#### IN THE SECTION 194 ENQUIRY

**HELD AT THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA, CAPE TOWN**

In respect of

**THE REMOVAL OF THE PUBLIC PROTECTOR OF SOUTH AFRICA, ADV B MKWHEBANE**

**CHAIRPERSON’S RESPONSE TO THE PUBLIC PROTCTOR’S RECUSAL APPLICATION**

# INTRODUCTION

1. Following the written application for recusal lodged on 20 September 2022 on behalf of the Public Protector (‘**the PP**’) and oral representations made by Adv Mpofu SC on 21 September 2022, seeking the recusal of myself and the Honourable member, Mr Kevin Mileham,[[1]](#footnote-1) from the committee established in terms of section 194 of the Constitution (‘**the Committee**’), at a Committee meeting held on 23 September 2022 I undertook to provide the Committee with my response to the recusal application.
2. Taking the facts into account and having taken time to carefully consider the PP’s application, I have decided not to recuse myself. I do so in the belief that the PP has failed to establish any grounds upon which it can be said that I am biased or that my conduct may give rise to an apprehension of bias. I am satisfied, for the reasons set out below, that there is no basis for me to stop discharging the important public function with which I have been charged.
3. I remain open-minded in my conduct of the proceedings and can say with certainty that I have not reached any firm conclusions in relation to any of the content of the Motion. I have no preconceived notions as to the outcome of the Committee’s work. Indeed, I have emphasised that this must be the position adopted by all members until the conclusion of the hearings. I have listened to the evidence and I am acutely aware that the PP has not as yet led her evidence (as has been indicated she intends doing) and has not yet had the opportunity to provide her oral evidence. Nor has the PP, save for a handful of questions, answered Members’ questions as yet.
4. There can be no doubt that the Committee’s process must be fair or that that standard has been met. The PP has been aware of the contents of the Motion for a significant period of time. Prior to the commencement of the hearings, the PP was afforded the opportunity to make written representations to the Committee, but declined to do so. In addition, the PP has an opportunity to deal with the written and oral evidence presented by the Evidence Leaders, may lead her own evidence and respond to questions from members and the Evidence Leaders, and will, at the end of the hearings, be afforded another opportunity to make representations to the Committee in relation to any findings or recommendations prior to such being adopted by the Committee. She has, at all times, had the benefit of her legal team’s assistance, and will continue to do so.

**Ad paras 4, 14, 16, 18, 19:**

1. The recusal application is considered in light of the written and oral submissions made on behalf of the PP.
2. Whilst I undertook to provide the Committee with a detailed paragraph by paragraph response to the application, this has not always been possible because the application mostly appears to be generalised and non-specific, with little or no elaboration in the oral argument.
3. Where the application has sufficient detail, I have endeavoured to deal with it, and to address the context in which the conduct complained of occurred.
4. As chairperson I have had to ensure that I maintain order in the hearings. I do not draw a comparison with a court – where much of what has occurred would not have been permitted – because the Committee is not a court and I am not a judge. I also made it clear early in the proceedings that the members would not be curtailed in the questions they ask and that, in the final analysis, should any of the questions asked and/or responses given be irrelevant to the Motion, then it simply meant that the Committee would disregard them when preparing its report. This remains a unique process. However, it cannot be forgotten that this is essentially an oversight process and as members we are constitutionally bound to hold the PP to account.
5. With reference to the alleged *“warnings”* said to have been repeatedly issued, I did not regard remarks made by Adv Mpofu SC to be *“warnings”*, and instead applied myself to chairing the proceedings without any fear or favour and in the best interest of the Enquiry.
6. I recognised that I needed to ensure, to the best of my ability, that the process continues and that it not be allowed to be side tracked or derailed. So, where such comments were made, I did not respond in a similar vein. Because it was not in the best interest of the work of the Committee to challenge Adv Mpofu SC on every single comment made, I did not do so. If I had sought to do so, I would have had to make specific rulings on each comment, which would have given rise to a plethora of objections, with the process and questioning of witnesses, in particular, being constantly and inevitably interrupted and delayed. My priority was (and remains) to ensure the orderly conduct of the proceedings, that it would not further or progress the work of the Committee to engage Adv Mpofu SC by taking issue with every statement or interjection uttered. The Rules require that the process be completed within a reasonable timeframe and the Constitution requires that all constitutional functions be performed diligently and without delay.
7. The vague references in the recusal application to a worsening situation ostensibly “*aggravated by the conduct of the Chairperson*” are not borne out by the facts and are denied.
8. However, at all material times it has been my intent that, once the Evidence Leaders had completed the leading of oral evidence, I would place on record my position in relation to the litany of accusations/threats/comments and what have now been referred to as “warnings”. I discussed this approach with Ms Fatima Ebrahim, the parliamentary legal adviser assigned to the Committee.
9. Indeed, the relationship with Adv Mpofu SC, the PP and the remainder of the legal team through the proceedings remained, in my view, cordial and professional.
10. With particular reference to the issue of relevance of the evidence of witnesses, when objections were raised and I was satisfied with the explanation provided by the Evidence Leaders as to why such witness was being led, I allowed the evidence to continue. Conversely, I have made rulings regarding relevance which were in favour of the PP in circumstances where the Evidence Leaders, or even members, have questioned particular lines of questioning pursued by Adv Mpofu SC on behalf of the PP.

**Ad para 5:**

1. When complaints were raised in respect of the participation of Mr Mileham, legal advice dated 20 July 2022 was obtained from the Chief Legal Adviser, who, inter alia, advised that Mr Mileham’s marriage to Ms Mazzone did not, in and of itself, preclude him being a member of any parliamentary committee. This was accepted by the Committee and no further objection was raised by any member.
2. The Motion was lodged by Ms Mazzone in her capacity as the Chief Whip of the Democratic Alliance (‘**DA**’). Mr Mileham, as confirmed in the legal advice received, is entitled to occupy his position as a Member of Parliament and participate in committees to which he is appointed. On the basis of the abovementioned advice, no steps were taken for his removal from the Committee.
3. There is in any event no Assembly Rule that empowers me, as Chairperson, to permanently remove any member from the Committee. To now impute a failure to exercise a power I did not have to constitute a basis for recusal on my part is without any merit.
4. I do recall that there were instances where I both allowed and disallowed points raised by Mr Mileham – as was the case with some other members of the Committee.

**Para 6:**

1. As a matter of principle it does not behove any legal practitioner to “*threaten*” (or“*issue warnings*”to) a Presiding Officer.
2. At all material times I have endeavoured to keep order in the meeting. For various reasons it remains a constant challenge to ensure that those who have the floor are permitted to speak uninterrupted and without interjections. This task is made harder by the fact that the Committee is so large and, as Chairperson, I must ensure that all role players are afforded the opportunity to participate meaningfully. There has been no “*worsening or deterioration*” of any alleged situation; nor have the conditions become intolerable or impossible for the Enquiry to continue.

**Ad paras 8 and 17:**

1. I deny that the standards of fairness, reasonableness and transparency have been breached. I accommodated Adv Mpofu SC in numerous respects –in respect of affording him more time in cross-examining witnesses, in the manner in which he conducted his cross examination, and being permitted to raise whatever objections he sought to make and placing matters “*on record*”. The accusation of a lack of transparency appears to relate to an allegation of collusion with the Evidence Leaders, which they have already dealt with during their oral address, and to which I refer below.
2. To the extent that there have been rulings made during the proceedings, these have occurred in circumstances predominantly where Adv Mpofu SC has refused to heed the ruling of the Chairperson, to allow other persons who were speaking to complete what they were saying and where he sought to interject without leave. These efforts to maintain order in the meeting do not constitute unfair treatment, nor can they be construed as bias. It is my duty to maintain the order and decorum of the proceedings.

# FIRST GROUND: SCOPE OF THE ENQUIRY

1. I did not act unfairly or unreasonably, or display bias or substantial prejudice or act in a manner that gives rise to any reasonable apprehension of bias in relation to any rulings made in relation to the scope of the Motion before the Enquiry.
2. Whilst Adv Mpofu SC on a number of occasions raised this same objection, I indicated several times that it was the Motion in its entirety that served before the Committee. As Chairperson I was not entitled to narrow the scope of the Motion. It is the Motion that is before the Committee, and not only the grounds on which the Independent Panel (after conducting its desktop exercise) concluded that there was *prima facie* evidence of misconduct and/or incompetence. The Independent Panel was not empowered to amend the Motion in any way, as is being suggested in **para 22**.
3. Just as the Independent Panel’s finding that there is *prima facie* evidence on some of the grounds is not sufficient, in and of itself, to justify a finding by the Committee that a particular charge has been proven, so too is the Independent Panel’s conclusion that on some grounds there was no *prima facie* evidence sufficient to justify a conclusion that the Committee should not have any consideration to and dismiss the charge on that basis alone.
4. In considering whether I had the power to broaden or narrow the Motion, I considered the provisions of s 194 of the Constitution, the legal framework within which the Committee operates, as well as the relevant decisions of the Speaker, the Independent Panel and the National Assembly. This was also supported by Ms Ebrahim, with whom this was discussed, and who so advised during the discussions at the Committee meeting regarding this issue on 20 July 2022. The advice was to the effect that neither the Chairperson nor the Committee had the power to narrow the scope of what the National Assembly had referred to it on 21 June 2021.
   1. Under section 194(1)(b) of the Constitution, the Committee is tasked with making a finding on whether the PP has committed misconduct and/or is incompetent.
   2. The Committee’s function under the National Assembly Rules is ‘*to consider motions initiated in terms of section 194 and referred to it*’[[2]](#footnote-2) and to ‘*establish the veracity of the charges and report to the Assembly thereon.*’
5. For this purpose the Committee is entitled to consider oral evidence (which the Independent Panel was prohibited from considering in any form), further evidence adduced by Adv Mkhwebane and/or or the Evidence Leaders at the enquiry, and evidence (oral and otherwise) flowing from the public-participation process which parliamentary committees are obliged to embark upon.[[3]](#footnote-3)
6. The PP’s complaint appears to be one of material prejudice solely because the PP would be called upon “*to produce evidence to rebut charges in respect of which the Independent Panel has ruled that no prima facie evidence or case exists.*”(**at para 23**). I am not able to deal with this claim further, factually, as the precise nature of the material prejudice was not elaborated upon by the PP. As far as I am aware, the PP remains on full pay and her reasonable legal costs, travel and accommodation are being covered by the PPSA.
7. Accordingly, there is no basis for this ground of complaint.

