day would not suffice both for the cross-examination of Ms Thejane and the evidence of Mr Van der Merwe. As Adv Mpofu SC had previously advised that he was not available on 15 and 16 September 2022 – as he was engaged with another matter – the Committee Secretary was asked to ascertain whether Members were available on Tuesday, 13 September 2022. It was confirmed on Saturday morning - 10 September - that the members could be available for the morning of 13 September 2022, but not in the afternoon, as their presence was required in Parliament for other commitments.

8. On the morning of 10 September 2022, at 08:57, Adv Bawa SC called Adv Mpofu SC to liaise with him about this. As Adv Mpofu SC was not answering his phone, she posted on a joint WhatsApp chat shared with the Evidence Leaders, the Parliamentary Legal Advisor, Ms Ebrahim, and the PP's legal team, asking that he return her call – either then or during the tea adjournment.

9. Adv Mpofu SC returned the call during the lunch adjournment (at 13h49) advising that the arrangements for Tuesday and Wednesday, 12 and 13 September 2022 for further evidence could not be confirmed because the PP was intending to launch an urgent application following on a leave to appeal application launched by the Democratic Alliance on the evening of 9 September 2022, after the Full Bench judgement delivered earlier on the same day. He indicated that he was not sure as to what their position would be and would revert to Adv Bawa SC.

10. Hence, when the PP's legal team launched her application later on 10 September 2022 seeking urgent relief and setting it down for hearing on Tuesday, 13 September 2022, they had already been informed that the Committee sought to sit on 12 and 13 September 2022 to deal with the remaining witnesses. This was done to ensure minimal disruption to the schedule in that a period of 14 days had been requested by the PP's legal team between the evidence of Mr van Der Merwe and the date of the PP's first witness. This would have been possible before the proceedings resumed again on 27 September as per the then Committee programme, at which time the members of the Committee would have become available to sit for a continuous period from then until 14 October 2022 for the hearing of the PP's evidence, as opposed to only being available 2 or 3 days a week (inclusive of a Saturday) as a consequence of other Parliamentary commitments. The only explanation provided as why the urgent application was set down for hearing on the same date as a Committee hearing was given by Adv Mpofu SC during his oral address to the Committee on 13 September 2022:

> *"One of the reasons why we wanted to do this matter this week, was, Chairperson, exactly because we didn't want, for example, to set it for another*

week and then we start interfering with the program of this Committee, too much."

11. We do not understand this to be so because had the application indeed been set down the following week, it would have allowed for the evidence of Ms Thejane and Mr van der Merwe to have been completed and there would have been no disruption other than hearing dates having to be reshuffled.

12. At the close of the proceedings on 10 September 2022 the following exchange occurred (as detailed on the PMG website. The Committee hearing transcript appears to have excluded this):

"Chairperson: *Thank you Adv Ncumisa Mayosi, the time is exactly 18:00. It would be unfair for me to proceed and ask that we start cross-examination. I would love to do that but I have to think for everybody else. At this point, colleagues, we are going to pause with our work today. We started at nine o'clock. Then we'll continue with cross-examination led by Adv Mpofu and then questions by Members. We're going to meet therefore on Tuesday and the last witness for phase 1 on Wednesday. On that note, I want to thank you Ms Thejane for now, you're not done yet. We just led evidence for today.*

Adv Mpofu: *Chair?*

Chairperson: *I am told your team is losing, so you want to announce that?*

Adv Mpofu: *Don't tell me Chair. Thank you, Chair. I was saying I have no problem with the pause. But there is a problem that I just want to raise. We don't have to resolve it now, we might resolve it in the so-called backroom … But I am raising it here so that the Members are aware of it. We might have a problem, Chair, particularly with Tuesday but… in fact, next week we might have a problem. We have to be in court for… I think on Tuesday, on some urgent matter related to this. Let's just leave it there, Chair, I'll be in touch with the Evidence Leaders. If it is insurmountable. Oh no. I am in the dark.*

Chairperson: *You are very good in the dark. That's fine. We heard you. I thought you had finished putting the matter on the table?*

Adv Mpofu: *Can you hear me now, Chair? Yeah, so there is a real possibility of not being able to do anything this week. At worst, maybe we can*

squeeze in Wednesday. It is a matter beyond our control. I will discuss with the Evidence Leaders, and you, Chair, at the earliest convenience.

