STATEMENT / AFFIDAVIT TO THE COMMITTEE DETERMINING FITNESS TO HOLD OFFICE BY PUBLIC PROTECTOR OF SOUTH AFRICA (PART A)

Table of Contents

I, the undersigned,

BUSISIWE MKHWEBANE

do hereby make oath and state that:

1. I am the Public Protector in terms of the Constitution of the Republic of South Africa 1996 ("the Constitution") and appointed as such in terms of Section 1A (2) of the Public Protector Act, 23 of 1994 ("the Public Protector Act") by the President of the Republic of South Africa for a term. I am the subject of the current Enquiry established in terms of Section 194 of the Constitution of South Africa, read with Rule 129 of the Rules of the National Assembly in my capacity as the incumbent Public Protector conducted by a Committee established in terms of Section 194 (1) of the Constitution ("the Committee).

2. The facts deposed to in this affidavit are within my personal knowledge except where it is evident from the context that they are not. Where I make submissions of a legal nature, I do so on the basis of my own understanding of the law and the advice of my legal representatives which advice I believe to be correct.

3. In line with the latest pronouncements of and the flexibility introduced by the Committee as articulated in its letter dated 2 March 2023, this is the first in a series of written statements which will be submitted to the Committee in the course of the delivery of my oral testimony. It is envisaged that there will be a minimum of two more parts, depending on future developments in respect of future witnesses who may be called, the requirements of the Committee or my legal team, as the case may be. This first affidavit will deal mainly with the

context and overview of the backdrop against which my evidence regarding the merits of the charges will be presented as well as my version in respect of paragraph 11 of charge 4 of the Motion of Ms Natasha Mazzone ("the Mazzone Motion"). It is anticipated that the second instalment of my affidavit/statement will largely deal with Charges 1, 2 and 3 of the Mazzone Motion. Those charges are principally based on the so-called CIEX and Vrede matters. That second statement will deal in detail with both the defects in those charges and, in the alternative, the merits thereof. The third and hopefully last statement will deal with the separable and totally baseless allegations of victimisation, intimidation and harassment of staff members which have been made in paragraph 10 of the Mazzone Motion. The logic behind this separation and sequencing of my evidence will become clear from what is stated below.

A. BACKGROUND AND PURPOSE OF THE AFFIDAVIT

4. The purpose of this affidavit is to outline to varying degrees of detail, some of the key issues which arise from the more than 60 000 pages of documentary and other evidence which has so far been presented as forming the basis of the charges laid by Ms Natasha Mazzone MP against me and which therefore, in turn, form the basis of the accusations whose veracity the section 194 (1) Committee is tasked to establish in terms of Rule 129AD of the applicable Rules of the National Assembly, which states that:-

"*129AD. Functions and powers of the committee*

(1) The committee must, when the Assembly has approved the recommendations of the independent panel in terms of Rule 129Z proceed

to conduct an enquiry and establish the veracity of the charges and report to the Assembly thereon.

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

(3) The committee must afford the holder of a public office the right to be heard in his or her own defence and to be assisted by a legal practitioner or other expert of his or her choice.

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

5. This affidavit deals with the various topics as outlined in the contents page above. However it is important to state upfront that the said outline does not necessarily represent the sequence in which my oral evidence will be led. I start with some personal information.

6. Before dealing with my credentials and some of the overarching information it is crucial to put my evidence into its true and proper perspective by calling out this process for what it is and what it is not, in my honest opinion. For the record I do not, for one second, believe that this process represents a genuine impeachment process. It is merely a politically motivated witch-hunt reminiscent of, *inter alia*, the words of Chief Justice Mogoeng, speaking for the unanimous Constitutional Court, when he said about the Public Protector: "*Her investigative powers are not supposed to bow down to anybody, not even at the door of the highest chambers of raw State power. The predicament though is that mere allegations and investigation of improper or corrupt conduct against all, especially powerful public office-bearers, are generally*

bound to attract a very unfriendly response. An unfavourable finding of unethical or corrupt conduct coupled with remedial action, will probably be strongly resisted in an attempt to repair or soften the inescapable reputational damage. It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated."

7. This whole process is also a vanity "*Special Project*" of the Democratic Alliance ("The DA") aimed at scoring political points as the first party to have ever caused a head of the Chapter Nine institution to face impeachment proceedings. This process has nothing to do with accountability. It has nothing to do with the Constitution of the Republic of South Africa or the Rule of law. This process is as far removed from the Constitution as the South is from the North. It is a politically motivated witch-hunt masquerading as a *bona fide* enquiry under the auspices of section 194 of the Constitution. It is not. It is a racially motivated campaign born out of the fear of real change which might actually benefit the poorest and most marginalised members of the public who are in the main black at the expense of those who benefit the most from an untransformed economic status quo, who are in the main white and the backbone constituency of the DA.

8. In its effort to get rid of me and to punish me for doing my work as prescribed in the Constitution, i.e. without fear, favour and prejudice, the DA is aided and abetted by the ruling African National Congress (ANC) which is driven by separate motives of retaliation and revenge for having exposed corruption and other wrongdoing on the part of its most powerful leaders such as President Cyril Ramaphosa (in respect of notably the CR17/BOSASA funding and more recently, the Phalaphala scandal) and the likes of Minister Pravin Gordhan (in

respect of his role in the so-called "*Rogue Unit*" scandal and the fake "*retirement*" of his friend and comrade, Mr Ivan Pillay). As the Chief Justice said such investigations are "*generally bound to attract a very unfriendly response*."

9. Neither is my current suspension a *bona fide* exercise. The suspension is a vengeful, retaliatory and illegal act by the current President for no other reason than the multiple investigations I was seized with before and at the time of the suspension, principally the abovementioned CR17/BOSASA matter and the Phalaphala scandal, to mention a few. A Full Court of three judges recently described my suspension as follows:

> "*In our view the hurried nature of the suspension … when he suspended the applicant*."

10. It is these factors which have led to the formation of the unholy alliance between the DA and the ANC to advance their common objective of removing me from office by hook or by crook and, if the courts are to be believed, mostly by crook.

11. As with all externally based campaigns to silence voices which genuinely work for the upliftment and true freedom for the marginalised, the literal and figurative assassination of such efforts can never succeed without the active assistance of those who collaborate with the values of such freedom.

12. In this joint operation neither of them, armed with a parliamentary majority, will be deterred by such niceties as fairness, reasonableness or the lack of evidence. To seek to convince them to look at the evidence without pursuing

their joint and predetermined outcome will be an exercise in futility and Einstenian insanity. My evidence is therefore directed more at the South African public to judge my record, my performance and the evidence for itself. It is, after all, the public which the members of parliament are supposed to represent. It is also the public which relies on my office for its protection against the excesses of state functionaries in all spheres.

13. Any objective, fair and reasonable analysis of what has occurred during my incumbency until this point can only lead to one conclusion and one conclusion only: I am not guilty of the "*charges*" concocted by Ms Mazzone's DA and supported by the ANC majority. On the contrary I have taken the Office of the Public Protector to greater and unprecedented performance and governance issues pertaining to proper accountability.

14. To put matters into their proper perspective I wish to point out the following glaring absurdities:-

14.1. My 7-year non-renewable term of office will expire in 6 months time, in mid-October 2023;

14.2. Based on past experience, within the next few weeks or days the process of advertisement, shortlisting and interviews for the next Public Protector should commence;

14.3. The current enquiry is estimated to cost the taxpayer approximately R1 million per day (in addition, the non-financial cost to the public for the instability caused in the Office of the Public Protector is incalculable);

14.4. Contrary to the popular and false narrative, my legal team and I have been to courts on countless occasions making several attempts to stop the commencement and/or continuation of this illegal process. Currently two significant judgments are awaited from the Full Court of the Western Cape High Court and the Constitutional Court, respectively. On each occasion the President, the Speaker, the Chairperson of the Committee and/or the DA have opposed all efforts to stop this costly and pointless and futile exercise;

14.5. The witnesses called by the Evidence Leaders and/or the Committee alone have effectively exonerated me of any impeachable wrongdoing in respect of any single one of the charges. No fair court of law can possibly uphold the contrary finding which will inevitably be made by the current DA-ANC overwhelming majority in the Committee. The impeachment effort is therefore doomed to fail if subjected to any fair judicial scrutiny.

15. On the first day of the sitting of this Committee and in the opening address, I made it abundantly clear that the process was inherently and irreparably unfair, biased, predetermined and doomed from the start. I however indicated that I would participate in the charade, albeit under protest and in the hope that somehow and miraculously, sanity might prevail. I also wanted to disprove the popular narrative of the media and my other detractors that I was somehow avoiding or scared of this illegal process due to any wrongdoing on my part.

16. My actual experience of what has transpired in the past 7 months since that date, have only served to amplify the defects which already existed on 11 July 2022. These include:-

16.1. the refusal to exclude charges in respect of which the Independent Panel found no *prima facie* evidence;

16.2. the repeated conducting of the proceedings in my absence (even when I was sick) and/or in the absence of my legal practitioners (even when the reasons for their unavailability had been "*accepted*");

16.3. the illogical refusal to recuse the Chairperson and/or Mr Mileham who is the wedded husband of the complainant, Ms Mazzone;

16.4. the refusal by the Committee to call witnesses who are the architects and originators of the allegations in the charges including President Cyril Ramaphosa, Minister Pravin Gordhan and Ms Natasha Mazzone;

16.5. the most recent refusal to grant me sufficient time to prepare for the delivery of my evidence in spite of new evidence and a court appearance taking place within 48 hours of my testimony, on the grounds that the Committee must furnish its work by a predetermined date irrespective of the fairness or reasonableness thereof in the actual circumstances.

17. It is against this background that I now turn to addressing right-thinking South Africans regarding this fatally flawed impeachment exercise which is solely based on improper motives and constitutes an illegal process. Thereafter I will

start by dealing with the real issues behind this impeachment, CR17/BOSASA, Rogue Unit, Pillay and CIEX/Vrede. The rest of the issues will be dealt with last, including the HR related issues and the non-starter issue of legal costs.

A1: <u>A political process</u>

18. In the countless court affidavits filed by the Speaker, Chairperson, the President and/or DA co-operative , including the latest which took place earlier this week, these parties have sought to emphasise that the current proceedings constitute a political process and not a conventional legal process. In this regard they have also consistently argued that, for example, section 34 of the Constitution does not apply.

19. Despite my earlier resistance of that idea, I have indeed come to accept that the process is indeed driven by politics and not what the drafters of the Constitution had in mind in enacting section 194 of the Constitution.

20. I was appointed and assumed office on 15 October 2016, following a parliamentary interview and selection process conducted in public.

21. Of the 12 political parties then represented in Parliament, 10 parties supported my appointment, one (COPE) abstained and another one (the DA) opposed it.

22. Literally from day one or even before day one of my appointment, the DA falsely accused me of being a "*spy*". These false accusations have led to acrimonious litigation between me and the DA which has never been able to substantiate the damaging spy allegations. The DA continues to perpetrate that false narrative even in the current process where its members constantly

suggest that the State Security Agency was running the affairs of the Office of the Public Protector during my term. Nothing could be further from the truth.

23. For its part the ANC seeks to portray me as a person who deliberately went out of her way to target the document faction within the party, led by the likes of Mr Ramaphosa and Mr Gordhan and to exonerate the opposing faction made up to the likes of Mr Ace Magashule and Mr Mosebenzi Zwane. If true, this false narrative would certainly constitute grounds for impeachment because the mantra of any independent public office with such extensive powers as the judiciary or the Public Protector is the exercise of those powers "*without fear, favour or prejudice*". This is why charges 11.3 and 11.4 have been added. I will demonstrate that these allegations of bias and/or dishonesty on my part are, to the knowledge of their makers, false and fabricated. In any event no evidence has been advanced in this enquiry to sustain them. On the contrary ample proof has been furnished to indicate their falsity and not their veracity.

24. Within less than a year of my assumption of office and from September 2017 to date, the DA has made at least five separate attempts to have me removed from office. With this current process being the sixth. Hardly before the ink on my appointment letter could dry, the DA labelled me a spy and cast all sorts of aspersions upon me.

25. On or about 21 June 2018, the then Chairperson of the Portfolio Committee on Justice and Correctional Services, Dr Motshekga, addressed a letter to me indicating that:

"*The Speaker of the National Assembly received a letter from Mr J Steenhuisen, MP requesting the National Assembly to expedite procedures to remove the Public Protector in terms of section 194 of the Constitution read with section 2(1)(c) of the Public Protector Act 23 of 1994.*"

26. In an attempt to enlighten the Portfolio Committee I then, *inter alia*, pointed out that such a process for my removal could not be embarked upon without the appropriate (and valid) rules. This was in line with the decision of the 2018 Constitutional Court in *Economic Freedom Fighters v Speaker, National Assembly* (also known as the EFF Impeachment Judgment).

27. On 6 March 2018, the Portfolio Committee released to the public a report where members had delved extensively into the merits of the then pending court proceedings and the merits of the Public Protector's investigations and Reports. In so doing, they also prejudged the outcome of any section 194 enquiry by making comments such as:

27.1. "*it is unacceptable for the Public Protector to state that personal cost orders undermine her independence*";

27.2. She had completely failed to investigate criminal allegations;

27.3. Whether she could reasonably expect people to believe that she was a fit and proper person to occupy her office. She was told to consider "*doing the honourable thing and resign just as the former President did*";

27.4. "*as a whole, the Committee expressed disappointment, frustration and even anger at the responses of the Public Protector and the manner in which she conducted the Vrede investigation*" (emphasis added).

28. At some point, the current Chairperson of this enquiry, Mr Dyantyi went as far as making comments such as "*here, we have budgeted for incompetence*". Today he has been entrusted with the task of presiding over a process which requires open minds as to whether or not I am indeed incompetent. The absurdity in this should be clear and obvious.

29. When the false spy allegations fell flat, the DA changed its accusations to "*incompetence*". The accusations were specifically premised on utterances made by judges in the delivery of their judgment. This is not withstanding the fact that similar if not more scathing remarks had been made by Judges regarding the conduct of my predecessors such as Adv Lawrence Mushwana and Prof Madonsela where various judges indicated that their conduct of various investigations were infested by bias. Despite these remarks, my predecessors were never labelled incompetent by the DA nor ever hauled before a section 194 Committee. Instead the DA and the ANC have heaped them with very undeserved praise.

30. After I had pointed out the obvious fact that there were no Rules in place to govern the removal of a head of Chapter Nine institution, the DA immediately went back to the drawing board and dismally attempted to craft such rules by making a "cut and paste" job from the Rules for the impeachment of a President. The DA usurped that process by submitting draft rules, which were clearly targeted at the Public Protector despite the euphemistic references to

"*the removal of a Chapter 9 head*". An example of the slip-of-the-tongue but true intentions was articulated by Mr John Steenhuisen in his letter to the Speaker enclosing the draft rules, which were more than 90% adopted as the impugned rules, and when he wrote:

> "*I submit these draft rules to your office in the hope that it (sic) can be of assistance to the Rules and Programming Committee when they (sic) meet to draw up rules to govern the process of considering the removal of the Public Protector*" (emphasis added). In support of the above I annex hereto to aforesaid letter as marked Annexure **"BM1".**

31. On 3 December 2019, the Rules were adopted by the National Assembly and were titled "*Rules for removal of a holder of office*" . This happened after the rules had been debated on and "*modified*". A copy of the aforesaid rules is annexed hereto marked Annexure **"BM2**".

32. The aforesaid violated the Constitutional right of a holder of Chapter Nine institutions right to legal representation in that they provided for a "*mummified*" lawyer to sit in the enquiry and say but nothing. This was purportedly done because as an Advocate I would be able to speak for myself, forgetting for a minute the fact that these rules were supposedly aimed at all Chapter nine institutions including instances where the head is not a lawyer. This was a clear sign that the rules were in fact specifically designed for me, reminiscent of the vile and odious Sobukwe Clause issued by the apartheid regime in the 1960s.

33. On 6th December 2019, a mere 72 hours after the adoption of the rules the then Chief Whip of the DA Ms Natasha Mazzone put in a request to the

9 8

Speaker to consider my removal as a matter of urgency stating that I was unfit to hold office and basing that conclusion on court judgments.

34. On 24 January 2020 the former Speaker (Ms Thandi Modise) issued a media statement announcing that her decision to accept the DA motion as "*in order*" in terms of Rule 129S and that she was therefore inviting all political parties represented in the National Assembly to submit the names of candidates for selection onto the Independent Panel to be created in terms of Rule 129T, 129U AND 129V of the new rules.

35. In a bid to reach an amicable solution to this issue I instructed my attorney to address a letter dated 28 January 2020 to the then speaker of Parliament Ms Thandi Modise explaining some of the grounds for holding that the Rules were unconstitutional and requesting reasons that led her to approving the Mazzone Motion. In the letter I also suggested that she halts the process until it is established that the aforesaid Rules pass the constitutional muster. A copy of the said letter is annexed hereto as Annexure "**BM3**".

36. On 30 January 2020 the Speaker responded to my letter, and she indicated that "*the substantive motion complied with the form requirements in the rules*". This was despite the fact that the rules required the motion to be compliant both in form and substance. The Speaker was also adamant that the Rules were constitutional, despite the fact that, among other things, they denied me the right to legal representation at the enquiry stage.

37. The aforesaid response by the Speaker was indicative of the adversarial and hostile attitude that I would endure to this day. As a result, I informed the

Speaker of my intentions to challenge the constitutional validity of the Rules in court.

38. On 21 February 2020, Ms Mazzone withdrew the first motion and simultaneously "replaced" it with a new motion for my removal.

39. This was a transparent and *mala fide* attempt to cure the intended illegal retrospective application of the Rules. The "*cure*" was found in the form of a perjured "*affidavit*" by one Mr Sphelo Samuel, a disgruntled employee of the Public Protector South Africa who was resisting legitimate (not "*trumped up*") disciplinary charges for having been convicted in a criminal court for assaulting a member of the public at the Limpopo offices of the Public Protector. The victim, Mr Nchaupe Peter Seabi told his tragic story to this Committee and it was not challenged. Instead at least 3 ANC members of the Committee, Ms Dlakude, Ms Siwela and Mr Nqola openly undertook to him that, as public representatives, they would raise his agonising cries with the former Public Protector who had turned a blind eye to his plight. When Prof Madonsela did come to the Committee to testify, not a single one of these three members raised the issue of the allegedly ignored assault of Mr Seabi, who was a live and real example of the alleged "*Gogo Dlamini*" for which Prof Madonsela professed utmost care and prioritisation. This is but one example of the kind of unreasonable and unfair attitude and conduct which I have had to endure from this Committee.

40. On 26 February 2020 the Speaker addressed a letter to me indicating that:

40.1. She had already made a decision that the second motion too was "*in order*";

40.2. She had sent out invitations to Chief Whip of all political parties to make "*fresh*" nominations for the Independent Panel;

40.3. After 6 March she was planning to:

40.3.1. establish and appoint the Independent Panel;

40.3.2. appoint one of the panellist as its Chairperson in terms of Assembly Rule 129W;

40.3.3. refer the motion and supporting documentation provided Ms Mazzone MP to the Panel in terms of Assembly Rule 129T;

40.3.4. advise the Panel that it is required by Assembly Rule 129X to conduct and finalise an assessment and report relating to the motion within 30 days of its appointment; and

40.3.5. inform the National Assembly and the President of the referral to the Panel as required by Assembly Rule 129T.

41. Following delays associated with the then pending litigation and the Covid-19 outbreak, the Speaker subsequently established a three member Independent Panel whose function was to assess the motion and determine whether there was *prima facie* evidence that I was guilty of misconduct and/or incompetence. The Independent Panel consisted of Justice Bess Nkabinde, Advocate Dumisa Ntsebeza SC and Advocate Johan De Waal SC. It finalised its report on 24 February 2021 in which it stated that there was *prima facie* evidence that I committed misconduct in respect of some of the charges. Notably it rejected as deficient or non-existent, any *prima facie* evidence in relation to allegations pertaining to Ms Basani Baloyi and Mr Ivan Pillay. In

spite thereof, the Committee illegally elected to include these allegations in its "*enquiry*". I deal with the issue of the clear disjunctive between the recommendations of the Panel and the current charges, will be dealt with later.

42. I participated by providing answers to the complaint motion. The aforesaid answers can be found in the **Bundle A, page 9239 to 9287** which is already before this Committee.

43. The Independent Panel recommended that an enquiry into my fitness to hold office be conducted regarding matters where they found prima facie evidence. I must state that the Independent Panel also clearly concentrated on utterances by various judges in arriving at its findings. The Independent Panel found that there was no *prima facie* evidence of misconduct as if those findings as far as the human resources issue is concerned, save for Mr Samuel's issue. It found that human resources issues fell within the purview and competency of the Chief Executive Officer. Furthermore, the Independent Panel never conceded the Pillay-pension matter as it never served before them. However, I should mention the fact that the Committee extended the scope of the enquiry by adding matters and/or charges that were unchallengeable, never conceded by the Independent Panel and as such never went through the sifting mechanism envisaged by the rules.

44. The Report of the Independent Panel was then referred to the National Assembly and the Panel's recommendations were adopted. In actual fact the Committee reinstated the Mazzone Motion in its original form and as if it had never been "*filtered*" by the Panel.

45. The Speaker then constituted this present Committee. It is a 36 members' Committee and its Chairperson is the very same Mr Richard Dyantyi who had earlier made remarks regarding my alleged "*incompetence*". The majority of the vast members (19) of the Committee are ANC members, followed by the DA (4), the EFF (2), and one member each for all the other 11 smaller parties represented in the National Assembly.

46. I must mention that one of the members of the Committee, a DA member is a Mr Mileham, who is the husband to Ms Natasha Mazzone, the complainant and author of the Motion which is being enquired into. My repeated complaint in this regard, which was first raised within a week of the start of the enquiry, has fallen on deaf ears. The Committee majority ruled that there was nothing wrong with this situation, despite contrary views expressed by the minority parties.

47. <u>Litigation</u>

47.1. Despite the fact that the constitutionality of the Rules for the removal of a Head of a Chapter Nine Institution as adopted by the National Assembly was being challenged, the Speaker and the DA were always hellbent on pressing ahead on with the Section 194 proceedings. Again the voices of the minority to the contrary have always been drowned out by the majority vote. As a result, I approached the Western Cape High Court seeking an interdict halting the aforesaid process pending the determination of the constitutionality of the aforesaid Rules.

47.2. On 9 October 2020, the aforesaid application was heard by the Full Court (per Saldanha, Steyn and Samela JJ). The application was dismissed with costs, on the basis that the Rules were constitutional.

47.3. On 30 November 2020, my bid for leave to appeal to the Supreme Court of Appeal was also dismissed by the Honourable Court.

47.4. From 7 to 11 June 2021, Part B of the aforesaid application wherein I had originally raised 12 points in support of the submission that the aforesaid Rules are unconstitutional was heard by the full court (per Baartman, Dolamo and Nuku JJ) and the court upheld two of those six grounds of unconstitutionality, namely:

47.4.1. The denial of the right to full legal representation in Rule 129AD (3); and

47.4.2. The violation of the separation of powers by the inclusion of a Judge in the Independent Panel in Rule 129V.

47.5. Both the Speaker and the DA launched appeals against the judgment of the Honourable Court directly to the Constitutional Court.

47.6. As a result thereof, the Ad Hoc Committee formed to initiate the impeachment proceedings against me took a decision, with respect correctly, to suspend its work until the final outcome of the litigation pending before the Constitutional Court. This was as instructed by the then Acting Speaker, Mr Lechesa Tsenoli.

47.7. On 4 February 2022, the Constitutional Court handed down a final judgment, Per Mhlantla J, in which it found amongst others that the

appeal relating to the constitutionality of Rule 129V is dismissed. This rule deals with the participation of a judge in the independent non-National Assembly panel (separation of powers). The relevant challenge by the Public Protector was premised on whether it was constitutionally permissible and/or competent to appoint a judge to the panel without a statute empowering such appointment and in view of the rule of law principles and/or the doctrine of separation of powers. This entailed two separate rule of law challenges based on ultra vires and the separation of powers, respectively. The first challenge was raised in the Public Protector's conditional cross-appeal and the second one was raised in the appeals separately lodged by the Speaker and the DA.

47.8. However the Constitutional Court upheld the finding that Rule 129AD (3) was inconsistent with the Constitution in that it denied me my right to full legal representation. Hence, I now enjoy full legal representation. In spite of this binding decision of the apex court, and in contempt thereof, the Committee has actually proceeded in the absence of my legal representatives on at least three separate dates since the enquiry started.

48. Suspension: The Phala Phala or "*Farmgate*" scandal

48.1. I must give background regarding my suspension which crystalises the real reason why we are where we are today. Despite the Committee's denial that my appearance before it and the suspension

are unrelated, I will demonstrate that in fact the two issues are fruits of the same tree.

48.2. On or about 1 June 2022, a former senior investigating officer and Director-General, Mr Arthur Fraser, laid criminal charges at the Rosebank Police Station in relation to extremely serious allegations of criminal misconduct involving the President related to inter alia:

48.2.1. money laundering;

48.2.2. tax evasion;

48.2.3. concealment of a serious crime by only reporting it to the Head of his Presidential Protection Unit instead of the relevant police station;

48.2.4. kidnapping; and

48.2.5. torture of a woman and/or other persons who were suspects so as to induce them to give the money back.

48.3. The resultant scandal, which is now known as "*Farmgate*" has blown out and caused unprecedented national strife and international concern, with calls for the arrest and charging of the President by the National Prosecuting Authority ("the NPA"). This issue has been widely reported, both by the local, continental and international media. Purely to illustrate the widespread reach of the issue, I annex hereto marked "**BM5,** "**BM6"** and "**BM7**" respectively, copies of articles published by the Independent Newspapers of South Africa, the Namibian Newspaper of Namibia and the international agency called

Al Jazeera under its Corruption News category. I also attach hereto, marked "**BM8**", a formal public statement dated 16 June 2022 released by the government of Namibia, which contains sufficient proof of the seriousness of the situation.

48.4. On 3 June 2022 and against that background, I received a complaint against the President from another political party represented in the National Assembly namely the African Transformation Movement ("the ATM") instituting a complaint against the President for me to investigate any role which the President may have played in the commission of the abovementioned crimes but with specific focus on any breaches of EMEA and/or the President's oath of office. A copy of the said complaint is annexed hereto marked "**BM9**".

48.5. On 7 June 2022 I addressed a letter to President Ramaphosa titled "the investigation into allegations of a violation of the Executive Ethics Code against The President of the Republic of South Africa, His Excellency Mr MC Ramaphosa". The said letter contained 31 questions for the attention of the President. A copy of the aforesaid letter is annexed hereto marked "**BM10**".

48.6. On 8 June 2022, I duly announced to the public that I had decided to launch such investigations as I am enjoined to do so in law. A copy of such media statement is annexed hereto marked "**BM11**".

48.7. It must be noted that in terms of section 3(2) of EMEA, all investigations in respect of that Act must be concluded within 30 days

of the date of the lodgment of the complaint. Such investigations are inherently urgent, by operation of law.

48.8. Merely and just some hours after my announcement above, the President, in a retaliatory manner suspended me on 9 June 2022. I annex hereto a copy of the suspension letter to me from the President marked "**BM12**". My suspension in such hurried and suspicious circumstances lends credence to the publicly expressed and legitimate fears that the other relevant state agencies, including the Public Protector, the Hawks and the NPA, will not succeed in getting to the bottom of the current allegations of criminality or other wrongdoing while the President is in occupation of his powerful office. Indeed, as the first occupant of one of those offices to announce an investigation and to send questions to the President, I was met with an almost immediate retaliatory response of an immediate, inexplicable and clearly irrational suspension. The message and example sent to the other agencies, whether advertently or otherwise, must clearly be one of intimidation and instilling fear. My suspension will most certainly have that probably desired effect.