# SECOND GROUND: AMENDMENT AND MISAPPLICATION OF THE DIRECTIVES

1. I did not act procedurally irrationally, unreasonably or to the prejudice of the Public Protector.
2. Under rule 183 of the Rules, the Chairperson is empowered to determine directions and procedures for the Committee. The Directives allow for amendment from time to time, as well as for condonation for non-compliance.
3. The facts as set out in this section of the PP’s recusal application are not a correct reflection of what actually transpired:
   1. The Committee’s legal team proposed an addendum to two provisions of the Directives.
   2. The proposed addendum was provided to the PP’s legal team for comment on 1 September 2022.
   3. The PP objected to only one of the proposed changes and did so in a letter dated 6 September 2022, which the legal adviser was to consider and advise on. As Ms Ebrahim informed the Committee on 23 September 2022, she received the letter in the afternoon and immediately realised that there was a miscommunication as the letter spoke of the draft addendum as a matter that had been finalised, whereas this was not the case. She intended raising this with me at a meeting held that evening but took ill during the meeting and was hospitalised, with the consequence that this letter was not responded to and did not receive attention prior to this application being brought. However, at all material times the draft addendum was never applied nor was it ever adopted and issued by myself.
   4. The factual position is thus that the addendum has to date not been adopted, the Directives have not been amended in accordance with the proposed addendum and there has been no stipulation that the proposed changes must operate retrospectively.
4. Accordingly, there is no merit to this ground as a basis to impute any bias.
5. For the sake of completeness I dispute that in relation to Messrs Loggerenberg and Pillay or Ms Baloyi that it had been “*agreed*” that they would be recalled as indicated in **para 28.**
   1. It was only after the completion of the cross-examination that Adv Mpofu SC sought to reserve his rights to recall Mr Van Loggerenberg. The latter testified on 13 to 15 July. The Evidence Leaders led him for approximately 4 hrs, 20 min on the first day. Adv Mpofu SC thereafter utilised nearly 8 hours. The members questioned him for 1 hr, 10 min and did not complete their questions – the outstanding questions were posed in writing and a response was received.
   2. Mr Pillay’s testimony was subject to a one-day restriction. He is not in South Africa and there appears to be no indication as to when he intends returning. The Evidence Leaders were so informed, and relayed this to Adv Mpofu SC. The proceedings commenced at 09h00 (instead of 10h00) for this reason. Mr Pillay was examined by Adv Bawa SC for approximately 2½ hrs, cross-examined by Adv Mpofu SC for approximately 3½ hrs and the members questioned him for approximately 2 ½ hrs.
   3. In relation to Ms Baloyi, Adv Mpofu SC objected to her evidence for the first 20 min of the day. She was led for approximately 3 hrs (with interruptions) and she was cross-examined for approximately 3½ hrs (almost uninterrupted). The members asked questions for approximately 2hrs 15 min.
6. The Evidence Leaders informally made contact with the witnesses (or their representatives), given Adv Mpofu SC’s request, and requested that they voluntarily avail themselves to further oral questions from Adv Mpofu SC, in an endeavour to see whether his request to recall them could be accommodated and whether they would willingly return. They refused. The Evidence Leaders requested that the Secretariat formally address letters to them, so that their response could be formally recorded, which has occurred. This was in an attempt to accommodate the request from Adv Mpofu SC, notwithstanding that Adv Mpofu SC had been afforded a reasonable time to conduct his cross-examine.
7. The Directives allow for questions to be answered in writing. The witnesses have indicated a willingness to do so under oath. The PP’s legal team is not amenable to furnishing such questions, nor has there even been any indications as to the nature of the questions to be asked.
8. I never issued the addendum, unilaterally or otherwise, and therefore never ‘*unfairly shifted the goalposts*’ as alleged (para 28 of the recusal application).
9. Given what is stated above, there is no impediment to the PP’s preparation of the witnesses she seeks to lead, and therefore no conceivable prejudice (real or perceived) that could conceivably give rise to any reasonable apprehension of bias. There are no “*predicaments*” that have been created. The Committee’s stance in relation to the Motion does not make it impossible to lead evidence.
10. Of course, the effect of the recusal application has resulted in a delay in the completion of the evidence of Ms Thejane (yet to be cross-examined) which is highly undesirable, and the leading of the evidence of Mr van der Merwe.
11. To date the PP’s legal team has not filed any witness statements and it appears, that to date there are no witnesses that they seek to call and in respect of whom a summons is required – other than the President, in relation to which the Committee refused the request for a summons.

# THIRD GROUND: ISSUING A SUBPOENA TO MR RAMAPHOSA

1. I did not act unfairly or unreasonably or show manifest bias.
2. I make no comment at this juncture in relation to the allegation that the President had made “*scathing remarks*” against the PP. In this regard, as indicated by the Evidence Leaders and pursuant to the Directives, the Evidence Leaders will be referring to the affidavits filed in court proceedings, as opposed to calling witnesses, and in relation to the CR17/BOSASA aspects, as indicated by the Evidence Leaders in oral submissions.
3. During oral submissions Adv Mpofu SC claimed that I had blocked the subpoena out of a desire to ‘*pander*’ to Mr Ramaphosa and whatever ‘*largesse*’ he can offer. The written submissions suggest that I had “*ruled in a manner*” which exhibited manifest bias against the PP and in favour of Mr Ramaphosa, based on a presumption that I am a “*loyal*” member of the ANC. I have reiterated that I approach my task with an open mind. Loyalty or membership of a political party of which the President is a member does not automatically give rise to any perception of bias.
4. The decision complained of was not mine – it was the Committee’s. And the Committee acted lawfully and reasonably. Legal advice was obtained and considered.
5. Thus this claim is false and made without evidence.
6. In the Committee’s consideration of whether or not the President should be summoned, Mr Herron stated that the legal opinion provided by the Legal Services was very helpful, and that, before deciding whether the President should be called or not, the legal team for the PP or the PP herself needed to submit a substantive motivation that met the very high standard of relevance that the legal opinion set out. He was of the view that the Committee should not simply say the President’s evidence was irrelevant, and that the PP had an obligation to convince the Committee that the evidence that the President could give was relevant and in what respects. Mr Herron suggested that further information was required from the PP because the letter sent lacked the specificity required by the relevant clause in the Directives. The requirements of the Directives are known to the PP’s legal team, and are clear as to what was required, in seeking a summons.
7. This request did not carry the support of the Committee.

# FOURTH GROUND: FAVOURITISM, COLLUSION AND AN OPPOSITIONAL POSTURE

1. I deny that I have shown bias or favouritism towards the Evidence Leaders.
2. A degree of cooperation is required between the Chairperson, the Committee Secretariat and support team, and the Evidence Leaders for the Committee to function effectively. This is not unusual, unfair or prejudicial.
3. This cooperation is reflected in the Terms of Reference (clauses 4, 6 in particular).
4. ‘*Collusion*’ implies something sinister, underhanded and/or unlawful, and denotes an effort to conceal what should be disclosed with an improper purpose in mind. The legal meaning was addressed by the Evidence Leaders in general on 21 September 2022. Whilst the written application for recusal makes such allegations, there is no evidence provided to sustain such conclusion and none was specifically referred to in the oral address to which I can specifically respond.
5. This is so because there is no evidence of collusion. Simply put, it has not occurred. All interactions that I have had with the Evidence Leaders have been in the proper discharge of our respective functions.
6. The time allocated to the Evidence Leaders is less than the time either allocated to and/or times ultimately appropriated by Adv Mpofu SC (notwithstanding allocations) for cross-examination of witnesses (in addition to the times given to him, at his request, for addressing and/or placing on record numerous matters). The Evidence Leaders have seldom raised objections that have required a ruling, when compared with the number of times these have been raised by the PP’s legal team and even the members. The Evidence Leaders have generally not sought to belabour points; they have followed rulings and have seldom led evidence over set limits that required me to reprimand them.
7. The only exception to date was the evidence of Mr Sithole in reply, when at the outset it was made clear by the Evidence Leaders that further questions were required arising from the cross-examination, and I afforded them the latitude. There were then numerous objections and repeated interruptions during the further questioning of Mr Sithole, which resulted in the flow of the questions constantly being interrupted with the resultant effect that it took longer. All of this, I believe, the record will show.
8. To the best of my recollection, I have not always ruled in favour of the Evidence Leaders. This too the record will show.
9. Paragraph 33 of the recusal application has various sub-paragraphs that detail alleged examples of bias and favouritism. They are incorrect and/or unfounded and I address each in turn.

## Para 33.1 of the recusal application

1. The PP submits that I have rejected ‘*almost all objections*’ she put forward. As only one example is provided, it is all I can meaningfully deal with. It is incorrect:
   1. Adv Mpofu SC indicated in his oral address that he had raised various objections that the evidence led by the Evidence Leaders was irrelevant, which were rejected out of hand. The only example cited relates to the evidence of Mr Ndou. Adv Mpofu SC argued that the Evidence Leaders sought a “*relevance determination*” in respect of Mr Ndou’s evidence, following which I paused the Enquiry and consulted with the Committee.
   2. This is not how it happened. The Enquiry was not paused in order to make a determination on relevance. The issue raised by the Evidence Leaders was that there were allegations of sexual harassment made in relation to Mr Ndou, in circumstances where he had not been found guilty of any such charges. There was a concern that private, sensitive and confidential information should not be the subject of a public broadcast and that the rights to privacy and dignity should be respected, requiring that the evidence – if led – should be treated differently from that of other evidence and other witnesses.
   3. It was requested that questions relating to the sexual harassment charges be done in a closed forum, alternatively that they not be allowed at all.
   4. As rule 184(2) of the Rules provides, a decision on whether the Committee should proceed by way of a closed session is a decision to be taken by the Committee. A closed Committee meeting was convened.
   5. The decision of the Committee, which was taken following legal advice, was relayed to both the PP’s legal team and the Evidence Leaders and was to the effect that Adv Mpofu SC would be permitted to cross-examine the witness in an open forum and, should he at any stage seek to cross-examine in relation to the sexual harassment charges, for those limited questions the session would be closed.
   6. The request from the Evidence Leaders that the questions in relation to the sexual harassment not be allowed at all was not granted.
2. As it turned out, there were no questions asked that necessitated the hearing being closed.

## Para 33.2 of the recusal application

1. The PP alleges that I allowed the Evidence Leaders to lead witnesses for ‘*whatever duration they want*’, but then unduly curtailed her cross-examination.
2. The application does not cite any examples of this alleged differential treatment, which is therefore completely unsubstantiated. The Evidence Leaders have questioned the witnesses in a limited time period, whereas the PP’s legal team has taken considerably longer and in almost every instance been afforded more time.
3. One example of the treatment afforded to the Evidence Leaders and the PP’s team is with reference to Mr Johann van Loggerenberg.
   1. Mr van Loggerenberg was not sought out by the Evidence Leaders. He prepared his own affidavit with his own legal team, which he submitted when the Committee called for input from the public. Based on that submission, he gave oral evidence over three days. He had indicated that he was only available until 15h00 each day.
   2. On the first day, he was questioned by Adv Bawa SC for just over three and a half hours. On the second day, Adv Mpofu SC took 47 minutes to put issues on the record and questioned him for approximately three and a half hours. His cross-examination was not complete, and so I allowed it to roll over to a third day. At the commencement of proceedings on the third day, I indicated that we should aim to conclude with Mr van Loggerenberg by lunch, so that the next witness could commence giving evidence at 14h00.
   3. Adv Mpofu SC indicated that he was only going to cross-examination Mr van Loggerenberg on five topics, which he completed after the lunch adjournment, taking an additional three hours.[[4]](#footnote-4)
   4. Mr van Loggerenberg had to push past his own time limits to accommodate members’ questions once Adv Mpofu SC concluded his cross-examination. Three members were unable to pose their questions to Mr van Loggerenberg orally, but instead put them in writing, and these were subsequently comprehensively answered.[[5]](#footnote-5)
   5. When Adv Mpofu SC was unnecessarily interrupted by members, I directed them to desist.
   6. The Committee was not able to engage with another witness on the day in question (other than to pose unanswered questions to the PP) due to the time taken by Adv Mpofu SC with Mr van Loggerenberg.
4. Another example is the very first day of proceedings.
   1. The Evidence Leaders addressed opening remarks to the Committee for approximately 35 minutes, which included interactions with members.
   2. The rest of the day’s proceedings were taken up with Adv Mpofu SC’s opening address, and his engagement with members.
   3. Adv Mpofu SC’s address dealt with various points that were not strictly before the Committee – including the President’s decision to suspend the PP (which falls outside of the ambit of the Committee’s powers and functions) – but he was permitted to continue. As this was the start of novel proceedings, I granted the latitude. After having addressed the Committee for more than 90 minutes, Adv Mpofu SC indicated that he was ‘*winding down*’. He then spoke for another 25 minutes or so.[[6]](#footnote-6)
   4. After the lunch adjournment, Adv Mpofu SC engaged with the Committee for a further period – close to two and a half further hours – in response to issues raised by members.
   5. When Adv Mpofu SC was interrupted by members, I directed them to wait to let him complete his statement.[[7]](#footnote-7) When I indicated to Adv Mpofu SC that he needed to wrap up because of the length of time he had been speaking, and because he was traversing territory already covered, he requested an indulgence to speak further, which I allowed.
   6. From inception, therefore, the PP’s legal team has been granted far more speaking time (even longer than they have requested) and been permitted to speak on a much broader range of issues, more than the Evidence Leaders on both counts.[[8]](#footnote-8)
5. A third example relates to the Committee’s sittings in late July 2022. I explained to the Committee on 15 July 2022 that the PP’s team would be unavailable for Committee hearings from 20 – 26 July 2022, in order to prepare for and attend a High Court hearing. This allowance had been raised at inception and the schedule was devised to allow for these dates to be accommodated, notwithstanding the pressing importance of the Committee’s work; the need to discharge the Committee’s function with expedition; and the inevitable disruption it would create for members.
6. I do keep time records. The Evidence Leaders have not been afforded more favourable time allocations than the PP’s team has. The latter has not been unduly curtailed. If anything, the PP’s legal team has been repeatedly indulged on this score. There have been times where I have allocated less time to the Evidence Leaders than what they would like. Even in circumstances where Adv Mpofu SC indicates how much time he would require, he has repeatedly gone over the allocated and/or self-imposed times.
7. Time allocations are hence not a basis on which to claim I am either biased, nor do they give rise to a reasonable apprehension thereof.