Chairperson: *That's fine. Thank you, Adv Mpofu. Adv Bawa, if you want to say anything. But for now we are saying I'm closing the meeting on the note of a Tuesday and Wednesday meeting, subject to that discussion that you're going to have in the backroom.*

Adv Mpofu: *I see the thumbs up from Adv Bawa. Now she says* iAfrika *or something.*

Adv Bawa: *Can you hear me Chair?*

Chairperson: *Yes, someone is strangling you there. I am worried because Adv Mpofu is not there. Just use Mayosi's device. You are in the same space… in the Public Protector's Office. Adv Bawa?*

Adv Bawa: *(Inaudible).*

Chairperson: *We can't hear you Adv Bawa.*

Adv Bawa: *I'm saying that the planned programme was for us to finish up this week, to allow for Adv Mpofu's team to have two weeks to line up their witnesses and to then resume around the 27th. We are going to be throwing that entire programme into some disarray because we have several full days at the beginning of October for him to do that. So we are in your hands, Chair. We will endeavour to speak to Adv Mpofu about this. It is also quite undesirable for this witness to have to wait for cross-examination for such a lengthy period which isn't quite ideal as well. I'm hoping we can reach some arrangement on this.*

Chairperson: *We are not going to discuss this here. All you need to know is that we leave this meeting with the arrangement standing for Tuesday 13 September and Wednesday. As the Chair, I will hear from you how you sort things out between now and then. Members will leave here knowing we are set for Tuesday and Wednesday but we will allow the backroom to have that discussion.*

Adv Mpofu: *Thank you, Chair. I am happy with that.*

Chairperson: *Thank you Members."*

13. Efforts to liaise between Adv Bawa SC and Adv Mpofu SC on the evening after the hearing of 10 September 2022 were not successful as they missed each other's calls.

14. On Sunday 11 September 2022 at 13:26, Adv Mpofu SC sent the following WhatsApp message to Adv Bawa SC:

> *"Dear Nazreen*
>
> *As indicated yesterday we may have a serious problem with sitting or being ready to participate in the enquiry proceedings this coming week. As you know following our last meeting it was jointly anticipated that the Evidence Leaders would call their last witness yesterday. While we fully understand and appreciate the reasons why that could not be achieved it does have an inevitable negative impact on the rest of the programme.*
>
> *To avoid last minute inconvenience to so many members and other persons we propose the following:*
>
> *1. That the next sitting to finish the evidence of Mr Thejane and Adv Van der Merwe be scheduled for 19 and/or 20 September 2022. (It is our view that one day should be sufficient but you expressed a different view that we may need two days.)*
>
> *2. That to allow for the requested two weeks break which has previously been agreed to in principle, the next sitting thereafter be scheduled for the week of 3 October 2022 on any day which is suitable to the members and others.*
>
> *Please convey and discuss this proposal with the Chairperson as part of the "backroom" engagements. We look forward to hearing from you and are, of course, available to chat in the meantime.*
>
> *Many thanks*
> *Dali & PP legal team"*

15. Adv Bawa SC responded as follows:

> *"Hi Dali*
>
> *I think ur proposed dates may be a problem as those days are parliament dates that members not avail but let me check when Thembinkosi and the chair and revert."* (at 13:29)

16. Adv Bawa SC had also informed Adv Mpofu SC that the members were reserved for Tuesday morning and for a full day on Wednesday as the Secretary had to do so in the meantime; and that she would revert once she received a response in relation to

the request made to the Chairperson. She also enquired from Adv Mpofu SC as to whether there had been confirmation received that the urgent application would indeed be set down for hearing on Tuesday. Adv Mpofu SC advised as follows:

> *"Not yet … still waiting for the directions of the JP or the Full Court … but either way we will be embroiled in that litigation this week."* (13:32)
>
> *"We can sit on the 22nd"* (13:33)

17. From this exchange it appeared that there was no confirmation as to whether the legal representatives of the other parties were available for the matter to be heard, or even whether the Court was so available on Tuesday, 13 September 2022.

18. Adv Bawa SC then forwarded the WhatsApp message received from Adv Mpofu SC to Ms Adhikari, who was substituting for Ms Ebrahim, the Parliamentary Legal Advisor allocated to the Committee. The latter had become temporarily unavailable due to ill health. Adv Bawa SC indicated to her that this proposal from Adv Mpofu SC would need to be raised with the Chairperson.