48.9. As matters currently stand, the Acting Public Protector has taken over the investigation and the country is eagerly awaiting the PPSA's report in this regard. Indications from a recently leaked section 7(9) report are that the President has been predictably exonerated of any wrongdoing. Due to my related suspension I am unable to verify the correctness of this decision by my office. I can however safely say that

a matter of this importance and relative simplicity would never have taken almost 10 months to a year.

48.10. The Full Bench of the Western Cape High Court, per Nuku J, Francis J and Lekhuleni J handed down Judgment on 9 September 2022 to the effect that the President's decision to suspend me was *"[t]hereby declared invalid … and set aside effectively from the date of [that] order."* *(own emphasis).* Some remarks made by the Justices deserve mention and are as follows:

"[155] Significantly the sequence of events --- very lawfulness of the suspension.

[157] In our view, the hurried nature of the suspension of the applicant in the circumstances, notwithstanding that a judgment of the full court was looming on the same subject matter, leads this court to an ineluctable conclusion that the suspension may have been retaliatory and, hence, unlawful. It was certainly tainted by bias of a disqualifying kind and perhaps an improper motive. In our view, the President could not bring an unbiased mind to bear as he was conflicted when he suspended the applicant."(Own emphasis)

48.11. The aforementioned Judgment is currently the subject of confirmation proceedings before the Constitutional Court, wherein Judgment has been reserved since 24 November 2022.

Proceedings before the section 194 enquiry: Selected conduct of the Committee

49. On 11 July 2022, the enquiry called its first witness.

50. The evidence Leaders has since called a total of 18 witnesses and I have called a total of 6 witnesses. The Committee has also caused 2 witnesses, including my predecessor, Prof Madonsela to give testimony to assist the Committee. The other was Mr Rodney Mataboge one of the Senior Investigators who was involved in the aforementioned CR17 and "*Rogue Unit*" matters, among others. Mr Mataboge was a very helpful, co-operative and truthful witness. Prof Madonsela was a hostile, unco-operative and untruthful witness whose conduct in "*amending*" a sworn affidavit a day after it was commissioned stands out and will be referred to the correct authorities. She also refused to answer simple questions, for example about her qualifications in terms of the Public Protector Act of 1994. All this was allowed and/or condoned by the Chairperson and the majority in the Committee.

51. The Committee also refused to call Ms Mazzone, who is the complainant and the author of the Mazzone motion. The Committee also refused to call Mr Cyril Ramaphosa despite overwhelming evidence that he is a key witness to assist the Committee regarding Charge 4.

52. The Committee similarly refused to call Mr Pravin Gordhan who is a key witness as far as the so called "*Rogue Unit*" is concerned.

53. It is common cause and indisputable that Mr Ramaphosa and Mr Gordhan are the originators in their various sworn statements filed in our courts, of the cardinal allegations of my purported bias and dishonesty and more particularly my allegedly targeted them to achieve political and/or criminal ends.

54. The Committee is also refusing to recall three witnesses whose testimony is outstanding as they were not able to finish their cross examination Ms Basani Baloyi, Mr Johan Van Loggerenberg and Mr Ivan Pillay. In doing so, I have unreasonably and unfairly been deprived of my right to refute evidence given against me by those witnesses.

55. Recently the Committee has decreed that I need not furnish a statement, alternatively I could do so while my evidence was being led. As a result this is Part 1 of the statement. Parts 2 and 3 will be submitted in due course. If it proves to be necessary other supplementary statements will be furnished. There remains a possibility of further witnesses being called, to which I would be entitled to respond both orally and in writing.

B. EDUCATIONAL QUALIFICATIONS AND WORK EXPERIENCE

56. I hold B. Proc and LLB degrees from the University of Limpopo, which I obtained in 1989 and 1992 respectively. I also possess a Diploma in Corporate Law as well as a Higher Diploma in Tax Law, both from the University of Johannesburg. At the time of my assumption of office I was in my 20th year as an admitted Advocate of the High Court of South Africa, this fact is material to my position since the relevant legislation prescribes for any person to be eligible to serve as a Public Protector, he or she must have been admitted as an Advocate or an Attorney for a period of at least 10 years after having been so admitted. I am currently duly registered with the Legal Practice Counsel (LPC) and my LPC number is 100601.

57. I started working full time as a Public Prosecutor in December 1994 to 1996. I moved from Mkobolo Magistrates Court to Kwa Mhlanga Magistrates Court working as Public Prosecutor.

58. I was later transferred to the Department of Justice: Head office in 1996 to work as a Legal Administration Officer within the International Relations division. My area of responsibility was extradition law and mutual legal assistance. I was also trained in Siracusa, Italy on Extradition Law.

59. I participated in various Human Rights Law projects and was part of the team that drafted South Africa's Country Report on Human and People's Rights which was deposited to the African Union and I was further a member of the Coordinating Committee that drafted the National Action Plan on Human Rights, which was deposited to the United Nations High Commissioner on 10 December 1998.

60. I worked as a Senior Researcher at the South African Human Rights Commission from 1998 to 1999, where I was tasked with compiling a country Report on the status of human rights in South Africa.

61. My first interaction with the Public Protector South Africa ("PPSA") was when I joined the institution as a junior investigator in 1999, whereafter I had the honour of being promoted from one rank to the other. Some of my achievements whilst working for the PPSA are as follows:

    61.1. Oversaw the establishment and successful launch of the Public Protector Office in Gauteng as Acting Provincial Head;

61.2. Established visiting points at various institutions, including municipal Thusong offices in Soweto;

61.3. Recommended ways to improve service delivery to the Compensation Commissioner on complaints received; and

61.4. Investigated disclosure of HIV/AIDS status of patients without their consent, steps taken by the Health Professions Council and produced a report.

62. My portfolio involved a strong record of 11 years in Senior Management within Immigration Services at the Department of Home Affairs.

63. I provided strategic and leadership of refugee services across the country especially Gauteng, Western Cape, Eastern Cape, KwaZulu-Natal and Limpopo, where Refugee Reception offices were located. I monitored the rollout of the integrated biometric system to five Refugee Reception Offices and increased the staff compliment from 20 to 300.

64. During the course of political instability in Zimbabwe around 2006/07, I provided strategic direction for processing asylum applications, which spiked from 50 000 to more than 200 000.

65. I participated in the drafting and the signing of the tripartite plan of operation for the repatriation of Angolan Refugees between the South African Department of Home Affairs, Angolan Department of Home Affairs and United National High Commissioner for Refugees. I also:

65.1. Was Appointed as the Board member of the Refugee Relief Fund Board by the then Minister of Social Development;

65.2. Participated at various United Nations High Commission for Refugees EXCOM meetings in Geneva, Switzerland;

65.3. Participated at the African Union meetings in Ethiopia relating to Refugees. A key achievement in this regard was the adoption of the AU Convention relating to Displaced persons in Africa;

65.4. Represented SA at SADC Refugee Commissioners' meetings;

65.5. Presented papers internationally on refugee policy in Germany and within Southern Africa.

66. In April 2010 was appointed as a Counsellor Immigration and Civic Services, as representative of the Department of Home Affairs at the office which is based in the Peoples' Republic of China and as such I had to relocate together with my family to live in China. I facilitated the establishment of the Visa outsource offices both in Beijing and Shanghai. This included standardisation of operations of the two Missions, improved customer service and service delivery to deepen political and economic relations with the People's Republic of China. I was based in China for a period of 4 years 6 Months. Further, on my departure, I negotiated opening more such visa facilities, since government had to approve such if centres need to be opened in areas where there is no SA Mission.

67. Due to excellent service delivery and the impact made on the relations between SA and China, an article was published in the local China Daily newspaper.

68. I drafted the Chapter on Immigration Green Paper relating to Management of asylum seekers and refugees.

69. In June 2014 I returned back to South Africa and I worked at the Department of Home Affairs, as Director Country of Origin research within the Chief Directorate: Asylum Seeker Management.

70. I started working for State Security Agency as Senior Analyst in July 2016. My responsibilities included advising Director Domestic Branch on compliance to constitutional provisions whilst protecting the state actors, which are people, government, values, territory, legislation and stakeholder relations. I held this post for a period of only 3 months before my appointment to occupying the position of Public Protector. This short stint could not by any means qualify me for the slur by the DA of being called "a spy".

71. I was appointed South Africa's fourth Public Protector for a non-renewable seven-year term of office by President Jacob Zuma effective 15 October 2016.

72. This followed a thorough and transparent selection process carried out by a parliamentary multi-party, ad-hoc committee. All but one political party (Democratic Alliance) and COPE abstention, in the committee endorsed my candidacy.

73. In July 2018, I was appointed the First Vice President of the African Ombudsman and Mediators Association (AOMA), a continental body of Public Protector-like institutions. I am also the Board Chairperson of the Durban-based African Ombudsman Research Centre, which assists the AOMA with research, information, capacity-building and advocacy.

74. In December 2018, I was elected the President of AOMA during the association's sixth General Assembly in Kigali, Rwanda.

75. I serve in the board of the International Ombudsman Institute, a global body of Public Protector-type institutions which is headquartered in Vienna, Austria.

76. In dealing with my experience I wish to isolate five important aspects which have, in my humble opinion, set me apart from all my predecessors and which may be answerable for my far better achievements in the fulfilment of the mandate of the Public Protector. These are:-

76.1. My humility based on my humble beginnings and the early installation upon me of the value and rewards of hard work;

76.2. My faith and belief in God and my outlook and quest as a devout Christian to do unto others as I would like them to do unto me;

76.3. My work experience in such pressured environments as the Department of Home Affairs;

76.4. The incomparable and invaluable insights and hands on experience I gained from previously having worked at the Public Protector as an Investigator;

76.5. Above all my belief that I cannot betray my beliefs and my people because of the evil deeds and intentions of my detractors which requires me to stand firm in the face of adversity guided by the spirit and ethos of other prosecuted women who came before me including Winnie Madikizela-Mandela, Rosa Parks and Esther of biblical times who famously stated that she would not look back on her mission to

face the all earthly ruler and powerful King. She stated defiantly to her people, as reflected in the Book of Esther 4:16

"*Go, gather all the Jews in Susa, and hold a fast on my behalf, and do not eat or drink for three days, night or day. I and my young women will also fast as you do. Then I will go to the King, though it is against the law, and if I perish, I perish*".

77. I too, will face the powerful face to face, only <u>because</u> the new land compels me to do so. And if I perish, I perish. It is an essential requirement of my current office to conduct myself without fear, favor or prejudice. Therefore I am not scared of anything or anybody.

78. During my testimony I will constantly touch on the aforementioned five aspects of who I am and who I will always be, no matter what. I receive the prosecution meted out by my enemies as a gift which can only make me stronger and hopefully inspire future generations of women patriots when required to walk a path similar to or even worse than mine. In a further appropriate biblical metaphor Chief Justice Mogoeng famously described the Public Protector as:-

"*the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption. Hers are indeed very wide powers that leave no lever of government powers above scrutiny, <u>coincidental embarrassment and censure</u> ---. In the execution of her investigative, reporting or remedial powers she is <u>not to be inhibited, undermined or sabotaged</u>.*"

79. I now turn to dealing with the mandate of the Public Protector.

C. CONSTITUTIONAL AND OTHER LEGISLATIVE MANDATE

i) Constitutional Mandate

80. The Public Protector is an independent Constitutional institution whose mandate is derived from Section 182 of the Constitution read with Section 181 to support and strengthen constitutional democracy by investigating and redressing maladministration or improper conduct in state affairs. Section 182 of the Constitution states that:

"(1) The Public Protector has the power as regulated by national legislation

a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

b) to report on that conduct; and

c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential."

ii) Additional key mandate areas

81. In addition to the Constitutional mandate above, these are the following key mandate areas: -

81.1. Maladministration Mandate (Public Protector Act 23 of 1994);

81.2. Anti-corruption Mandate (Shared Enforcement of the Prevention and Combating of Corrupt Activities Act 12 of 2004);

81.3. Sole Agency Supporting Enforcement of the Executive Members' Ethics Code (Executive Members' Ethics Act 82 of 1998);

81.4. Safe haven for whistle-blowers (Shared under Protected Disclosures Act 26 of 2000);

81.5. Review of decisions by the NHRBC (Housing Protection Measures Act 95 of 1998);

81.6. Resolving Access to Information Disputes until Information Regulator takes over;

81.7. The Public Protector's oversight extends to over 1000 organs of state and government agencies operating on all three spheres of government, as well as public institutions and bodies performing a public function. These include:

81.7.1. 47 national departments;

81.7.2. 110 provincial government departments;

81.7.3. 253 municipalities; and

81.7.4. Other organs of state / public bodies such as 533 public entities, 26 universities, nine institutions / commissions / authorities, statutory bodies and institutions performing a public function.

82. Furthermore, since ours is a Constitutional democracy, and a young one at that, the mandate of the Public Protector is being developed or developing through jurisprudence. In addition to the above, for one to fully understand the mandate of the Public Protector and its practical application, one has to look at some of the key authorities which will be discussed later on, such as:

82.1. Economic Freedom Fighters and Others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC) (the so-called "*Impeachment*" case (paragraphs 67 – 71));

82.2. Economic Freedom Fighters v Speaker of the National Assembly 2016 (3) SA 580 (CC) (the so-called "*Nkandla*" case);

82.3. Public Protector v Commissioner for the South African Revenue Service and Others (CCT63/20) [2020] ZACC 28; 2021 (5) BCLR 522 (CC); 2022 (1) SA 340 (CC) (15 December 2020);

82.4. Public Protector v Mail and Guardian 2011 (4) SA 420 (SCA); and

82.5. South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others (393/2015) [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) (8 October 2015).

D. ASSUMPTION OF DUTIES, A HANDOVER BY MY PREDECESSOR & THE FIRST 100 DAYS IN OFFICE

83. As would happen in every institution when I assumed my duties, I was eagerly looking forward to a more comprehensive and seamless hand-over from my predecessor, Prof Madonsela. My expectations were that we would have a hand over meeting where I would be appraised of issues such as:

83.1. 2015/2016 Annual Report as well as its presentation before the Portfolio Committee for justice and Correctional Services ("The Portfolio Committee");

83.2. Outstanding and eminent Reports;

83.3. Outstanding investigations;

83.4. Human resources issues;

83.5. Investigations that were being pursued in terms of Executive Members Ethics Act (EMEA);

83.6. Investigations which were being pursued even though they impacted upon section 6(9) of the Public Protector Act (where the complaint was more than two years old when the decision to investigate was taken;

83.7. Audits by the Auditor General of South Africa (AGSA);

83.8. Reports that were in the process of being reviewed by the courts; and

83.9. The impact of the Nkandla judgment (the binding effect of the Remedial actions) especially on the budget of the institution.

84. However, this was not to be as my predecessor only met with me for a short duration of time. A meeting was held with my predecessor Prof Madonsela on 14 October 2016 which meeting only lasted for about 20 – 30 minutes. This was as a result of Prof Madonsela's rushed schedule to issue reports, which included among others, the State of Capture report. Mr Malunga was also present in the meeting. Prof Madonsela provided me with a one pager of what she was going to focus the handover and we agreed to meet the following week for a full report. We however could not meet due to some preparations for the Parliament Portfolio Committee. Prof Madonsela then emailed the handover report to the Spokesperson (who was, at the time, the Senior Manager Communications), Mr Oupa Segalwe.

85. The first thing I did was hold meetings with staff and the management team, with a view to understanding who was playing which role and how do I lead the team towards a common goal.

86. To my dismay, I found the institution in some state of disarray, I had to hit the ground running, literally. Not having received any job specification nor training exacerbated things. Some of the issues which I identified as concerning included: -

86.1. Massive backlogs in respect of different types of categories of cases, especially the bread and butter issues;

86.2. Staff shortages;

86.3. Security clearance issues;

86.4. Persistent governance issues and audit queries;

86.5. Low staff morale;

86.6. Missing information;

86.7. Transformation and affirmative procurement especially, in relation to legal services (for example the repeated utilization of the same white law firms without a panel of attorney in breach of Section 217 of the Constitution and the regulated framework) ;

86.8. Payment of service providers in terms of the Treasury Regulations;

86.9. Excessive reliance on consultants in respect of core functions (for example, as reflected in the OMA Forensic Report which was uploaded under Bundle H, Item 14, p 341); and

86.10. Misalignment of meetings and unnecessary travelling time.

87. I swore that when I leave the institution in 7 years time I would make sure that my successor would inherit a well-oiled organisation which would be a significantly improved version in relation to the issues listed above. It was also my specific aim to use my final 6 months to clean-up on all outstanding major issues and reports and also to prepare a comprehensive handover report

which would ensure a seamless transition for the benefit of the public. Sadly and due to this process and my illegal suspension, that dream has been temporarily curtailed if not sabotaged.

88. Conveniently, my arrival coincided with the time of year when most state institutions hold their strategic planning sessions in preparation for the year ahead. Accordingly, the office and I held our own two-day session where we sought to bring our organisational strategy in line with my vision of broadening access at the level of ordinary people as well as imploring on productivity and governance.

89. During the very first few days, I was called upon to present the institution's Annual Report for 2015/16 which had been left behind by my predecessor to the Portfolio Committee as well as hosting my counterparts from all over Africa for the 5th General Assembly of the African Ombudsman and Mediators Association (AOMA), in my capacity as the Board Chairperson of the African Ombudsman Research Centre. This portion is specifically reserved for the incumbent Public Protector of South Africa.

90. I later visited the community of Khayelitsha in Cape Town as part of the commemoration of the 16 Days of Activism for No Violence against Women and Children, where I got an opportunity to engage with ordinary people who grapple with service delivery issues daily. In the midst of all these, work pertaining to our core function of investigations was underway.

91. As indicated herein above, Prof Madonsela left the institution without having presented the 2015/2016 Annual report to the Portfolio Committee for Justice and Correctional Services. As a result, I had to be the one who presented the

aforesaid annual report and I was blamed for using external donor funding and I was informed by Dr Motshekga that "there is nothing such as a free lunch". The issue of the then Deputy Public Protector, Mr Kevin Malunga's security clearance was also sharply raised which cautioned me about his involvement in dealing with classified information in any manner which could be in breach of the applicable regulations.

92. I issued three investigation reports within a short space of time after assumption of my duties. These were matters concerning ordinary people such as the pensioners from Vhembe District in Limpopo, who had been left worse off following the privatisation of the Venda Pension Fund. This was a special report that confirmed the findings and remedial action of the former Public Protector in a report that was issued in 2012. A copy of this and the two other reports – one on the plight of a small businessman who alleged that he lost out on an opportunity to secure a contract due to the improper conduct of officials at a North West municipality and a member of the public who was allegedly prejudiced by the conduct of officials at the Commission for Conciliation, Mediation and Arbitration (CCMA).

93. It had been quite a busy time for our investigation branches. Between October and December 2016, the total number of cases at hand was 7556. By the end of that quarter, we had managed to finalise 2083 while the rest were carried over into the current quarter. However, our case backlog remained a concern. At the beginning of that financial year, I was informed that we had 449 cases that were older than a year. By the end of last quarter, we had managed to reduce that backlog to 259, with 72 of the cases that had been closed up to that point disposed of in the first 100 days of my being in office.

94. I was also appraised of the fact that the institution had 719 cases older than two years at the end of April 2016. By the end of December 2016, the figure stood at 518, with 87 of the cases that were closed up to that point disposed of during the 100 days of me being in office. I had issued eight Section 7(9) notices and/or Provisional Reports in the last three months. These are notices through which parties against whom I was considering to make adverse findings against are given an opportunity to provide me with more information, essentially to persuade me to reconsider my such anticipated adverse findings.

95. The notices followed investigations into allegations of maladministration against the South African Revenue Services, Department of Home Affairs, Agri Sector Education Training Authority (AgriSETA), Transnet, Department of Mineral Resources and the South African Nuclear Energy Corporation, among others.

96. As stated herein above, my predecessor had, for example, left the CIEX investigation not nearly half done. This investigation had been outstanding for about 4 to 5 years and there was understandable pressure from the complainant to finalise it. Unfortunately, at that stage, a draft report was leaked and the media published the content of draft report that was released improperly without my consent which impacted negatively on the credibility of this institution and its investigation processes. I had to refer the case to the police for investigating the leak. Very powerful and sinister forces were clearly at work to undermine that particular investigation which involved the interests of Big Business and those in charge of our economy.

97. At that point there were up to 19 draft reports that were still being quality assured. They consisted of :-

97.1. Alleged irregular acquisition of VVIP planes for the Presidency;

97.2. Alleged maladministration and irregular conduct against the Rustenburg Local Municipality in respect of the funeral of Cllr. Moses Phakoe;

97.3. Alleged maladministration, corruption and unconscionable use of public funds by the Eastern Cape Provincial Government in connection with the expenditure of public funds in preparation for the funeral of the late former President Nelson Mandela; and

97.4. The Estina Dairy Farm Investigation also known as the Vrede Investigation (which prominently features in the Mazzone Motion).

98. Within the first 100 days, the office and I had dealt with various cases of litigation, primarily cases where some of our reports were being taken on judicial review. The most recent of those cases was the application by the President to have the remedial action of the State of Capture report set aside. I had at that stage filed a notice to oppose the application in order to comply with court rules. In the notice, I clearly indicated that I would consider my position once I had been advised by Senior Counsel on the legalities of the basis of the 5 applications. It must be noted that this was a complex matter and no precedent existed in South African law on how to approach it. I expected to obtain a comprehensive legal opinion from Senior Counsel.

99. We continued during the period under review to monitor implementation of past reports. We specifically worked on 19 of such reports, four of which had since been implemented fully while the rest had either been partially implemented or implementation was still in progress.

100. I should mention that a large chunk of our investigations do not result in formal reports. We settle them through Alternative Dispute Resolution (ADR) mechanisms such as conciliation, mediation and negotiation. This involves sitting the parties around the table and talking things out to find an amicable solution. Once common ground has been reached, a settlement agreement is developed and signed right away to implement remedial action. At that point, we were handling hundreds of such cases. One such case involved the nudist beach in the Hibiscus Coastal municipal area in KwaZulu-Natal. We were approached by pastors who called themselves the *"Concerned Citizens Group"*. They complained that the Hibiscus Coast Municipality approved an application by an association of nudists to use parts of the Mpenjanthi beach to enjoy their nudity. The municipality appears to believe there would be economic spin-offs for the area if this was allowed to go ahead. The Members of the religious community, on the other hand, were worried that children would be exposed to nudity, that there will be promiscuity and related "moral decay". Then there were the traditional leaders, who were of the view that the place is a sacred space. The Deputy Public Protector was overseeing that matter and several other matters with unique challenges.

101. Regarding the overall performance of the Public Protector South Africa against the targets set in the Annual Performance Plan, at that time, we had improved from 11% in the quarter preceding my arrival to 32% by the end of December.

With a little under two months left, we were pulling out all stops to ensure that we would achieve more on the 45 strategic goals that we had set for ourselves by 31 March 2017.

102. One of the challenges we faced was the misalignment of the Public Protector Act 23 of 1994 and the Constitution. This is mainly because the Act was based on the Interim Constitution of 1993 and thus, it predated the current Constitution. I then initiated a process that sought to propose the amendment of the Act to bring it into line with the Final proposed Constitution. I also finalised the Public Protector Rules as required by the Act. I further requested the Department of Justice to assist in placing the amendment on the parliamentary legislative process.

103. One of my constitutional mandates, apart from the well-known task of investigating improper conduct in state affairs, is to be more accessible to all persons and communities. In pursuit of this little-known mandate, I separately met with two Cabinet Ministers, Hon. Michael Masutha and Hon. Des van Rooyen, in efforts to find new ways to broaden access. We explored the use of, inter alia, Magistrates Courts, Municipal Premises and Traditional Authorities Offices to reach more people.

104. On resourcing, the office of the Public Protector is one of the most underfunded institutions when one looks at its broad mandate and jurisdiction. During that financial year, we were allocated R263.3 million. Only half of our organisational structure is funded, which means we operate at half our potential. We then embarked on a restructuring process that sought to align operations with the new vision.

105. We had also been addressing the challenges of low staff morale that resulted from, among other things, the inability to implement the Occupation Specific Dispensation for legally qualified Senior Managers. There had been continuous engagement with Labour Union to address other issues that had contributed to low staff morale such as performance management and related policies as well as job evaluations.

106. Between November 2016 and January 2017, we advertised up to 45 vacancies that ought to be filled to urgently to help us deliver on our mandate. Key among these are positions of Chief Executive Officer, Chief Operating Officer, Executive Manager: Complaints and Stakeholder Management and Senior Manager: Legal Services. For those positions, we had interviewed candidates and would be making offers soon, with a view to having the successful contenders start in March 2017.

107. During the period under review, we had about five contract positions. Three of them; Chief of Staff, Manager: Communications and Special Advisor: Report Writing and Quality Management; ceased to exist and were largely the cause of the turbulence I referred to earlier. The former Chief of Staff, who had six months left on his 12 months contract, agreed to part ways with the institution and he was paid for the remaining months.

108. The Communication Manager's contract lapsed at the end of December 2016 and was not renewed. Instead we advertised for a permanent position of Communication Manager. The Special Advisor: Report Writing and Quality Management was advised to resign and she did. This was because she had been appointed improperly. All of these happened before I assumed duty. The

agreement between her and the institution had been that she would be reappointed as a consultant. The planned appointment then had to happen during my tenure. I could not approve that as it would have amounted to a contravention of the Public Finance Management Act. She then took the institution to the CCMA, which found in her favour. Following this, the institution paid her out.

109. Turning to stakeholder management, on 16 February 2017, I kick-started a four month, nationwide stakeholder engagement roadshow that saw me crisscrossing the country, interacting with a varied network of stakeholders. These included Premiers, Members of the Executive Councils and Members of Provincial Legislatures to the general public and political parties represented in Parliament. Held under the theme: "*Broadening Access: Taking the Public Protector to the grassroots*", the roadshow sought achieve, among other things, the following:

109.1. Formally introduce myself to stakeholders;

109.2. Communicated my vision to stakeholders and to solicit their views; and

109.3. Increase awareness about the existence, mandate and services of the Public Protector as well as increase access to the said services.

110. I then spent at least two days in each province, engaging with government leaders on the one day and affording the public an opportunity to engage with us on the other. Our first two engagements took place in Gauteng. Some were voicing their apparent frustrations with us while others were being supportive.

The roadshow therefore presented an opportune moment for media to engage us directly, in an unmediated fashion.

E. THE PRACTICAL OPERATIONS OF THE PPSA

E1: Investigations

111. The Public Protector can either investigate on the basis of a complaint or on own initiative. In the case of complaints, any person may lodge a complaint and they do not need to be victims of the maladministration or improper conduct complained about.

112. In the instance of alleged breaches of the Executive Code of Ethics under the Executive Members' Ethics Act, only members of the Executive, Members of the Provincial Legislature or Members of Parliament may lodge complaints with the Public Protector.

113. The Public Protector initiates investigations mainly in respect of systemic deficiencies or trends flowing from existing complaints, information in the public domain as a result of media reports and public displays of dissatisfaction with service delivery such as protests.