## Para 33.3 of the recusal application

1. Given the lack of specifics, I am not able to deal with this allegation.
2. This notwithstanding, it bears stating that at no stage have I made decisions on the Evidence Leaders’ written submissions to this Committee, nor have I added input to them, as appears to be what is alleged.

## Para 33.4 of the recusal application

1. The PP alleges that I confer with and rely on the Evidence Leaders in making decisions, while excluding her legal team.
2. I had directed the Evidence Leaders and the PP’s legal team to engage each other through what has become known in these proceedings as ‘*the back room*’, aimed to avoid matters taking up Committee time that can be resolved outside the proceedings.
3. The one example cited by the PP is a letter she alleges was ‘*clearly written or heavily influenced*’ by the Evidence Leaders, because it included information that had exclusively been shared with them, which she says shows ‘*undue collusion*’.
4. Included in the ‘*backroom*' process is Ms Ebrahim and the Committee Secretariat, who would generally relay the outcomes of these meetings to me. I then confer on legal aspects with Ms Ebrahim as I deem necessary. I had thought it was working well in that the hearings had consistently been running in a fairly collegial manner and without any serious delays. Where such discussions only involved counsel, this would either be relayed to me by Ms Ebrahim or by the Evidence Leaders.
5. The allegations in the recusal application are a mischaracterisation that does not bear scrutiny.
   1. The PP wrote to me to request an adjustment of the Committee’s programme. This was a scheduling matter, and therefore something that could properly be canvassed in ‘*the back room*’. The Evidence Leaders had been directed to inform the PP that the Committee would, in fact, be convening on 13 September 2022.
   2. The Evidence Leaders and the PP’s legal team engaged about the Committee’s hearings during the week of 13 September 2022. The Evidence Leaders relayed the PP’s position to the Parliamentary legal advisers and I was then informed. There is nothing improper about that, especially given that the legal teams, by themselves, do not determine when the Committee convenes.
   3. Moreover, as Ms Ebrahim had taken ill, it was not surprising that factual information was sought from the Evidence Leaders, and that it was provided.
6. The PP’s legal team has not been unduly excluded, and I have not engaged in any ‘*collusion*’ with the Evidence Leaders. To the extent that the letter contained information which solely lay with the Evidence Leaders, the letter indicates them to be the source. There was no endeavour to hide such and it does not present alleged “*tell-tale*” signs of collusion, undue or otherwise.
7. To the extent that the application says “*this* [without any clarity on what “*this*” was] *was not happening for the first or even the last time*”, this is unsubstantiated. No further elaboration was presented in oral argument and in the absence of details of precisely what I am being accused of, I am not able to deal further with this allegation. But, as it stands, it does not reflect any bias or any reasonable apprehension of bias.

## Para 33.5 of the recusal application

1. The PP alleges that I have aimed ‘*unidirectional hostility and negative remarks*’ at her team, while not censuring similar conduct by the Evidence Leaders. There are no examples provided of conduct on the part of the Evidence Leaders that required such sanction that I could meaningfully deal with.
2. I have not shown ‘*undue*’ impatience with, or shouted at, or suppressed the PP’s legal team. Paragraph 33.5 of the recusal application does not cite any examples of my alleged hostility or negativity. On the contrary, I believe that I have been very patient as reflected in the charge to which I refer later herein.
3. Whilst Adv Mpofu SC has said that I should not shout at him, I was not shouting at the time he says so. I have not shouted at Adv Mpofu SC or unduly suppressed him. At times, it has been necessary to raise my voice because various participants in the Enquiry have spoken simultaneously or have refused to adhere to the rule that they should only speak once recognised by the Chairperson. At times, engagements became robust. At all times I sought to act reasonably and appropriately in the circumstances, and with the aim of preventing the hearings from unravelling into chaos. That is the duty of the Chairperson.
4. I reiterate that these are *sui generis* proceedings and have not been easy to manage, exacerbated by the complexity of the issues.
5. For example, in respect of Mr van Loggerenberg’s evidence:
   1. Adv Mpofu SC cross-examined Mr van Loggerenberg on 14 and 15 July 2022. He accused Mr van Loggerenberg of wasting members’ time; he referred to Mr van Loggerenberg’s ‘*favourite topic*’ i.e. the matter on which Mr van Loggerenberg was called to give evidence – the manner in which the PP had conducted her investigation; he referred to his own language as being the product of ‘*bantu education*’, when his language is obviously learned and his vocabulary extensive; and in response to some of Mr van Loggerenberg’s evidence, Adv Mpofu SC responded ‘*whatever*’.
   2. Adv Mpofu SC referred to the ‘*so-called rogue unit*’, to which Mr Van Loggerenberg objected as he found the term disrespectful. Adv Mpofu SC agreed to merely call it ‘*the unit*’, but then later referred to the ‘*rogue unit*’. One of the members intervened in an attempt to prevent Adv Mpofu SC from referencing ‘*rogue*’, but I permitted him to continue. In an attempt at humour, Mr van Loggerenberg indicated that, just as no one should refer to a ‘*rogue unit*’, he would not refer to a ‘*rogue advocate*’. Adv Mpofu SC felt insulted by this comment, and took time to address the Committee on it, and made further reference to it during the proceedings – none of which assisted the Committee in hearing evidence, and in circumstances where he had repeatedly referred to the ‘*so-called rogue unit*’, despite having agreed with Mr van Loggerenberg that he would simply refer to it as ‘*the unit’*.
   3. I had to caution Adv Mpofu SC not to shout at me and not to be aggressive or disrespectful to members, after a heated exchange with Mr Mulder about Mr van Loggerenberg’s evidence. I also had to request Adv Mpofu SC to tone down his language.
   4. I also expressed frustration at Mr Mileham for interrupting me as I was encouraging the wrapping up of Mr van Loggerenberg’s cross-examination. None of this reflects any animus against the PP or her legal team.
   5. Adv Mpofu SC and Mr van Loggerenberg exchanged apologies at the end of the session. That, however, did not undo the conduct I have referred to above, or recover any of the time that had been diverted from the Committee’s function.
6. Another example is in respect of Mr Tebogo Kekana’s evidence.
   1. Mr Kekana sought to make a protected disclosure regarding the PP,[[9]](#footnote-9) which he set out in an affidavit deposed to on 12 December 2019 (long before this Committee began its proceedings). However, when the Evidence Leaders approached him to give evidence to the Committee, he declined to do so voluntarily and had to be summoned.
   2. Mr Kekana gave evidence under subpoena on 18 and 19 July 2022. He was examined by Adv Bawa SC for just over two hours and then cross-examined by Adv Mpofu SC for approximately six and a half hours.
   3. Adv Mpofu SC aggressively cross-examined Mr Kekana, accusing the latter of being a liar. He referred to him as an ‘*expert on oddities*’, which he then withdrew. This after Mr Kekana testified as to various actions by the PP that he found to be odd. He put questions to him to the effect that ‘*So you think you are the only person that is right in South Africa?*’ The interactions were terse with statements being made that Mr Kekana had ‘*moved his lips and something came out of his mouth*’ but that it did not constitute an answer. In response to one of Mr Kekana’s answers, Adv Mpofu SC responded ‘*congratulations*’.
   4. During his interactions with Mr Kekana, Adv Mpofu SC indicated that the PP had been portrayed as incompetent by ‘*apartheid apologists and clever blacks*’.
   5. Adv Mpofu SC devoted a great deal of time to whether or not Mr Kekana believed that his affidavit fell within the ambit of the Protected Disclosures Act. Adv Mpofu SC then told Mr Kekana ‘*You are the exact opposite of a whistle blower… You’re a whistle inhaler*’, at which point I intervened, drawing Adv Mpofu SC’s attention to the Directives issued which prohibited bullying, intimidation and harassment of witnesses, as well as deliberate insults.
   6. I protected Adv Mpofu SC from interruptions by members, in an endeavour to move the cross-examination along, mindful of time.
   7. On the second day of Mr Kekana’s testimony (as I had on the previous day), I indicated that Adv Mpofu SC should aim to complete his cross-examination by tea-time, so that members could have sufficient time within which to interact with the witness (who had only been subpoenaed to appear for two days). I also indicated, however, that if need be, I was prepared to grant Adv Mpofu SC the indulgence of extending his cross-examination until lunch-time. Adv Mpofu SC did not conclude by tea-time, or even by lunch-time. I allocated him fifteen additional minutes with Mr Kekana, which he again exceeded.
7. Another example is the oral submissions on the recusal application. Adv Mpofu SC referred to ‘*fake outrage*’ and ‘*foolish people*’ and ‘*infantile*’ arguments and how only ‘*racists and their fellow travellers*’ would be upset by his conduct.
8. The examples in the preceding paragraphs are not exhaustive – they merely set out a few instances to demonstrate that, as Chairperson, it remained a challenge to maintain a standard of decorum in the proceedings and balance the interests of PP’s team to ask questions, the rights of witnesses to be treated with respect and dignity, the rights of members to actively participate and to ensure that the process is neither delayed nor derailed. This was a daily challenge. As the record shows, it is not an easy balancing act, but it is one that must be done as an imperative, and to do so does not give rise to any bias or perceptions of bias.
9. The Evidence Leaders have so far not dealt with witnesses in such a manner, or used language, that warranted censure. To date, they have seldom sought to interject. Should they do so inappropriately, I will not hesitate to take the appropriate action.

## Para 33.6 of the recusal application

1. The PP alleges that I ‘*instinctively reject*’ her proposals, unless they are supported by the Evidence Leaders and/or a member.
2. This is not correct. For example, I have not canvassed the various time indulgences that I have granted to her legal team with the Evidence Leaders or any members.
3. The only example referred to was in respect of a “*whispering*” during the testimony of Mr Pillay, when Adv Mpofu SC had claimed that, when he raised the issue of someone whispering to the witness, the issue was ignored, but when Mr Herron raised it, the whispering was addressed.
4. This is not correct. I had not heard the whispering myself. When Adv Mpofu SC initially raised it, he did not say that he had heard answers being whispered. I sought to address the whispering but, before I could fully canvass the issue with Mr Pillay, Adv Mpofu SC interjected (without being recognised to speak). I then noted Mr Herron’s raised hand and gave him the floor, before responding to the issue, and he also indicated that he had heard whispering. I could only then revert to Mr Pillay, as the transcript of 5 August 2022 reflects the following interaction in this regard:

Adv Mpofu: No, Chair. I didn’t say anything of that sort. You, Chair, said that when you were responding to me, that you don’t have a predetermined outcome. I said no, I am not on that point at all. Chair, I wanted to make another point sort of completely different. **We’ve observed that this witness is in the company of someone who keeps on whispering to him, can we find out who that person is?**

Chairperson: Thank you, Adv Mpofu. I have not picked that up. I’ve not seen it but I will confirm with him as I go to Hon Maotwe. Mr Pillay, do you have a challenge where you are? Do you have people whispering around you? Please mute yourself, Adv Mpofu.

Mr Pillay: I have my family around, Chair.

Chairperson: Are you in the house?

Mr Pillay: Yes, in the house. I apologise.

**Adv Mpofu: Chairperson, no, no. I’m sorry, Chair. I don’t know what you are doing here, Chair. I’m not talking about the house. I’m saying he has people whispering information to him and you are leading him to, to say these people in the house? Why? Why do I care about people in the house? The people are whispering to him. You must ask him about that because that’s wrong. It’s illegal.**

Chairperson: Hon Herron?

Mr Herron: Chair, I think to be fair and honest, **we have to acknowledge that when I was asking questions, someone was whispering to Mr Pillay about the Sunday Times.**

Adv Mpofu: Thank you, Hon Herron. You are the new Chairperson.