19. Adv Bawa SC further indicated to Adv Mpofu SC as follows:

> *"I am concerned that if u can't sit this week and it spills over we have another problem. TN[1] I think has it planned for us to run from 27 Sep thru to 14th Oct."*

20. She further indicated that she was waiting to hear from the substitute legal advisor to whom she had sent a message.

[1] Mr Thembinkosi Ngoma, the Secretary for the S 194 Committee

21. At approximately 15:14 Adv Bawa SC received the following What App response from Ms Adhikari:[2]

> *"Dear Counsel*
>
> *I have raised the request with the chairperson as per the proposal of the PP legal team. The Chairperson has indicated that this cannot be agreed to as the knock on impact will create significant programming challenges and the urgency (that has now been created) would also impact on the witnesses (especially the one currently under cross) who has been scheduled according to the current revised program. In light of the fact that PP has a big legal team, he will expect that they manage the challenge within the team."* (This was received at 15h14 and relayed to Adv Mpofu SC immediately)

22. Adv Mpofu SC responded "*As expected … thanks*.

23. There was no further communication on 11 September 2022.

(i) <u>12 September 2022</u>

24. On 12 September 2022[3], the Secretariat received a letter from Seanego Inc. which was forwarded to the Chairperson, and to which the Chair referred to in his presentation to the Committee on 21 September 2022 - at the inception of the hearing – as having been received at approximately 12h00 from the Committee Secretariat, requesting a postponement of the hearings for the following day. The letter also requested a response from him by 13h00 – a deadline which he subsequently indicated to the Committee that he could not meet.

25. Whilst the Seanego letter sought to reflect that it was a response to the "*revised draft program*" of the Committee, Adv Mpofu SC, as reflected above had been apprised of

[2] Adv Bawa SC did not communicate directly with the chairperson.
[3] The relevant correspondence is provided herewith and the contents are self-explanatory

the hearing dates on Saturday, 10 September 2022 already. The letter indicated as follows:

> *"As we indicated on Saturday and as you may be aware from the public domain the Public Protector has been drawn into urgent litigation necessitated by the reaction of the DA and subsequently the President and the Deputy Public Protector, to the court judgment delivered last Friday setting aside her suspension."*

26. What had been stated on the preceding Saturday is referred to above. The urgent litigation referred to was in fact an application brought by the PP and unilaterally set down on Tuesday, 13 September 2022 to implement the High Court order insofar as it related to the PP's reinstatement into office. The DA's application and that of the President were to the Constitutional Court and had not been set down. The effect of these applications was to suspend the WCHC order.

27. The Seanego letter also indicated the following:

    27.1. The resultant litigation would take place that week and involve numerous parties on both sides;

    27.2. It would be impossible for the PP to consult her legal team and honour obligations to attend to the Inquiry that week (and not only the day);

    27.3. Disappointment by the report received from the Evidence Leaders that the Chairperson had rejected the proposal for the adjustment of the program to "*accommodate the unforeseeable clash of dates which was caused by the failure of the Evidence Leaders to finish their case on the first agreed [sic] of 26 August 2022 and even on the extended date of Saturday, 10 September*".

28. The allegation that the detail was as a consequence of a failure on the part of the evidence leaders is not correct. There were a number of events that had preceded 26 August 2022 and 10 September 2022 that had resulted in witnesses' evidence not being finalized, including loadshedding, resulting in Mr Ndou's testimony having to be abandoned and rescheduled for another date; the deliberation of an application to have some evidence led in a closed hearing; extensive evidence from Ms Mogaladi resulting in her evidence spanning over 24 and 25 August 2022. She was led in evidence in chief for three hours and 45 minutes, and her cross-examination lasted nearly six hours. In addition, further time was spent when Adv Mpofu SC challenged a waiver which had been afforded to employees at the Public Protector's Office to give evidence before the Committee. In addition, on 26 August 2022, Adv Mpofu SC sought to place matters on the record using the first half an hour of the proceedings to do so. Arising from the nature of the evidence led under cross-examination of Mr Sithole, and after member's questions, the evidence leaders re-examined him more extensively. This led to constant and repeated objection from Adv Mpofu SC repeatedly objecting and many interjections.

