APPLICATION FOR THE REMOVAL AND/OR REPLACEMENT OF THE EVIDENCE LEADERS:

PUBLIC PROTECTOR'S REPLY TO THE EVIDENCE LEADERS' RESPONSE

A: INTRODUCTION

1. On 21 November 2022 and in terms of the applicable Directive, the Chairperson imposed timelines for the delivery of the Public Protector's application on 23 November 2022 and the anticipated written response of the Evidence Leaders on 26th November 2022.

2. The Public Protector complied with the deadline. The Evidence Leaders failed to comply with their deadline and apparently delivered their document on 27 November 2022. For some reason the response was not sent to the Public Protector until that issue was raised during the oral presentation of the application. After the first break, at about midday the Chairperson ruled that the proceedings be adjourned until the following morning at 9h30 so as to allow the Public Protector's legal team to receive the document, go through it and prepare a written response by 08h00 on the following day. In addition, the Public Protector was expected to prepare her first witness.

3. This is then the reply:

4. Due to the aforesaid unreasonable timelines, it will not be possible to do any justice to the reply. Below we raise in cryptic form only the key issues which require a response.

5. Although high expectations were created upon the response of the Evidence Leaders when Honourable Corne' Mulder, in a typical display of a predetermined outcome, stated in public that the said response was so comprehensive that if the Public Protector had read it, she would not have proceeded with her application! This was at a point before this reply or any deliberations on the application. The Public Protector is expected to believe that people who make such premature and biased remarks can deliver a fair outcome of this and other applications made by her.

6. In spite of such inappropriate and rather generous remarks, the response by the Evidence Leaders is rather disappointing in that it totally fails to understand the real basis of the application and misses the point which is sought to be maintained. The response is big on insults, prejudging a number of issues which are yet to be argued and determined and selective skewed and openly partisan commentary aimed at all and sundry including the Public Protector, her legal team, aggrieved members of the legal profession as well as organisations of the organised legal profession who have publicly raised any disapproval of the conduct of the Evidence Leaders relevant to the present application.

7. Such direct and indirect insult are too many to mention and are indeed regrettable. However, we elect not to reply in kind and we will therefore

concentrate on what content may be discerned from the response and not to the vitriolic attacks and unfounded personalised attacks.

8. The Evidence Leaders betray their lack of understanding of the true character of the application when they state that “it is more a recusal application than a removal application.” This is unfortunate because it is self-evidently impossible to respond to something which you have not even described properly. Such a response is bound to be irrelevant to the real issues.

9. Instead of raising issues for real debate the Evidence Leaders have contended themselves with hurling gratuitous insults on the Public Protector, her legal team and all those who have found their conduct objectionable. The selection of uncharitable adjectives and the descriptions directed at these parties is impossible to list exhaustively but include words which described the Public Protector and/or her application as “unfounded”, “misconceived”, “misleading”, “patently false”, “unjust”, “irrelevant”, “contrived”, “preposterous”, “opportunistic”, “vexatious” and “fabricated” to mention only a few examples.

10. We will deal with any remaining content in point form.

11. The Evidence Leaders then go on to pass judgment on all manner of issues which are still to be argued or are in serious dispute. Prominent examples in respect of the alleged and disputed “walk out”, the question whether or not the Committee acted in contempt of court, the question whether the motion or charge sheet refers to legal fees or legal costs, the credibility of the document

submitted to the Committee by Adv Sikhakhane SC, at the invitation of the Chairperson, whether there was a duty to inform the affected advocates and/ or attorneys, whether or not it was necessary to include the names of the affected practitioners.

12. We now turn to dealing with some of the broad and the specific submissions made in the Evidence Leader's response. We do so by adopting the paragraph based methodology subject to the proviso that anything not specifically responded to which is inconsistent with the version advanced by the Public Protector, must be regarded as disputed.

AD PARAGRAPHS 1 - 11

13. This introductory section is seemingly intended to communicate that the present application:

    13.1. does not arise from a genuine concern of the Public Protector but is an endeavour to delay or stop the continuation of the move of this Committee and "simply another attempt to distract the Committee from its objectives and the task at hand": we reply by rejecting this characterisation as unfortunate in so far as it imputes unfounded improper motives of the Public Protector;

    13.2. is more a recusal application than a removal application: the Evidence Leaders are not being asked to recuse themselves. It is the committee which is being required to exercise its duty that it "must ensure that the inquiry is conducted in a reasonable and procedurally fair manner";

13.3. should be brought only at the end of the proceedings: it would be extremely wasteful to allow a flawed and biased process to run its course and only raise the issue at the end or when the outcome has been reached;

13.4. is "misleading" because it equates the Evidence Leaders with prosecutors and fails to recognize that evidence leaders have no decision making powers: it is not the Public Protector but the applicable prescripts including the terms of reference, the directive and indeed the Evidence Leaders themselves in their previous utterances which make the comparative statement that the Evidence Leaders are not prosecutors; and

13.5. is based on false claims: the issues raised by the Public Protector are based on factually objective bases premised on the record and/or documents which have been annexed.