Chairperson: Mr Pillay?

Mr Pillay: Yes, my spouse is here. She whispers to me some time and she’s also working in the house. But I apologise.

Chairperson: Apology accepted. Thank you. Let’s proceed, Hon Maotwe.”

## Paras 34 – 37 of the recusal application

1. The PP alleges that I ‘*reneged*’ on the ‘*arrangement*’ between her legal team and the Evidence Leaders about a two-week preparation period before her team begins leading her evidence.
2. The he Evidence Leaders cannot bind the Chairperson. They communicate requests and, as Chairperson, I ultimately decide, based on the programme and available days etc.
3. I never ‘*reneged*’ on any arrangement, whether in the form of a ‘*gentlemen’s agreement*’ or otherwise. I have also never issued a ruling that the PP’s team would only have 1-day preparation time.
4. The Evidence Leaders now only have one more witness they intend to call for oral evidence before the PP, so the PP is well aware of much of the evidence she has to answer. As matters now stand, the Committee last convened on 21 September 2022, and is likely only to reconvene in the middle to latter part of October, affording a period of more than two weeks already to the PP and her team for the necessary arrangements to be made in relation to witnesses. As such, additional preparation time may not be required, but this will have to be determined at the appropriate future time.
5. As early as August 2022, during a hearing of the Committee when Adv Mpofu SC was in Johannesburg and he joined the hearing on a virtual platform whilst Adv Mkhwebane and Adv Matlhape were attending the hearing physically in Cape Town, Adv Mpofu SC explained to the Committee that this division of resources was occasioned by the fact that his team was already then seized with obtaining witness statements, and some of these witnesses were based in Johannesburg.
6. In my view there is no merit to this ground. Ultimately, once the evidence from the next witness has been completed, a fresh assessment can be made as to how much time the PP reasonably requires before her legal team begins leading her witnesses, especially given the breaks in the hearings whilst this recusal application is being considered.
7. Further in responding to questions during his oral submissions in support of the recusal application, Adv Mpofu SC stated:

*“There was no agreement in the true sense of the word. It was an understanding between us and the Evidence Leaders and the Chair. If it was an agreement, I would tell you. I don’t want to accuse people of things that are not there. It was not an agreement. It was an understanding and Adv Bawa is right. Even that understanding was not rigid or cast in stone on the 12 tablets. It was a moving target.”*

1. In light of this and given that my stance has been that at the time it should go back to the “*backroom*” for discussion amongst the respective teams, the allegations in para 34 are firstly, incorrect, and secondly, not a reflection of any unfairness, unreasonableness, selective treatment or bias.

# FIFTH GROUND: HIGH COURT LITIGATION

1. Bringing a Constitutional Court judgment to the attention of the High Court is not improper and cannot be taken as a show of bias. In any event, it was done on the advice of senior counsel, and the Parliamentary legal advisers were in agreement with this advice.
2. The High Court application brought by the PP cited me as a respondent. It is not clear what the precise nature of the impropriety complained of is, or how it manifests as a *“clear display of [my] bias,”* when I was drawn into the litigation by the PP herself.
3. During the oral address Adv Mpofu SC stated that I was *“writing to the High Court to try and influence litigation which is related to this Committee”*. This is a misconstruction of what happened. Also l made no statement in relation to the personal costs ordered by the Constitutional Court against the PP that could be cast as being *“celebratory”*.[[10]](#footnote-10) It is a Constitutional Court order and it is what it is.
4. I was not involved in either the contents of the media statement issued by Parliament nor part of a decision to issue such statement. It can thus hardly be construed as a basis for bias against me.
5. Interviews given in relation thereto, if any, by others can also not constitute actual bias or a reasonable apprehension of bias on my part.

# SIXTH GROUND: RULINGS ON EXAMINATION

1. There has been no ‘*undue*’ or ‘*arbitrary*’ questioning of the PP by members. Members can ask questions even if the PP is not on the witness stand. This emanates from the judgment of the Constitutional Court, which provided that members may ‘*ask the office-bearer directly to respond to certain questions, even if she is not at that time giving evidence under oath*’.[[11]](#footnote-11)
2. So it was not arbitrary or biased to allow members to pose direct questions to the PP (who then delayed her responses).
3. I was advised by Ms Ebrahim that it was within my powers, and not ‘*unlawful*’, to permit members to engage in general questioning at the appropriate time. Indeed, I was advised that the questions asked by members are critical to the oversight and accountability function that the Committee is required to discharge.
4. In respect of Mr van Loggerenberg, as indicated above, I granted Adv Mpofu SC an indulgence of more time for his cross-examination, which he utilised to canvass the five issues he had indicated that he wanted to cover. He completed those five points. He then concluded his cross-examination, and subsequently noted that he reserved his right to recall the witness if that became necessary. Members commenced their questioning after he was done with his points.
5. In respect of Mr Pillay, Adv Mpofu SC was aware that the witness had availability constraints, it having been made clear that he was only available for one day. Mr Pillay was testifying from the Netherlands. For that reason, proceedings commenced an hour early on the day Mr Pillay was due to give evidence. At the outset I announced that Adv Bawa SC would be permitted to question Mr Pillay from 09h00 until 12h00, Adv Mpofu SC from 12h00 until 16h00, and thereafter the members would engage with the witness. In fact, Adv Mpofu SC commenced before 12h00 and ended after 16h00. The balance of the day was devoted to members’ questions, which went on until after 19h00 that night. The time limits imposed on the various parties with an interest in questioning Mr Pillay were, in the circumstances, reasonable and appropriate.
6. In respect of Ms Thejane, members were permitted to question the witness because Adv Mpofu SC had indicated that he was unprepared to cross-examine Ms Thejane. I therefore excused him from having to engage in cross-examination on the day in question (at his request), and only Members’ questions were asked. The PP will be able to access the full record of the members’ engagement with Ms Thejane and would then be able raise any material with her when cross-examination occurs.
7. The Directives have not been arbitrarily applied, nor abandoned, but I have had to apply them flexibly to cater for the exigencies of any situation which required, for reasons that were obvious at the time; that members be permitted to ask their questions. This is not tantamount to any manifest bias.
8. During his oral address on the recusal application, Adv Mpofu SC claimed that the time granted for cross-examination is insufficient, because the PP is granted the same time allocation as the Evidence Leaders. That is demonstrably untrue: as is evident from the few witnesses discussed herein, the PP is frequently allowed significantly more time than the Evidence Leaders to interact with witnesses. This has been the pattern with most of the witnesses who have given evidence to date. It has frequently been the case that, despite an objection having been raised that the witness’s evidence is irrelevant to the Motion, the witness is extensively cross-examined by Adv Mpofu SC on a wide range of issues, some emanating from the Motion.
9. The PP argues that, unlike the Evidence Leaders, she is not permitted ‘*to ask questions arising out of the questions asked by the members and/or the Chairperson in terms of Rule 6.16*’, which shows bias.
   1. First, this process is not adversarial, nor is this a court and the fact that the rules or conventions of a court are not applied, does not make it unfair, nor does it make my rulings biased.
   2. Second, the rule permits Evidence Leaders to clarify issues with witnesses, pursuant to their duty to ensure that a clear and full picture is presented to the Committee.
   3. Third, were any clarity to be required on any responses given by the witnesses to questions from members, nothing precluded such being sought through the Chair, even by Adv Mpofu SC.
10. The PP’s final complaint under this heading is that the Evidence Leaders are not permitted to cross-examine anyone and should never have been permitted to cross-examine Mr Thembinkosi Muntu Sithole, a witness that the Evidence Leaders themselves called.
11. This, however, is incorrect:
    1. Under the TOR, the Committee will utilise the services of the Evidence Leaders (clause 4). Witnesses will be required both to submit written statements and answer oral questions (clause 4.1(b)) – there is no stipulation that those questions may not be posed through cross-examination by the Evidence Leaders and there is no stipulation as to the nature of the questions.
    2. Under the TOR, the Evidence Leaders are entitled ‘*to put any questions to any witness called by the PP*’ (clause 4.4(b)). For the sake of clarity, the Directives made it clear that this would include leading questions.
    3. Under the TOR, the Committee’s proceedings are expressly inquisitorial in nature (clauses 4 and 5). Pursuant to that inquisitorial nature, the Evidence Leaders’ role is to present ‘*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*’ (clause 5). That includes both the asking of leading questions, and questions pertaining to the credibility of particular evidence tendered. In fact, the nature of the questions is not in any way limited.
    4. In fact, the Constitutional Court has concluded that ‘*[t]here is nothing unusual, in an inquisitorial process, in the cross-examination of witnesses being done through the chairperson*’.[[12]](#footnote-12) In the present case, the Evidence Leaders have been appointed to lead the evidence before the Committee in an inquisitorial process, so there is nothing unusual with them engaging in cross-examination when required.
    5. The TOR also do not stipulate that the Evidence Leaders are limited to ‘*examination in chief*’ as would ordinarily occur in adversarial trial proceedings. Neither do the Directives.
    6. The Directives (clause 6.3) provide for requirements that must be met in order for an Evidence Leader to impugn the character of a witness. That shows that it is expressly contemplated that an Evidence Leader may question the credibility or character of a witness.
12. Mr Sithole’s questioning was therefore not ‘*the most egregious violation of the Directives*’ (recusal application para 47), or any violation. Adv Bawa SC’s questioning regarding the accuracy and credibility of his evidence was entirely in line with her mandate as an Evidence Leader (which is first and foremost to assist the Committee) and the regulatory framework that applies to the Committee. At the commencement thereof she made it clear that it arose as a result of answers that had been given that conflicted with the direct evidence and questions which required clarification.
13. I refrain from providing any assessment of any witness’s evidence, as this is not the appropriate time to do so, nor is it material to this recusal application.
14. The attempt to pigeon-hole the nature of the questions asked by the Evidence Leaders into conventional court procedures is not appropriate. As far as I am concerned, they are afforded flexibility in what and how witnesses are questioned – limited only by relevance.

# SEVENTH GROUND: RULINGS ON RELEVANCE

1. There has been no skewed or unfair application, or abuse, of the Directives, nor are the rulings a “*product of inherit bias*”.
2. The PP alleges that almost all the evidence of some 15 witnesses called is irrelevant, but fails to provide any particularity in this regard, aside from indicating that the evidence relates to ‘*human resources grievances*’ (para 50 of the recusal application) and ‘*views on deadlines*’ (Adv Mpofu SC’s oral submissions).
3. I did note that the Independent Panel stated:

*“We do not believe that section 194 of the Constitution or the NA rules exclude misconduct or incompetence in the context of labour relations from being considered”* (at para 183).