29. The cumulative effect, among others, was that two witnesses that were anticipated to be led during the week of 18 – 26 August 2022 could not be led and had to be carried over. Initially it had been envisaged that only the evidence of Mr Van der Merwe would have had to be heard in the week commencing 5 September 2022. But this was not to be and instead it was four witnesses, with a further affidavit having been uploaded for Mr van der Merwe on the Sunday, 11 October 2022. with the only days available for sitting that week being 8, 9 and 10 September 2022.

30. It was also not the first request on the part of the PP to be accommodated and for certain dates to be excluded in the scheduling. These could (and were) accommodated as far as we are aware. For example, when the litigation in the High Court proceedings was underway and Adv Mpofu SC had timeously indicated the days on which it was set down, and the time he required away from the s 194 Inquiry to prepare for that matter, the schedule was adjusted and those dates were excluded from the scheduling. In fact, this had been set down prior to the commencement of the Inquiry.

31. On being apprised of the formal request seeking a postponement, Adv Bawa SC liaised with Adv Mpofu SC in an endeavour to reach a *via media* between the PP's team, requiring time during the course of that week, and requesting that the concerns raise by the Chairperson be considered, vis-à-vis the need for the Committee's proceedings not to be unduly delayed.

32. During the course of that communication, Adv Mpofu SC indicated that he did not anticipate that his cross-examination of Ms Thejane would take more than an hour given that the issues had previously been canvassed by other witnesses. Adv Bawa SC proposed that he completes the cross-examination of Ms Thejane on the morning of 13 September 2022 so that the witness was not left hanging, as it were; and further that, in respect of Mr Van der Merwe his evidence in chief be led and his cross-examination then be left over for the following week. This proposal meant that no work was immediately required from the PP's legal team for purposes of preparing for the hearing, save for the cross-examination. As it had been anticipated that this would have been done Saturday, 10 September, but it had not occurred because of time constraints it was presumed that it would not require much preparation, if any.

Further, that as the hearings were recorded, when Mr van der Merwe was being led it would not have required the PP's entire legal team to be present as they could watch the recording afterwards to prepare for cross-examination.

33. Adv Mpofu SC indicated that he was meeting with the parties in the urgent application and would revert thereafter. Thereafter, he indicated to Adv Bawa SC that the PP's legal team was not amenable to that proposal.

34. The Chairperson's response and reasons are apparent from the letter sent to Seanego Inc, on 12 September 2022. The letter had initially been prepared by Adv Jenkins. He had sought assistance from the Evidence Leaders in respect of the background as he was merely standing in on the matter for Ms Ebrahim and needed to advised as to what precisely had preceded this letter. Information was relayed to him, and the letter was then finalised by Ms Adhikarie. As she is currently on leave the evidence leaders do not know when precisely on 12 September it was sent to Seanego Inc.

35. It is with reference to this response that there were allegations of "collusion" levelled against the Chairperson and the evidence leaders, which were addressed by the evidence leaders at the hearing on 21 September 2022, and were refuted. This is evident from the transcript of the proceedings.

36. The Chairperson's letter of 12 September 2022 is self-explanatory and sets out his reasons for refusing the postponement as sought on 12 September 2022, and yet allowing for some aspects to stand over for the following week.

37. The Chairperson also made a ruling on 13 September 2022 after affording Adv Mpofu SC an opportunity to motivate his application orally. This too appears from the transcript of 13 September 2022.

38. Should any further information be required from the evidence leaders by the counsel rendering advice to the Committee this could be addressed in writing and we will endeavour to respond as expeditiously as possible.

N BAWA SC
N MAYOSI

"C"

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Your Ref: Mr. Dyantyi 6 September 2022

Our Ref: TNS/PUB1/0028

Mr QR Dyantyi
Chairperson: Committee of the Section 194 Enquiry
Parliament Building
Parliament Street
Cape Town

Per Email: [redacted]

Dear Honourable Chairperson,

RE: "ADDENDUM 1 TO THE AMENDED DIRECTIVES"

1. During one of the most recent sitting of the Section 194(1) Committee sittings, you mentioned a "*new*" rule in response to our reminder that certain witnesses needed to be recalled in order to finish their testimony.

2. Subsequently and during a legal teams' meeting held at our request between the Public Protector's team and the Evidence Leaders on 1 September 2022, an undertaking was made to furnish us with a copy of the alleged "*new*" rule or directive.