114. The investigation is conducted in terms of sections 6 and 7 of the Public Protector Act.

115. The Public Protector Act confers on the Public Protector the sole discretion to:-

115.1. determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act recognises

the Public Protector's authority to investigate and report her/his findings regarding any complaint lodged;

115.2. exercise his/ her discretion in terms of section 6(3) of the Act, pertaining to the acceptance or refusal of complaints lodged by officers or employees in the service of the State or persons to whom the provisions of the Public Service Act, 1994 (Proclamation 103 of 1994), apply, or prejudiced persons as envisaged in sections 6(4) and (5) of the Act;

115.3. investigate, at his or her own initiative any alleged maladministration in connection with the affairs of government at any level in terms of section 6(4)(a) of the Public Protector Act;

115.4. institute, manage and Chair proceedings aimed at the resolution of matters by means of mediation, conciliation or negotiation in terms of section 6(4)(b)(i) of the Act and Chapter 8 of the Rules;

115.5. investigate, manage (control and direct) and/or facilitate the resolution of complaints pertaining to the Public Protector's mandate areas as envisaged in terms of sections 6(4) (a), 6(4) (b), and 6(5) of the Act;

115.6. depose in any proceedings in or before a court of law, any body, or institution established by or under any law, any response or affidavit in connection with any information relating to the investigation which in the course of his or her investigation has come to his or her knowledge in terms of section 6(8) of the Act;

115.7. take and communicate decisions in respect of the acceptance or refusal of a complaint lodged after two years from the occurrence of the incident or matter concerned in terms of section 6(9) of the PP Act, read with Rule 10 of the Rules Relating to investigations by the Public Protector and Matters Incidental Thereto, 2018 (the Rules);

115.8. conduct or manage preliminary investigations as envisaged in section 7(1)(a) of the Act and Chapter 6 of the Rules;

115.9. determine the format and the procedure to be followed in conducting any investigation in terms of section 7(1)(b) of the Act;

115.10. consider and determine access in terms of section 7(2) of the Act, to the contents of any document in the possession of a member of the office of the Public Protector or the record of any evidence given before the Public Protector, the Deputy Public Protector or a person during an investigation;

115.11. request or designate additional investigation resources (persons) to assist him or her, under his or her supervision and control, in the performance of his or her functions with regard to a particular investigation or investigations in general;

115.12. request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being or to be investigated, in terms of section 7 (4)(b) of the Act;

115.13. direct (subpoena) any person in terms of section 7 (4) (a) of the Act to submit an affidavit or affirmed declaration or to appear before him

or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and to examine such person if required;

115.14. authorise any person in terms of section7 (5) of the Act to deliver or serve a subpoena issued in terms of section7 (4)(a) of the Act;

115.15. require at his or her discretion, any person appearing as a witness before him or her in terms of section 7(4) of the Act, to give evidence on oath or after having made an affirmation;

115.16. administer an oath to or accept an affirmation from any person appearing as a witness before him/ her under section 7 (4) of the Act;

115.17. afford any person implicated in a matter being investigated, to the detriment of that person or that may result in an adverse finding pertaining to that person, an opportunity to respond in connection therewith in terms of section 7(9) of the Act, in any manner that may be expedient under the circumstances;

115.18. apply for (depose an affidavit) and execute a warrant in terms of section 7A of the Act to enter, any building or premises and there to make such investigation or enquiry as deemed necessary, and to seize anything on those premises which has a bearing on the investigation, before a magistrate or a judge of the area of jurisdiction within which the premises is situated;

115.19. issue Rules (published in the Government Gazette and tabled in the National Assembly) in terms of section 7(11) of the Act, in respect of

any matter which has a bearing on an investigation or in respect of any matter incidental thereto;

115.20. communicate any finding, point of view in respect of a matter investigated by the Public Protector in terms of section 8(1) of the Act;

115.21. submit a report to the National Assembly on the findings of a particular investigation in the circumstances prescribed in section 8(2)(b) of the Act;

115.22. initiate contempt of the Public Protector proceedings in terms of section 9(1) of the Act;

115.23. conduct an internal review lodged in terms of Rule 45 of the Rules, by Complainants who are dissatisfied with a decision of any official of the Office of the Public Protector or the Public Protector to close or refuse the investigation of a complaint.

E2: <u>Processing of Complaints</u>

116. With all new cases, whether resulting from complaints or own-initiative, a case file with a unique reference number is opened and referred to an assessment panel of investigators.

117. In the meantime, an acknowledgement letter is written to the complainant. In the letter, the complainant is informed of the ensuing assessment process and that the office will be in contact.

118. The office has an in-house assessment panel which resides within the Complaints and Stakeholder Management, one of the investigation branches within the PPSA. The purpose of assessment is to establish jurisdiction and merit. Assessors must also establish if the complainant has exhausted all available remedies before approaching the Public Protector South Africa, which is the complaints body of last resort.

119. Where jurisdiction and merit are established and the assessors have satisfied themselves that the complainant has exhausted all other remedies, the case file is allocated to the appropriate investigation branch whose head would then assign the matter to an investigator(s) within his or her branch.

120. In the event jurisdiction is not established, the complaint is rejected. If jurisdiction is established but the complainant is found to have failed to exhaust all remedies, the matter is referred to the appropriate complaints body of first instance.

121. In any of the instances referred to here, the complainant is informed of the fate of the complaint in writing. In respect of complaints assigned to investigators, an investigation plan is developed, a preliminary investigation may be conducted and a consultation with a complainant may be arranged to clarify the complaint and lock the issues for investigation. From then an investigation is carried out.

122. There are various ways in which the matter may be handled. These include Alternative Dispute Resolution (ADR) methods and a formal investigation. In the case of the ADR approach, the parties to the dispute are brought together in a session overseen by the Public Protector.

123. Where the allegations appear to be unsubstantiated, a discretionary notice is issued to the complainant for the purpose of soliciting a comment. A report is prepared thereafter. This can either be a final report with findings and remedial action or a closing report. Beyond this point, the case file is closed and archived.

E3: <u>Approach to an Investigation</u>

124. Like every Public Protector investigation, the investigation is approached using an enquiry process that seeks to find out:-

124.1. What happened?

124.2. What should have happened?

124.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?

124.4. In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?

125. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation.

126. The enquiry regarding what should have happened, focuses on the law or rules that regulates the standard that should have been met to prevent improper conduct and/or, maladministration as well as prejudice.

127. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration, where possible and appropriate.

128. In the important case of Public Protector v Mail and Guardian, 2011 (4) SA 420 (SCA), the Supreme Court of Appeal (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

129. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the government institutions that were under investigation to prevent maladministration and improper conduct.

130. The Public Protector's own institutional touchstones, being principles from previous reports, are always, and were also considered.

131. In the case of conduct failure as was the case in the complaint investigated, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.

E4: <u>Remedial Action of the Public Protector</u>

132. In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that:

"*When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.*"

133. In the abovementioned Constitutional Court matter, Mogoeng CJ, stated amongst other things the following, when confirming the powers of the Public Protector:

"[65] *Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles.*"

134. The court further held that:

"[67] An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced."

"[68] Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint."

134.1. *[71(e)] "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case."*

135. In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017), the Court held as follows:

135.1. The constitutional power is curtailed in the circumstances wherein there is conflict with obligations under the Constitution (para 71);

> "*The Public Protector, in appropriate circumstances, has the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective;* (paragraphs 85 and 152 of the judgment)

135.2. I have the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (para 82);

135.3. There is nothing in the Public Protector Act that prohibits me from instructing another entity to conduct further investigation, as I am empowered by section 6(4) (c) (ii) of the Public Protector Act; (paragraphs 91 and 92 of the judgment);

135.4. Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords me with the following three separate powers; (paragraphs 100 and 101 of the judgment):

135.4.1. Conduct an investigation;

135.4.2. Report on that conduct; and

135.4.3. To take remedial action;

135.5. I am constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings; (paragraph 104 of the judgment);

135.6. My primary role as the Public Protector is that of an investigator and not an adjudicator. My role is not to supplant the role and function of the court; (paragraph 105 of the judgment);

135.7. The fact that there is no firm findings on the wrong doing, does not prohibit me from taking remedial action. My observations constitute prima facie findings that point to serious misconduct; (paragraphs 107 and 108 of the Judgment); and

135.8. *Prima facie* evidence which points to serious misconduct is a sufficient and appropriate basis for me to take remedial action. (Paragraph 112 of the judgment).

136. In simple terms to remedy is to cure, to correct or put right what is wrong. The concept has the same meaning as in the medical field.

E5: <u>Structure of the Reports</u>

137. We adapted the then existing structure/template of the report as follows: -

137.1. Executive Summary ;

137.2. Introduction;

137.3. Own Initiative Investigation;

137.4. Powers and Jurisdiction of the Public Protector to Investigate the Complaint;

137.5. The determination of the issues in relation to the evidence obtained and conclusions made with regard to the applicable law and prescripts;

137.6. Findings;

137.7. Remedial Action;

137.8. Monitoring;

E6: <u>Operational matrix of the PPSA</u>

138. The key operationally based structures at the PPSA are as follows:

138.1. Leadership Meetings;

138.2. Participants: PP, DPP, CEO, CFO, COS;

138.3. EXCO: CEO, EM'S, Senior Managers;

138.4. Think Tank (previously);

138.5. Dashboard Meetings;

138.6. Task Register meetings;

138.7. QA meetings;

138.8. Full Bench meetings; and

138.9. Service Standards.

139. Registration and Assessment Register new complaints within 2 working days of receipt of the complaint;

140. Identify and allocate EMEA Matters within 1 working day of registration;

141. Conclude assessment within 7 working days of registration including referral to another institution;

142. Finalise all no-jurisdiction matters within 5 working days of registration;

143. Allocate/transfer a file to another Unit or office within 2 working days of assessment; In specific matters conclude preliminary enquiries within 30 days of assessment; and

144. Conduct file inspections every Quarter;

145. Internal Reviews and Customer Service Complaints;

146. Conclude requests for internal reviews within 60 Days of receipt;

147. Resolve Customer service complaints within 10 working days of receipt; and

148. Report back to complainant on customer service complaints within 5 working days of resolution. 4 Administrative Justice And Service Delivery Unit, Good Governance and Integrity Branches, and Provincial Offices 4.1 The Service

Delivery and Good Governance Branches/Units were established to investigate and resolve complaints of improper conduct, maladministration and corruption by organs of state. These investigations include systemic interventions and investigations.

149. The investigators of these branches/units and provincial offices commit themselves to:

149.1. Within 5 days after allocation of the complaint to the Branch/Unit/ Office

a) Decide how the complaint will be dealt with; and

b) Inform the complainant of the investigator's name and contact particulars.

150. Finalise investigation plan within 10 working days for simple matters and 15 - working days for complex matters of receipt of file by investigator. (If a complainant does not respond to confirm issues, the investigator does not have to wait for confirmation before finalising the investigation plan).

151. Communicate with the Complainant on investigation approach within 10 working days of allocation of file to an Investigator including issues identified for investigation as well as confirmation of the relief sought by the Complainant.

152. Conclude full investigations/ Alternative dispute resolution processes within the following timeframes:

152.1. Finalise Early resolution investigations within 6-months;

152.2. Finalise Service failure investigations within 12-months;

152.3. Finalise conduct failure investigations complaints within 24- months;

152.4. Finalise investigation of complaints in terms of the Executive Members' Ethics Act, within 30-days, or such extension as is allowed by the Act;

152.5. Provide feedback to complainants every 30 working days;

152.6. Return calls, Facebook/twitter messages within one working day after receiving a message;

152.7. Draft and submit a closing report on an investigation within 15 working days for service failure matters and 30 working days conduct failure matters after certification by the Manager that the investigation is concluded;

152.8. Draft and submit section 7(9) notice and/or draft report to Quality assurance within 30 working days after certification by the Manager that the investigation is complete;

152.9. Identify issues that can be resolved through ADR and resolve them within 6 months from date of receipt by the Investigator and investigate other issues and finalise the investigation within the following time periods:

152.9.1. 12- months for service failure complaints. 24- months for conduct failure complaints.

152.9.2. Conduct file inspections every Quarter 5. Think Tank and Quality Assurance

152.9.3. Acknowledge receipt of sect 7(9) notices and draft reports within 5 working days of receipt; 5.2. Finalise quality assurance of section 7(9) notice and draft reports within 30 working days of receipt.

152.9.4. Monitoring implementation of Remedial action 6.1 .1 The Public Protector may if remedial action is not implemented within the relevant time frames as outlined in the implementation plan or terms of an agreement and/or as outlined in the report6.1.1 .2 Send at least two (2) written and oral reminders to the state institution within five (5) working days of the expiry of the time frame.

152.9.5. Failure to respond, within five (5) working days escalate the matter to the Minister or Executive Council in charge of the State Institution.

152.9.6. Within fourteen (14) working days send a written intention to subpoena the state institution (specifically the responsible officials cited on the report to implement the remedial action);

152.9.7. Issue a subpoena to the state institution within seven (07) working days of receipt of the notice of intention.

152.9.8. Refer the matter to the National Assembly or Provincial Legislature, for assistance in terms of section 8(2)(b)(iii) of the Act read with sections 181 (3), 42(3) and 55(2) of the Constitution, within fourteen (14) days of the subpoena.

E7: <u>Monitoring of the Implementation of the Settlements Agreements</u>

153. Subsequent to receipt of the settlement agreement from the Investigation branch/Province, the Compliance Branch must:

153.1. Within 2 working days of receipt the settlement agreement would be recorded/registered within Compliance Unit;

153.2. Within seven (7) working days of receipt of the Settlement Agreement the State Institution would be requested to submit an implementation plan with time frames on their approach towards implementation of the settlement agreement and dates they commit to;

153.3. The Compliance Unit would request for a progress report from the state institution on monthly basis after receipt of an implementation plan;

153.4. Within ten 10 working days two (2) reminders would be forwarded to the state institution that has not submitted a progress report;

153.5. The matter would be escalated to the Minister or Executive Council in charge of the State Institution; within one (1) month for lack of co-operation from the state institution; and

153.6. If the settlement agreement is still not implemented after escalation to the Minister or Executive Council in charge of the State Institution, the matter will be referred back to the relevant investigations branch/province for adjudication and report writing.

F. VISION 2023 EXPLAINED

154. A seven-year journey at the end of which the traveler aspires to leave behind a proud legacy would be a dismal failure without a detailed plan with clear goals.

155. This is why, at the start of my tenure as South Africa's fourth Public Protector, I laid out a blueprint titled Vision 2023 to guide the institutional programme of action over the course of my non-renewable term of office.

156. Operationalized by a strategic plan that was set to remain largely unchanged over the implementation period, the vision gave a window into what I intended to leave behind when I bow out of office in October 2023.

157. With the ultimate goal of seeing to it that the impact of the exercise of my constitutional investigative and remedial powers would be felt primarily at the grassroots, it rests on the following set of eight pillars:

157.1. Access – Embedded somewhere in section 182 of the Constitution is a less known and yet vital mandate of the Public Protector. That is the mandate to be accessible to all persons and communities. This

mandate generally overshadowed the power to investigate, report and take appropriate remedial action. Vision 2023 brings it into sharp focus, placing emphasis on the grassroots. The idea was to take services closer to the doorsteps of communities living in the margins of society. The community outreach program, with sub-programs such as the Mobile Office of the Public Protector, is a critical aspect of this pillar;

157.2. Vernacular – South Africa is a country with 11 official languages. The Public Protector has resolved to engage each linguistic community in their mother tongue. Indigenous languages was to be used in all community outreach programs. In addition, linguistic public broadcaster and community radio stations would be the primary medium of interacting with communities. This way, I believed that the message would hit home;

157.3. Footprint – For an institution with an unambiguous constitutional mandate to be accessible to all people across the land, the Public Protector at that time fell short when it came to physical presence among the communities the institution served. There were only 19 Public Protector Service Centers across the country, being the headquarters in Pretoria, the nine provincial offices and another nine regional offices in most of the provinces. Processes were underway to woo the Department of Justice as well as Cooperative Governance and Traditional Affairs, with a view to exploring the use of magistrates' courts, municipal premises and traditional offices as satellite service centers to increase the Public Protector's reach;

157.4. Agreements – The vision was and is still an ambitious project. Going it alone, therefore, may not be the wisest approach. This is where cooperation with stakeholders came in. Accordingly, the Public Protector intended entering into agreements aimed at fostering cooperation with several institutions that were critical to the attainment of the goals set in the vision. Memoranda of Agreement with institutions such as the South African Local Government Association (SALGA) as well as Departments of Justice and Cooperative Governance and Traditional Affairs were mooted;

157.5. Safe Haven – Troubled members of the public, in particular the poor and the marginalized, whose misery had its roots in maladministration occurring within state affairs would see in the Public Protector a stronghold and fortress under whose safeguard they would receive protection;

157.6. Rights – People that were well versed with their rights were an empowered lot. It was my strongly held view that only informed people would directly hold their leaders to account and do so in a constructive and peaceful manner. This approach at that time would guarantee to free the Public Protector's hands to pay more attention to systemic challenges that had implications for groups and communities;

157.7. Complaints resolution – While it is true that the Public Protector's mandate is broad, covering any and every administrative action within State affairs to the exclusion of court decisions, it is also correct that not every case needs to be brought to the institution. To this end, I

encouraged organs of State to establish effective complaints resolution units or sector-specific ombudsman institutions in the mold of the Health, Tax and Military Ombudsman. Individual cases that would ordinarily clog the Public Protector system could be handled by such institutions as the Public Protector is the complaints body of last resort;

157.8. Self-protection – All in all, the vision seeks to see to it that when the sun sets on my term of office, the grassroots must be teeming with empowered people who are their own liberators. It must be a people that see themselves as Public Protectors in their own right.

G. ACCOUNTING TO PARLIAMENT: ANNUAL PERFOMANCE PLANS PRESENTATION TO JUSTICE PORTFOLIO COMMITTEE

158. As part of my constitutional mandate I have to account to Parliament through Annual Performance Plans presentations to the Justice Portfolio Committee. Until my suspension, I had presented my Annual Performance Plan for the period 2016/2017, 2017/2018, 2018/2019, 2019/2020 and 2020/21 Quarter 1 as well as 2020/2021 Annual Performance Report.

159. It is of outmost importance that I share with this Enquiry Committee what I have presented before the Portfolio Committee in order to shed some light on my performance up to date in order for this Committee to make an informed decision during deliberations after the presentation of the evidence in its entirety. I therefore, outline a summary of what I have presented before the Portfolio Committee for the periods referred to above.

G1: 2016/2017

160. For the period referred herein above, I informed the Portfolio Committee of what had transpired reflecting on the 12 months to see how the team and I had fared.

161. I informed them of my eight-pillared plan that the team and I call the Public Protector Vision 2023. This vision is about making the kind of impact, on governance in state affairs that will be felt at the grassroots level.

162. The vison involves ensuring far-flung communities' access to the Public Protector, communicating with such communities in their mother tongues, expanding the reach of the Public Protector through additional service points, entering into Memoranda of Understanding with other institutions to advance our plans, turning the Public Protector South Africa into a safe haven for the poor, empowering people to know their rights, encouraging state organs to establish effective internal complaints resolution mechanisms and ultimately empowering people to be their own liberators and Public Protectors.

163. I informed them that the highlights of the achievements registered since the roll out of the vision were as follows:

163.1. I inspired the team to finalise 10 787 cases out of a total workload of 16 397. Nearly 50% of the matters finalised were upheld, meaning we helped over 5000 people to exact accountability on the state and to vindicate their rights;

163.2. An overwhelming majority of the matters finalised are what we call "*bread and butter*" issues. Such matters do not result in formal and

published investigation reports, which is why only 17 reports were issued during the year under review.

164. The reports in question, which are comprehensively summarized in the Annual Report, cover and shine the light on a wide range of issues – from whistle-blower victimization and problems with workmen's compensation to the plight of small business people and the violation of executive ethics.

165. At that point, five of the reports were subject of judicial review processes. These were CIEX; Kagisano-Molopo Local Municipality; Bapo Ba Mogale; Limpopo Department of Transport, Safety and Liaison and Department of Arts and Culture reports. The five represent 19.2% of all the reports issued during that period.

166. I presented to the Portfolio Committee that in order to be accessible, we left the comfort of our offices to travel far and wide in efforts to take our services to the doorsteps of far-flung communities and we held, as much as 803 community outreach clinics across the nine provinces. During such events, not only were communities taught about who we are, what we do and why they need to know about PPSA, they were also given the opportunity to lodge complaints for investigation. A significant portion of the 9 563 new complaints that we received during the reporting period came through this stream. In addition to these clinics, I embarked on a nationwide tour of provinces during the last quarter of the year under review to introduce myself, lay out my plans and consulted stakeholders on them. Some of the complaints came from those interactions.

167. I explained to the Portfolio Committee that an example of a systemic investigation is the one that concerns the relationship between traditional leaders and other spheres of government, which allegedly hampers service delivery to communities residing on tribal land. Hearings in this regard would be conducted during the Good Governance Week later that month (October 2017).

168. I enlightened the Committee that having a matter taken to judicial review did not necessarily mean that there was anything wrong with the Report, but people are free to exercise their rights. At that point, there were several reports which had been taken on judicial review and most of those applications were dismissed with costs by courts. This included the following matters:-

168.1. On 16 February 2017, the court dismissed with costs an application for judicial review brought by National Department of Basic Education and costs in the amount of R295 695.47 was recovered from the department;

168.2. On 20 October 2016, the court dismissed with costs an application for judicial review brought by Minister of Home Affairs. This application was on appeal at that point in time;

168.3. On 13 March 2017, the court dismissed with costs an application for judicial review brought by Minister of Agriculture, Forestry and Fisheries. We are recovering cost of R772 946.37 from the department; and

168.4. On 26th September 2017, the court dismissed with costs an application for judicial review brought by Senqu Municipality.

169. During that period, the Courts found against the PP on the following matters: CIEX, NEF judicial review and on the State capture declaratory order.

G2: 2017/2018

170. During this period I presented to the Portfolio Committee the progress made in the office during my second year as Public Protector. I presented that my office had a constitutional obligation to be accessible to all persons and communities, and that I had learnt over the previous two years at the time that when people do approach us, the public's complaints could be against any of the more than 1000 organs of state over whom we have jurisdiction. I shared that I had also learnt that more than 95% of the complaints would be about "*bread and butter*" matters while the rest would be the so-called "*high profile matters*".

171. I was still being guided by Vision 2023 in the execution of the strategic plan of the PPSA and I incorporated this by working the spirit of the vision into our successive Annual Performance Plans. At that point, my office's combined workload for past two financial years amounted to a whopping 29 498 cases. The figure rose slightly higher when one adds the new matters that we had received since April 2018. Out of the 29 498 matters, we managed to finalise 24 359. "*Finalised*" refers to cases settled, referred to alternative competent bodies or assessed and rejected on the grounds that they fall outside our ambit.

172. I also presented to the Portfolio Committee a comparison of the 2016/17 and 2017/18 statistics. It reflected a modest improvement. For instance, our total workload for 2017/18 rose to 18 356 from 16 397 in 2016/17. We also finalised 13 572 matters in 2017/18, which was an increase from 10 787 in 2016/17. Of the matters finalised in 2017/18, 39% were upheld, meaning we made findings and took appropriate remedial action in favour of the complainants in nearly 40 % of the finalised matters. In the previous year(2016/17), we upheld 49% of the finalised matters. There was also an improvement in the number of new complaints we attracted in 2017/18. Figures show that we got 11 943 new matters compared to 9 563 in the preceding year.

173. I informed the Committee that the fact that more people approached us with new matters in 2017/18 than in 2016/17 could mean that there has been a slight growth in awareness on the mandate of the Public Protector over the 12 month period ending March 2018.

174. A lot of the people who approach us with complaints do not have the financial muscle to take the state to a court of law. The figures I have just shared, therefore, tell a story of the real impact we made and continue to make in bringing justice to those that would have otherwise struggled to vindicate their rights.

175. At that point, I had issued 51 investigation reports since October 2016. Fourteen (14) of those were being taken on judicial review while in the rest of the matters implementation of remedial action was pending.

176. I informed the Portfolio Committee that at that point we had signed Memoranda of Understanding with the likes of the National Prosecuting

Authority, the Special Investigating Unit, the Public Service Commission and a number of Provincial Legislatures. Regarding international relations, my office continued to play an influential role in the continental ombudsman space.

G3: 2018/2019

177. The Portfolio Committee meeting for this period came only three days after the 24th year anniversary of the Public Protector as an institution and also three days after I completed a full three years as Public Protector.

178. I presented to the Committee the fact that our year-on-year institutional performance data for the period ending March 31, 2019 showed significant improvement. We achieved 72% of our performance targets in 2018/19, up from 50% in the preceding year. This represents a 22% improvement.

179. This is more significant when one takes into account the fact that, during the period under review, we increased our performance targets from 14 to 18. Among these targets were the finalization of 30 formal investigation reports and the finalization of ten systemic investigations.

180. I impressed upon the Committee that often we focus more on the numbers and less on the actual impact that we make in the lives of the people of South Africans as follows:

180.1. Among the cases we finalized was one where we helped a 66-year-old former civil servant to receive more than R1million in arrear pension benefits which had been outstanding for over five years. For

a full five-years, that person did not have any source of income. Their livelihood has now been positively impacted as a result of our effort;

180.2. In another case, within two weeks of being entrusted with the complaint, we managed to help bring to an end a Limpopo man's three-year struggle to access an amount of R250 000 kept for him in the Master of the High Court's Guardian's Fund. Again, this is a person who would have had to contend with poverty for 36 months while his money is sitting with officials in the Department of Justice and Correctional Services. All it took was two weeks of back and forth correspondence between my office and the officials at the Department to unlock the funds; and

180.3. We also helped a distraught Western Cape mother to receive over R300 000 in arrear and future child maintenance, giving effect to several court orders which directed that the defaulting father's pension benefits be attached for this purpose. Prior to our intervention, the orders had seemingly been ignored.

181. These examples were just a few among the thousands of matters which were resolved through alternative dispute resolution mechanisms as opposed to formal investigations which result in formal reports during that period.

182. An example of formal investigations that resulted in a report are:

182.1. One where we helped 45 small business people in Gauteng who had been owed a collective R12million by the provincial Human Settlements Department for the work they did as part of a low-cost

housing project in Alexandra 20 years ago. The department was at that time complying with our remedial action;

182.2. Another example of overachievement was in relation to our community outreach programme, which is critical as it gives effect to section 182(4) of the Constitution. This provision enjoins the Public Protector to be accessible to all persons and communities. We exceeded our outreach clinics target by 69, holding 277 when we had planned to conduct only 208;

182.3. In addition, we conducted 23 more radio slots that the planned 36, bringing the total to 59. This means more people got to learn about the role and services of this office as well as who it can help and how to access its intervention.

183. These successes were an add-on to the office's successful run over the previous three years, during which period I dealt with nearly 50 000 matters, finalizing around 70% of those. This excluded the financial year in question. In addition, since 15 October 2016 to 31 March 2019, I produced 91 formal investigation reports.

184. I also impressed upon the Portfolio Committee the fact that some organs of State still looked the other way when my office pointed them to their administrative lapses. This was in spite of the instructive Constitutional Court decision, which clarified once and for all that my remedial action is binding unless set aside by a court of law. This left a lot of the complainants, in whose favour we had made findings and taken appropriate remedial action, in limbo. Moreover, owing to insufficient resources, my office could not afford to have

the remedial action we had taken enforced through the courts. As far as the affected parties were concerned, this rendered the office somewhat toothless.

185. It was for that reason that, at the end of the period under review, I published a list of nearly 40 organs of State, which had either ignored my reports in their entirety or implemented only part of the remedial action. The idea was to appeal to the conscience of those involved, with the hope that they will see the plight of those affected members of the public. Unfortunately, in some cases, this only served to harden attitudes and invited more litigation.

186. Further, in contravention of sections 181(3) and (4) of the Constitution, my office has been at the receiving end of one blistering attack from senior Members of the Executive arm of government, who are also Members of Parliament. Unsubstantiated accusations that I am beholden to a faction of the governing party have largely underpinned these attacks. We have reported these to the Speaker.

187. Another notable achievement related to our continued impact in the entire African continent where issues of good governance, human rights and the rule of law are concerned. Our effort in this regard was acknowledged when my counterparts and peers from elsewhere in the continent elected me President of the African Ombudsman and Mediators Association (AOMA), which is an umbrella body of Public Protector-type institution in the continent.