1. The witnesses to whom these criticisms are directed are not identified by name and in any event, it would be inappropriate for me at this juncture to provide any assessment of their evidence. I, and the Committee, am awaiting to hear the PP’s evidence. Once her evidence is provided with reference to the Motion, an assessment of the evidence in that context, in its totality will be done.
2. I am alive to the fact that some aspects of various individuals’ evidence may turn out to be irrelevant. In such instances, such evidence can be discarded during deliberations and if any aspect is inadvertently relied upon (when it should not be), then the PP would be able to point this out to the Committee when she is afforded an opportunity to comment on the draft report prior to it being sent to the National Assembly. Fairness should be assessed in the context of the entirety of the Enquiry.
3. In my assessment there has, however, been no basis to rule from inception that the leading of the oral evidence of any of the witnesses led so far is entirely irrelevant and that they should not be heard by the Committee, given that it appears from the affidavits that the evidence do relate to some of the allegations in the Motion.
4. The fact that I have disagreed with the PP’s legal team’s assessment of the relevance does not amount to a bias of any kind, nor are these rulings inappropriate and/or prejudicial to the PP in any way, as she is afforded an opportunity to deal with such evidence both during cross-examination and also permitted to put other evidence. This is borne out by the extensive cross-examination of witnesses whose evidence was initially objected to on the basis of irrelevance.
5. I have also not abdicated my duty to control the Committee’s proceedings. I have to balance my various obligations. I have sought to ensure that the proceedings focus on the allegations contained in the Motion. However, at the same time, I have at all times been bound to allow members their freedom, as duly elected public representatives and members of Parliament, to engage with the witnesses. If I do not do so, the next complaint will be that members are restricted in the questions that they ask.
6. Members of Parliament are not practising lawyers and cannot and should not in their engagement with witnesses be held to the standards of questioning expected in court rooms. This must also be balanced against time management, given that there are 36 members of the Committee entitled to ask questions. Unduly preventing a question from being asked or a response from being given would result in “*to and fro*” of objections, best avoided unless absolutely necessary, when this could be more swiftly dealt with during the deliberations process. In the circumstances, this complaint does not constitute a ground on which to allege bias or a reasonable apprehension of bias on my part.
7. The complaint that the example as referred to in paragraph 53 is a reflection of egregious rulings is not correct. It should be viewed contextually.
8. The allegations in para 55 of the recusal application is not correct. As the evidence gathering process is not completed it would be premature to contend that any of these aspects have been *“conclusively established”*. The Committee has not yet concluded hearing evidence and must still, among others, at the very least hear from the Senior Manager: Legal Services, the PP herself as well as any other witnesses the PP wishes to bring.
9. The Motion expressly alleges that the PP has been responsible for ‘*failing intentionally or in a grossly negligent manner to prevent fruitless and wasteful and/or unauthorised public expenditure in legal costs*’ (para 11.2 of the Motion). It is therefore necessary and appropriate for the Committee to hear evidence on the legal expenditure that has been incurred at the cost of taxpayers, and I cannot at inception rule out such evidence.
10. There has been no intention to ‘*embarrass members of the present legal team*’ and to date, to the best of my recollection, there has in fact been no publication of their individual earnings (para 56 of recusal application). The identity of the PP’s current and previous legal representatives is, as it must be, a matter of public record, and para 11.2 of the Motion requires a consideration of the Office of the Public Protector’s (OPP) legal expenditure in order to make an assessment of what is set out in para 11.2, including whether if found to be “*intentionally or in a grossly negligent manner”,* it can or cannot be attributed to the PP. In any event the OPP is funded from the public purse and is accountable to Parliament for its expenditure- there is nothing untoward about a Parliamentary Committee being provided with hearing such information.
11. Thus in allowing this evidence, it is unclear how this amounts to a demonstration of bias. If there were objections raised on the basis of privacy having to be preserved necessitating a closed hearing on this evidence, I would have referred this to the Committee for consideration, but no such request was made.
12. The Public Protector argues that ‘*inaccurate and misleading figures*’ on legal expenditure have been published. The inaccuracy was not raised at the time. However, the Evidence Leaders have indicated that the figures presented to date were provided by the OPP, which is the best possible source of the required information.
13. Furthermore, the Public Protector’s legal team could have disputed the evidence when it was led, as the information relating to the PP’s attorney of record would have fallen within their personal knowledge. However, I do not recall them having done so. There will be ample opportunity to do so when the PP leads her evidence. As such I again, fail to see how this has any bearing on a recusal application.
14. The claims of ‘*malicious misinformation*’ and my failure to exclude irrelevant evidence are accordingly baseless and do not amount to bias, nor give rise to a reasonable apprehension thereof.

# EIGHTH GROUND: MY PREVIOUS UTTERANCES

1. I deny that the media article relied on is a reflection of “*express statements*” I made and that it constitutes conclusive proof that I had “*prejudged the crucial and relevant issue of the Public Protector’s alleged incompetence*”.
2. I did not provide an interview to the author of the article referred to, nor was I asked to comment. Instead, it appears that reliance was placed on “*soundbites*” of a Justice Portfolio Committee meeting that took place on 10 July 2019, at which the OPP’s annual performance plan and budget was considered and discussed.
3. Frankly, I did not even recall the details of this meeting until it was raised by Adv Mpofu SC. What occurred at this meeting is the following. I noted that the presentation provided to members of the Portfolio Committee showed that the OPP had done a lot of good work. I asked questions, pursuant to my duty to ensure accountability. I did not say that the Public Protector had been incompetent or pre-judge anything. It is also taken entirely out of context without regard to the fact that it was an engagement with the PP in which members posed questions and she was afforded the opportunity to respond.
4. I have repeatedly emphasised that the Committee and I operate with open minds and have no pre-determined outcomes. For my part, this has been demonstrated by the even-handedness that I have shown in chairing the Committee to date. It should also be borne in mind that, as prescribed by the Constitution, I have sworn an oath of office to ‘*obey, respect and uphold the Constitution and all other law of the Republic*’, which oath binds me to act fairly and independently. I take that oath seriously.

# THE 9TH AND 10TH GROUNDS – REFUSAL TO POSTPONE ON 13 SEPTEMBER 2022 (AVAILABILITY OF LEGAL REPRESENTATIVES AND TEMPORARY MEDICAL UNFITNESS)

1. As the factual events of what happened on 13 September 2022 apply equally to both grounds, I deal with them together.

## Sequence of events of 13 September 2022

1. While waiting for the witness – Ms Thejane – on 13 September 2022, Adv Mpofu SC indicated that he was going to seek a postponement. This had been foreshadowed in a letter I had received at approximately 12PM the previous day, and to which I responded.
2. I was assisted by the Parliamentary legal advisors in drafting a 3½-page letter in response, in which I made the position and reasons for not granting the request clear. The application for recusal says that my response was a 5 page letter. It was not.
3. As far as I was aware, by the time the Committee hearing was to convene on Tuesday, 13 September 2022, there were no papers filed in the High Court that necessitated a response from the PP’s legal team that would make them unavailable to do a one hour cross-examination of Ms Thejane. I had been informed that it was Adv Mpofu SC’s estimation that his cross-examination of Ms Thejane would not take longer than an hour.
4. For ease of reference, copies of both letters are attached. In my letter, I proposed a way forward which in my assessment would have alleviated the difficulties raised on behalf of the PP in the letter to which I was responding.
5. I had been informed that the PP’s urgent application was only set down for Friday, 16 September 2022, so there was therefore no clash with the Committee hearing on the 13th and the urgent application hearing on the 16th. This, coupled with the indication that the cross-examination of Ms Thejane scheduled for that day would be no more than an hour and my assessment that the members’ subsequent questions would not require a long session, led me to assess that the hearing could proceed on Tuesday 13 September 2022. The cross-examination would then not remain outstanding, as has now been the case since 13 September, which is not desirable.
6. Mr van der Merwe’s evidence would then be led on Wednesday 14 September 2022, with his cross-examination and questioning to stand over to Wednesday, 21 September 2022. This would afford the PP’s legal team with additional time to prepare for their hearing in the High Court on 16 September 2022. They would have a clear day and a half, same as would have been the case had the matter been heard on Tuesday, 13 September 2022 as they had planned.
7. I also noted in my letter that, as the hearings were recorded and fully virtual, they could easily be watched and it would not have required the PP’s entire legal team to be present virtually on Wednesday, 14 September 2022 for the cross-examination.
8. In so doing, I balanced granting the PP’s legal team’s request, partially, taking into account what had been conveyed to me in their letter of 12 September 2022, as well as fulfilling my obligations to ensure that the proceedings are not delayed and the Parliamentary program is not unduly disrupted by the PP’s application. In ensuring fairness in the process, I am obliged to also consider the fair treatment of witnesses and the rights of members and the Committee’s duties – all have to be continually balanced.
9. If this was acceptable, an application for postponement would not be necessary. This approach also afforded Members involved in the litigation (such as the UDM) time to consult with their legal representatives as requested, as the hearings on 13 September 2022 would likely be completed before even a lunch adjournment.
10. When the proceedings commenced on 13 September 2022 I did not as yet know whether this was acceptable until Adv Mpofu SC indicated that he wished to proceed with his application for postponement. I allowed him uninterrupted time to address the Committee to do so.
11. The submission made by Adv Mpofu SC when he commenced his address was to say that he was going to be doing an application for the postponement, but that the PP was not there because she was ill and was being taken to the doctor. This was a new issue raised that morning. He expressly stated that that was “*not the reason we were going to apply for this application*”, but that it was just an additional reason. At that juncture (as is the case to date on my part, though nothing turns on this) no one appeared to know what the nature of the illness was, whether she would be back from the doctor, whether it was something serious or something which just required immediate attention and she would be back in the hearings. No details were provided beyond that she was going to see a doctor.
12. Adv Mpofu SC indicated that the PP was simply not there – he had no instruction to tender an apology on her behalf. He made it clear that the postponement being sought was based on the letter sent the previous day, to which I had responded.
13. Adv Mpofu SC proceeded to set out what had happened since the DA filed an urgent application to the Constitutional Court on Friday, 9 September 2022, following on the High Court judgment earlier that day, indicating that the effect of this was that the High Court judgment was suspended and the PP could not return to work on Saturday 10 September 2022 as she had intended to do. On Saturday, 10 September 2022, whilst the Committee hearing dealing with Ms Motsitsi and Ms Thejane’s evidence was underway, the PP launched an urgent application asking the High Court to make an order for the implementation of the earlier order to allow her to return to work.
14. The High Court dismissed the PP’s challenge to the lawfulness of the s194 Committee remaining any impediment to the Committee continuing its work. I do not comment on the merits of the urgent High Court application which has since been dismissed, but only deal with its timing and impact on the Committee’s work.
15. As indicated in my letter of 12 September 2022, the PP’s legal team sought to set down their urgent application knowing that the Enquiry was ongoing and that it was to sit on 13 and 14 September 2022. In other words, they knowingly set down a High Court application on a day that evidence was to be led before the Committee, where they were also participating. The Tuesday had been selected for the Committee’s hearings precisely because the Thursday and Friday (15 and 16 September 2022) were unavailable: Adv Mpofu SC had indicated that he was not available on those days as he had commitments in other matters. By selecting the Tuesday, cognisance was already taken of Adv Mpofu SC’s unavailability later in that same week. It is noted that he nevertheless made himself available for the High Court proceedings on the very Friday that he had earlier indicated he was involved in another matter.
16. I had not been told during the hearing on Saturday, 10 September 2022 that the application was set down during the course of that afternoon by the PP’s legal team for Tuesday, 13 September 2022. Had this been expressly stated, I would have dealt with it on the Saturday already. All that Adv Mpofu SC said was that the situation was such that it could be dealt with in the “*backroom*” conversations with the Evidence Leaders. I had no reason to think it would disrupt proceedings until I was informed on Sunday, 11 September 2022 via a WhatsApp message received from the Chief Legal Adviser, who had in turn received it from Adv Bawa SC, to the effect that the PP was seeking a suspension of the Committee’s proceedings for that week.
17. In the application it is stated that this was based on the non-availability of the PP’s legal team as a result of “*a related emergency playing itself out in the courts*”. Adv Mpofu SC, during his oral address, indicated that the PP “*had been put in the situation of an urgent application, which ordinarily would have been heard this morning (being Tuesday), but for other related reasons it has now been set down for Friday*”. With respect, based on correspondence that had been made available to the Parliamentary legal advisors, it appears that as of Sunday, 11 September 2022, it was already apparent that no hearing would happen on Tuesday, 13 September 2022 for threefold reasons:
    1. The President’s senior counsel was not available on the Tuesday and given the nature of the matter it would not be appropriate to brief another senior counsel;
    2. The respondents in the PP’s application required time to file affidavits and these would not be ready for a hearing on 13 September 2022; and
    3. The respondents in the PP’s application regarded as extremely prejudicial for a matter to be heard on such expedited timeframes.
18. On Sunday, 11 September 2022 this was not brought to my attention. All I was informed of was that there was not yet an indication as to whether or not the matter would be heard on Tuesday, but that it was highly unlikely that it would be as answering papers would still need to be filed, and it was not likely, given other commitments, that three judges would readily be available to hear the matter in the High Court.
19. As it turned out, the litigating parties – which did not include any legal representatives for the Committee or the National Assembly – reached an agreement that it would be argued on Friday, 16 September 2022 based on their availability and given that the Court was also available. This the PP’s legal team appeared to have agreed to without any regard to the Committee’s timetable.
20. Adv Mpofu SC, during his oral address on 13 September 2022, represented that there has been a “*whole lot of developments and exchange of papers*”. He did not refer to any answering affidavits as yet having been filed in the High Court proceedings that warranted a response for the Friday hearing but appear to make reference to the papers filed for the Constitutional Court. I specifically asked what had to be attended to on that day. Although he did not expressly inform the Committee hereof during his address, the DA and the President’s papers were only expected to be filed by 21h00 on that evening. However, Adv Mpofu SC indicated that he had since 04h00 that morning been at what I understood to be his office to meet a deadline for papers to be filed by 09h00 – and which I understood had to be filed in the High Court by that time.
21. It was represented to the Committee by Adv Mpofu SC that the situation that they found themselves in was not of their making. But I determined, from his own submissions, that it was the application brought on behalf of the PP on an expedited basis setting it down on 13 September that caused the situation. In my view it was precisely of their own making. There appeared to be no reason that prevented the PP from setting the application down for any day of the following week so as to avoid any disruption of the Committee hearings, and hence allowing for Ms Thejane’s cross examination to be completed and Mr van der Merwe’s evidence to be completed.
22. During the oral address the only reason given as to why the PP’s legal team sought to set the matter down for 13 September was because they did not want to disrupt the Committee for another week and interfere with the program of the Committee. But, as the Committee had nothing scheduled for the following week, this, with respect, made no sense.
23. Adv Mpofu SC had in the course of his address also indicated that the PP’s legal team was not in a position to proceed “*with this enquiry right now*”. It was for this reason that I thought the Evidence Leaders sought clarity on the impact of court proceedings on the Enquiry, as I refer to below. Adv Mpofu SC pointed out that the PP could not be dealing at the same time with both the Enquiry and the urgent proceedings at Court, yet it was the PP who had sought to set the latter down at the same time when the former was underway. This was materially different from the previous hearing before the WCHC which had been set down before the Enquiry commenced on 11 July 2022, and which both the hearing dates and preparation time was from the inception of the Enquiry accommodated in the schedule.
24. Contrary to what was indicated in the postponement application, the PP had not been drawn into an urgent litigation. The PP had in fact brought the urgent application herself – setting it down on a date on which the PP’s legal team knew was a day on which the Committee was scheduled to sit. This was no unforeseeable clash of dates. All indications were that the urgent application was not “*thrust upon*” them as indicated. It had been self-created by the date they had arbitrarily selected to set down the urgent application, without regard to the fact that the Committee was to hear evidence on 13 and 14 September 2022. Having deliberately so set it down, the PP cannot now allege that I am biased for wanting the Committee hearings to proceed and for the process not to be derailed.
25. The only information provided on 13 September 2022 that had a bearing on the hearing on that day in my view was:
    1. that Adv Mpofu SC was busy with papers from 04h00 to 09h00;
    2. for that reason, he was unprepared to conduct a cross-examination; and, communicated this to the Committee on that morning; and
    3. that the PP was ill and at the doctor.
26. There was no mention of any answering papers that warranted the attention of the PP’s legal team as yet.
27. Ultimately, on 13 September 2022, I granted Adv Mpofu SC the indulgence of not proceedings with Ms Thejane’s cross-examination and not having to prepare for Mr van der Merwe’s cross-examination that week and allowed members to proceed with questioning Ms Thejane.
28. I did not regard it as unreasonable or unfair to have balanced the interests of the Committee with the interests of the PP by allowing Adv Mpofu SC not to have to prepare for cross-examination that week and yet to allow the time available to be used sensibly by permitting the Members to ask questions of Ms Thejane and for the Evidence Leaders to proceed with presenting the direct evidence of Mr Van der Merwe. In doing so I balanced the resources and the time available of the Committee with Adv Mpofu SC’s team’s need for additional time to prepare for their urgent application, notwithstanding that this had been brought on by themselves.
29. Also in response to Adv Bawa SC, Adv Mpofu SC confirmed that the postponement was only sought for the two days of that week.
30. I was well aware that not every member of the PP’s legal team is required to attend the hearing and previously, in fact, this had been the case. Adv Matlhape has on occasion accompanied the PP to hearings in Cape Town, in the absence of both Adv Mpofu SC and Adv Shabalala, who on those occasions were in attendance and participated virtually from Johannesburg**.**