AD PARAGRAPHS 12 TO 16

14. This section is based on the unsustainable denial of the fact that several witnesses have themselves articulated that the Evidence Leaders put words in their mouth which they could not defend or justify. We must emphasize that we are not referring to the everyday practice of legal practitioners preparing affidavits and other legal documents for witnesses. We are specifically referring to evidence given under oath but which was specifically disowned by the witnesses and attributed to the Evidence Leaders. The prominent examples are Mr Samuel who testified that he had never read the cases which "he describes in his affidavit" and Ms Thejane who specifically referred to charge four as the

foundation of her affidavit and also cited specifically numbered paragraph of the affidavit of Ms Mogaladi only to testify that she had never read both of the relevant documents(i.e the Mazonne motion and or the affidavit of Ms Mogaladi).

15. Instead of dealing with this concerning trend, the Evidence Leaders choose to refer to Mr Mahlangu to whom the issues raised does not apply.

16. Regarding the claim of collusion, tangible evidence was provided in the form of letters in which information specifically conveyed to the Evidence Leaders found itself in letters written by the Chairperson. Such information was clearly and obviously conveyed in discussions or meetings which excluded the Public Protector only or her legal team.

AD PARAGRAPH 23 to 32

17. We again point out that far from being “not apposite”, the comparisons and or contradictions of the role of Evidence Leaders with reference to prosecutors, is derived from the Terms of Reference and other relevant sources. The purpose of making the comparison must have been exactly to avoid the issues complained above in the Public Protectors application, namely, coaching witnesses for a desired outcome and or assuming an adversarial posture by for example, cross examination by the Evidence Leaders as in the case of Mr Sithole.

18. The insult that Adv Mkhwebane might have been “prompted from elsewhere” when she was addressing the Committee, which is an accusation of dishonesty, is regrettable.

19. So is the submission that, in the context of this application, it should make any difference whether the forum is a tribunal such as an inquiry or a Commission, or a courtroom. It is trite that section 34 of the Constitution applies equally to proceedings such as the present. In any event, procedural fairness is a compulsory standard in the present proceedings. Indeed the terms of reference boldly state that “the principle of fairness shall be paramount to the manner in which the Committee conducts the inquiry”. This must clearly include all persons assisting the Committee. We dispute the assertion that the Evidence Leaders cannot be blamed for what circulates in the public media space, when such materially emanates from the conduct of the Evidence Leaders which would clearly, predictably and inevitably lead to negative and targeted violations of the rights of specific persons.

AD PARAGRAPHS 34 - 45

20. These submissions seem to confuse the charge which specifically relates to allegations of PFMA breaches in respect of legal fees, the meaning of which is still hopefully to be explained by the complainant, and the broader discussion on austerity measures and other good management measures. The first issue is about governance and the latter is about general management or leadership.

21. Furthermore, our emphasizing the fact that the Committee has no jurisdiction to adjudicate on or resolve the various complaints or public pronouncements of professional misconduct on the part of the Evidence Leaders is not a "concession" but intended to explain the context in which these issues are referred to, namely, for their objective existence out there rather than their validity or invalidity. The test for a reasonable apprehension of bias is objective, not subjective. The mere existence of allegations of racism against anyone involved in the inquiry can never possibly be "irrelevant to the Terms of Reference of this Committee" such a statement merely needs to be made to be rejected.

22. We admit that the genesis of the present issues what was indeed the unfounded suggestion by Mr Mileham that certain firms of attorneys and advocates had "benefited" from the allegedly unlawful expenditure and that the R2M cap was arbitrary. We further confirmed that the Public Protector objected immediately to the request based on irrelevance and predictable harm to the rights of others. It is also true that "the chairperson and undertook to be sensitive to the concerns raised by Adv Mpofu Sc, in relation to private financial issues and the abuse of parliamentary immunity". It is the failure to adhere to that undertaking by both the Chairperson and specifically the Evidence Leaders which is at the centre of this issue.

23. The mere fact that, despite that history, such contested evidence was led in the absence of the Public Protector's legal representatives of choice, is no mere aggravation. No legal and fair outcome can come from illegal proceedings.

24. The submission that “it would seem it would seem that there would have been no objection had only the names of white Counsel been shown” boldly misses the point and trivializes the hurt caused and repeatedly expressed by neutral parties, member of the public and organs of society.