3. On the same day, the Evidence Leaders indeed sent us a copy of two such new rules concerning the recalling of witness (Directive 6A) and a replacement of Rule 5.9. The purported or intended effective date of these provisions is not clear from the documentation supplied.

4. We are instructed to respond as set out below.

5. We reject the *ex post facto*, unilateral and piece-meal introduction of the new provisions for various reasons, including but not limited to the following:

   5.1. their introduction is irrational, unreasonable and grossly unfair;

   5.2. they have not been transparently introduced;

   5.3. they unlawfully depart from the clear import of the Constitutional Court judgment awarding the Public Protector full legal representation;

   5.4. they cannot be applied retrospectively; and

   5.5. they are clearly intended to shield certain witness from accounting for their utterances.

6. In any event and even if the new directives were lawfully introduced, which is denied, they cannot apply to the three witnesses whose evidence was simply not completed in that, as we had indicated, their cross-examination was unfinished. Those witnesses are:

   6.1. Johan van Loggerenberg;
   6.2. Ivan Pillay; and
   6.3. Basani Baloyi.

7. A distinction obviously has to be made between recalling a witness "*who has testified*" as provided in the new 6A and one who has not completed his or her testimony, as applies to the three witnesses referred to above. In any event they are not being recalled "*to provide further evidence*" but simply to finish their unfinished initial testimonies.

8. As previously indicated any failure to allow the Public Protector to complete her cross-examination of any witness, which is a blatant limitation or denial of her right to cross-examine, must automatically result in the evidence of that witness being discarded in totality. Any consideration or acceptance of such untested evidence by the Committee would clearly defeat the purpose of granting the Public Protector her hard won right to legal representation in particular and fairness in general.

9. Regarding the purported "*repeal*" of Directive 5.9 we have previously and repeatedly voiced our view that it is an unprecedented and incorrect procedure whose disruptive effect can only serve to undermine the rights of the Public Protector and to render her evidence, if and when it is subsequently presented, to be meaningless. No useful purpose will be served by repeating our earlier submissions in that regard. Suffice to say it is still rejected.

DEMAND

10. In view of the above, we are instructed to demand as we hereby do, that:-

    10.1. the document headed "*Addendum to the amended Directives*" be withdrawn forthwith;

    10.2. immediate consultations and/or engagements be initiated with the Public Protector regarding any proposed amendments to the Directives as contained in the so-called addendum; and

    10.3. arrangements be made to recall the three witnesses referred to above so that they may complete their evidence before requiring the Public Protector to present any evidence or call her witnesses.

11. Failure to attend and accede to these demands, by no later than 15 September 2022 may result in further legal steps being taken on an urgent basis without any further notice to you. Such steps may include approaching the appropriate court of law, as a matter of last resort, to raise these and the plethora of other issues of serious concern which we have previously raised, all in vain. The latest conduct constitutes the last straw in the serial violation of the constitutional rights of the Public Protector at the hands of your Committee.

12. We look forward to your urgent response.

Yours faithfully

SEANEGO ATTORNEYS INC.

“D”

Chair’s oral statement made on 21 September 2022 in respect of what transpired after the meeting of 13 September 2022 (medical certificate)

….. I’m going to make a couple of remarks from the chair and put certain issues on record, especially with reference to what transpired after we adjourned the hearing on Tuesday, 13 September…..

By way of background, what was scheduled on 13 September was the cross-examination of Ms Nelisiwe Thejane, who I've just excused now which would have been followed by Members’ questions and the evidence of Mr van der Merwe the following day. Prior thereto on Monday 12 September, a letter was received at approximately 12 o'clock by the Committee Secretary from the PP legal team requesting a postponement of 13 September. A response was expected from me at one o’clock on the same day. Obviously, it was a deadline I could not meet as I was required to make a fair determination.

After considering this request, I responded. Included in that response was a proposal on the way forward. This proposal included the PP legal team cross-examination of Mr van der Merwe be extended but to allow the cross-examination of Ms Thejane to be completed. Adv Mpofu indicated to the evidence leaders that he would not likely be more than an hour in such cross-examination. A copy of the correspondence will be made available by the Secretariat.