## Clarity sought by the Evidence Leaders

1. After Adv Mpofu SC had addressed the Committee, I gave Adv Bawa SC the floor, but before she could say anything of substance, Adv Mpofu SC objected. When I indicated that he must wait until Adv Bawa SC has completed, he converted his objection to a point of order.
2. I was then accused of abusing him. There was no justification for this accusation, as is evident from the transcript:

**“CHAIRPERSON:** You are not ready for cross-examination. That seems to be what you’re also placing now, that you’re not ready to do the cross-examination. I’m going to come back later on the issues of the letters and my response to your request. But I’m just going to go as you placed many other accusations, even on the evidence leaders. Adv Bawa, if you have got any comment you want to make, I’m going to allow you to do that.

**ADV MPOFU:** I didn’t place accusations, don’t say that Mr Dyantyi- [interrupted]

**CHAIRPERSON:** Don’t tell me what to say and how to say it.

**ADV MPOFU:** No, well, you can say it about other people, you are saying it about me.

**CHAIRPERSON:** Adv Bawa. I’m not recognizing you; I’m recognizing Adv Bawa.

**ADV MPOFU:** Yeah, well, I’ll speak in the end, yeah.

**CHAIRPERSON:** Thembinkosi, please mute Adv Mpofu, I’m on the platform. Adv Bawa?

**ADV BAWA:** Good morning, Chair. I have – [interrupted]

**ADV MPOFU:** Okay, Chairperson – [interrupted]

**CHAIRPERSON:** I’ve got Adv Bawa on the platform, I did not recognize you, Adv Mpofu.

**ADV MPOFU:** No, Chair, no – [interrupted]

**CHAIRPERSON:** Adv Bawa is on the platform. Please proceed, Adv Bawa. Adv Bawa, please proceed.

**ADV BAWA:** Chair, I have three issues that I’d like to raise, just so that we can get clarity on what is being sought. And maybe I must place on record that dates have been – [interrupted]

**ADV MPOFU:** Chairperson, I want to raise an objection, please?

**CHAIRPERSON:** You’re going to wait for Adv Bawa to finish what she’s saying.

**ADV MPOFU:** I’m raising a point of order, Chairperson, I’m raising an objection – [interrupted]

**CHAIRPERSON:** I’ve heard your point of order, she’s on the platform. Please respect that, Adv Mpofu. Proceed, Adv Bawa.

**ADV MPOFU:** No, but it’s about what she’s talking about, Chairperson. (underlining added for emphasis)

**CHAIRPERSON:** You’ve not even heard what she’s – [interrupted]

**ADV BAWA:** I haven’t said anything.

**CHAIRPERSON:** Proceed, Adv Bawa. Please stop, Adv Mpofu.

**ADV MPOFU:** No, you are abusing us, Mr Dyantyi.

**CHAIRPERSON:** Please proceed, Adv Bawa.”

1. It is apparent from this exchange that the reason I had given Adv Bawa SC the platform was because, in his address, Adv Mpofu SC – and I stated it as such – had placed “*many other accusations, even on the Evidence Leaders*”. It was the use of the phrase *“accusations*” that caused Adv Mpofu SC to then again interject without having the floor. This resulted in an exchange causing me to instruct the Secretariat, for the sake of order and progress, to mute Adv Mpofu SC in order to allow Adv Bawa SC (and others for that matter, properly recognised) to speak. It will be seen from the audio recording of the event that even as he (as he says) had muted himself, he appears to have still been speaking (to me and/or the Committee) during this self-muted period. The fact of his being muted by the Secretariat, when he had purportedly already muted himself (even as he was ostensibly addressing me and/or the Committee during his self-muting) appears to have infuriated Adv Mpofu SC even more than he already was, as evident from the statements he made thereafter (and as can be observed from the recording of the proceedings).
2. Adv Bawa SC sought clarity as to the ambit of the postponement that was requested, in the context of the further litigation in the courts, as well as clearing up issues raised by Adv Mpofu SC in his address. As will be noted, it was indicated that the delays to the completion of evidence prior to that day had been as a result of the Evidence Leaders not completing their witnesses.
3. As far as I was concerned, Adv Mpofu SC had now dealt with the issue in respect of the accusation and I wanted to proceed and continue and address the issue of the clarity that had been sought, being the specific issue for which I had given him the floor. He then persisted to say that I had made an accusation to which I did not want him to respond. I pointed out that he had already made that point and again asked him to respond to the clarity sought. This was met with the response “*You’re going to regret this. I’m telling you now.*” I then again asked him to respond to the clarity sought, at which point the Honourable Member Zungula intervened on a point of order.
4. After I invited Adv Mpofu SC to provide clarity in respect of what Adv Bawa SC had indicated, he reverted to his objection. It turned out that this objection had nothing to do with what Adv Bawa SC was to say, contrary to what he had indicated earlier. He then stated the following, in which he was insisting to speak to the “*accusation*”, still. He proceeded to state the following:

**“ADV MPOFU:** Okay. No, Chairperson, I’ll start with the objection that I was raising. I was saying to you, you don’t need to do the things that you are doing. You know, I think it’s clear now what your attitude is to this thing. I spoke and I muted myself and you’re saying I must be muted, when I muted myself. You know, you don’t have to do that, go overboard and abuse me like you normally do. But coming to the issues that are raised here, the reason now I wanted to intervene Chair, was to say that, I was trying to save time, because I’ve indicated to you, the more this goes on, actually, is actually defeating the purpose of what I’ve been saying to you. I was saying, you wrongly said I made accusations. That’s not true. That’s just completely false. I didn’t make accusations. I said, if you play the recording, you’ll hear I said that the evidence leaders did not finish for understandable reasons that had been discussed with us. That's not an accusation. I also said that the evidence leaders have failed to meet the seven-day deadline as Ms Bawa has indicated. That’s not an accusation, it’s what happened. But I also said, that was, as she correctly pointed out, discussed with me and we agreed. So, it was not even a complaint or an accusation, because it's something that I had agreed to. I was just using those examples to indicate that we, when accommodation was needed from us, we have been willing to grant such accommodation, not accusation, so there’s no need to misrepresent me and then mute me when I’m trying to correct you.”

1. Adv Mpofu SC again interjected, saying “*Your day will come*”. I indicated that I had not recognised him. I then enquired from Mr Zungula what his point of order was. He simply reiterated that Adv Mpofu SC was addressing his point of order, to which I had indicated he would do so after the Evidence Leaders had proceeded. As far as I was concerned he had indicated that the point of order that he sought to raise was “*about what she’s talking about*” [line 435] and he did so at the time when Adv Bawa SC had not even commenced with the substance of her submissions.
2. I allowed Adv Mpofu SC to complete his input. It was at this point that the following exchange occurred:

“**ADV MPOFU:** Okay, thank you, Chairperson. Yeah, I was just rounding off on the point of order, but I’ll finish yeah. I just want to say to you that, you know, the only reason I’m tolerating what you are doing to me is really for the interest of the client, otherwise you’re not entitled to abuse me like you are abusing me. I’m senior to you in many ways, not just in age but in many ways, you know it. So, have no right to abuse me, but fine, you’ve got the power now, you can exercise it, but you’ll pay one day, yeah. But anyway, I was saying, Chairperson – [interrupted]

**CHAIRPERSON:** Are you threatening me now.

**UNIDENTIFIED SPEAKER:** Chairperson.

**ADV MPOFU:** Pardon?

**CHAIRPERSON:** Are you threatening me now?

**ADV MPOFU:** Yeah.

**CHAIRPERSON:** Okay. Alright, please conclude what you want to say and attend to that [indistinct 1:06:16.8] I will make a ruling – [interrupted]