188. I informed the Portfolio Committee about my plans as President of IOMA in that I wanted to focus on encouraging AOMA members to implement their respective mandates with a view to turning continental development plan, Agenda 2063: The African We Want, into reality. In particular, I wanted my

counterparts to concentrate their energies on the third and fourth aspirations of the plan, which deal with good governance, democracy, respect for human rights, justice and the rule of law, and peace and security, respectively. This included continental efforts to silence the guns by 2020. I informed the Committee that it would mean a lot to me if Parliament were to support our work in this regard.

189. I impressed upon the Committee the fat that the PPSA remain under funded and that I looked up to the National Assembly to help us obtain a bigger slice of the budget. That would go a long way in helping us to satisfactorily live up to our constitutional mandate.

G4: 2019/20 and 2020/21 Quarter 1

190. I appeared before the Portfolio Committee once again for the above period and I informed the Committee that Vision 2023 was in its fourth year of implementation, the Public Protector Vision 2023 remained the engine that powers all the Public Protector South Africa (hereinafter PPSA and/or office of the Public Protector) operations. I again outlined the eight pillars, namely:

190.1. Enhancing access to our services;

190.2. Engaging communities in their mother tongues for effective communication;

190.3. Increasing our footprint;

190.4. Leveraging stakeholder relations to advance our interests through MOUs;

190.5. Projecting an image of a stronghold for the poor as we should be;

190.6. Ensuring that people are well-versed in their rights;

190.7. Persuading organs of state to have effective in-house complaints resolution means to offload some of the burden from our shoulders; and

190.8. Inspiring people to be their own liberators.

191. Every little step we took to implement our constitutional mandate is informed by this vision. This included the 1 602 COVID-19 related complaints received since the beginning of the lockdown. The bulk of these matters relate to the R350-a-month special social relief of distress grant while the rest have to do with Personal Protective Equipment procurement irregularities which have financial implications of an estimated R4billion for the public purse.

192. We had also embarked on an own initiative investigation into the state of the country's health care system and basic education. The investigation was prompted by public outcry and media reports as a result of the pandemic. To this end we visited hospitals and schools in various provinces to establish, among other things, how they are coping with the devastation brought about by COVID-19 and the general state of the facilities in respect of whether they are able to render services effectively and efficiently to the public of the Republic. The Reports regarding these issues have since been published.

193. I once again appealed to the Portfolio Committee about the issues of funding and the fact that we had not been immune to the budget cuts that were taking

place across the board as a direct result of the contraction of our economy. More budget cuts had been forecast for the financial years ahead.

194. This has given us more reason to continue imploring organs of State to make an effort to establish in-house complaint units in line with the 7th Pillar of Vision 2023, which would result in a significant reduction of the number of complaints we receive, thereby freeing investigators' hands to focus on complex matters and improve on the quality of investigations. What's more, this could significantly reduce service delivery protests if properly implemented.

195. But more than just easing our caseload and curbing demonstrations, this approach would see to it that the PPSA does not take-over the work that public servants are already being paid to perform. We had already commenced working closely with organs of State such as the Government Pensions Adjudication Agency (GPAA), the City of Tshwane, the National Student Financial Aid Scheme, Higher Education and Training and Home Affairs. We request Parliament's assistance to encourage the establishment of internal complaints units across all spheres of government.

196. By way of examples, Home Affairs matters in question relate to refugee visas, delays in the finalization of applications for certificates of naturalization, processing of identity documents and passports, delays to correct birth certificates and to finalize applications for permits for permanent residence. Regarding the GPAA, the main issue is the delays in the payment of pension benefits and spousal benefits.

197. The process of amending the Public Protector Act remains on course and is another critical step for the institution within the context of a decreasing

budget. If successful, the amendment of the Act will see organs of State whose conduct are reported to the Public Protector paying us for the investigations in much the same way as auditees pay the Auditor-General for audit work. That is how we hoped to augment our budget.

198. We were concerned about forensic investigations commissioned by various organs of State, at a huge cost to the public, only for the resultant reports with recommendations to gather dust in file cabinets. One of the things we were considering were to enforce the implementation of such recommendations. Alternatively, the money set aside for such investigations could be allocated to us and the organs of state concerned could use our services instead of wasting money on recommendations that are not going to be implemented.

199. We were concerned about forensic investigations commissioned by various organs of state, at a huge cost to the public, only for the resultant reports with recommendations to gather dust in file cabinets. One of the things we were considering was to enforce the implementation of such recommendations. Alternatively, the money set aside for such investigations could have been allocated to us and the organs of State concerned could use our services instead of wasting money on recommendations that were not going to be implemented.

200. Another stumbling block for which we required Parliament's assistance was the unwillingness by some organs of State to help us with information during investigations. To this end, there is one matter that I wish to bring to the attention of Parliament, and it involves the difficulties we were experiencing in

relation to lack of cooperation from the National Prosecuting Authority on matters they are involved in.

201. At that point, we were not making headway in that matter due to what the NPA said is interference in the case, its refusal to submit requested documents due to the sensitivity of the case and its challenge of the Public Protector's legal authority to investigate allegations of maladministration in terms of the Public Protector Act 23, 1994 and the Constitution, 1996 in the matter concerned.

202. The language the NPA use in correspondence when responding to our requests for assistance did not accord with the spirit of collegiality expected of institutions of state which have the same goal. I then pleaded with the Portfolio Committee to assist us in that regard. It does not help to subpoena information about the subject of an investigation when another organ of state in the accountability value chain already has possession of it and could simply have shared with us. Moreover, we don't investigate the same aspects of matter. They look at criminal conduct while we focus on maladministration.

203. The same goes for the Provincial Directorate of Public Prosecutions. One such matter was the KwaZulu-Natal North Sea Jazz Festival and I brought this matter to the attention of the National Director of Public Prosecutions.

204. The lack of cooperation had a bearing on the completion of the investigation. The matter escalated to the Chairperson of the Portfolio Committee for intervention. In the same breath, we requested Parliament to assist us with organs of State which neither took our reports on review nor implemented the remedial action, leaving complainants high and dry. This is rife in the North West provincial government and the City of Tshwane. Over and above

intervention from the Members of Parliament, we also sought the assistance of the Forum of South African Directors-General (FOSAD).

205. We also highlighted the fact that it was not all organs of state that were uncooperative. For instance, it was gratifying to see the Premier of the Free State opening a criminal case in line with the remedial action spelt out in our report on an investigation into allegations of maladministration concerning the award of a contract for the eradication of asbestos roofs in that province to Black-Head Consulting Proprietary Ltd/Diamond Hill Trading 71 Proprietary Limited Joint Venture in the 2014/15 financial year. It was equally rewarding to see arrests being made as a result.

206. Thereafter, the ACEO and her team presented in detail performance data. However, I impressed upon the Portfolio Committee that we had seen an upswing in institutional performance over the past three years. In 2017/18, our performance was at an underwhelming 50%. It rose to 72% in 2018/19 before impressively spiking by 7% to 79% in 2019/20. We hoped to keep the momentum and breach the 80% mark in the year in question.

207. On the corporate governance front, we did well in developing and implementing a turnaround strategy for effectiveness and efficiency. This was being done in a phased approach. In the year under review, we implemented Phase 2.

208. We started the 2020/21 financial year rather slowly, achieving only 70% of the quarter 1 targets although we did well on several of them both in administration and in core.

209. I impressed upon the Portfolio Committee that like everybody else, our operations were adversely affected by the COVID-19 pandemic. Our enhancement of access efforts had been hit the hardest. We could not conduct outreach clinics or allow walk-ins at any of our 18 service centers countrywide, including Head Office. This was a direct result of the National State of Disaster Lockdown. Accordingly, we had to revise our Annual Performance Plan for the relevant mid-term.

210. We planned a modest commemoration of this milestone for later that month and planned to invite all the former Public Protectors to share in the moment as they each played a role in building this institution into the force that it was. We also intended to invite Parliament to take part in those virtual proceedings.

G5: 2020/21 Annual Performance Report

211. As far as this period is concerned, I presented before the portfolio Committee only a few weeks after the Public Protector South Africa celebrated three great milestones. I reported that we celebrated my fifth year in office. This meant that I was then left with less than two years to guide the team to the full realization of the aspirations of the Public Protector Vision 2023. However, indications were that we had done exceedingly well in breathing life into that ambitious plan and we were well on course to meet its goals by 14 October 2023.

212. I also addressed to the Committee that we marked the 26th anniversary of the office's existence at the time. Such a moment beckoned us to take a breather and reflect on the journey that started with unsteady baby steps when Judge Selby Baqwa led a handful staff members from a modest office in a high-rise building on Visagie Street in Tshwane. In addition to Judge Baqwa, we paid homage to Adv. Lawrence Mushwana and Prof Madonsela and the teams they led for laying the foundation. We are because they were. We always saw our role as the vast improvement on their previous achievements while saying a more solid foundation for our successors.

213. I also reported that we celebrated our achievement of the second successive Clean Audit – a first for this institution at that time. When one considers where we come from as an institution regarding our own internal state of governance, this was a great achievement. In the darkest of our days, it was said that we were technically insolvent. This was obviously a bitter pill to swallow given the justified and reasonable expectation that, as an accountability and integrity institution, we would lead by example and hold others to account for transgressions we weren't, ourselves, found wanting on.

214. At the onset of my journey as Public Protector, I vowed that my seven-year term of office would largely be characterized by the drive to take the services of this institution to grassroots communities, many of whom dwell on farms, in informal settlements, townships and rural villages, as per Vision 2023.

215. I explained at the time that this was a vision through which we were going to broaden access to our services, use vernacular languages in our communication with the users of our services, expand our footprint and

leverage stakeholder relations by concluding agreements and/or memoranda of understanding.

216. I also indicated that through the vision, this institution would seek to project the image of a safe haven for the marginalized, empower them to be conversant – chapter and verse – with their rights and responsibilities, encourage the establishment of in-house complaints-handling mechanisms across the public administration and inspire people to be their own liberators.

217. One of the latest organs of State to have heeded our call in that regard was the Department of Home Affairs, with whom we have an agreement in terms of which we refer many of the complaints that are directly lodged with us. These included matters such as visas for refugees, delays in the finalization of applications for certificates of naturalization, processing of identity documents and passports, delays to correct birth certificates and to finalize applications for permits for permanent residence.

218. I indicated to the Committee that it was pleasing to see the impact that that approach had had. For instance, in 2018/19, Home Affairs accounted for most of the complaints in our caseload. A mere three financial years down the line, the Department went down the ranks, dropping to fifth position.

219. We had hoped to duplicate that success in respect of other organs of State with whom we had similar agreements, and which had also responded positively to our call for the development of internal capacity to resolve complaints. These included the Government Pension Administration Agency, which features regularly on our list of top 10 institutions against whom complaints are lodged.

220. We continued to do equally well in inspiring people to be defenders of their own rights, using institutions such as my office as opposed to judicial means. I took the following example: -

220.1. Lindiwe Toheed in Atteridgeville, west of Tshwane, who tirelessly knocked on multiple doors to see to it that the remedial action we took in favour of her parents in 2019 was implemented. She had borrowed money to build a house for her parents, Mr. Alfred and Mrs. Constance Mhlahla. The house was later flattened by the Red Ants at the instance of the Gauteng Human Settlements Department. This was just as the family was about to move in. Officials from the Department later conceded that the house was erroneously bulldozed as it was not among those of land invaders, who were the real target of the demolition. They made this concession during a mediation session presided over by my office;

220.2. In addition, they undertook to rebuild the house. Despite this, a period of more than two years passed without the department turning the sod on the Mhlahlas' backyard. Rather than dampen her spirits, that state of affairs spurred her on to hold the Gauteng government to account. An impressive three bedroom house has since risen from the rubble of the old structure. Hers is a classic example of what we meant when we said we will inspire people to be their own liberators.

221. The period under review saw our internal business continuity regime being put to the ultimate test as the global pandemic of COVID-19 threatened to paralyse our operations.

222. I was pleased to report that we were able to adjust to the changed environment. A combination of the ability to appreciate the enormity of the potential effect of the pandemic on operations early on in the year and the foresight to effect the necessary alterations on our Annual Performance Plan saw us through.

223. For instance, at the beginning of the financial year, the plan was to carry out 208 outreach clinics. These were mass meetings that served as information sessions on the mandate and role of the institution, and also a mobile office service. Such events targeted remote areas where the grassroots communities were based. We had also planned to embark on our customary flagship outreach programme, the Public Protector Roadshows.

224. I reported that when it became clear that it would not be possible to hold such potential super-spreader events, we tweaked the targets. Rather than rally the communities, we relied heavily on community radio and in place of roadshows, webinars became the order of the day.

225. At the height of the lockdown, we saw to it that staff had laptops and internet connectivity to enable them to work from home whenever this became necessary. Our ground-breaking interventions and investigations into failures regarding the R350 social relief of distress grants for the unemployed, announced by President Cyril Ramaphosa, and the irregularities that plagued the public procurement processes for Personal Protective Equipment (PPE) were carried out during that period.

226. During that same period, we got out of the offices and homes to traverse the length and breadth of the country, inspecting various public health care

facilities across the country as the sector buckled under the weight of the pandemic. Those inspections led to various investigations, whose findings were publicized, calling on public health authorities to do better.

227. I reported further that we also travelled far and wide to a number of institutions of higher learning in the country and interacted with stakeholders in the higher education sector. These included the Minister of Higher Education, Science and Innovation, the National Student Financial Aid Scheme (NSFAS), student formations, and university and TVET college management, among others. Working closely with the South African Human Rights Commission, the aim was to do our bit to see to it that, come the beginning of the next academic year, students were in the lecture halls as opposed to the streets, protesting against financial exclusion, lack of accommodation, problems with NSFAS and so forth.

228. I indicated that overall, in our investigation work at the time, we finalized 6 927 matters out of the 9 299 that we were entrusted with. The latter figure was the sum total of matters we could not finalise in 2019/20 and the new cases that we received in 2020/21. We summarised the impact we made in that regard from Page 31 of the Annual Report.

229. I impressed that we were still developing a Mobile Referral Application, which would be a very useful tool in the hands of the public as it will have capabilities to refer potential Public Protector complainants to competent complaints bodies of last resort. This would have the same impact as the drive to encourage organs of State to establish internal complaints units.

230. Finally, I reported that although we were proud of these modest successes, we remained alive to the reality that more was yet to be done and that there was always room for improvement.

H. MAIN ACHIEVEMENTS IN SUMMARY

231. As at the time of my illegal suspension the institution had released a pie-chart attached as annexure "**BM13**" which reflected, among others, the following key performance areas: -

231.1. Audits by the AGSA;

231.2. Backlog / Investigation Reports;

231.3. Public Education Activities;

231.4. Reports Successfully Defended in Courts vs Set Aside and Reviewed;

231.5. Finalised Cases; and

231.6. Caseload.

I. RELATIONSHIP BETWEEN THE PUBLIC PROTECTOR SOUTH AFRICA AND AOMA

232. I am currently the First Vice President of the African Ombudsman and Mediators Association (AOMA), which is a continental body of Public Protector-like institution. The AOMA is affiliated to the African Union and has the status of an observer at AU meetings.

233. I am also the Board Chairperson of the African Ombudsman Research Centre (AORC), which supports the AOMA with research, information-sharing, capacity-building and advocacy. Since former President Jacob Zuma launched it in 2011, the AORC has been operating on the basis of financial support from the Department of International Relations and Cooperation's African Renaissance Fund. Through this investment, the South African government – through us – contributes immensely towards Agenda 2063: The Africa We Want. One of the seven Agenda 2063 Aspirations is for our continent to realise good governance, democracy, and respect for human rights, justice and the rule of law including furtherance of peace and stability. The role of African Ombudsman institutions or Public Protector-like institutions across the continent is helping to realise this particular Agenda 2063 Aspiration cannot be overemphasised.

J. THE KEY PRINCIPLES UNDERLYING THE WORK OF THE PUBLIC PROTECTOR IN SOUTH AFRICA, THROUGH SOME OF THE KEY COURT CASE

234. It would be impossible for any person to participate meaningfully in the process without reading, internalising and grasping what the courts have said about the person and institution of the Public Protector. These utterances of our courts have been repeated and entrenched in our jurisprudence in numerous and countless court judgments. However and for the sake of brevity I have selected 5 cases which I will refer to as "*the Big 5*" which individually and cumulatively should expose the nature, purpose, functions and constitutional place of the Public Protector of South Africa.

235. **<u>This first is the matter of Mail and Guardian</u>**

235.1. Regarding the Constitutional mandate of the Public Protector and the active role that he/she must take in conducting her investigations the SCA had this to say:

"[5] The Constitution upon which the nation is founded is a grave and solemn promise to all its citizens. It includes a promise of representative and accountable government functioning within the framework of pockets of independence that are provided by various independent institutions. One of those independent institutions is the office of the Public Protector.

[6] The office of the Public Protector is an important institution. It provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that is capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee.

[7] The constitutional mandate and duty of the Public Protector is stated by implication in the powers that are recited in s 182 of the Constitution:

'(1) The Public Protector has the power, as regulated by national legislation –

1. to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

2. to report on that conduct; and

3. to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.'

[8] The office of the Public Protector is declared by the Constitution to be one that is independent and impartial, and the Constitution demands that its powers must be exercised 'without fear, favour or prejudice'. Those words are not mere material for rhetoric, as words of that kind are often used. The words mean what they say. Fulfilling their demands will call for courage at times, but it will always call for vigilance and conviction of purpose.

*[9] The national legislation that is referred to in s 182 is the **Public Protector Act 23 of 1994**. The Act makes it clear that while the functions of the Public Protector include those that are ordinarily associated with an ombudsman[3] they also go much beyond that. The Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances. Although the Public Protector may act upon complaints that are made, he or she may also take the initiative to commence an enquiry, and on no more than 'information that has come to his or her knowledge' of maladministration, malfeasance or impropriety in public life.*

[10] The Act repeats in greater detail the constitutional jurisdiction of the Public Protector over public bodies and functionaries and it also extends that jurisdiction to include other persons and entities in certain circumstances. In broad terms, the Public Protector may investigate, amongst other things, any alleged improper or dishonest conduct with respect to public money,[5] any alleged offence created by specified sections of the ***Prevention and Combating of Corrupt Activities Act 12 of 2004*** *with respect to public money, and any alleged improper or unlawful receipt of improper advantage by a person as a result of conduct by various public entities or functionaries.*

[11] But although the conduct that may be investigated is circumscribed I think it is important to bear in mind that there is no circumscription of the persons from whom and the bodies from which information may be sought in the course of an investigation. The Act confers upon the Public Protector sweeping powers to discover information from any person at all. He or she may call for explanations, on oath or otherwise, from any person, he or she may require any person to appear for examination, he or she may call for the production of documents by any person,[8] and premises may be searched and material seized upon a warrant issued by a judicial officer.[9] Those powers emphasise once again that the Public Protector has a pro-active function. He or she is expected not to sit back and wait for proof where there are allegations of malfeasance but is enjoined to actively discover the truth".

235.2. Regarding the conduct of investigations the Court found that they should be done with an open and inquiring mind. The court further had this to say:

"[21] There is no dispute in this case that an investigation and report of the Public Protector is subject to review by a court. I do not find it necessary to pronounce upon the threshold that will need to be overcome before the work of the Public Protector will be set aside on review. It would be invidious for a court to mark the work of the Public Protector as if it was marking an academic essay. But I think there is nonetheless at least one feature of an investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind – which is that the investigation must have been conducted with an open and enquiring mind. An investigation that is not conducted with an open and enquiring mind is no investigation at all. That is the benchmark against which I have assessed the investigation in this case.

[22] I think that it is necessary to say something about what I mean by an open and enquiring mind. That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first they do not then it asks questions and seeks out information until they do. (own emphasis) It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry then it might progress to being a suspicious

mind. And if the pieces still do not fit then it might progress to conviction that there is deceit. How it progresses will vary with the exigencies of the particular case. One question might lead to another, and that question to yet another, and so it might go on. But whatever the state of mind that is finally reached, it must always start out as one that is open and enquiring."

236. **The second is the matter of SABC v Democratic Alliance and Others**

236.1. Regarding the PP being a watchdog the court had this to say:

"[28] The most significant constitutional provision is s 182, which reads:

'(1) The Public Protector has the pow er, as regulated by national D legislation — to investigate any conduct in State affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and E to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and F communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.'"

...

[32] It is necessary to have regard to the relevant provisions of the Act to C see how action by the Public Protector is triggered, as well as to examine the range of statutory measures available to that office. But before we do that it is worth noting the material parts of the preamble to the Act:

'Whereas sections 181 to 183 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), provide for the establishment of the office of Public Protector and that the Public Protector has the power, as regulated by national legislation, to investigate any conduct in State affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to have resulted in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action, in order to strengthen and support constitutional E democracy in the Republic; . . . .'

...

[42] Subsections 6(4)(b), (c) and (d) of the Act, which was enacted pursuant to the interim Constitution, appear to mirror the language of s 112(1)(b) of the interim Constitution. The final Constitution, however, in a significant shift in language, conferred an express further power E on the Public Protector. Instead of empowering the Public Protector to 'endeavour' to resolve a dispute, or 'rectify any act or omission' by simply 'advising' a complainant of an appropriate remedy as under the interim Constitution, the final Constitution empowers the Public Protector to 'take appropriate remedial action'. Significantly, the Constitution F itself directly confers powers on the Public Protector. Section 182(1) confers the power on the Public

Protector to: (a) investigate; (b) report; and (c) take appropriate remedial action. Those powers are complementary. If, of course, a complaint, or an investigation on her own initiative, yields no indication of maladministration or corruption G there will be no need to take remedial steps or utilise any of the other measures available to her. Once the Public Protector establishes state misconduct, however, she has the vast array of measures available to her as provided in the Constitution and the Act.

...

[52] The Public Protector cannot realise the constitutional purpose of her office if other organs of state may secondguess her findings and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct its implementation. It follows that the language, history and purpose of s 182(1)(c) G make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for state misconduct, which includes the power to determine the remedy and direct its implementation. All counsel before us rightly accepted that the Public Protector's report, findings and remedial measures could not be ignored.

[53] To sum up, the office of the Public Protector, like all ch 9 institutions, is a venerable one. Our constitutional compact demands that remedial action taken by the Public Protector should not be ignored. State institutions are obliged to heed the principles of co-

operative governance as prescribed by s 41 of the Constitution. Any affected I person or institution aggrieved by a finding, decision or action taken by the Public Protector might, in appropriate circumstances, challenge that by way of a review application. Absent a review application, however, such person is not entitled to simply ignore the findings, decision or remedial action taken by the Public Protector. Moreover, an individual or body affected by any finding, decision or remedial action taken by the J Public Protector is not entitled to embark on a parallel investigation Navsa JA and Ponnan JA (Mpati P, Swain JA and Dambuza JA concurring) process to that of the Public Protector, and adopt the position that the A outcome of that parallel process trumps the findings, decision or remedial action taken by the Public Protector. A mere power of recommendation of the kind suggested by the High Court appears to be more consistent with the language of the interim Constitution and is neither fitting nor effective, denudes the office of the Public Protector of B any meaningful content, and defeats its purpose. The effect of the High Court's judgment is that, if the organ of state or state official concerned simply ignores the Public Protector's remedial measures, it would fall to a private litigant or the Public Protector herself to institute court proceedings to vindicate her office. Before us, all the parties were agreed that a useful metaphor for the Public Protector was that of a watchdog. As is evident from what is set out above, this watchdog should not be muzzled." (Own emphasis)

237. **The third is the matter of EFF v The Speaker (Nkandla)**

237.1. As far as the Public Protector's remedial actions, the Constitutional Court had this to say:

"[67] An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced."

"[68] Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint."

[71(e)] "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case."

238. **The fourth is the matter of SARS v the Public Protector**

238.1. As far as the issue of personal cost orders against the Public Protector arising out of the performance of her duties, the Constitutional Court held in paragraph 29 that :

"*The office of the Public Protector is a constitutional creation. It and other Chapter 9 institutions exist for the purpose of "supporting*

constitutional democracy". Its independence and proper, unhindered functioning are at the core of our constitutional democracy. Unwarranted costs orders against the Public Protector in her personal capacity in work-related litigation may have a chilling and deleterious effect on the exercise of her powers. Because of this likely impact on the exercise of constitutional powers, unwarranted – not just any – costs orders engage this Court's constitutional jurisdiction. Also, costs orders against organs of state serve the constitutional function of holding organs of state to account."

238.2. Still on the issue of costs and unwarranted scathing remarks by the Judges in the court a quo, the Court further held that :

Subpoena issued in fraudem legis

[35] The Public Protector's view that she was entitled to issue the subpoena regardless of the prohibition in section 69(1) is misguided. But it appears to have been a genuinely held view. Based on that genuinely held view, there is no cogent basis for suggesting that the subpoena was issued for any purpose other than the investigation the Public Protector was conducting. The High Court's conclusion that it was issued in fraudem legis is without factual foundation and constitutes a misdirection on the facts. (own emphasis)

Mala fides re lack of funds

[36] The Public Protector explains that the first opinion was sought and obtained in one financial year and the second opinion was sought

and obtained in the ensuing financial year. She did not have funds in the first financial year and she had them in the following financial year. That sounds like a perfectly sensible explanation. The High Court's conclusion of bad faith is thus a leap in logic and yet another misdirection. (own emphasis)

Mala fides re not inviting Commissioner to participate in second opinion and not sharing that opinion with him.

[37] An incontrovertible (or even common cause) fact is that the Public Protector did advise the Commissioner beforehand that she would seek a second opinion; she was not cagey about it. She was not required to involve the Commissioner in seeking that second opinion. And she was entitled to obtain it if she was not satisfied with the first opinion. In those circumstances, failure to share the second opinion hardly justifies a conclusion of mala fides. Had she been acting mala fide in this regard, she would not even have shared with the Commissioner the fact that she was going to seek a second opinion. Also, as the Commissioner was aware that the Public Protector was to seek a second opinion, he could have asked for it. Or, at the very least, he could have asked if the Public Protector eventually got the second opinion she was to seek. Nothing suggests that she might have withheld it; not when she had volunteered information that she was to seek it. (own emphasis)

Proclivity to operate outside of the law, and a deep rooted recalcitrance to accept advice from counsel

[38] According to the High Court, a "proclivity" to operate outside of the law, and a "deep rooted recalcitrance to accept advice from senior and junior counsel" were proof of unreasonable, arbitrary and mala fide conduct. A dictionary meaning of "proclivity" is: "a tendency to do something regularly; an inclination"; "an inclination or predisposition toward something". What we have on the facts of this case is only the one instance of not being happy with the first opinion and, as a result, seeking a second opinion. How that becomes a proclivity escapes me. As they say, one swallow does not a summer make. Also mind boggling is the holding that the Public Protector acted outside the law in seeking a second opinion, when she was perfectly entitled to seek it. In fact, in addition to being entitled to seek the second opinion, the Public Protector acted on the basis of it. Strangely, the High Court regards the opinion of the one senior counsel as gospel and that of the other not. The reality is that the Public Protector had two conflicting opinions and she preferred one: the correct legal position could have been what was stated in the one or the other, or in neither. The conclusion that – by picking the one opinion – she acted unreasonably, arbitrarily and in bad faith thus beggars belief and is gratuitous. In fact, it was wrong of the High Court to assume that the Public Protector was obliged to take the advice of senior counsel and to conclude that failure to take it is per se reckless or mala fide.
(own emphasis)

Expectation that the Public Protector must act with a "high degree of perfection"

[39] As stated before, the High Court held that it was expected of the Public Protector to "always act with a high degree of perfection". It is one thing to expect the highest possible standard of performance from a public official within whatever set parameters at the workplace. But it is quite another to hold that the slightest deviation from that standard must result in a personal costs order in the event that the deviation leads to litigation. If the latter were true, all litigation in which public officials came second best would result in personal costs orders against them. And that would be because the slight deviation does not meet the standard of "perfection". This has never been our law. It is not any deviation from the set norm that results in personal costs orders. To attract such order, the deviation must be reprehensible or egregious or it must constitute a gross disregard of professional responsibilities. That is a far cry from ordering costs de bonis propriis as a result of a dip even by a slight margin from perfection.