Shortly after the proceedings commenced on 13 September, and whilst awaiting the arrival of Ms Thejane, who was delayed due to technical difficulties that we all witnessed. Adv Mpofu SC indicated that he was seeking a postponement of the sittings of the Committee for 13 and 14 September, as foreshadowed in the letter of the previous day.

The postponement application was sought in the context of a court application that had been brought by the PP in the Western Cape High Court on an urgent basis. This – I saw that, I don't know maybe somebody does not want to see the Chair. I don't want to suspect who that is, but it must be fixed, but it won't stop. I'm sure you can hear – following a ruling of the Western Cape High Court which had found the President's conduct in suspending the Public Protector to be unlawful, and at the same time upholding the legality of the proceedings of this Committee and declining to interdict or stop the work of this Committee. Hence in the absence of any interdict, the Committee is to proceed with its work.

In his submissions in support of the hearings postponement, extensive references were made to the papers received for application for leave to appeal to the Constitutional Court, filed by the Democratic Alliance and the Public Protector on enquiry evidence. At this stage no document has yet been filed by the respondents in the Western Cape High Court. However, in addressing the postponement, Adv Mpofu indicated that he had been involved in the drafting of papers until the early hours of that morning to meet a filing deadline of 9:00. As such, he was not able to prepare for the cross-examination of Ms Thejane.

Adv Mpofu also raised with the Committee that the Public Protector had taken ill but that he did not have the details or any further information of such illness at that stage. Neither was he submitting an apology for the PP’s nonattendance at the hearing. It was made clear that he had no knowledge as to what ailed the PP.

Prior to this announcement, neither I nor the Secretariat had received notice that the PP would not be in attendance as expected. Te only available information provided was that the PP had gone to the doctor.

After hearing Adv Mpofu's request and following questions from the evidence leaders and the views expressed by some Members, I ruled that the cross-examination of Ms Thejane will stand over given that Adv Mpofu was not ready to proceed.

However, mindful that the proceedings were already behind schedule and in the light of the Committee rules which require that it must conduct its business within a reasonable time, I ruled that Members may proceed to question Ms Thejane. As I was of the view that we had secured the witness already and that time should not be wasted. In considering this I had due regard to the fact that the PP and her legal team, in any event, had no entitlement to intervene in the questions from the Members and that if irrelevant questions were asked they would simply be disregarded.

I was also mindful of the fact that this is not a court of law, and the PP is not being prosecuted. Underlying this process is one of fairness and no prejudice would result to the PP from such questions given that the witness would be available at a later stage to answer questions under cross-examination. In the event any issue arises during the PP's absence and the questions posed to Ms Thejane, the PP legal team would have ample opportunity to be able to take instructions on any aspect raised in the PP's absence.

Weighing this up, I determined that the PP would not be prejudiced in any way. I further instructed the Secretary to ensure that all Members' questions and Ms Thejane's answers be sent to the PP team. The Secretary advised that he ensured that the recording was sent directly.

It was after commencing with the Members' questions that Adv Mpofu sought to interject and display what was referred to as a sick certificate, which by that stage he had received. I did not allow this in the middle of Members' questions, as you would remember. You will have noted that to date, I've taken care to ensure that sessions are not disrupted and that witnesses are, where possible, not made to sit through what is essentially Committee business. This disrupts the flow and is unfair to the witness and to Members. I indicated clearly that the PP's sick certificate should be sent to the Secretary. I did not deem it appropriate for me to permit the showing of a document that contains personal information of the PP regarding her health in her absence and without the express consent of the PP, which we did not have. I've been at pains to remind the Secretary to ensure that personal information is not displayed where there is no lawful basis.

Although the Secretary sent the certificate to me via email at 11:44 during the Committee proceedings, as the hearing was still in progress, I considered it only once the meeting adjourned at 12:44. Having satisfied myself with the content and noting it provided for the PP to be off for the rest of the week, I liaised with the Secretariat instructing that Committee hearings would not be convened during the dates reflected on the medical certificate, to amend the schedule and postpone the hearings.

The postponement application was duly considered, and relief was granted with reference to the arguments made. In addition, I had ruled that only the direct evidence of the next witness would be heard, alleviating the need for preparation for cross-examination on the part of the PP legal team prior to the Western Cape High Court hearing brought by the PP. It would therefore be incorrect to suggest or say that I refused to grant a postponement despite the PP being ill. On the contrary, I immediately took a decision to postpone the hearings upon consideration of the certificate.