**ADV MPOFU:** No, actually, it’s not a threat, as I said, it’s a promise.

**CHAIRPERSON:** Yeah.”

## The Ruling

1. After the tea adjournment and before my ruling, Adv Mpofu SC indicated that his team had received a phone call to say that the PP was still at the doctor and that they would not be able to conduct the cross-examination without her being there to assist them. I had already intended to rule that they would not need to do any cross-examination that week, so this did not take it any further.
2. Before I made the ruling, Adv Mpofu SC interjected again, without having the floor.
3. I commenced with my ruling [YouTube reference 2:09:51]. Prior to the ruling I placed a number of issues on the record including:
   1. That at 12:00PM the preceding day I received a letter seeking a reconsideration of my decision that the proceedings continue, with a 13:00 deadline for me to respond thereto, which was not reasonable.
   2. Prior thereto, on Saturday, the PP’s legal team was informed that the matter would proceed on Tuesday morning, 13 September 2022.
   3. It was already understood that the Committee would sit on Wednesday, 14 September 2022.
   4. The situation came about because the PP brought an urgent application to the WCHC setting the application down for Tuesday, 13 September 2022, knowing the Committee’s hearings were ongoing. The events were created by this occurrence.
   5. The application was to be heard on Friday at the behest of the High Court (which is what I understood at the time).
   6. I specifically indicated that I make no comment in relation to a decision to set the matter down, but to the extent that this decision impacts on the Committee’s proceedings, it has arisen.
   7. That this was different to the position that prevailed when the accommodation was made for the High Court proceedings dealing with the suspension that was heard on 26 July 2022, as those proceedings had been pending and known about when the Enquiry’s programs were devised.
   8. The Committee will not sit on days which the Court is to hear matters, as we did in the past. But what is now being sought is different to that.
   9. Based on Adv Mpofu SC’s submissions it appears evident that what is being sought may have a knock-on effect which could negatively affect the proceedings going forward.
   10. Adv Mpofu SC has indicated that he is not ready and explained the circumstances.
4. In light of that, I granted his request and I then proceeded to state the following:

“Adv Mpofu SC has indicated that he’s not ready and explained the circumstances. In light of that, I’m granting his request to postpone his cross-examination of the witness, Ms Thejane, to accommodate him and in the absence of the PP, I will allow the cross-examination to be deferred to Wednesday the 21st September 2022 at 9am. To allow the Committee not be unduly delayed, the following two things will happen. The members will proceed today to ask questions of Ms Thejane. B, the Evidence Leaders should proceed with leading the direct evidence in relation to Mr Van der Merwe tomorrow, Wednesday. The cross-examination of Adv Van der Merwe will be deferred to Wednesday, to continue after the cross-examination of Ms Thejane, whereafter the members will ask Mr Van der Merwe questions. And lastly, Adv Mpofu will, during the course of the day advise the secretary as to the nature of the PP’s illness. That’s the ruling, colleagues.”

1. I had also after the hearing instructed the Secretariat that a recording of the questions posed by the Members to Ms Thejane be provided to the PP’s legal team in order that they would then have the opportunity to prepare for cross-examination scheduled the following week.

## Events after the ruling was made

1. I proceeded to invite Members to ask questions of Ms Thejane after the ruling.
2. I noted Honourable Member Gondwe and Honourable Member Maotwe.
3. Adv Mpofu SC raised his hand and indicated that he had raised his hand in seeking clarity and that he did not understand the ruling. I made it clear that the cross-examination would be postponed, as per his request. This was because Adv Mpofu SC was not ready, but I did not want the Committee to be delayed.
4. Adv Mpofu SC stated the continuation to be a contradiction and that he could not understand how it could continue on the next day. Clearly I had not allowed for the request for the Committee not to continue on the following day.
5. I indicated that the PP does not have a right to intervene in the questions that are asked by Members which requires conference with her legal representatives. As Adv Mpofu SC’s cross-examination was going to be delayed, that afforded them every opportunity to consult and for any issue to be raised with the witness in cross-examination. There was no contradiction with what Adv Mpofu SC had indicated was my ruling.
6. As for the next day it was quite clear that I ruled against the application for postponement. But I had mitigated this by indicating that Adv Mpofu SC did not need to cross-examine. Adv Mpofu SC then proceeded to indicate as follows:

“**ADV MPOFU:** So, again, it’s untenable for the witness tomorrow to be led in our absence, presumably and then we are asked to cross-examine next Wednesday, I mean, I don’t know what that means. And also, if the Public Protector is also not here when that witness gives evidence tomorrow, that makes it even more of disgraceful conduct. So, the … it’s not possible to have the person in respect of whom the witnesses are giving evidence, (a), absent for reasons of sickness, but (b) her legal representatives also absent for reasons that have been explained and accepted by you, Chair. Then the whole thing is just, will just be a waste of time and joke. So – [interrupted]

**CHAIRPERSON:** Adv Mpofu, thank you.

**ADV MPOFU:** No, I want to know, I don’t want, I want to know at what point then are we excused in line with the first part of your ruling and the second part is that you are continuing in our absence, you can do that, you can feel free, but we just don’t want to be accused of walking out, because the first part you said you are granting us our request.

I then proceeded:

**CHAIRPERSON:** Thank you, Adv Mpofu. The request to postpone the meeting is declined, that’s very clear.

**ADV MPOFU:** Oh.

**CHAIRPERSON:** I have granted you the request based on you not being ready to do cross-examination today. I’ve granted you that and I’ve indicated when that will happen. For now, members are going to continue asking their questions and for that there is no problem that the Public Protector is not here. They can’t be barred from asking their questions on the basis of that and therefore I want to proceed. I want to recognize Honourable Gondwe to ask [crosstalk 1:36:56.7]”

1. Adv Mpofu SC interjected, asking me to bear with him, to which I indicated that I had been doing so all morning and had now made a ruling. This was still not accepted by Adv Mpofu SC, who then persisted to interject, stating that he needed to understand what he needed to do. I then indicated to him that based on the ruling he had a choice as to what he wanted to do. It was not up to me to tell him what to do.
2. I was then accused of shouting at Adv Mpofu SC, which I was not doing. I indicated to him quite clearly that I am not shouting; that I had explained to him that I had made a ruling; that the questions needed to be proceeded with; and that I was not discussing the ruling with him.
3. Adv Mpofu SC was still unhappy and wanted to repeat what the position was again. I allowed him and indicated to him that I will give him a minute. Just because he had asked me for one minute, I granted him such an indulgence. I told Honourable Gondwe to be ready; that Adv Mpofu SC had only asked for a minute and I granted him that.
4. Instead of dealing with what he wanted to deal with, Adv Mpofu SC lashed out again, accusing me of bias – which was not the case. I simply wanted the meeting to proceed, Adv Mpofu SC then stated the following:

“**ADV MPOFU:** Chairperson, you know, your impatience only exposes your bias, you don’t have to, you expose your bias on a daily basis, you don’t have to do it every day. I’m saying to you, Chair, that I need to understand what the implications of the ruling is, because the next thing, if I, as I have obviously misread what you said, you’ve just explained it now and I don’t want to misread you because if you are excusing us, then you are excusing us. If you are not excusing us, you know, somebody went to jail for, you know, the lawyers leaving when allegedly they had not been allowed to leave. So, I don’t want that situation. I’m saying that the … you must explain, excuse me, whether you are excusing us because there’s no point, we cannot participate, Chairperson, with the greatest respect, in any proceedings in the absence of the Public Protector because she is sick. So, you must just understand that. Apart from the thing about preparation and all that. I’m saying, we cannot, because we’ll just be sitting here and doing what? So, that’s the first thing, yeah. The second one, yeah, the second one is that for the reasons that we have explained, we have already now lost almost three hours for something that you and I could have resolved on Sunday and we, so again, for that reason as well, we cannot continue to participate. So, I need to place those on the record. Please bear with me so that next, because next time it will be the misunderstanding, you know, now we are here, but a month or so later, it might all be misunderstood, so rather waste five minutes in clarifying what is happening, so that we know what we are entitled or not entitled to do, rather than, you know, rushing to Honourable Gondwe just for the sake of it.

**CHAIRPERSON:** Thank you.

**ADV MPOFU:** So, are you excusing us or are you not excusing us? Number one. Number two, are you expecting us to participate in anything because we can’t do that because our client is sick. Even the, you know, in Nazi Germany, they don’t continue when the – [interrupted]”

1. Thereafter, notwithstanding what was being said to me, I did not want it to become a dialogue. I merely pointed out that he had made his point. I repeated that the postponement of the meeting was declined – the meeting was to continue. But that the request not to cross-examine was granted. It was in terms stated “*Members are going to be asking questions and their questions are recorded. So there is nothing that is going to be unfair to the Public Protector in relation to that*”. I also indicated that I was not going to entertain his response again.
2. Adv Mpofu SC indicated that in terms of the Directives the Members asked questions after cross-examination. I then pointed out that because he had indicated he was not ready for cross-examination, that I would not delay the Members from asking questions. The Directives allow me to condone any non-compliance with any provisions of the Directives.
3. As Chair of the meeting and under the Parliamentary Rules, as well as the Directives, I am entitled to rule in that manner. I had previously sought advice from Ms Ebrahim in this regard and she had confirmed that as Chairperson I had the power to do so to cater for exigencies that may arise. In addition, the Directives operate in conjunction with the powers I have under the NA Rules.
4. At that point Honourable Member Maotwe interjected, asking for the meeting to be adjourned. Thereafter, Honourable Member Holomisa raised a further point of order, also supporting an adjournment, but I had already ruled and the meeting needed to proceed.
5. General Holomisa then stated as follows:

“To Dali Mpofu, please, if you are not satisfied, sir, don’t waste our time. Just go and seek remedial action. Challenge this thing in Court that you have been illtreated, because it’s unheard of in the history of judicial services. So, in the history of justice. But we as members of this Committee, we must be consulted. Nobody must decide on his own without consulting us. Thank you.”

1. I responded by pointing out to General Holomisa that the ruling had been made; that I was not obliged to consult on the ruling I had made; and thanked him for his input. The Parliamentary Rules did not require that I consult.
2. The third point of order was from Mr Zungula, also advocating that there be consultation and discussion on the way forward with the Committee. As far as I was concerned, the process was fair. The fact that the Members asked their questions before cross-examination, there was nothing procedurally unfair about doing so. The PP’s legal team would be able to deal with any aspect arising from the members’ questions when it came time for their cross-examination of Ms Thejane.
3. I was aware that I could place restrictions on time and process in accordance with the Directives and this was not in conflict with them.
4. Members then proceeded to ask Ms Thejane questions. After Honourable Member Gondwe completed her questions, Adv Mpofu SC again sought to interject. I then acknowledged him and another exchange occurred:
5. I was patient with Adv Mpofu SC and if one watches the audio-visual recording when I am accused of shouting, I was not shouting. I was merely seeking to move along with the meeting and allow the Members to ask questions, but Adv Mpofu SC was not satisfied, and he insisted on speaking when others were speaking, which was untenable.
6. I made it clear that I did not want Adv Mpofu SC in the middle of members’ questions to put up the medical information of the PP. In performing my duties as the Chairperson, I regarded it as inappropriate to put up a medical certificate in the middle of members asking questions in circumstances where it should properly be submitted to the Committee Secretary and be provided to me. I subsequently explained in my address on 21 September 2022 that although I did not at the time say it, I was mindful of privacy issues and did not want a medical certificate to be in the public domain especially since I was aware there may be legal implications of displaying same. I did not want the process to be accused of forcing the PP to disclose her private medical matters, the nature of which was entirely unknown at that point. More than once I told Adv Mpofu SC to submit the certificate to the Committee Secretary.
7. Adv Mpofu SC then indicated that he wished to raise a point of order. I gave him the floor. And what he then sought to raise was not a point of order. As is apparent from a reading of his address, he simply said he was raising a point of order so as to regain the floor.
8. I was then told to take a “*chill pill*”. As inappropriate as that was, I did not retaliate or respond in any negative manner. Accusations of me shouting and bellowing were without merit. I was simply trying to bring order to the meeting for members to continue with questions.
9. When I pressed Adv Mpofu SC that his point of order was not in fact a point of order, he raised something entirely different arising from the witness and could have been dealt with on cross-examination. That too was not a point of order.
10. Adv Mpofu SC then stated that if I did not want the medical certificate, it was going to be released into the public domain anyway. And he then pointed out that the public was watching.
11. I did not want that medical certificate to be released through the Committee to the public. If the PP’s instructions at the time to Adv Mpofu SC was to release the medical certificate in the public domain, then that is her decision. As long as it was not through the Committee process that the PP felt pressured to reveal private medical information.
12. As apparent from the aforegoing, I deny that I had unreasonably and unfairly refused to entertain and/or grant a postponement of the proceedings, as requested. This is apparent from the above.
13. I also deny, for the reasons which I have already explained, that the ruling I made on 13 September 2022 resulted in gross prejudice to the PP or a denial of her fairness rights.