[40] If the conduct of a public official has fallen short of the required standard and given rise to litigation, it may attract a costs order against her or him in her or his official capacity. It is only where there is reprehensibility in whatever form that the punitive step of ordering costs de bonis propriis may then be taken. So, the High Court's standard of "a high degree of perfection" was yet again a misdirection.

Concluding remarks

[41] There was simply no basis for the High Court's award of costs de bonis propriis. The award must be set aside. And this conclusion

cannot be affected by an issue I deal with when I deal with costs in this Court. (own emphasis)

[42] When a de bonis propriis costs award against the Public Protector is warranted, it is certainly within a court's remit to order it. After all, as Froneman J said in Black Sash II, personal costs orders against public officials serve to vindicate the Constitution. However, courts should grant personal costs orders against the Public Protector only when that is warranted. There appears to be a developing trend of seeking personal costs orders in most if not all matters involving the Public Protector. Of these a total of four, including this one, have reached us. And in three, the High Court granted personal costs orders against the Public Protector. What made one of those cases stand out was that a personal costs order was granted based on the "usual rule" that costs follow the result, with no consideration whatsoever of special circumstances that justified the order. This is a far cry from the stringent test for the award of personal costs orders. And in the instant matter the High Court – in its conclusions – has carefully selected and used epithets and particular nouns that are suited to awards of personal costs orders, but there is not a scintilla of evidence to support those epithets and particular nouns and, therefore, the conclusions. Thus the conclusions simply cannot stand up to scrutiny. (own emphasis)

[43] Out of the four applications that have landed here, it is only in one that this Court has sanctioned a personal costs order. Of course, that does not mean litigants who – on cogent grounds – believe they are

entitled to the award of personal costs against the Public Protector must not push for such awards and that – where such costs are warranted – courts should not grant them. But it does mean that courts must be wary not to fall into the trap of thinking that the Public Protector is fair game for automatic personal costs awards. Whether inadvertently or otherwise, the High Court judgments in the EFF v Gordhan matter and in the instant matter are instances where the High Court fell into that trap.

[44] Personal costs orders may have a chilling effect on the exercise of the Public Protector's powers, including litigating where necessary. Hers, an office specially created together with others under Chapter 9 of the Constitution, is an important cog in our constitutionalism as it and the others were created to "strengthen constitutional democracy". Axiomatically, the Public Protector's office is more important than any incumbent. The impact of certain types of conduct that shake its operations at the foundations may outlive the terms of office of a number of incumbents. Needless to say, as the Judiciary, we must not be guilty of contributing to the weakening of that office. You weaken it, you weaken our constitutional democracy. Its potency, its attractiveness to those it must serve, its effectiveness to deliver on the constitutional mandate, must be preserved for posterity. (own emphasis)

[45] I voice these words of caution because of the disturbing frequency and regularity of applications for, and awards of, personal costs orders against the Public Protector. What is particularly

disturbing is that it is clear that the applications and awards are not always justified. That much is apparent from the fact that two out of the three personal costs awards that have come before us, including this one, have been set aside. Crucially, these two typify the worst examples of personal costs awards. And in the fourth matter where there was no personal costs order by the High Court but there was an insistence that this Court should make such an award, we declined that invitation. (own emphasis)

238.3. The Court also recognised the Public Protector's power to subpoena witnesses in terms of the Public Protector Act as follows:

"[6] Let me interpose this to the narrative. The Public Protector's subpoena powers are contained in ***section 7(4)(a)*** *of the* ***Public Protector Act****. The section provides:*

"For the purposes of conducting an investigation the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person."

[7] ***Section 11(3)*** *of the* ***Public Protector Act criminalises*** *failure to comply with a subpoena in these terms:*

"Any person who, without just cause, refuses or fails to comply with a direction or request under ***section 7(4)*** *or refuses to answer any question put to him or her under that section or gives to such question*

an answer which to his or her knowledge is false, or refuses to take the oath or to make an affirmation at the request of the Public Protector in terms of ***section 7(6)****, shall be guilty of an offence."*

239. **The fifth is the case of EFF v The Speaker (Impeachment)**

239.1. Regarding whether the President violated the Constitution by not implementing the Remedial actions of the Public Protector, the court had this to say:

"[109] In fact one of the orders issued by this Court in EFF 1 was a declaratory order that the conduct of the President in failing to implement the Public Protector's remedial action was inconsistent with the Constitution. That order appears in paragraph 4 of the order of this Court in that case. That meant that that conduct on the part of the President violated the Constitution. On 1 April 2016 the President addressed the nation and said that he accepted the judgment of this Court unreservedly and he respected it. He urged everybody to accept and respect the judgment. This means that the President also accepted the conclusions that this Court had reached in regard to his conduct. That includes the conclusion that he had violated the Constitution. In fact he said that he had not deliberately violated the Constitution.

[110] Furthermore, the question whether or not the President's conduct was consistent with the Constitution or whether or not he had violated the Constitution by failing to implement the Public Protector's remedial

action was an issue in respect of which this Court had the final say in terms of section 167(5) of the Constitution. Section 167(5) reads in relevant parts:

"The Constitutional Court makes the final decision whether . . . conduct of the President is constitutional…"

[111] Once this Court had pronounced that the President had violated the Constitution, nobody – not least the National Assembly or any committee or body created by it – could conduct an investigation whether, indeed, that was so. No such committee could alter that conclusion or second-guess it. Therefore, that finding or conclusion or order stood. We held in EFF 1 that the National Assembly and the President could not second-guess the Public Protector's remedial action. In this case we cannot make a pronouncement the effect of which is that a decision of this Court could or can be second-guessed by the National Assembly or any committee or structure created by it. Therefore, there is no room for the proposition that some fact finding process was required to establish whether the President had violated the Constitution by failing to implement the Public Protector's remedial action."

240. For all the reasons already explained in the overview, I now turn to deal with the Charge 4 contained in the motion, starting with the CR17/BOSASA matter.

241. Before doing so it will be appropriate to set out in brief what the next two instalments of my witness statement will deal with.

PART 2: CIEX AND VREDE

CIEX

242. We will start with the Ciex Report and point out that:-

242.1. The majority judgment is flawed and the minority judgment is to be preferred;

242.2. The elements of intention and gross negligence (or recklessness) have not been established;

242.3. The reference to "*the standard of conduct expected of the holder of the office of the Public Protector*" is not determinable in the absence of a job description or the communication of such standard to me by Parliament or any other person;

242.4. The charges are fatally defective or void for vagueness in so far as the conjunctive "*and*" is used but not "*and/or*". Whenever "*and*" is used then all the factors enumerated must be proved or established. This has not been done;

242.5. No evidence has been led to support the allegation that I met with the Presidency "*secretly*";

242.6. There was no provisional report except my own;

242.7. I am entitled both to broaden or narrow the scope of an investigation, in line with the **Mail & Guardian** case and other cases;

242.8. Failure to give *audi* does not necessarily point to bias;

242.9. I did not make any undertakings to the Reserve Bank nor was I aware of any;

242.10. All representations submitted were taken into account;

242.11. Reliance on economic experts was indicated; and

242.12. My accounts of all events is clear to any objective person.

VREDE

243. We will then cover Vrede by stating that:-

243.1. The elements of intention and gross negligence (or recklessness) have not been established;

243.2. The use of "*and*" is fatal. The charges are defective in this and other respects;

243.3. There was no provisional report prepared by Prof Madonsela and therefore the charges specified in paragraphs 4.1 and 4.4 must fail;

243.4. The third complaint was submitted in the investigation;

243.5. There was no failure to investigate;

243.6. To the extent that any issue was not investigated further, there were sufficient legal reasons e.g. an adequate section 7(9) explanation;

243.7. No forensic weakness is detectable, as explained by the Chief Justice; and

243.8. The remedial action was within my powers if it is properly interpreted and understood against the very wide powers of the Public Protector. Whether it was correct or not is not a matter which can be determined by the court or this Committee.

PART 3

244. The last statement will deal with the allegations of harassment, victimisation and intimidation, as follows:-

244.1. No victimisation, etc has been established on the part of Mr Mahlangu. If it has, it has not been established that it was at my "*behest;*

244.2. None of the listed persons had trumped-up charges against them;

244.3. Several witnesses called by the Evidence Leaders have refuted these allegations;

244.4. Several other witnesses, called by the Public Protector, have also refuted the allegations;

244.5. The remainder of the evidence led by the Evidence Leaders was discredited and unreliable; and

244.6. I do not get directly involved in disciplinary matters.

245. These and other relevant issues will be canvassed in more detail in the forthcoming instalments of my statement.

246. In dealing with these topics I will make reference to the relevant reports, Judgments as well as the evidence led by the relevant witnesses.

247. It is important to emphasise that the overview outlined above form the foundational basis for all my evidence which will deal with the charges more specifically. Accordingly the aforesaid future instalments of my statements will be shorter than this one and will deal with the specific charges contained in the Mazzone Motion, all against the backdrop of the preceding sections detailed above.

K. THE CHARGES

248. Given the fact that this matter is mainly motivated by the retaliatory objectives of some of the members and the President for the investigations related to him and his political allies and associates, I will start with the CR17 and Rogue Unit cases which are key to that agenda.

K1 CHARGE 4 - CR17

249. Charge 4, as reflected in the Mazzone Motion, relates to allegations of misconduct and/or incompetence in respect of certain other actions and reports amongst others, failing, intentionally or in a grossly negligent manner to conduct my investigations and/or make my decisions in a manner that ensures the independent and impartial conduct of investigations. These allegation are made in respect of all the investigations falling under charges

1,2 and 3 and extends to the CR17 report, Gordan/Pillay Rogue unit report, the Zuma tax report and the Gems report.

250. How this charge is formulated makes it difficult for me to respond, it gives an impression that the complainant was on a fishing expedition. This charge is not only confusing but prejudicial to me as it fails to deal with specific allegations or to even name the politicians whom I allegedly disfavoured and/or favoured.

251. The CR17 report emanates from my decision to investigate and report on the CR17 election campaign of the then Deputy President Cyril Ramaphosa for the African National Congress leadership in December 2017, which would inevitably lead to the Presidency of the Republic. During November 2018 and again in January 2019, I received complaints about President Ramaphosa. The first complaint was from Mr Mmusi Maimane the then leader of the Democratic Alliance. The complaint was related to the relationship of President Ramaphosa with a company called African Global Operation formerly known as BOSASA, ("*BOSASA*"). The following information appeared from Mr Maimane's complaint, namely: -

251.1. On 18 October 2017, an amount of R500 000.00 was paid into the EFG2 trust foundation account by Mr Petrus Venter on 18 October 2017 on the instruction of the late Mr Gavin Watson. The R500 000.00 was part of about R 3 000 000.00 which had been transferred from Mr Watson's personal account by Ms Natasha Olivier, the PA to Mr Watson, into the account of Miotto Trading which was the company of Mr Venter's sister, Ms Margaret Longworth.

251.2. The money was paid from the personal account of the late Mr Watson. Mr Watson was the CEO of BOSASA.

251.3. From Mr Watsons personal account the money was transferred to the account of Miotto Trading, the company closely associated with BOSASA. From there the money was paid into the EFG2, said to be a trust or foundation of the son of President Ramaphosa, Mr Andile Ramaphosa.

251.4. On 6 November 2018 during a question session in the National Assembly Mr Maimane presented the President with documentary proof of the payment and the sworn statement alleging that the money was intended for the President's son, Mr Andile Ramaphosa. The president confirmed that he was aware of the payment but had been satisfied that it was a lawful payment for services rendered by a consultancy firm owned or operated by his son, Mr Andile Ramaphosa. It later transpired that the President's answer to parliament was false.

251.5. On 16 November 2018, the President sent a letter to the Speaker of the National Assembly purporting to correct the answer he had given in the National Assembly on 6 November 2018. In this letter, the President confessed that the payment was actually a donation towards his campaign to be elected as President in December 2017. In his complaint, Mr Maimane, alluded that he was concerned that there was possibly an improper relationship existing between the

President and his family on the one side and the company, African Global Operations, on the other side.

252. The issue for my determination was whether the payment of the set amount as a donation to the campaign was proper and whether it did not amount to money laundering due to the money having had to pass through several intermediaries before reaching its intended beneficiary (President Ramaphosa / the CR17 campaign).

253. Mr Maimane in his complaint further alleged that BOSASA was widely reported to have received billions of rands in state tenders. He further stated that, he was concerned that the President may have misled the National Assembly in his reply to the question on 6 November 2018 and that the true facts of the matter needed to be established.

254. The second complaint was from Mr Floyd Shivambu, the Deputy President of the Economic Freedom Fighters. His complaint was premised on section 4 (1) of the Executive Ethics Act in respect of an alleged breach of the Executive Ethics Code by the President in that during the Presidents appearance in the National Assembly on 6 November 2018, when responding to the question from Mr Maimane about a payment of R500 000.00 from Mr Watson, the President misled the National Assembly. The President had stated that his sons company had a contract with BOSASA for the provision of consultancy services and that the President went on to explicitly state that, he saw the contract that his son signed with BOSASA and that the contract dealt with issues of interpreting anti-corruption and there was nothing untoward.

255. As for this separate complaint by Mr Shivambu, the issues for determination were whether the statement by President Ramaphosa in the National Assembly on the 6 November 2018, that he saw a contract that his son signed with BOSASA was true and that the contract indeed existed. Furthermore, whether President Ramaphosa deliberately mislead parliament in violation of the Executive Ethics Code.

256. I now deal with the report in respect of the CR17 campaign in which the R500 000.00 payment was made. During a question session, in the National Assembly, President Ramaphosa confirmed that the payment was a lawful payment for services rendered by a consultancy firm owned or operated by his son, Andile, later the President, sought to correct his earlier statement, by revealing that the payment was actually a donation towards his campaign to the elected ANC President. A complaint thereafter was lodged by Mr Shivambu. His complaint amongst others was whether President Ramaphosa deliberately misled Parliament in violation of the Executive Ethics Code

257. Having outlined the basis of the two complaints I now deal with the merits of the investigation as per each complaint. In doing so, I first deal with the CR17 donations, in doing so I am going to demonstrate how based on the evidence I came to a conclusion that President Ramaphosa personally benefitted from the CR17 campaign donations.

258. It has already been established and I hereby confirm that the key documents which will be used in my evidence to rebut the allegations into the charges which emanate from my CR17/BOSASA report are:-

258.1. The CR17/BOSASA investigation report;

258.2. The pleadings in the Constitutional Court Appeal (especially my founding affidavit);

258.3. The Constitutional Court Judgment (especially the minority judgment of Chief Justice Mogoeng);

258.4. Various newspaper reports which detailed information regarding donors and recipients of CR17 funds;

258.5. The recordings of interviews with some of the key players; and

258.6. A recent SABC interview making reference to foreign funding to influence the 2017 ANC conference outcome in favour of President Ramaphosa.

259. During my investigation, I received evidence that showed among other things that there were monies transferred to the Cyril Ramaphosa foundation, that Mr Watson was present at the fund-raising dinner hosted by President Ramaphosa and that on the 17 November 2017, Ms Donne Leigh Nicole, the President's legal advisor, sent an email to the President regarding fund raising and events. This email stated:

"Hi, please find questions, notes around fundraising events; I have tasked PG to raise about fifteen million. He has got Johnny Copelyn on board and is meeting a few other people. He is suggesting an event with 15 -20 people on the 24 after the NEC. Is this possible? I think we should still schedule the following:

Cocktail with black business maybe 30: includes Moss, Saki, others

Cocktail with the Greeks suggested by Theo. You have said yes. Just trying to prioritise and get into your diary.

People I need you to call, please:

1. *Mick Davis to co-ordinate a group from London including Martin Moshal- ask for a collective R20m 00447771 662693*
2. *Eric Samson to thank him for money and ask for another R10m*

   Can I ask the following for money:

   1. *Tony Geordiades*
   2. *Kojo Mills*
   3. *David Ngobeni*
   4. *Paul Ekon*

   Requests for meetings:

   1. *Paul Ekon*
   2. *Steve Ratau, Paul Nkuna, Manne Dipico"*

260. There was further evidence that showed that on 12 November 2017 Ms Nicole had sent an email to the President stating that "*Stavros says the following will fund if we had a small cocktail party. I need to discuss diary with you.*"

261. During the investigation there was a further uncontested email from President Ramaphosa to a person named Donald which stated the following:-

> *"Hi Donald*
>
> *Thank you for assisting with the internet banking the other day. Could you kindly transfer an amount of R 20 million from the Money Market investment that was left after we shifted R 75million from the Money Market Select to Ria Tenda Trust Standard Bank, account number 012497077, branch code 004301. I shall call you to confirm all this.*
>
> *Cyril"*

262. The investigation revealed that several accounts were used to mobilise funds for the CR17 campaign. These included Ria Tenda Trust, Edelstein Faber Grobbler (EFG) Incorporated and a company called Linked Environmental Services (Pty) Ltd.

263. Some of the beneficiaries of the donations were senior members of the ANC and officials or functionaries of the CR17 campaign including Ms. Marion Sparg, Mr Mxolisi Dukwana, Ms Thembi Siweya and Ms Khumbudzo Ntshavheni.

264. Millions of Rands in excess of R 8 000 000.00 were used to fund only hotel accommodation for several delegates who attended the ANC National Conference in December 2017 in and around Johannesburg.

265. Very important economic players in the South African economy paid millions of rands into the CR17 campaign raising reasonable suspicion that they were

buying influence. In turn and from those funds several officials and/or functionaries of the CR17 campaign received large amounts of money.

266. I pause here and state that, the records which include emails and bank records which I intend to rely on as evidence were sealed by the High Court in order to prevent them from being made public.

267. Over and above showing how the money was moved around, the sealed records revealed that as false the version that the President was ignorant of the identity of the donors of the CR17 campaign.

268. We also had evidence which indicated that some of the money collected through the CR17 trust account was transferred to the Cyril Ramaphosa Foundation account which belongs to the President.

269. The investigation further established that President Ramaphosa hosted the dinner functions which had been organised for the donors where he addressed them, which was further proof that he actively participated in the campaign process and knew who the donors were and/or the attendees of the fundraising dinners.

270. Furthermore, we had evidence which confirmed regular updates to President Ramaphosa on the operations of the CR17 campaign by the campaign managers, his directives to them about payments of the money into the CR foundation as well as being asked by the campaign managers for him to personally speak to certain donors.

271. In light of the above indisputable facts the version that the President did not know the identities of the donors defied all logistically and credibility it was plainly false on any analysis of the available evidence. So was the theory that he did not personally benefit from the campaign for his own election into the ANC Presidency as a sure gateway to the Presidency of the country or even as an end in itself.

272. Subsequently, before the issuing of the section 7(9) notice, I met with President Ramaphosa on 29 January 2019, I raised the issue of the transfer of the R500 00.00 to EFG2 account. President Ramaphosa indicated that he was "*not involved*" in the fundraising process for the CR17 campaign and that there were campaign managers who were responsible for it. He stated that he only got to learn about the alleged payment from one of his advisors Mr Bejane Chauke on or about 5 September 2018. Mr Chauke was informed about a rumour that his son Mr Andile Ramaphosa had received a payment of an amount of R500 000.00 from BOSASA.

273. President Ramaphosa informed me that all the information pertaining to the fund raising for the CR17 campaign could be sourced from the campaign managers whose names he provided me with.

274. Thereafter, as part of our investigation the relevant bank records were subpoenaed and reviewed. The investigation team further prepared subpoenas for interviews with key role players in the matter under investigation.

275. These included President Ramaphosa advisors Ms Donne Leigh Nicole, the CR17 campaign managers Mr Chauke, Mr James Motlatsi, Mr Andile

Ramaphosa, the two banks involved in the transaction, FNB and ABSA, Mr Petrus Venter, two other employees of BOSASA the late Mr Watson as well as the EFG2 attorneys.

276. I have uploaded the relevant source documents as well as the audio recordings of the above meetings I held with the witnesses mentioned above.

277. I can also confirm that large sums of money were transferred by various benefactors into the EFG2 trust account for the CR17 campaign from where it was disbursed by the attorneys to several beneficiaries, including the Cyril Ramaphosa Foundation.

278. From the evidence received by my office, an amount of R 191 482.43 was deposited into the EFG2 ABSA trust account between 6 December 2016 and 1 January 2018 and R 190 108 227.00 was transferred to of this account in the same period.

279. Evidence from bank records reflect that an amount of R388 544 340.34 was deposited into SBSA Ria Tenda Trust account between 1 January 2017 and 20 February 2019 whilst about R388 518.55 was transferred out of it in the same period.

280. About R335 738 42 was transferred from Linked Environmental Services FNB account into the Cyril Ramaphosa Foundation between 20 July 2017 and 26 March 2018.

281. Out of all the donations received for the campaign, records reflect that there were three single largest donations of R30 000 000.00 on 9 March 2017, R 39

620,00 on 29 September 2017 and R 51 506 000.00 on the same date into the EFG2 ABSA trust account, which came from the same donor.

282. In conclusion on the above revelations in relation to exchanges of large sums of money, some of which received from private companies, I wish to express my preliminary view that such a scenario when looked at carefully, creates a situation of the risk of some sort of state capture by those donating these amounts to the campaign, as properly articulated in the minority judgment of Chief Justice Mogoeng, with which I am in total agreement.

283. I will also seek to convince the Committee that, upon any objective enquiry, there will be no option but to endorse the views expressed in the minority judgment, whilst acknowledging the legal status of the majority judgment. That exercise is in turn, dependent upon whether the Committee adopts the view that its role is to rubberstamp the relevant court judgments or to independently enquire into the issues raised in the charges.

284. Based on the facts alluded to above as well as evidence adduced during the investigation, my team came to the conclusion that there was merit to the allegation relating to the suspicion of money laundering, violation of the Executive Ethics Code and that the President personally benefited from the CR17 Campaign donations.

285. It is notable that Mr Rodney Mataboge, who was the lead investigator, independently came to the same conclusion. His evidence to that effect was unchallenged.

286. Most notably, it would be absurd to label as dishonest or biased a view or conclusion which was reached by the Chief Justice, who expressed the issues in even stronger terms. That view may or may not be correct but it is certainly not reached in bad faith or outrageously, as alleged by Ms Mazzone or the Evidence Leaders.

287. During my oral testimony I will specifically refer in more detail to the relevant passages found in both the majority and minority judgements to indicate the factual flaws identified by me and on the basis of which I am in respectful disagreement with some of the key conclusions reached by the courts as compared to the referrable reasoning in the minority judgement .

288. The key findings of the majority are summarized in paragraph 137 of the majority judgement as follows:

> *[137] The Public Protector, like all of us, is fallible and mistakes are to be expected in the course of the exercise of her powers. But what is troubling in this matter is the series of weighty errors, some of which defy any characterisation of an innocent mistake. For example, giving the phrase "wilfully misleading" the meaning of "inadvertently misleading" for it to fit established facts. She disregarded uncontroverted evidence to the effect that the President did not personally benefit from the CR17 donations and stated that on the evidence placed before her, he benefitted personally. This finding was made when there was simply no*

evidence to the contrary. These are some of the disconcerting features of the impugned report.

289. While I acknowledge that legally speaking the majority Judgment is of course a reflection of the law as it stands, I am of the view that this Committee is still required to enquire into the veracity of the adverse pronouncements made against me and/or the Office of the Public protector.

290. By way of contrast the Honourable Chief Justice came to the following different conclusions with which I am in full agreement: -

290.1. *"[168] For this reason, whatever legal personality the President and his campaign managers may have chosen to clothe the repository of his campaign sponsorship or financial assistance with, cannot detract from the naked truth that (i) he pleaded with potential sponsors to give money in and for his name – CR17 campaign (Cyril Ramaphosa's Campaign for the ANC Presidency in 2017); (ii) he knew that the money that was being given and spent on his own ambitious campaign came from an agreed structure known as the CR17 campaign to which he also contributed; and (iii) he personally benefitted from the sponsorship that propelled his campaign to its logical conclusion – the Presidency of the ANC. Election or elevation to a position you desire is a benefit. And the benefit is personal because the targeted beneficiary gets to occupy and enjoy the position and all its accompaniments. It is perhaps necessary to state*

the obvious, the position is not occupied by a group but by an individual. When the sponsored one attains the desired position, people congratulate him or her because they see him or her as the winner – the successful one."

290.2. *"[171] For this reason, any proposition that the Public Protector should not have investigated possible ethical breaches concerning all other CR17 campaign donations, either because Honourable Maimane, MP did not explicitly mention the CR17 campaign or seems to have confined his complaint, based on the donation, to the relationship between African Global Operations or Mr Watson and the President and his family, would be missing the point. The President himself said that Mr Watson's donation was made to "a campaign established to support my candidature for the Presidency of the African National Congress". It was his campaign and it was known as the CR17 campaign. It is such an embodiment of his aspirations that it even bore his initials. This was the one and only campaign structure to which donations for his Presidential campaign were made. African Global Operations is a donor like all other donors to the CR17 campaign. The pursuit of the whole truth alluded to in Mail & Guardian demanded of the Public Protector, in obedience to the constitutional mandate of her Office to strengthen our democracy, to investigate and satisfy herself, on behalf of the public, that none of the otherCR17 campaign-related donations were on the wrong side of the constitutionally prescribed and set ethical standards."*

290.3. *"[173] The President's duty to disclose was triggered the moment he agreed to establish or became aware of the existence of the CR17 campaign, asked sponsors to support his campaign and became aware that money was being spent by the CR17 campaign to advance his presidential bid. The emails in the possession of the Public Protector, which are by the way merely additional but not essential material for the purpose of establishing a case against the President, that are not denied, and the briefings to the President about the state and activities of the CR17 campaign make the situation even worse for the President. The contents of any genuine email generated by a specific person should ordinarily be as good as the oral evidence given by that person. As a matter of practice and law, the contents of an email or a document by X and Y may, assuming its authenticity is not disputed, be used to contradict and discredit their own oral evidence and vice versa. This extends to the evidence of the recipient of those emails who might have asserted a contrary view. He or she may be similarly discredited. For this reason, the Public Protector ought to be understood to be saying that the oral evidence of the President and the CR17 campaign managers regarding the happenings in the campaign with regard to the donors and their donations was effectively belied by their own exchange of emails that revealed that the President knew what they claimed, in their oral evidence, that he did not know."*

290.4. *"[174] Besides, even in the absence of the proof (emails) uncovered by the Public Protector regarding the President's knowledge of who*

the donors were and what the CR17 campaign was doing, just how realistic or in keeping with lived experience is it to assume that he would not want to know about the progression of his own destiny defining project or that donors would not want him to know that they were his enablers to the much-coveted position or throne. He should, with respect, not be allowed to hide behind a structure that bears his name and that was established for the primary purpose of advancing his private interests and that actually advanced his personal mission to be President."