25. A typical example of the skewed and self-serving manner in which the evidence leaders are addressing the issues is best illustrated by the account of what happened on 10 November 2022, at paragraphs 75 to 78. The record will show that the key objection raised was exactly the fact that while the evidence leaders expressly left the decision in the hands of the Committee, it was instead the Chairperson who voluntary made the decision to repeat the very conduct at the centre of the complaint. This valid objection of the Public Protector, was also supported by one of the members, Honourable Maotwe. Yet the evidence leaders miraculously made no mention of both objections.

26. The idea that discourtesy and unprofessional failure to forewarn the affected advocates would have made any difference is disputed. The obvious dangers of the misleading failure to explain the full context was actually conceded by Mr Van Der Merwe under cross-examination.

27. It is untrue that the omission of names could not be avoided. This is ironically proven by the present deletion of names in the invoices contained at pages 26 to 29 of the evidence leaders response.

28. The issues of inaccuracies is a peripheral issue compared to the unnecessary brandishing of the names and private earnings of practitioners.

29. Fully knowing that the members and the Chairperson are clearly not legally trained, the evidence leaders carry an additional duty to point out when the rules are being flouted to the prejudice of any person. They have failed to discharge this duty resulting in unfairness being visited upon the Public Protector.

30. It is illogical both to deny the obvious fact that Mr Sithole made important concerns which were helpful to congruent to the version of the Public Protector but to concede that the evidence leaders actually cross-examined him. The issue is the impropriety of such cross-examination, given the duty upon the evidence leaders not to have a competing version to “put” to a witness. That is the nub of the complaint of bias which necessitates the removal of the evidence leaders.

31. It is indeed clear from any objective interpretation of the Terms of Reference and the indisputable role of evidence leaders that they are not capable of having a version and/or enjoying the right to cross-examine witnesses, least of all witnesses called by them. This is elementary. The Committee cant possible be “empowered” by defying this fundamental rule. The expression “any questions” must be understood withing the context of the rule and the well accepted role of evidence leaders.

AD PARAGRAPH 180

32. At the risk of reputation, we take no issue with the daily practice that practitioners prepare statements and/or affidavits. What is not allowed is to invent evidence which the deponent subsequently disavows as not his or hers. That this disturbing trend occurred, is exemplified in the evidence of Mr Samuel and Ms. Thejane and to some extent Mr Raedani. In fact once is more than enough.

33. In respect of these examples the credibility of the alleged denials by the affected witnesses, the record speaks for itself. Suffice to state that the relevant witnesses made necessary admissions and/or concessions under cross-examination. If necessary, another witness will be called to support the Public Protector's version of the illegitimate coaching of witnesses. It is unhelpful for the evidence leaders to simply state that "it is not clear why Ms Thejane contradicted herself in her evidence". The issue is that it is common cause that:-

33.1. her affidavit falsely refers to documents which she never read, with seemingly accurate specificity;

33.2. the affidavit was prepared for her by the evidence leaders; and

33.3. the relevant contents of the affidavit could not possibly have emanated from her.

34. In the ironies of ironies the evidence leaders complained about unspecified posts allegedly made on twitter by an unnamed member of the Committee. Yet

they remained totally silent when concrete and admitted evidence was provided to the Committee about insults hurled on Twitter against lead Counsel for the Public Protector by Mr Kevin Mileham, a member of the Committee. Needless to say the Committee also found nothing wrong with such conduct.

35. It is improper for the evidence leaders to label the previous applications by concerned members of the Committee as “vexatious”. Members are entitled to raise their concerns and to give any person an opportunity to be heard, as was clearly done in respect of the previous applications.

36. The fact that the evidence leaders are not “decision-makers” is totally irrelevant. All participants are duty-bound to comply with the applicable prescripts and to avoid any conduct which violates the rights of others. These duties lie on decision-makers and non-decision-makers alike. Moreover the Committee bears a duty and power to ensure fairness. It is simply untrue that the evidence leaders or anyone who has followed the inquiry “have not heard one witness say, of their own accord, that anything had been added to their affidavits”.

37. The Public Protector does not dispute legal qualifications, experience and appointability of the evidence leaders. It is only their proven conduct which is incongruent with their role in this particular matter which is at issue.

38. Unlike the Public Protector, the evidence leaders have failed to attach or identify the “overwhelming messages of support” when they refer to. Such claims must therefore be discounted as unsubstantiated. The claims of racism are serious

and ought not to be trivialised as invalid and presented opportunistically or "when all else fails". It is not clear what failed, how and when.

39. In line with our previous practise and as indicated to the Committee at the sitting, we annex hereto marked "**RA5**" a copy of the LPC complaint lodged on 29 November 2022 by Adv Ngalwana SC about which Adv Bawa was informed by him.

40. The application ought accordingly to be upheld.

DC MPOFU SC

B SHABALALA

H MATLHAPE

29 November 2022