## Temporary Medical Unfitness

1. With reference to temporary medical unfitness, it is alleged in the application for recusal that I had dismissed a postponement application based on the medical condition of the PP even though at the time of the ruling there was no medical certificate. This is incorrect. The PP’s ill-health was not the reason for which the postponement was sought.
2. I point out that at no stage were the details of the medical condition of the PP on 13 September 2022 disclosed. In fact, Adv Mpofu SC’s only knowledge at the time that it was raised was that the PP was ill and had been taken to the doctor. He initially even said the P was taken to the ‘hospital or doctor’ – he was not even sure. He sought to infer that the PP’s conditions could well have been related to “*the stress of the refusal to accommodate the postponement*”.
3. I have set out above the chronology of the manner in which the alleged relevant medical evidence was sought to be put before the Committee in the form of a medical certificate and the reasons why I refused to allow that medical certificate to be shown on the public screen. I addressed this in my address to the Committee on 21 September 2022, before Adv Mpofu SC made his oral submissions supporting the application for recusal.
4. I still do not know what ailed the PP. The medical certificate provided made no mention of the nature of her sickness, as I discovered later in the day. All that it reflected was that the PP had been seen by a certain doctor and she was unable to work for the period 13 – 16 September 2022. I accepted the medical certificate in good faith and did not seek to obtain any further information on the nature of the illness.
5. At the time of the ruling the PP’s medical condition was not known. The postponement application was always premised on what was playing out in relation to the urgent application which was brought by the PP in the High Court. I accordingly deny that the manner in which I dealt with the PP’s medical condition amounted to anything constituting gross unreasonableness, unfairness, insensitivity, cruelty or malice as reflected in paragraph 63 of the application. There was nothing before me at the time of my ruling to suggest that, for medical reasons, the PP would not be available later in the day or the following day. I have since been made aware that subsequently she was able to sign an affidavit during the afternoon of 13 September 2022 and any other affidavits for the urgent WCHC application.
6. When I was provided with the medical certificate after the proceedings had closed at lunchtime on 13 September, I noted from the contents thereof that the PP had been put off work by a medical doctor for the period 13 – 16 September 2022. As a result, I instructed the Secretariat to cancel the planned hearing for 14 September 2022 and to consider what days in the following week the members would be available for the matter to continue.
7. I received the PP’s medical certificate after it had properly been submitted to the Secretariat. I considered it, and duly directed that the Committee’s programme be adjusted as a result thereof. I did not question the certificate. As indicated I did not even ask for further details of her illness. And when the PP’s legal team further asked for the hearing scheduled for the following week on Monday 19 September not to be held, but rather on Wednesday 21 September, this request too was granted. Accordingly, allegations of bias or reasonable apprehension of bias are misconceived.

## Conclusion

1. As is apparent from the exchange which I have set out above, I refused the public presentation of the PP’s medical certificate and indicated that it must be properly submitted to the Committee Secretary. I did not consider a postponement on the basis of the PP being ill and at the doctor as that was not the basis for the postponement that was being sought.
2. I did not retaliate to Adv Mpofu’s attacks. I did not respond, no matter how provocative the comments made. I did not insult Adv Mpofu SC. I sought to protect the PP’s privacy. And in my view, I sought to balance the interests of the Committee with those of the PP. There is no basis upon which actual bias or a reasonable apprehension of bias can be construed.
3. There is therefore no basis to seek my recusal on either grounds nine or ten.

# THE ELEVENTH GROUND: REJECTION OF MEMBERS’ REQUESTS TO BE CONSULTED

1. The members’ requests were not unduly rejected. I invited all members to make submissions and to raise any issue they wanted to raise. Various members had done so and then continued to do so, including Dr Lotriet, Mr Mulder, Ms Siwela, Ms Maotwe, General Holomisa, Mr Zungula and Ms Dlakude.
2. There were no dictatorial tendencies, manifest bias or disqualifying impropriety. The PP’s application was partially successful in that I granted the request to postpone cross-examination. The fact that the PP’s application was not wholly successful cannot be taken as evidence of bias or unfairness.

# THE TWELFTH GROUND: STATEMENTS IN THE PUBLIC DOMAIN

1. The PP alleges that I presented ‘*false facts*’ during two interviews. These were not identified. As such, I am unable to deal with such allegations.
2. For the avoidance of any doubt, I did not present any false facts: the claim is both baseless and untrue. The PP also alleges that I called for Adv Mpofu SC to be investigated by the Legal Practice Council (‘**LPC**’), for ‘*allegedly “threatening”*’ me, which restated the ‘*unduly hostile*’ position adopted by certain political parties. Again, this is incorrect.
3. I should note that Adv Mpofu SC’s utterances are not mere allegations, but were viewed on a live broadcast by much of the country and confirmed by him during the proceedings. His intention during the hearing was something that he expressly said, by first confirming it to be a threat, and thereafter clarifying that it was ‘*a promise*’.
4. I did not replicate the stance of any particular political party, nor did I adopt an ‘*unduly hostile*’ position.
5. During an interview with NewzRoom Afrika, the interviewer asked me a question about Adv Mpofu SC, and I responded.
6. I did not issue a call for Adv Mpofu SC to be investigated by the LPC. I merely noted that the LPC, as the professional body responsible for the ethics and behaviour of the legal profession would address Adv Mpofu SC’s conduct if, in fact, anything warranted attention by that body.
7. I made the point that, whatever the interaction may have been with Adv Mpofu SC, the Committee should not be distracted from its important work i.e. engaging with, and assessing, the evidence in respect of the various charges in the Motion.
8. At no stage did I say that the PP’s legal team should be removed or that the PP should be “*stripped of her right to legal representation*”. For the avoidance of any doubt I have personally not laid any complaint nor taken any steps to initiate an investigation into Adv Mpofu SC. All that I indicated in the interview was to point out that he is regulated by a professional body and if they feel he has to account then they must call upon him to do so.
9. I did not show, or possess, any ‘*lack of impartiality*’ or ‘*negative attitude*’.
10. The PP claims that ‘*fake outrage*’ has been generated in response to Adv Mpofu SC’s ‘*warnings*’ that a recusal application would be brought (see para 6 of the application).
11. It is not clear who this *“fake outrage”* is being attributed to, but if it is a reference to me then I deny the allegation. I cannot speak to the plethora of public views expressed. I endeavoured to maintain order in the meeting, which was not made easy by the position and threats/warnings/promises as the case may be that were issued by Adv Mpofu SC himself.
12. I regard my response to have been reasonable in the circumstances.
13. On 13 September 2022, when Adv Mpofu SC confirmed that he had threatened me, I did not regard it as a threat or warning that would form the impetus for an instruction that a recusal application be brought against me. In fact, the PP was not even present during this exchange to have given such an instruction at the time.
14. The language used was vague, using phrases along the lines of ‘*You will pay one day*’ and ‘*Your day is coming*’. I did not understand these phrases to refer to a recusal application or even emanate from an instruction given by the PP, nor could it be attributed to her as she was not there. Accordingly, it would be nonsensical to attribute any response as a reflection of any bias (real or perceived) against her.
15. The situation as it was evolving was incredulous – and that is why I sought clarity as to whether I was in fact being threatened by Adv Mpofu SC. He first confirmed that he was in fact threatening me, before he said that he was not, within seconds indicating that it was a ‘*promise*’ with the elaboration that he was more senior to me in many respects, not just in age. He addressed me in isiXhosa, saying ‘*Jonga*’ (i.e. ‘*look*’ or ‘*look here*’ in English).
16. Adv Mpofu SC also alleged, on the day, that I was shouting at him. That is not true. I spoke sternly, because he constantly interjected, interrupting the continuation of the Committee’s business. This, even after I had clearly made my ruling on the PP’s postponement application. Those sorts of interruptions have repeatedly occurred and not been conducive to an orderly or functional meeting. My task has been to ensure that I do not allow them repeatedly to occur.
17. Adv Mpofu SC’s repeated interruptions, refusal to accept that he could only speak once recognised by the Chairperson and his insistence on speaking even as I was speaking are the reasons I directed that his microphone be muted, in order to restore the order of the proceedings.
18. I accepted his *bona fides* that he was unable to conduct any cross-examination.
19. The PP has a large legal team, comprising two attorneys and three counsel in the Enquiry. Given that Committee members were proceeding to question Ms Thejane on 13 September 2022 after I ruled on the postponement application, one or two members of that team could have remained in attendance at the Committee meeting, while the balance requested to be excused to attend to the Public Protector’s High Court application, if they so wished.
20. In any event, for a considerable part thereof, Adv Mpofu SC did remain on the platform and even after leaving he returned, before leaving again. It was not clear whether the entire legal team was on the platform on that day.

# GENERAL

1. The Committee is undertaking an unprecedented process: never before in South Africa has a Chapter-9 office-bearer faced an enquiry under section 194 of the Constitution. It has received inputs from members of the public through a public-participation process, and its proceedings take place daily in full view of the public.
2. The Committee is large, in fact the largest Committee ever to have been established in our constitutional democracy. This creates logistical challenges which, as Chairperson, I try to manage to the best of my ability both in scheduling – especially when Parliament is in session – and during the course of a meeting.
3. The Committee is also required to traverse voluminous evidence. The Motion alone refers to numerous judgments, affidavits and court records, apart from the documentation that the Evidence Leaders provide in the Bundles uploaded to the Dropbox folder and shared with the PP. The legal teams have produced further evidence. Aside from the weeks of oral evidence that has already been led, the Committee has voluminous documentary evidence.
4. The Constitution provides that Members of Parliament must determine whether the Public Protector has misconducted herself, or been incompetent, as alleged. Not courts of law, not administrators, not quasi-judicial bodies. The Committee’s process is something that is exclusive to Parliament, and to its members, who are not lawyers or bureaucrats but directly elected representatives of the people.
5. The Constitutional Court has also determined that evidence may be led and tested through cross-examination. That is not ordinarily how parliamentary committees receive information, nor is there precedent for how this should unfold in the Parliamentary context.
6. The Committee’s proceedings are therefore substantial and complex, where some aspects may only be addressed as and when they arise. The Enquiry must be conducted ‘*diligently and without delay*’.[[13]](#footnote-13) All of this means that, if the Committee is not to unravel, it must be managed firmly and fairly.
7. This is what I have endeavoured to do. I have called Adv Mpofu SC to order when necessary, but more often than not have allowed him significant leeway for the sake of progress. I have called members to order when they have been unduly disruptive, and I have not acceded to objections by the Evidence Leaders when I deemed it appropriate.
8. All in all, I have no doubt that I have been fair, reasonable, firm and balanced in seeking to ensure that the Committee discharges its fundamental constitutional function. There is therefore no substantive merit in the recusal application. I am confident that at every stage of this process I have acted with integrity and have sought to ensure that the process is fair – to the PP, to witnesses, to members, the Evidence Leaders and the public alike.

1. In this response I do not address the recusal grounds that relate to Mr Mileham. He has prepared his own response and furnished a copy thereof to the Committee Secretariat. [↑](#footnote-ref-1)
2. [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. P590 00h06h55 - p 681 03h22h28 [↑](#footnote-ref-4)
5. P590 00h06h55 - p 681 03h22h28 [↑](#footnote-ref-5)
6. P68 just before 02h14h48 - p 141 04h42h32 [↑](#footnote-ref-6)
7. P112 [↑](#footnote-ref-7)
8. P140. [↑](#footnote-ref-8)
9. At this juncture I make no comment as to whether or not it was a protected disclosure as a matter of law. [↑](#footnote-ref-9)
10. I note that Adv Mpofu SC acknowledged that he was exaggerating. [↑](#footnote-ref-10)
11. **Speaker v PP** at para 45. [↑](#footnote-ref-11)
12. *Islamic Unity Convention v Minister of Telecommunications and Others* 2008 (3) SA 383 (CC) at para 73. [↑](#footnote-ref-12)
13. Section 237 of the Constitution. [↑](#footnote-ref-13)