290.5. *"[175] Whichever way you look at it, the President received a disclosable benefit, disclosable precisely because it has a potentially compromising short- and long-term effect. That money could have and should have come directly to the President because he is the one who needed it for his own personal benefit. He was required to and should therefore have disclosed it. That he and others chose to set up a structure that had the presumably unintended, but effective result of undermining or frustrating the imperative to be transparent, accountable and to disclose to Parliament - to be ethical - cannot help him. It cannot help the President that he might have chosen not to know who his benefactors were. He knew and should have disclosed that the people or entities he addressed asking them to fund his desire to become President heeded his plea or call and gave money to the CR17 campaign and that CR17 in turn released money for his personal election to the much sought-after office of President of the ANC."*

290.6. *"[176] On the need to disclose, again I say, the President knew of the CR17 campaign which existed primarily for the purpose of advancing his political career. The veil sought to be erected between him and that project should not be allowed to obscure that truth or reality. He was most unlikely to have been ignorant of a matter so destiny defining and all-important. He was therefore under the obligation to disclose, in the very least, his private interest in the form of the sum-total of the money paid to and used by the CR17 campaign and how this entity benefitted him financially in his journey towards the Presidency of the party."*

290.7. *"[177] More importantly, as the Public Protector correctly found, when he received or caused others to receive the sponsorship or financial benefit, he was still the Deputy President of the Republic and a Member of Parliament. The Code applied to him fully. He cannot be exempted from the consequences of what he did then by reason only of the fact that the "personal benefit" has worked so well that he now occupies the position of President in line with his and the sponsors' set objective."*

290.8. *"[185] The Public Protector should have afforded the President the opportunity to confront the contents of the emails that vitiate the version of the President and his campaign managers. It is concerning that she too, like the President, chose not to address the central feature of the concern raised – why she did not hear the President's side of the story before she finally relied on the emails. That is what*

the audi principle demanded of her. But, the President has taken us into his confidence and shared with us the views he would have expressed to the Public Protector regarding the emails, had he been afforded the opportunity to do so."

290.9. *"[188] And it bears repetition that that false version is that there was a deliberate plan to ensure that the President does not get to know who the donors were, how much they donated and how the financial assistance received for his campaign was being used. The emails squarely belie this assertion. The question that we should then be asking ourselves is: why did the President and his team deliberately convey a falsehood on an issue so crucial and inextricably connected to the constitutional imperative to promote and observe high ethical standards in obedience to the demands of our democratic State's founding values – openness and accountability. He must have known that if the truth evidenced by the emails were to be told the obligation to disclose the names of the funders and the size of their contributions to the National Assembly and by extension to the public would automatically and plainly be triggered. And in terms of the essence of My Vote Counts, the public would then have the opportunity to curiously and vigilantly monitor the outward manifestation of his relationship with the sponsors in line with the concerns raised by Honourable Maimane, MP regarding Mr Watson and the State tenders."*

290.10. *"[192] It also bears repetition that the President carefully and intentionally gave a false version of what he knew to be the case, to the Public Protector. What he did is highly unethical and a resounding rejection or dereliction of his key constitutional obligations. This is therefore not a question of the President and his team mistakenly putting forward a version, such as he did in the National Assembly with regard to the alleged Bosasa donation to his son, which he subsequently corrected. It is rather a case of a calculated misrepresentation of the facts by someone who is confident that the truth would never be uncovered. No wonder the President and his team have made no attempt at reconciling their version with the emails. The two versions are mutually exclusive or destructive and obviously incapable of reconciliation. And all the President could do and did was to keep on asking the Public Protector, and I paraphrase, how did you manage to access this well-kept or closely-guarded secret? Who gave this painful truth to you?"*

290.11. *"[199] There is indeed a disturbing tendency by some of us to, presumably without intending undue harm or injustice, unduly magnify virtually every error of the Public Protector, real or mistakenly perceived. This is quite surprising because Judges, with more experience as practitioners before their elevation to the Bench, and with more years of service as Judges than the ten years' minimum requirement as an Advocate or the mere fact of being a Judge regardless of how long to be appointable as a Public Protector, have*

committed similar or more serious errors. And we are not as harsh on them, or should I say on ourselves, and rightly so."

The Executive Ethics Code

291. I must state that on the issue of the Code, there is a 2000 Code and a 2007 Code.

292. The 2007 Code had since repealed the 2000 Code, but the President based his argument on the repealed 2000 Code, for obvious reasons, clause 2.3 provides that Members of the Executive may not wilfully mislead the legislature to which they are accountable, the President sought to take advantage of the fact that in terms of this Code the prohibition is against wilful misleading of Parliament.

293. Though my findings were not based on the 2000 Code, since this Code was repealed by the 2007 Code, which has consistently been applied by my predecessor and endorsed by the Constitutional Court in various matters, the 2007 Code was clear that a member of executive cannot wilfully and inadvertently mislead the legislature.

294. The Court was therefore wrong to make its findings based on a repealed Code. As this is a sensitive issue, I intend dealing with it extensively during my oral evidence. I have been unfairly and wrongly accused of changing the wording of the Code by adding "deliberate and inadvertent misleading of the Legislature" with the intention "to match with the facts". This is the furtherest thing from the truth. Evidence will be led to demonstrate beyond any question that my references to the 2007 Code were based on the historical reliance by the Office of the Public Protector on that Code long before my assumption of office. In this

regard, specific reference will be made to previous reports including, among others, the well known Nkandla Report, as well as other prominent reports such as the Shiceka, Dina Pule, Tina Joemat-Peterson and John Block reports. To this effect I refer to my Rescission application to the Constitutional Court. Same will be uploaded.

295. For now, it suffices to say, my findings of the breach of the 2007 Code are well-founded and substantiated.

296. The President's technical approach in this matter leaves much to be desired, especially when he says he stands for ethical leadership, but goes on to avoid accountability by ensuring that the CR17 campaign existed independently, however he does not argue that it registered as a separate entity. So, it was his campaign, and he was the face of his campaign.

297. He goes further to adopt a very narrow approach and say that he did not personally benefit from the CR17 campaign, but on the facts it is through this campaign that his personal status from being an ordinary man to becoming a president of the country changed. To date, the CR17 bank statements remain sealed, the country does not know who provided funds for the CR17 campaign. This is in contradiction and in violation of the constitutional principles of openness and transparency, to a greater extent ethical leadership which the President and his followers claim to adhere to.

Violation of Section 96(1) of the Constitution

298. In my report the President in his then capacity as the Deputy President of the country, exposed himself to a situation involving the risk of a conflict between

his official responsibilities and private interest, which is in section 96(1) of the constitution. On the objective facts and as equally supported by the Chief Justice, such a conclusion is irresistible.

Audi on the Remedial Action

299. On failure to give the President *audi* on the remedial action, this was based on the law at the time. Section 7(9) of the Public Protector Act made provisions for *audi* to alert implicated persons who are the subject of the investigation about possible adverse findings. According to section 7(9) I do not have an added obligation to anticipate remedial action when issuing a section 7(9) notice. For obvious reasons, I can still be persuaded by the answers provided and drop the claim/investigation against whosoever was implicated.

300. It was well accepted at the time that the *audi* was given to the President on remedial action. That approach was adopted by me in good faith and based, *inter alia*, on the legal advice of Mr Nemasisi who was the Head of Legal. However, the legal position has since been settled by the Constitutional Court.

301. In line with the principle that judgments must be used as learning opportunities I subsequently gave instructions which were in line with the court pronouncements and in all subsequent section 7(9) letters we now include the relevant remedial action. There was therefore also no deliberate or grossly negligent conduct on my part in respect of the section 7(9) issue. This version is supported by evidence witnesses of called by the Evidence Leaders, including: -

301.1. Mr. Neels Van Der Merwe;

301.2. Mr. Reginald Ndou; and

301.3. Mr. Muntu Sithole;

Directing the NDPP regarding prosecutions to be instated

302. On the accusation that I failed to appreciate that I cannot direct the NDPP regarding prosecutions to be instituted, although I accept that the NDPP is an independent institution and that the courts have delivered conflicting judgments on the PP's authority to direct other organs of state to assist her office. However, section 181(3) of the Constitution is clear that other organs of state must assist the Chapter 9 institutions to ensure amongst others effectiveness of these institutions.

303. In addition, section 6 (4) (c) (i) of the Public Protector Act, provides that the Public Protector may at any time prior to, during or after an investigation if he or she is of the opinion that the facts disclosed a commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions.

304. Contrary to the pronouncements made by Judge President Mlambo in the CR17/BOSASA High Court Judgment, it is indeed within the powers of the Public Protector to refer allegations of criminal conduct to the NPA for further investigation. The correct position is as articulated by Chief Justice Mogoeng in his Minority Judgment and as was ironically articulated by the same Judge President Mlambo in the State of Capture High Court Judgment a few years before.

Lack of Jurisdiction of the Public Protector

305. The Public Protectors' powers to investigate are sourced from section 182 (1) of the Constitution and section 6 (4) of the Public Protectors Act.

306. Although the complaint by Mr Maimane had been lodged in terms of the Executive Members Ethics Act, Mr Maimane had in the same complaint also requested that the suspicion of money laundering should be probed due to the manner in which the transaction relating to the payment to the CR17 campaign went through several intermediaries before reaching its intended beneficiary. In that regard my office discovered during a series of investigative interviews conducted with several key role players exactly what happened during the CR17 campaign. As an investigatory and oversight body I could not turn a blind eye, especially this lent credence to Mr Maimane's second issue relating to the suspicion of money laundering.

307. At the time of the CR17 campaign, Mr Ramaphosa was the Deputy President of the country and campaigning to become the President of the ANC with the likelihood of him becoming the President of the country.

308. After consideration of the abovementioned facts and an interpretation of section 182 (1) and section 6(4) of the Public Protector Act, I was convinced that the Public Protector has jurisdiction to investigate a possible ethical breach including possible personal benefit of President Ramaphosa through the CR17 campaign donations.

309. Although it later turned out that I had no jurisdiction to investigate the CR17 campaign, my decision to investigate was never influenced by the desire to target a certain individual in particular President Ramaphosa.

310. The investigation was as a consequence of a complaint by Mr Maimane, the then leader of the DA. In any event, losing a point of law in court cannot be elevated to an impeachable act of misconduct. It is not uncommon for parties to lose points of law in litigation proceedings. The worst thing that can happen in that scenario is for the party that has lost to be mulcted with a cost order. As a matter of fact, in these proceedings I was mulcted with a cost order.

311. Considering the double jeopardy principle it will be unlawful for me to be punished twice for the same offense.

Application of PRECCA and POCA

312. Our Court and Appeal systems allow a process whereby the findings of the lower courts can be overturned if one can prove that there was an error of law and/or fact. This is how our system functions within the context of the rule of law and the constitution. Furthermore, it is trite that an administrative decision remains valid until reviewed and set aside. The same applies to the decisions of the Public Protector, they are subject to a review process. It is therefore not clear why would I be charged for misapplying the law, when our system places the necessary safe guards or mechanisms to correct judgements and or decisions where there has been misapplication of the law. It is not clear to me why would misapplication of the law constitute an act of misconduct or incompetence, otherwise all judges would be guilty of an act of misconduct in the circumstances where the judges judgments are successfully appealed on

an error of law. Even at the Constitutional Court level, judges are allowed to hold different opinions when it comes to the application of the law hence a majority judgement and a minority judgement. It will be argued that there is no merit in this charge.

Finding that President Ramaphosa personally benefited from the CR17 campaign.

313. Based on the evidence, I concluded amongst others that President Ramaphosa as a presidential candidate for the ANC received campaign contributions which benefited him in his personal capacity.

314. My report was eventually taken on review by President Ramaphosa and subsequently reviewed and set aside. The court rejected my finding that the President received direct financial sponsorship through the CR17 campaign. The court's view was that I had not identified any evidence nor facts to substantiate my conclusion that the president received direct personal sponsorship through the campaign. The same goes for my finding that the President received campaign contributions through the CR17 campaign that benefited him in his personal capacity. The court was of the view that, this conclusion emanated from my confession between the CR17 campaign and the President. Although my report was eventually reviewed and set aside, I strongly believed that based on the facts and the evidence the President did derive a personal benefit from these CR17 donations. It was on the basis of this belief that I took the matter up to the Constitutional Court for a final verdict on this issue.

315. It is common cause that I lost the Constitutional Court appeal however, two judgements emerged from the Constitutional Court, the majority judgement

penned by Judge Jafta J and Chief Justice Mogoeng who wrote for the minority. What is of great interest with these two judgements was that both judges wrote on the same facts set out in the papers however, they differed vigorously on the approach and the reasoning. At the outset, Mogoeng CJ was clear that this case was fundamentally about two of the foundational values of our democratic state, namely; transparency or openness and accountability as well as our national quest for ethical leadership and the institutionalization of good governance.

316. The Chief Justices' approach was that central to the complaint was money that was paid to the CR17 campaign undeniably intended to strengthen the Presidents' prospects of becoming what he eventually became. How the Public Protector got to investigate the CR17 campaign does not seem to be a consequence of some inexplicable fishing expedition or of being unduly or overly suspicious of the President. As a matter of fact, Honourable Maimane asked me to look into a potential compromise in donations to the President, which as stated, we all know was to the CR17 campaign. The investigation was therefore triggered by Mr Maimane the then member of parliament.

317. Mogoeng CJ amongst others in his judgement deals with the true beneficiary and the duty to disclose. He found that cabinet members are prohibited from exposing themselves to any situation involving the risk of a conflict and that potential conflict is between their official responsibilities and private interest. He found that when the then Deputy President urged and allowed potential donors to sponsor his own ambition to become President of his party. He was thereby exposing himself to a situation where he was an incubator of a risk of conflict. Donors knew who they were helping and if the unethical ones

assuming there are any among them were ever to desire help or favours from the state, they would know who to go to, the Deputy President and soon to be President. There is an ever abiding risk of conflict between being financed to become President of a party (private interest) and one's position as the Deputy President and leader of government business in parliament or President of the Republic (official responsibility).

318. At paragraph 164 of his judgment, Mogoeng CJ further found that President Ramaphosa became a direct and primary beneficiary of the money sourced by the CR17 campaign. It was not for the benefit of the party or official party structure, party political campaign or any other person but for his own upward mobility – his personal benefit. The CR17 campaign was all about him, it was not meant to fund the party to run its day to day operations or win elections. It was about him fulfilling his dream to become the President of the party and by extension of the Republic. After all the party neither asked for those donations nor were they paid to the party coffers. He did, and they were paid to his chosen or endorsed recipient. Assertion to raw power or the supreme office enabled by funding sourced by the CR17 campaign was a quintessential personal benefit and a personal achievement of success.

319. Mogoeng CJ further found that President Ramaphosa personally benefited from the sponsorship that propelled its campaign from its logical conclusion – the presidency. Election of elevation to a position you desire is a benefit and the benefit is personal because the target beneficiary gets to occupy and enjoy the position and all its accompaniments. It is perhaps necessary to state the obvious, the position is not occupied by a group but by an individual.

320. The similarities of my findings and those of Mogoeng CJ in particular on the issue of personal benefit are glaring.

321. Based on Mogoeng CJ's reasoning and conclusions it is going to be argued that my findings are neither far-fetched nor irrational and that they cannot be the basis for an impeachment. It will be similarly argued that Mogoeng CJ never faced an impeachment enquiry for having made similar findings.

322. Based on the fact that all the allegations of bias and bad faith on my part in respect of this investigation demonstrably emanate from the affidavits and legal arguments of President Cyril Ramaphosa, the decision of the Committee not to subpoena him at my request, is also utterly inexplicable, incorrect and unfair. It taints the entire proceedings in that I was denied an opportunity to cross-examine the President on the issues emanating from his affidavit and utterances thereby denying me an opportunity to defend myself.

K2: CHARGE 4: GORDHAN, PILLAY, ROGUE UNIT REPORT

323. I understand this charge to be relating to my investigation into inter alia the alleged establishment of the so-called rogue unit by SARS. Emanating from this charge, are the following sub-charges namely:-

323.1. that during a public interview, I referred to the unit as the "*rogue unit*" and as a monster and I expressed the desire to defeat the monster. Based on this allegation it is alleged that I was biased and/or at least perceived to be biased;

323.2. that I inexplicably ignored the report of the Nugent commission and that I similarly ignored the apology and retraction of the adoption of

the Sikhakhane's panel's findings by the SARS advisory board headed by retired judge Frank Kroon;

323.3. that the KPMG report was flawed in fact and in law and that any reliance by me on the KPMG report was irrational and ill placed;

323.4. that according to the full court judgement of Baqwa J, I relied on the OIGI report despite explicitly stating in my report that "*I had not seen the report*" and that I relied on the OIG report only because I had it on good authority that certain findings were made therein;

323.5. that in dealing with the procedural fairness, I failed to give Mr Van Loggerenberg and Mr Pillay their rights to be heard;

323.6. I was criticised for turning no evidence in respect of unlawful purchase of equipment; and

323.7. that my interpretation of section 209 of the Constitution was clearly wrong, irrational and unlawful.

324. The gist of the impeachable allegation against me in respect of the Rogue Unit report is notably not whether I got it right or wrong regarding the existence and/or establishment of the alleged Rogue Unit. It is rather that my findings as contained in the report were in pursuit of a dishonest and biased politically motivated agenda to unfairly target Mr Gordhan and his associates. That is the only issue before this Committee.

325. At the outset, I wish to state that Ms Mvuyana and Mr Mataboge have already given testimony before this committee in their capacities as the Investigator

and Chief Investigator who were responsible for that particular investigation, the gathering of evidence, the identification of role players, the related documentation and notices as well as the compilation of the report. On their evidence above, the charge must fail. Their evidence was not challenged by the Evidence Leaders or the members of the Committee. It must therefore stand as uncontradicted. It is therefore impossible to make a finding that the allegations in the charge are verified.

326. As alluded above, the relevant charges against me which relate to this investigation and report are based on the adverse remarks made by the High Court in the matter of Pravin Jamnadas Gordhan v the Public Protector and Others, handed down on 7 December 2020, which already forms part of the papers.

327. I have attentively followed and listened to the evidence of both Ms Mvuyana and Mr Mataboge, their evidence to a large extent corroborates my evidence in so far as where charges levelled against me are concerned. In particular, both witnesses confirmed the logic behind the prioritization of the EMEA based leg of the investigation from the remainder (part 2 investigation) which was subsequently carried out.

328. I have equally listened to the evidence of Mr Pillay and Mr Van Loggerenberg. Both Mr Pillay and Mr Van Loggerenberg, have grossly misrepresented the true situation of what transpired.

329. I have also considered the adverse remarks and findings made by Baqwa J, some of his remarks and findings show a complete distortion of facts. It is on

the basis of these distorted and objectively untrue "*facts*" that Baqwa J makes incorrect findings or conclusions of law and I am going to demonstrate below how Baqwa J incorrectly and impermissibly relied on distorted facts in his judgement on material issues. The original distortions came from Mr Gordhan's affidavits. The refusal to call him as a witness to explain the distortions is therefore inexplicable.

330. The allegation that I am biased because during a public interview I referred to the unit as the Rogue Unit gives the wrong impression that I coined the term Rogue Unit is not true as Ms Mvuyana testified that the term was first used in the public domain in 2014, when the story of the SARS investigation unit broke out in the Sunday Times. The term was commonly and widely used in the public space by those who believed that the alleged existence of the unit was unlawful or rogue. This much is also stated in the relevant affidavit of Mr van Loggerenberg.

331. There is a misconception that I also ignored the Nugent report, however the evidence of both Ms Mvuyana and Mr Mataboge which stands uncontested is that we treated the Nugent report in the same was as we treated all the other reports. The court also missed the point that the Nugent commission had different terms of reference. He never found that the establishment of the Rogue Unit was lawful. He only expressed some doubts about some of the findings which he said were not clear to him.

332. On the KPMG and Sikhakhane reports, I respond in the following manner. Firstly, I state that both the KPMG and the Sikhakhane reports have not been reviewed and set aside. Having said that, I support the evidence of Ms

Mvuyana and Mr Mataboge, which again stands uncontested that, as a matter the findings of both reports corroborated and made findings similar to the PPSA findings which shows that the conclusions reached by the public protector's team were not outrages or irrational. Furthermore, both reports made a finding that the establishment of the intelligence unit without a mandate was unlawful and in contravention of section 209 of the Constitution and the relevant statute.

333. I do not dispute that Judge Kroon made retractions based on the fact that he had heavily relied on the Sikhakhane report, however the Kroon panel consisted of 7 members, there is no evidence that the rest of the panel members support the retractions by Judge Kroon. Neither was it clear that Judge Kroon was speaking on behalf of all the members of the panel. In my view, Judge Kroon's personal apology is a non-issue. Furthermore no specific reliance was placed on the Kroons' panel report by me.

334. The court in its judgement unfairly accuses me of bias based on distorted facts, the court found that I explicitly stated in my report that I had not seen the OIGI report and yet referred to its findings on the basis of the distorted facts, the court made a dishonest finding against me however, during the testimony of Ms Mvuyana and Mr Mataboge it was pointed out, at no stage did I claim that I did not see the OIGI report as repeatedly and wrongly asserted in the High Court judgement. I therefore submit that the dishonesty finding and the charge based on such wrongly distorted and asserted information cannot be used as a ground to impeach me. As such, this charge stands to fail.

335. There is also no merit to the charge that I did not give Mr Van Loggerenberg and Mr Pillay *audi*. First, Mr Van Loggerenberg was never served with a section 7(9) notice because he was not an implicated party in the establishment in the unlawful the Rogue unit. The investigation focused on the key players namely Mr Gordhan, Mr Pillay and Mr Magashule. In particular Mr Gordhan who was the accounting officer during the establishment of the Rogue Unit as such during the investigation process a section 7(9) notice was served on all three of them. The section 7(9) is a statutory notice served after the preliminary findings to afford the other side to respond before an adverse finding could otherwise be made against such party. All three responded to their section 7(9) notices and their responses were incorporated in the report.

336. There was also ample evidence that Mr Pillay irregularly instructed and/or permitted a certain Mr Lombard and Mr De Waal to intercept information/communication within the offices of the DSO and the NPO. I attach the uploaded audio recording of the interview between the two of them and the former Commissioner for SARS, Mr Tom Moyana. I am in the process of obtaining an affidavit which will confirm that he indeed participated in that recorded conversation.

337. Mr Pillay was accordingly served with the section 7(9) notice the evidence during his testimony that he was not given a hearing and that the PPSA ignored his evidence is disputed.

338. Ms Mvuyana testified that evidence in the form of an affidavit and response to the section 7(9) notice was received from Mr Pillay and the evidence

emanating from both the affidavit and his response was incorporated into the final report.

339. I have already stated above that Mr Van Loggerenberg on the other hand was not implicated and as such the section 7(9) notice was not served on him. His name was only referred to in so far as the evidence referred to him as a participant but not as a perpetrator. His position was similar to that of Mr Makwakwa who is also mentioned in the complaint. This complaint was dealt with in Part B of the investigation since the issues for investigations were split between Part A and Part B.

340. Although Mr Van Loggerenberg was not the subject matter in the investigation his name appeared in various documents that the investigation team analysed. As a result of his name appearing in various documents a decision was taken to subpoena his information and documentation from him. However, PPSA did not have the address of Mr Van Loggerenberg for the purposes of effecting services of the subpoena.

341. In his evidence Mr van Loggerenberg made heavy weather about the non-service of the subpoena on him. He suggested that this was as a result of deliberate bias on the part of the Public Protector or some intention not to subpoena him.

342. According to the evidence Ms Mvuyana and Mr Mataboge, the SARS human resources department was contacted to assist with the address of Mr Van Loggerenberg. They testified that on two occasions the messenger for the Public Protectors office , Mr Linda, who has subsequently submitted an

affidavit confirmed that he attempted to serve the subpoena on the address supplied by the SARS human resource department. Apparently a care taker of the complex informed Mr Linda that Mr Van Loggerenberg had moved out and that his unit was standing empty.

343. As much as I seek to give evidence that attempts for efforts were made to serve the subpoena of Mr Van Loggerenberg, as the Public Protector I play no part in tracing witnesses or serving documents. At my level, I would place total reliance on the investigators including Mr Linda, the messenger. This much was confirmed by both Adv Mvuyana and Mr Mataboge.

344. In dealing with the purchase of the spying equipment, I refer this committee to the evidence of Ms Mvuyana, she testified that they were invited by SARS to inspect the spying equipment. According to her evidence, the spying equipment could be valued at plus minus R40 million.

345. It is common cause that such equipment included devices for the interception of telephonic conversations and the well-known signal jamming device used in the intelligence world. The equipment in question is listed in the report and depicted in a slide show which forms part of the record of this enquiry.

346. During the investigation, there was no evidence that the spying equipment was purchased through a lawful procurement process. Even Mr Loggerenberg in his evidence did not deny the existence of the spying equipment. He only tried to down the value of the equipment by suggesting that most of the equipment were items which could have been bought from normal stores like

Game. This was disputed by the Public Protector and contradicted by the unchallenged evidence of Ms Mvuyana.

347. My interpretation of section 209 of the Constitution was based on the objective evidence available at the time. It was clear from the evidence analysed that SARS was aware that the unit could only be established if there was a law authorising for its establishment hence there was evidence that they attempted to have the unit housed within the National Intelligence Agency. This was done for obvious reasons as SARS was aware of the lack of legislative powers on its part to carry out the intended activities of the unit including surveillance and interception of communications. Mr Gordhan, the then accounting officer of SARS was central to the establishment of the intelligence unit. He submitted and signed the memorandum that resulted in the establishment of the intelligence unit within SARS. Based on this evidence, it was concluded that the establishment of the intelligence unit was in contravention of section 209 of the Constitution. Section 209 of the Constitution provides the following:-

> *(1) Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation.*

348. Coincidentally, the KPMG and Sikhakhane report made a finding that the establishment of the intelligence unit was unlawful and in contravention of section 209. I pause to explain that although the Sikhakhane and KPMG report came to our attention during the investigation we were never influenced by

their outcomes and conclusions. The PPSA investigations were independently conducted which resulted in their own conclusions based on the evidence and information before the PPSA investigation.

349. Notably it is also common cause that, based on similar information as that at my disposal, the NPA, per Adv Pretorius SC, found sufficient *prima facie* evidence of criminality on the part of, *inter alia*, Mr Pillay and Mr van Loggerenberg to the extent that they were criminally charged and made a few court appearances before the charges were withdrawn. I am in the process of securing the evidence around the mysterious withdrawal of the charges. What cannot be disputed is that they were indeed charged.

K3: CHARGE 4 CONTINUES; 11.1 MANAGEMENT OF INTERNAL RESOURCES

350. In relation to the remained of the sub charges contained in charge 4 I deal first and summarily with the allegations of failing to manage internal resources, staff and internal capacities of the institution. I wish to emphatically point out that there are no genuine or competent legal grounds for levelling such allegation against me as the executive authority.

351. Alternatively this issue will be covered with more elaborately in my fourth coming third statement dealing with allegations mainly pertaining to HR issues.

K4: CHARGE 4 (CONTINUED): 11.2 LEGAL COSTS

352. This charge must be summarily dismissed upon the following different reasons summarised below:-

352.1. Despite the futile attempts by the evidence leaders and Mr Mileham, there is no running away from the fact that this as presently framed, does not refer to legal fees but specifically to "legal costs". These are two different and distinguishable concepts which cannot be confused with each other.

352.2. The unreasonable refusal by the committee to call Ms Mazzone as a witness, inter alia, to explain what she meant by "legal costs" means that the issues which are included in this charge remain vague and indeterminate.

352.3. In any event, there is no evidence before the committee that there was any "fruitless, wasteful and or authorised public expenditure in legal costs" relating to legal costs.

352.4. Even if such unauthorised/wasteful expenditure had been established which is denied this is not a matter which fall witing my scope of functions as the executive authority. The auditor general has apparently declined the request to redo the audits which involve the relevant periods.

352.5. The evidence of the relevant witnesses namely Mr Sithole and Adv Van Der Merwe does not implicate me in any authorisation of legal fees, the evidence properly accessed exonerates me, the issue. The insinuations made by the evidence leaders, Mr Mileham and the likes of Mr Samuel.

352.6. To the extent that specific legal practitioners were engaged with my knowledge and or approval I relied on information from others in respect of their expertise, competence and professional status. I had, at the time, absolutely no reason to doubt the veracity of such information.

352.7. It therefore follows that the gratuitous and seemingly racist display of private and personal information regarding legal fees genuinely earned and paid out to various mainly black legal practitioners was a malicious and aimless exercise purely intended to embarrass them, as correctly articulated to the committee by Adv Sikhakhane SC and Adv Ngalwana SC in their written partition presented to this committee 10 November 2022.

352.8. In the event that any further discussion on this charge is still deemed to be warranted, which I dispute, it will be dealt with during the course of my evidence.

DEPONENT

SIGNED AND SWORN TO BEFORE ME AT CAPE TOWN ON THIS 14th DAY OF MARCH 2023, THE DEPONENT HAVING ACKNOWLEDGED IN MY PRESENCE THAT HE/SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THE PROVISIONS OF GOVERNMENT GAZETTE R1478 OF 11 JULY 1980 AS AMENDED BY GOVERNMENT GAZETTE R774 OF 20 APRIL 1982, CONCERNING THE TAKING OF THE OATH, HAVING BEEN COMPLIED WITH.

COMMISSIONER OF OATHS

Sithandiwe Bobotyana
Commissioner of Oaths
Practising Attorney
2nd Floor, Waalburg Building
28 Wale Street
Cape Town 8001

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF WHIP OF THE OPPOSITION

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: +27 (21) 403-3372, Fax: +27 (086) 724-6398
e-mail: dawhip@da.org.za

2 September 2019

Mrs Thandi Modise
Speaker of the National
Parliament of the Republic of South Africa
Cape Town

BY EMAIL

Dear Madam Speaker

DRAFT RULES FOR THE INSTITUTION OF A COMMITTEE TO CONSIDER THE REMOVAL OF A CHAPTER 9 HEAD

The abovementioned matter refers, as well as the proceedings of the portfolio committee on Justice and Correctional Services on 27 August 2019.

Kindly find hereto attached a set of draft rules which the DA had drawn up to establish a committee to consider the removal of the head of a Chapter 9 institution, in terms of section 194 of the Constitution. We had modelled these on the rules adopted in terms of section 89 of the Constitution, for the removal of a President.

I submit these draft rules to your office in the hope that it can be of assistance to the Rules and Programming Committee when they meet to draw up rules to govern the process of considering the removal of the Public Protector.

The DA believes that Parliament should move on this matter with an appropriate sense of urgency. With a set of draft rules already in circulation, the committee's work will hopefully be made easier and the process can be dealt with speedily.

I trust you find the above so in order and look forward to hearing from you.

Yours faithfully,

John Steenhuisen.

John Steenhuisen MP
Chief Whip of the Official Opposition
Parliament of RSA

VJ
TRM

DRAFT RULE TO REMOVE THE PUBLIC PROTECTOR, THE AUDITOR-GENERAL OR A MEMBER OF A COMMISSION ESTABLISHED BY CHAPTER NINE OF THE CONSTITUTION FROM OFFICE IN TERMS OF SECTION 194 OF THE CONSTITUTION

DEFINITIONS

For the purpose of a section 194(1) enquiry in terms of these rules –

"incapacity" means a permanent or temporary physical or mental condition, or a legal impediment, that renders the office-holder unable to perform his or her duties of office efficiently and effectively.

"incompetence" means a demonstrated and sustained failure by the office-holder to perform his or her duties efficiently and effectively, with "incompetent" having a corresponding meaning;

"member of a Commission" means a member of a Commission established by Chapter Nine of the Constitution

"misconduct" means unlawful conduct arising out of bad faith or gross negligence, dishonest conduct or improper conduct;

"panel" means the independent panel appointed under this Rule to conduct any preliminary enquiry on a motion initiated in a Section 194 enquiry

"section 194" means Section 194 of the Constitution, 1996

"Section 194 Committee" means the committee established under these Rules to conduct a section 194 enquiry, and "Committee" has a corresponding meaning in this Rule

"Section 194 Enquiry" means an enquiry initiated by the Assembly to remove the Public Protector or the Auditor General or a member of a Commission established by Chapter Nine of the Constitution, under section 194 of the Constitution and this rule.

PROCEDURES TO GIVE EFFECT TO SECTION 194 OF THE CONSTITUTION

Initiation of Section 194 enquiry

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

(a) the motion must be limited to a clearly formulated and substantiated charge on the grounds specified in section 194, which must *prima facie* show that the Public Protector, the Auditor General or a member of a Commission:

(i) committed misconduct;

TRM VJ

(ii) suffers from an incapacity to perform the functions of office; or

(iii) is incompetent in the performance of the functions of office;

(b) all evidence relied upon in support of the motion must be attached to the motion, with the understanding that if additional evidence becomes available at any time after the motion is moved but before the section 194 committee concludes its business, such evidence will be filed with the office of the Speaker and brought to the attention of the section 194 committee forthwith;

(c) the charge must relate to an action or conduct performed in person by the Public Protector, the Auditor General or the member of a Commission concerned; and

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

(2) For purposes of proceedings to remove in terms of section 194, the term "charge" must be understood as the grounds for averring the removal from office of the Public Protector, the Auditor General or the member of a Commission concerned.

Compliance with criteria

Once a member of the Assembly has given notice of a motion to initiate proceedings in a section 194 enquiry the Speaker may consult the member to ensure the motion is compliant with the criteria set out in this Rule.

Referral of motion

(1) When the motion is in order, the Speaker must immediately refer the motion, and any supporting documentation provided by the member, to the Section 194 Committee established under this Rule for the purposes of conducting a Section 194 Enquiry.

(2) The Speaker must inform the Assembly and the President of such referral without delay.

The Section 194 Committee

Establishment

A Section 194 Committee is established to consider motions in terms of section 194 of the Constitution, for the removal from office of the Public Protector, Auditor General or member of a Commission referred to it in terms of this Rule.

Composition and appointment

(1) The Section 194 Committee consists of the number of Assembly members that the Speaker may determine, provided that –

(a) half of its members must be members of opposition parties

VJ

TRM

C. SEQUENCE OF PROCEEDINGS

In terms of Rule 47 – Sequence of Proceedings – Members' Statements are scheduled after motions without notice. Over time, however, a concern was raised that to facilitate sufficient opportunity for ministerial responses to members' statements the sequence of proceedings should be amended to ensure that Members' Statements are taken towards the start of proceedings on days that they are scheduled. The Rules Committee therefore recommends that the House agree to amend Assembly Rule 47 as follows:

Rule 47. Sequence of proceedings

(1) Subject to the Constitution and these rules, and unless altered by resolution of the House, the business on each sitting day of the House must follow the following sequence of events:

(a) opportunity for silent prayer or meditation;
(b) announcements from the Chair;
(c) swearing in of new members;
(d) formal motions moved by the Chief Whip;
(e) when scheduled by the Programme Committee, opportunity for statements by members and responses to statements by Cabinet members;
(f) statements by Cabinet members; and
(g) orders of the day and notices of motion on the Order Paper, which must be dealt with in sequence; provided that precedence must be given to questions on question days.

(2) Subject to Subrule (1), and unless altered by resolution of the House, the business on any sitting day of the House may additionally include any event below, after the business under Subrule (1) has been completed and if included during any sitting must follow the following sequence of events:

(a) Any other formal motions;
(b) motions without notice;
(c) [opportunity for statements by members and responses to statements by Cabinet members];
(c) notices of motion; and
(d) petitions.

D. NEW RULES - REMOVAL OF OFFICE-BEARERS IN INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

Section 194(1) of the Constitution, 1996 states that the office-bearers and commissioners in Institutions Supporting Constitutional Democracy (Chapter Nine of the Constitution) may be removed from office on specific grounds. While the Constitution and the rules do set out a broad framework for Parliament to exercise its functions in terms of Section 194, there was a view that, to ensure clarity and uniformity, specific rules were required in respect of the removal of these office-bearers and commissioners. To this effect, the Committee recommends the insertion of the following new rules:

Part 4: Removal from office of a holder of a public office in a State Institution Supporting Constitutional Democracy

Definitions

For the purposes of Part 4 -

"holder of a public office" means a person appointed in terms of Chapter 9 of the Constitution;

"incapacity includes —

(a) a permanent or temporary condition that impairs a holder of a public office's ability to perform his or her work; and
(b) any legal impediment to employment;

"incompetence" in relation to a holder of a public office, includes a demonstrated and sustained lack of —

(a) knowledge to carry out; and
(b) ability or skill to perform,

his or her duties effectively and efficiently;

"member of a commission" means a member of a commission established under Chapter 9 of the Constitution;

"misconduct" means the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office; and

"section 194 enquiry" means an enquiry by the Assembly to remove a holder of a public office in terms of section 194 of the Constitution and these rules.

Initiation of section 194 enquiry

129R[2]. Initiation of Section 194 enquiry

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

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

(i) committed misconduct;
(ii) is incapacitated; or
(iii) is incompetent;

(b) the charge must relate to an action performed or conduct ascribed to the holder of a public office in person;
(c) all evidence relied upon in support of the motion must be attached to the motion; and
(d) the motion is consistent with the Constitution, the law and these rules.

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

129S. Compliance with criteria

Once a member has given notice of a motion to initiate proceedings in a section 194 enquiry, the Speaker may consult the member to ensure the motion is compliant with the criteria set out in this rule.

129T. Referral of motion

When the motion is in order, the Speaker must –

(a) immediately refer the motion, and any supporting documentation provided by the member, to an independent panel appointed by the Speaker for a preliminary assessment of the matter; and
(b) inform the Assembly and the President of such referral without delay.

Independent panel to conduct preliminary assessment into Section 194 enquiry

129U. Establishment

---

[2] The numbering of the rules would follow Rule 129A-Q, which concern the removal of the President in terms of Section 89 of the Constitution. This would be a temporary arrangement until the rules are re-printed, at which point both would be separate rules and be re-numbered accordingly.

The Speaker must, when required, establish an independent panel to conduct any preliminary inquiry on a motion initiated in a section 194 enquiry.

129V. Composition and Appointment

(1) The panel must consist of three fit and proper South African citizens, which may include a judge, and who collectively possess the necessary legal and other competencies and experience to conduct such an assessment.

(2) The Speaker must appoint the panel after giving political parties represented in the Assembly a reasonable opportunity to put forward nominees for consideration for the panel, and after the Speaker has given due consideration to all persons so nominated.

(3) If a judge is appointed to the panel, the Speaker must do so in consultation with the Chief Justice.

129W. Chairperson

The Speaker must appoint one of the panellists as chairperson of the panel.

129X. Functions and powers of the panel

(1) The panel –

(a) must be independent and subject only to the Constitution, the law and these rules, which it must apply impartially and without fear, favour or prejudice;

(b) must, within 30 days of its appointment, conduct and finalise a preliminary assessment relating to the motion proposing a section 194 enquiry to determine whether there is *prima facie* evidence to show that the holder of a public office –

(i) committed misconduct;
(ii) is incapacitated; or
(iii) is incompetent; and

(c) in considering the matter –

(i) may, in its sole discretion, afford any member an opportunity to place relevant written or recorded information before it within a specific timeframe;
(ii) must without delay provide the holder of a public office with copies of all information available to the panel relating to the assessment;
(iii) must provide the holder of a public office with a reasonable opportunity to respond, in writing, to all relevant allegations against him or her;
(iv) must not hold oral hearings and must limit its assessment to the relevant written and recorded information placed before it by

members, or by the holder of a public office, in terms of this rule; and

(v) must include in its report any recommendations, including the reasons for such recommendations, as well as any minority view of any panellist.

(2) The panel may determine its own working arrangements strictly within the parameters of the procedures provided for in this rule.

129Y. Quorum

The panel may proceed with its business when the chairperson and one other panellist is present.

129Z. Consideration of panel recommendations

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

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

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

Committee for section 194 Enquiry

129AA. Establishment

There is a committee to consider motions initiated in terms of section 194 and referred to it.

129AB. Composition and Appointment

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

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

129AC. Chairperson

The committee must elect one of its members as chairperson.

129AD. Functions and powers of the committee

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

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

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

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

129AE. Decisions

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

129AF. Report to the National Assembly

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

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

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

E. AMENDMENT TO RULE 88 – REFLECTIONS UPON JUDGES AND CERTAIN OTHER HOLDERS OF PUBLIC OFFICE

At present, Assembly Rule 88 provides that no member may reflect on the competence or integrity of the holder of a public office in a state institution supporting constitutional democracy whose removal from such office is dependent upon a decision of the House, except upon a motion, which, if true, would in the opinion of the Speaker, *prima facie,* warrant such a decision. Given the proposed Rules 129R-129AF the Rules Committee recommends that the following consequential amendment to Rule 88 should be made as follows –

Rule 88. Reflections upon judges and certain other holders of public office

No member may reflect on the competence or integrity of a judge of a superior court, the holder of a public office in a state institution supporting constitutional democracy referred to in section 194 of the Constitution or any other holder of an office (other than a member of the government), whose removal from office is dependent upon a decision of the House, except upon a separate substantive motion in the House presenting clearly formulated and properly substantiated charges **[which, if true, would in the opinion of the Speaker, prima facie warrant such a decision]**.

"BM3"

660

PP119

154

SEANEGO INCORPORATED

Block B, 1st Floor, Suite C
53 Kyalami Boulevard
Kyalami Business Park
Midrand
1684
Tel: (010) 466 0442/0169
Fax: (011) 466 6051
Email: info@seanego.co.za

Our Ref: TNS/0026
Your Ref:

28 January 2020

TO: MS THANDI MODISE, MP
THE SPEAKER OF THE NATIONAL ASSEMBLY
PARLIAMENT BUILDING,
ROOM E118,
PARLIAMENT STREET,
CAPE TOWN

URGENT

PER EMAILS: speaker@parliament.gov.za;
larendse@parliament.gov.za; snjikela@parliament.gov.za ;
zadhikarie@parliament.gov.za

Dear Honourable Madam Speaker

PARLIAMENTARY RULES FOR THE REMOVAL OF OFFICE-BEARERS IN INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY: PUBLIC PROTECTOR

1. We act for and on behalf of the Public Protector, Advocate Busisiwe Mkhwebane, herein after referred to as "our client".

2. Our client is aware that the Rules for removal of office-bearers in institutions supporting constitutional democracy were adopted on 3 December 2019, and having sought and obtained legal advice, she is of the firm view that these Rules are unconstitutional and unlawful as they amount to a violation of the constitutionally prescribed duty to protect the independence of chapter 9 Institutions. Neither do they adequately provide for *audi alterem partem* at all in their application and implementation. All in all, the Rules are fatally tainted by irrationality and several other breaches of the rule of law.

3. Despite the bold promise of fairness and justice, the Rules are *inter alia* unfair and in breach of our client's rights in terms of section 34 of the Constitution, *inter alia*, in that the Rules do not make provision for the requisite non-participation or recusal of a number of seriously conflicted parties in any of the envisaged processes contemplated therein, including the making of crucial decisions. Such parties include but are not limited to all individuals, both in the Executive and the Legislature, who are currently or have recently been placed under investigation by the Public Protector in respect of very serious allegations of impropriety and breach of law, as well as those, like members of the Portfolio Committee on Justice and Correctional Affairs in the 5th Administration, who have publicly pronounced and passed judgment on the very issues which reportedly form the subject of the complaint by the DA. Imagine if a judge, magistrate or arbitrator could behave in that manner and still be expected to conduct a fair trial.

4. The principle invoked above was established as follows by Mlambo JP in *President of the RSA v Public Protector* 2018 (2) SA 100 (GP) at paragraph 146:

> *"There is no reason why the recusal principle should not apply to the President. The principle of recusal applies here because the President has an official duty to select a judge to lead the commission (of inquiry), but he is conflicted, as he himself has been personally implicated, whether directly or indirectly, through his family and associates, in allegations of state capture..*

5. The alleged complaint by the DA is a contrived smokescreen which forms part of a web of political marriages of convenience by persons and parties who all have an axe to grind with our client related to the normal performance of her constitutional duties. The DA itself is currently involved in litigation instituted by our client in which the DA is called upon to substantiate its allegations that she is a "spy", which is false and a malicious insult and is calculated to undermine the office of the Public Protector in violation of section 181 of the Constitution. As Chief Justice Mogoeng remarked in the matter of *EFF v The Speaker of the National Assembly* 2016 (5) BCLR 618 CC, at paragraph [55]:

"An unfavourable finding of unethical or corrupt conduct, coupled with remedial action, will probably be strongly resisted in an attempt to repair or soften the inescapable reputational damage. It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated."

6. The DA's complaint pertains to matters which, even on the DA's version, allegedly occurred long before the adoption of the Rules. This purported retrospective application of the Rules is in flagrant violation of the rule of law, including the time-tested principle of *nulla poena sine lege*.

7. Section 181(3) of the Constitution prescribes that other organs of state, including the National Assembly, *"must assist and protect (the Public Protector) to ensure (its) independence, impartiality, dignity and effectiveness"*. The conduct described above is diametrically opposed to and incongruent with these constitutional directives.

8. The Speaker's own conduct in making a public announcement about the process to remove our client without even informing her of the decision, with the effect that our client only learnt about it in the media, is yet another blatant violation of her rights of dignity, privacy and confidentiality and is calculated to undermine the effectiveness of the office of the Public Protector. Since when does the Speaker make public announcements about the processing of a motion submitted by a Member of Parliament?

9. The pronouncements made by Dr Mathole Motshekga, speaking on behalf of the Portfolio Committee on Justice and Correctional Services, previously pronounced on the very issues which reportedly form part of the complaint. *Inter alia*, he accused our client of *"acting at odds with her constitutional duty (sic)"*, making statements *"which border on contempt of court"*. He questioned her fit and proper status and proposed that *"she should do the honourable thing and should resign, just as the former President had done"*. All these remarks were made despite the known fact that all the court cases remarked upon were still pending before the courts and in breach of:

   9.1. Rule 89 of the National Assembly, which provides that:

B 61

"*No member may reflect upon the merits of any matter on which a judicial decision in a court of law is pending*"; and

9.2. Rule 88 of the National Assembly, which provides that:

"*No member may reflect upon the competence or integrity of a judge of a superior court, the holder of a public office in a state institution supporting constitutional democracy referred to in section 194 of the Constitution, or any other holder of an office (other than a member of government) whose removal from such office is dependent upon a decision of the House ...*"

10. The rationale for these fundamental requirements of fairness ought to be self-explanatory and obvious. The current Rules make no provision for the recusal of such delinquent members implicated in the breach of the Rules referred to in the preceding paragraph, with the result that they too are therefore permitted to sit in "independent" assessment of our client's fitness for office.

11. Rule 129R provides that the Speaker shall only approve a motion once a *prima facie* case has been made. Generally speaking, it would be logically and legally impossible to conclude that a *prima facie* case has been made against a person without having afforded that person a hearing. The conduct of the Speaker in purporting to "approve" Ms Natasha Mazonne's motion is illegal on that basis alone. This principle was properly articulated by the Constitutional Court (per Jafta J) at paragraph 179 in *EFF v Speaker, National Assembly* 2018 (2) SA 571, also known as the Impeachment case, as follows:

"*For the impeachment process to commence, the Assembly must have determined that one of the listed grounds exists. This is so because those grounds constitute conditions for the President's removal. A removal of the President where none of the grounds is established would not be a removal contemplated in section 89(1). Equally, a process of removal of the President where none of the grounds exists would amount to a process not authorised by the section ... Without rules defining the entire process, it is impossible to implement section 89.*"

12. The same considerations must apply equally to section 194 of the Constitution.

13. In terms of Rule 129T, only once the motion is "in order" may the Speaker refer it to the next stage of the Independent panel and inform the President of such referral. The DA motion is not in order in that it is solely based on either ongoing or completed litigation and reports of the Public Protector thereby seeking to outsource the removal of the Public Protector to the judiciary in breach of the principle of separation of powers. The Speaker is accordingly not entitled to refer such an inherently defective motion.

14. The deficiencies of these Rules are simply too numerous to mention herein. Suffice to say that, as currently formulated, the said Rules are riddled with glaring violations of the Constitution and are woefully inadequate to cater for the fair impeachment of the Public Protector or any other head of a chapter 9 institution. If it becomes necessary, such deficiencies will be more exhaustively catalogued in the forthcoming court papers.

15. Notwithstanding all of the above, the National Assembly has unlawfully and out of the blue issued a media statement on 24 January 2020 stating that the Speaker has approved a motion brought by the Democratic Alliance and thereby purporting to initiate proceedings for the removal of the Public Protector. Our instructions are that our client has never ever been accorded the courtesy of being informed about the initiation of this process aimed at her removal from office, let alone being invited to comment thereon. She had to read about it in the media – all in the name of fairness, justice and ubuntu.

16. In light of the above, our client hereby requests the Honourable Speaker to provide forthwith:

16.1. a copy of the motion that the Democratic Alliance has launched against our client;

16.2. written reasons for making the decision to approve the motion by the Democratic Alliance;

16.3. written reasons for making the decision that a *prima facie* case has been made;

16.4. confirmation as to whether or not the requirements of rule 129R have been complied with;

16.5. an explanation of which part of the rules authorize the speaker to make a public announcement regarding her "approval" of the motion that has been brought in Parliament,

61

in light of your duty to protect the office of the Public Protector and to ensure its integrity, dignity and effectiveness; and

16.6. a detailed statement on what mechanisms, if any, are in place in order to protect our client from being subjected to a predetermined "removal", tainted by the participation of individuals, too many to mention by name at this stage, who have a lot to gain from her unlawful removal, as well as those who have long prejudged the issues under "investigation".

17. Furthermore, our client hereby requests an undertaking from the Speaker that the grossly unfair process which has been unlawfully initiated in terms of the impugned rules be temporarily suspended until all the above issues have been adequately dealt with, either amicably between the parties or, failing which and if needs be, by a court of law.

18. In the meantime, we are instructed further to demand, as we hereby do, that you refrain from taking any further steps in the purported impeachment process until the resolution of the issues raised herein. An undertaking to that effect must be made in writing.

19. Finally, we trust and hope that in your consideration of the above, you will take the words of Deputy Judge President Zondo seriously, when he correctly said at paragraph 55 of the impeachment judgment (*EFF v The Speaker*):

> *"Although all members of the National Assembly are expected to know the Rules of the National Assembly, there is an expectation that the Speaker would know the Rules of the National Assembly better than everyone else."*

20. Kindly furnish us with a response to the above by close of business on 30 January 2020, failing which our client reserves all its rights, including approaching a court of law for appropriate relief.

160

Regards

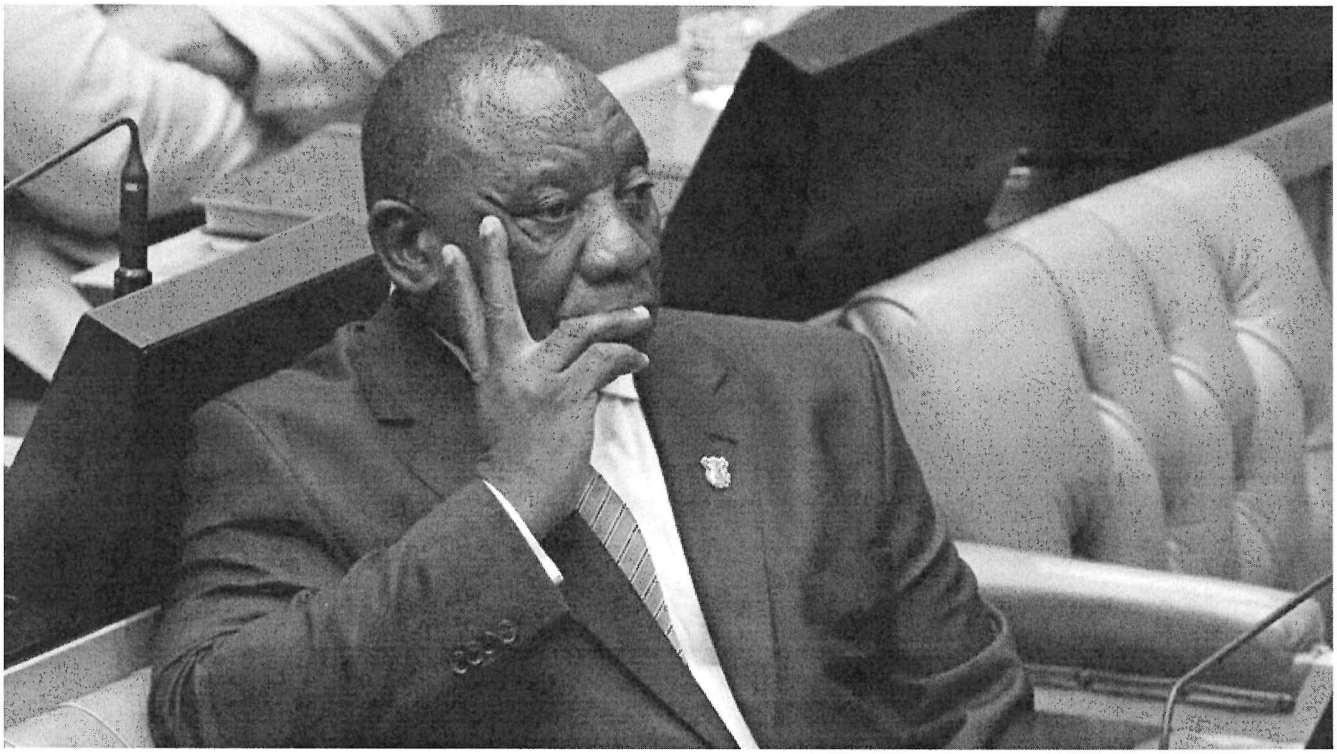
SEANEGO ATTORNEYS INC

Per: Theo Seanego

8 61

SUNDAYINDEPENDENT NEWS

One of Ramaphosa's 'Farmgate' robbers nabbed



President Cyril Ramaphosa in Parliament. Picture: Supplied

Published 22h ago

Written by

Mzilikazi Wa Afrika

million to $8 million concealed in furniture, including mattresses, at President Cyril Ramaphosa's farm, is languishing in a Cape Town jail, for possession of an unlicensed firearm.

Sunday Independent can confirm that Urbanus Shaumbwako, a Namibian national with a South African identity book, was arrested in October 2020 for possessing an unlicensed firearm.

The gun is believed to have been used in several robberies. His arrest was kept under the radar.

He is expected to appear in the Cape Town Magistrate's Court next month.

Shaumbwako is one of the five men named by former state security boss Arthur Fraser, in his affidavit to the police, as being responsible for the theft at Ramaphosa's Phala Phala Farm, in Bela-Bela, Limpopo, in February 2020.

Fraser opened a criminal case against Ramaphosa and his head of the Presidential Protection Unit, Wally Rhoode, for allegedly kidnapping and torturing five men, including Shaumbwako, to reveal where they had stashed their loot.

Ramaphosa didn't report the robbery to the police.

Fraser alleges, in his affidavit submitted at Rosebank Police Station, in Johannesburg, that after the five men made their confession and some of their loot recovered, Rhoode "instructed" Ramaphosa to pay them R150 000 each to buy their silence.

Fraser's lawyer, Eric Mabuza, issued a press statement confirming that his client met with members of the directorate for priority crime investigation (Hawks) probing the matter "in order to assist their investigation".

"He has furnished the Hawks with additional information and details to enable them to do their work," the statement said.

Sunday Independent broke the story online two weeks ago, on how the former spy boss opened criminal charges against Ramaphosa, detailing how the robbery was allegedly pulled off with the assistance of Ramaphosa's helper. She, too, was allegedly paid R150 000 not to talk about the incident.

Former State Security Agency boss Arthur Fraser, leaving the Rosebank Police Station, after opening a case against President Cyril Ramaphosa. Picture: Bhekikhaya Mabaso

The men, all Namibian nationals, fled to Cape Town after the robbery and went on a shopping spree, buying cars, including a Lamborghini and a Mercedes Benz G-Wagon,

Two days later, he was arrested in the capital, Windhoek, for illegally entering Namibia and contravening the Covid-19 lockdown regulations.

One of his alleged accomplices Erkki Shikongo bought a guest house for N$80 000 in Outapi, Namibia.

Fraser claims that Ramaphosa sought the help of his Namibian President Hage Geingob "in apprehending the suspect in Namibia".

Geingob's spokesperson Alfredo Hengari told *Sunday Independent* on Saturday that he can't comment on allegations that his President helped Ramaphosa to kidnap and torture Namibian citizens, as is alleged in Fraser's affidavit.

Ramaphosa and Geingob have failed to come clean and explain their full roles in the scandal.

However, Ramaphosa has admitted that the robbery occurred at his farm. He has, however, failed to answer any relevant questions about the crime.

A confidential report, compiled by former Namibian Crime Investigations Department head Nelius Becker, dated June 21, 2020, and seen by *Sunday Independent*, stated that "discussions are allegedly ongoing between the countries' two Presidents". This has been vehemently denied by Geingob, in his media statement released last week.

After spending more than four months in a Namibian jail, David pleaded guilty to two charges on November 13, 2020 – one for entering Namibia illegally and the second for failing to declare goods he brought into the country. He was found guilty and sentenced to a year in jail or N$5 000 for count one, and 24 months in prison or N$15 000 for count two.

He was also forced to forfeit his luxury watches, a Rolex worth N$280 000 and Tag Hauer worth N$28 000, as well as a gold chain work N$163 000 and $1 100 cash.

He was given 48 hours to leave Namibia and returned to South Africa the following day.

RELATED TOPICS:

CORRUPTION HAWKS SAPS CYRIL RAMAPHOSA ARTHUR FRASER
CRIME AND COURTS TRUE CRIME

SHARE

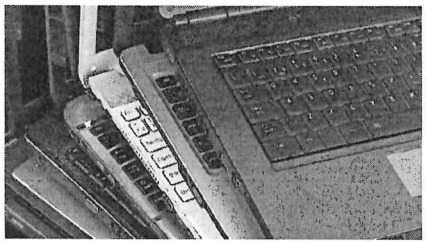
Read next

Here's why Rwanda's president ordered for the immediate deportation of 18 Chinese nationals

By Chad Williams | Published Jun 15, 2022

Recommended Stories

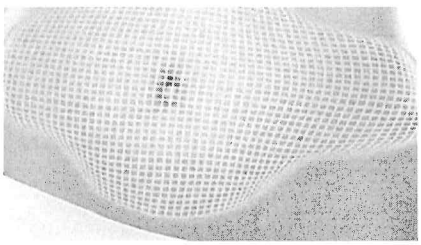
Recommended by



2020 Unsold Laptops that might be sold for nothing! Search Here

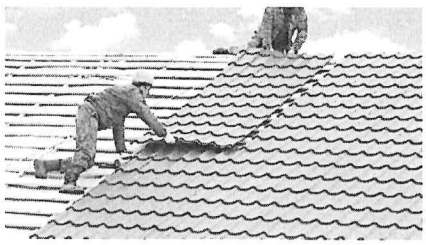
Laptop Deals | search ads

Prison official and inmate caught in prison romp are not married



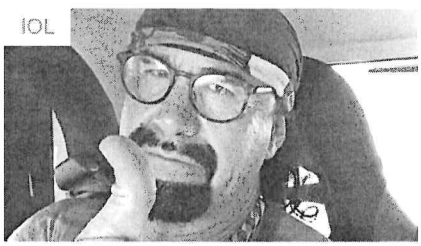
These liposuction patches are winning the hearts of the English

Well-being-review.com



Forget Expensive Roofing: Prices in 2022 Might Surprise You

High Court Allows Debt Reductions For South Africans



Muldersdrift shooting victim Len Cloete is back home

Heads rolling in Namibia over President Cyril Ramaphosa's Dollar$Gate

Hillary Gardee: The sangoma, the muti and more bodies

Ramapho$a Dollar Gate: The truth and the lie$

Ramaphosa cuts Cabinet's perks

"BM6"

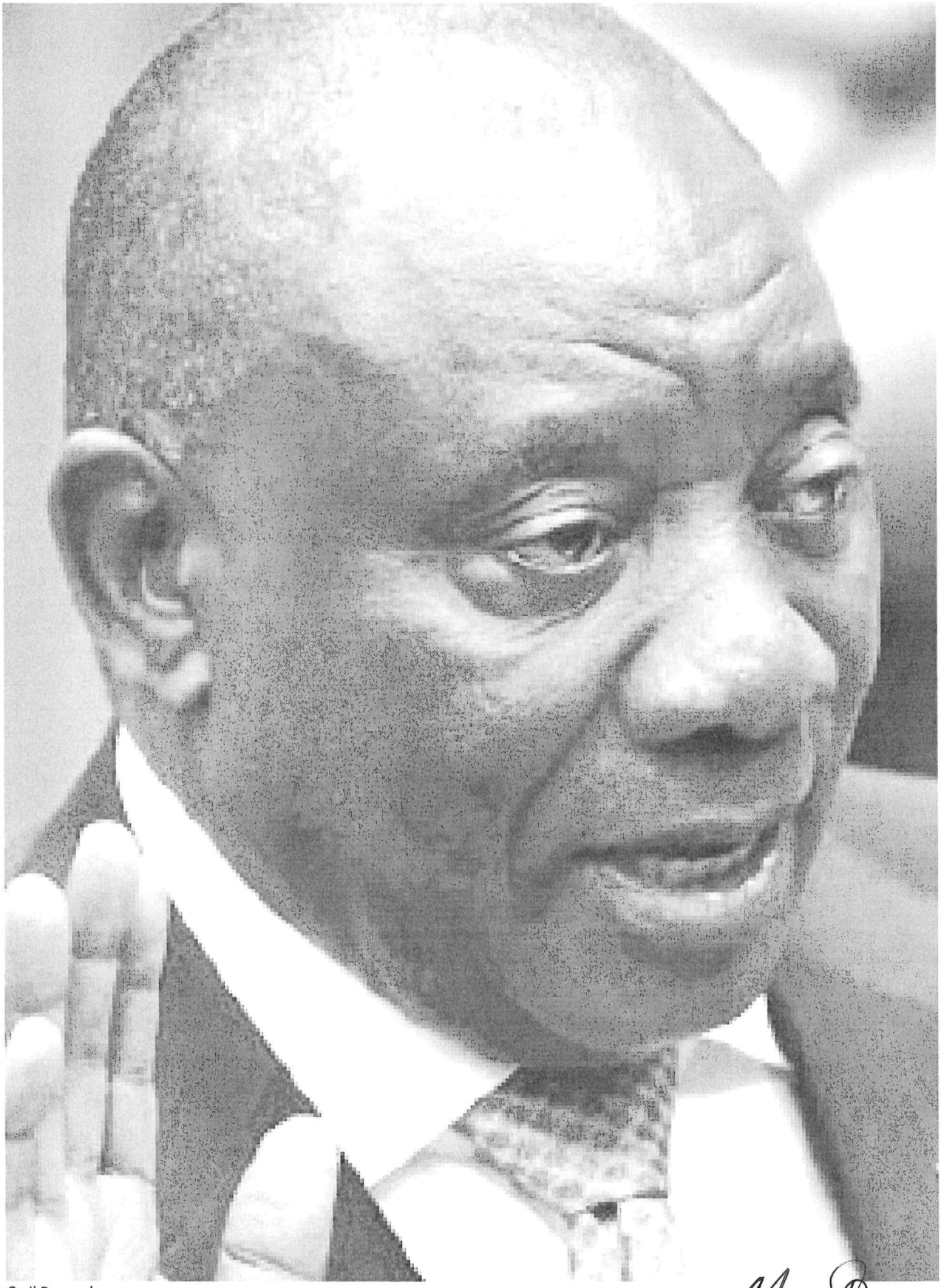
675

Namibian suspects splurged 'farmgate' loot in Cape Town

News - National | 2022-06-07

Page no: 1

by



Cyril Ramaphosa

676

• NICOLA DANIELS

THE Namibian men accused of stealing millions of unexplained United States (US) dollars kept at South African president Cyril Ramaphosa's Limpopo farm went on a shopping spree in Cape Town.

They spent their loot on high-performance luxury vehicles, according to former State Security Agency (SSA) director general Arthur Fraser's affidavit.

Fraser lodged a criminal complaint against Ramaphosa at Rosebank Police Station last week over the money allegedly stolen by five Namibians who allegedly conspired with his domestic worker in February 2020.

Ramaphosa allegedly kept large sums of money in foreign currency, estimated to be US$4 million and US$8m (between R62 million and R120 million), 'concealed' under a mattress and couches at his farm in Bela-Bela, in the Limpopo province.

In his affidavit, Fraser said: "The mere fact that president Ramaphosa had large undisclosed sums of foreign currency in the form of US dollars concealed in his furniture at his Phala Phala residence is prima facie proof of money laundering in contravention of Section 4 of the Prevention of Organised Crime Act No 121 of 1998 (Poca)."

After the alleged perpetrators "ransacked" the president's residence, they immediately headed to Cape Town, according to Fraser.

"The stolen US dollars were exchanged for South African rands at an informal foreign exchange service ordinarily run by persons of Chinese nationality."

Once the money was converted to rands, the shopping spree for high-end items and bank transfers allegedly commenced.

According to the documents, one of the suspects transferred R300 000 from his Gold Cheque Account held at First National Bank to Barons, Culemborg, and a further R415 000 again to Barons, Culemborg, on 16 February, 2020.

Fraser said a red Volkswagen GTI was subsequently registered in the suspect's name. Another suspect purchased a 2019 Ford Ranger 2.0TDCi Wildtrak 4x4 bakkie.

Fraser provided copies of all the relevant documents and pictures of some of the suspects with their new vehicles.

Ramaphosa only publicly disclosed and confirmed the crime after Fraser approached the police. His statement said the matter was reported to the Presidential Protection Unit of the South African Police Service for investigation, and denied he was involved in any criminal conduct.

He said the money was from the sale of game.

Addressing the Limpopo elective conference on Sunday, Ramaphosa again denied committing a crime, repeatedly saying he did not steal any taxpayer money.

677

"I want to reaffirm I was not involved in any criminal conduct. I pledge my full cooperation to any investigation. I would like to say I'm a farmer, I'm in the cattle business and the game business, and through that business, which has been declared in parliament and all over, I buy and sell animals.

"Sometimes people buy these animals. Sales are sometimes through cash, sometimes through transfers. Some of the people who are offshore customers and some who are local, they come through and buy animals, and some of them also come to hunt on the farm," Ramaphosa said.

"So what that is being reported was a clear business transaction of selling animals. The amount involved is far less than what is being reported ... I have never stolen money from anywhere, be it from our taxpayers (or anywhere else). I have never done so and will never do so."

The ANC referred the Cape Times to Ramaphosa's speech.

Zwelinzima Ndevu, the director of the School of Public Leadership at Stellenbosch University, says: "These are very serious allegations as they involve criminal activities which the president may have had knowledge of and never officially opened a case about.

"If true, it would therefore mean Ramaphosa committed a crime. It will have reputational risk for a senior ruling party official to be accused of this.

"I do believe that this is part of the strategy by those who want the president not to have a second term."

Political analyst professor Sipho Seepe says the ANC and the media have double standards.

"We already see some media trying to shield the president. Had this been somebody like former president Zuma or Duduzane, everyone would be calling for them to be held to account just because there is a suggestion that the law has been broken.

"So far the Democratic Alliance are the only ones suggesting a law has been broken . . . president Ramaphosa is saying he did not open a case because he did not want to cause panic. That's not good enough. The law must be applied without fear or favour."

– Cape Times via IOL

"BM7" SP1678

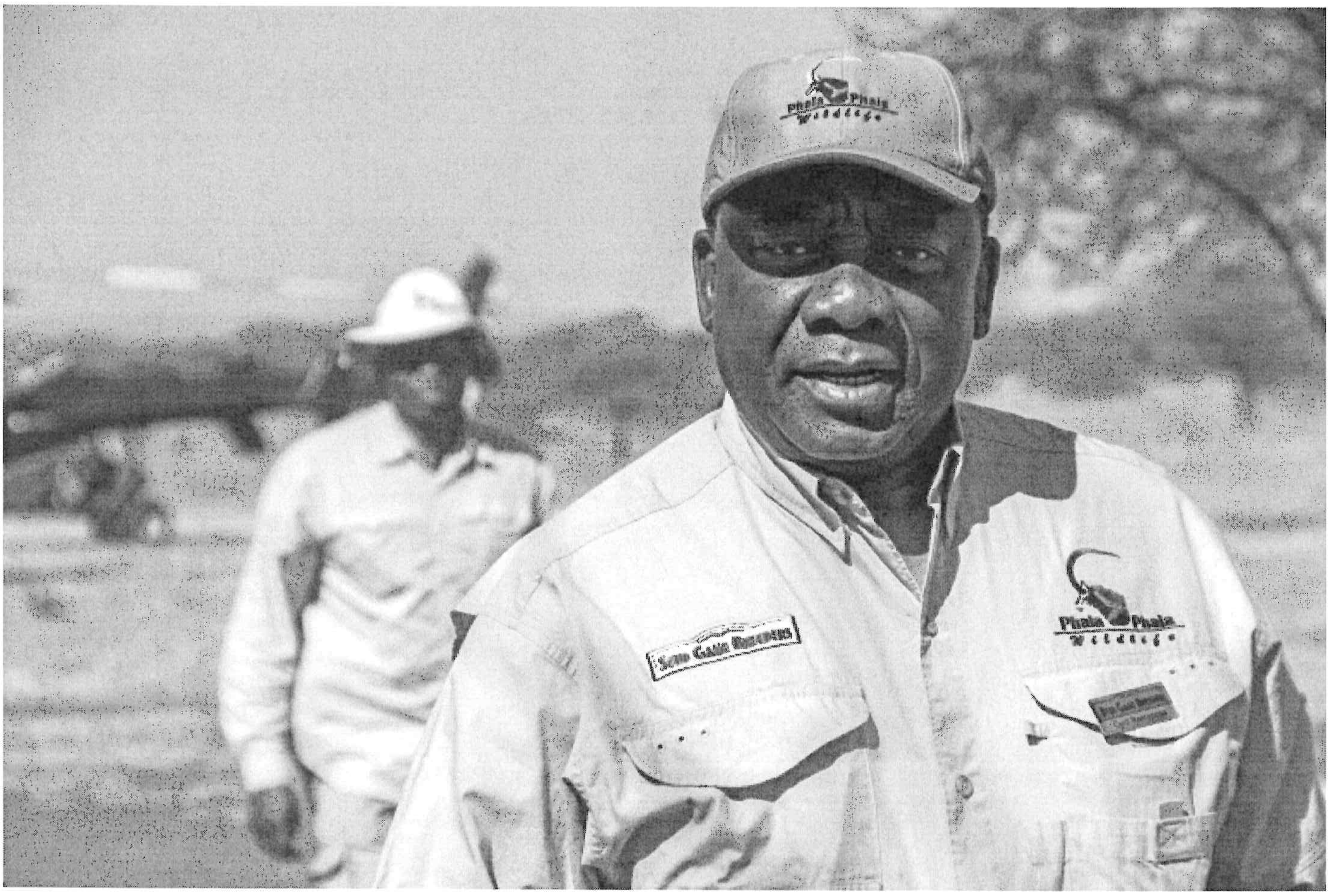
BREAKING Russia bans 121 Australian citizens including journalists, defence figures

EXPLAINER

Features | Corruption

What is South Africa's Phala Phala farm robbery scandal about?

President Ramaphosa is at the centre of an international scandal involving the theft of $4m from his game farm.



South Africa's Deputy President Cyril Ramaphosa arrives to attend the Stud Game Breeders auction at Mbizi Lodge outside Bela-Bela on September 6, 2014 wearing a cap customised for his Phala Phala game farm [File: Stefan Heunis/AFP]

By **Thabi Myeni**

9 Jun 2022

On June 1, 2022, Arthur Fraser, the former head of the South African State Security Agency, the country's spy agency, walked into a police station in Johannesburg and filed a criminal complaint against President Cyril Ramaphosa.

Fraser accused Ramaphosa of kidnapping, bribery, money laundering, and "concealing a crime" in relation to the alleged theft of $4m from his Phala Phala Farm, in a 12-page sworn statement, accompanied by photographs, documents and closed-circuit television (CCTV) footage of the alleged theft taking place.

KEEP READING

Mexico: A Lethal Field for Journalists

The arrest of Gupta brothers can be a turning point for S Africa

Swiss trial opens for ex-FIFA boss Blatter, ex-UEFA chief Platini

S Africa: Opposition calls for prosecution of Guptas after arrest

Shortly after the spymaster's allegations surfaced, Ramaphosa issued a statement confirming a robbery on his farm on February 9, 2020, saying "proceeds from the sale of game were stolen," but denying any wrongdoing or criminal conduct.

When he took office in 2018 after defeating Jacob Zuma-aligned former African Union Chairperson Nkosazana Dlamini-Zuma in the African National Congress (ANC) general elections, Ramaphosa vowed to root out corruption in state institutions.

However Ramaphosa's tenure has had its share of controversies, and Fraser's allegations could impact the president's career as the ruling ANC prepares to hold national elections in December.

What is the scandal?

- According to Fraser, criminals broke into Ramaphosa's Phala Phala wildlife farm in South Africa's Limpopo province, on February 9, 2020 and discovered large sums of dollar bills hidden in various pieces of furniture.
- Fraser alleged that Ramaphosa's housekeeper, whose identity is being protected, discovered the stash and messaged her brother, who knew a gang that could carry out the robbery.
- The gang allegedly included four Namibian citizens and two South Africans who gained entry into the premises by cutting the wire perimeter and entering through a window of the main farmhouse. The break-in was captured on CCTV footage, according to Fraser, who attached a video of what looks like two men crawling to a window on their knees, and two others waiting by a door.
- The president, who said in a statement that he was abroad at the time, claims to have reported the incident to the presidential protection police unit. Upon return, he asked his head of security, Major General Wally Rhoode, to investigate the incident.
- Rhoode allegedly assembled a team of retired police officers and serving members of the crime intelligence unit, who recovered some of the stolen loot from the housekeeper and some of her alleged co-conspirators after interrogation.
- Fraser claims that the housekeeper and the alleged perpetrators were later paid nearly $10,000 for their silence. The housekeeper was allegedly later reinstated but assigned to a different job on the farm.

What happened afterwards?

- Ramaphosa's spokesperson, Vincent Magwenya, denied Fraser's allegations in a statement and added: "President Cyril Ramaphosa acknowledges that while there is much public interest and concern about claims made in a criminal complaint against him, he remains firmly focused on the task of rebuilding the economy and the country."
- Some of the suspects are accused of changing the currency from United States dollars to South African rands and going on a spending spree – buying cars and houses in cash – in Cape Town shortly after the alleged heist. Fraser said this in his sworn statement and attached documents to support his claim.
- According to Fraser, one of the suspects fled the country and returned to Namibia. Ramaphosa then enlisted the assistance of Namibian President Hage Geingob, who dispatched local law enforcement to apprehend the suspect and hand him over to Rhoode, who recovered some of the loot.

- During a press conference on Tuesday, Geingob denied allegations that he was involved in anything unlawful, but confirmed that he had regular phone calls with his South African counterpart, The Namibian reported. "I'm in touch with about 14 presidents, we call each other [on the phone] ... This thing happened in South Africa, there will be a court case, maybe. It is a criminal case," said Geingob.
- He continued, "People were here, somebody came here illegally. He was arrested, he was later charged, paid and went back to South Africa. So I don't know what favour I would've done anybody."

What do we know about the Phala Phala farm?

- It lies on the outskirts of a town called Bela-Bela in Limpopo, the northernmost province of South Africa. According to its website, it spans 4,500 hectares (11,120 acres).
- It has been in operation since 2010.
- Ramaphosa's last declaration of business interests was in 2017 and Phala Phala was not mentioned specifically.
- This is not Phala Phala's first controversy. In November 2020, animal rights group People for the Ethical Treatment of Animals (PETA) accused Ramaphosa of having ties to South Africa's trophy hunting industry
- PETA claimed to have conducted an undercover investigation and obtained corroborating statements from farm workers. "Wild animals are bred specifically to be killed for trophies," its statement read. "Footage reveals that Ramaphosa is quietly developing and expanding a trophy hunting property called Diepdrift—stocking it with animals from his own wildlife breeding operation, Phala Phala—and that he owns a 50% stake in Tsala Hunting Safaris."
- Ramaphosa swiftly denied having a stake in the trophy hunting industry or in Tsala Hunting Safaris."Phala Phala's wildlife breeding and management activities comply with best ethical and lawful practice in the sector," he said in a statement.

What have the reactions been so far?

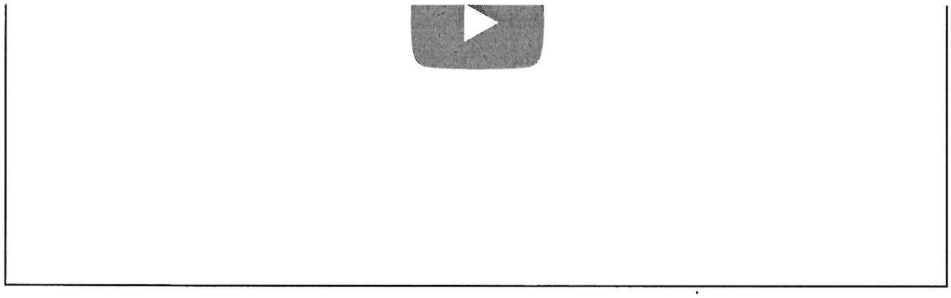
683

Opposition parties in South Africa have called for Ramaphosa's resignation in response to the public outcry.

Former president Zuma was ousted from office through a "vote of no confidence" motion tabled in parliament after a scandal in which $16m of taxpayer money was used for security enhancements in his private compound in Nkandla in the KwaZulu-Natal province.

South Africa's Jacob Zuma faces corruption inqu...

684



Earlier this week, the controversial brothers Rajesh and Atul Gupta, alleged to have used their affiliation with Zuma to influence contracts and appointments for years, were arrested by Dubai police. They are reportedly awaiting extradition.

- According to **Ramaphosa**'s critics and opponents, the allegations against him seem on par with that of his predecessor.
- In a press conference on Tuesday, leader of the Economic Freedom Fighters (EFF) **Julius Malema** said, "We will treat him the same way we treated Zuma. He has not respected his oath of office ... these are very serious allegations. Let them continue to push Fraser, there is more. Ramaphosa is engaged in money laundering and illicit financial flows without being held accountable."
- **Ramaphosa** has so far declined to say why he stored a substantial sum of money in foreign currency on his property, or whether the money was declared to the South African Revenue Service for tax purposes or customs upon entry into the country.
- Meanwhile, other opposition parties like the African Transformation Movement (ATM) and United Democratic Movement (UDM) have written to parliament, asking for an inquiry into the allegations and demanding that Ramaphosa take "sabbatical leave" until law enforcement concludes its investigation.
- **Nosiviwe Mapisa-Nqakula**, speaker of parliament, confirmed receipt of the letters to local news channel eNCA on Wednesday, saying "With

correspondence of this nature, we have to consult with the legal team of parliament and my own legal team to ascertain what is within my rights as the speaker in relation to the court's process."

- **Mapisa-Nqakula** also reaffirmed that Ramaphosa has denied the allegations and "made himself available to law enforcement in relation to the investigation."
- The Public Protector, **Advocate Busisiwe Mkhwebane**, confirmed on Thursday that her office, an independent government watchdog, has also launched an investigation into the matter after receiving a complaint from a member of parliament. "The complaint relates to President Ramaphosa's alleged conduct in respect of allegations of criminal activities at one of his properties," the statement read.

What next?

- Ramaphosa is preparing to host the Ankole Society of South Africa's national cattle auction next week at the same Phala Phala farm.
- As a number of government institutions begin probing the allegations by Fraser, it is only a matter of time before more details are revealed.

SOURCE: AL JAZEERA

686

LISTEN TO THESE PODCASTS

From: The Inside Story Podcast

What will the Belgian royal's visit to DR Congo achieve?

The legacy of Belgian colonialism in central Africa is back in the spotlight with the arrival of Belgium's royal couple on...

687

From: The Inside Story Podcast

What's behind the Western Sahara dispute?

A neglected conflict is straining ties between Algeria and Spain. Trade and diplomatic links have been cut because of a di...

From: The Inside Story Podcast

How effective is the UK's Rwanda asylum plan?

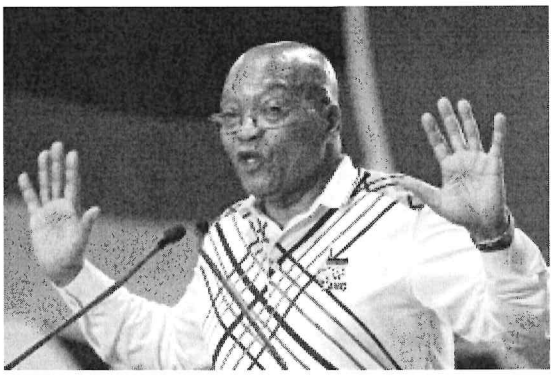
The UK is set to deport asylum seekers to Rwanda after legal challenges failed. It's a move described by many as inhumane....

RELATED

Zuma starts serving jail term: What you should know, in 500 words

South Africa's ex-president was sentenced last week to 15 months in jail for failing to show up at corruption inquiry.

8 Jul 2021

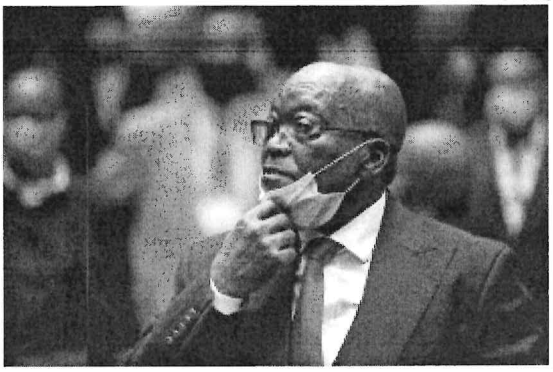


688

South Africa's Zuma handed 15-month jail term for inquiry no-show

The Constitutional Court ruling follows the ex-president's failure to appear at a corruption probe earlier this year.

29 Jun 2021



Ramaphosa 'misled' SA parliament about donation: Watchdog

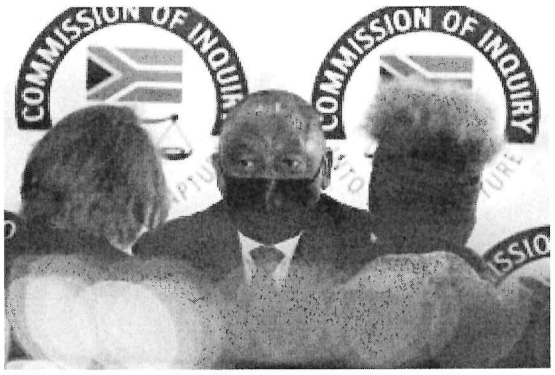
Report by public protector on president comes as predecessor abandons testimony to commission probing graft allegations.

19 Jul 2019

S Africa: Ramaphosa admits rampant graft during time as Zuma VP

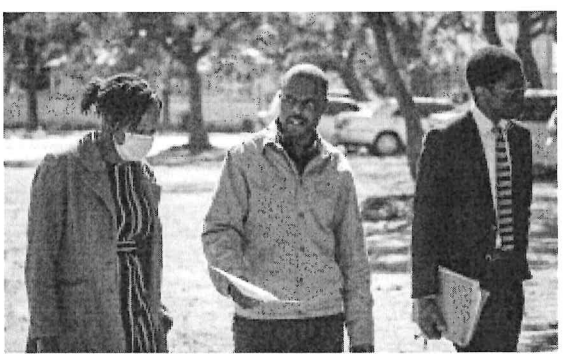
South African President Cyril Ramaphosa says he tried to resist corruption as former president Zuma's deputy.

11 Aug 2021



MORE FROM FEATURES

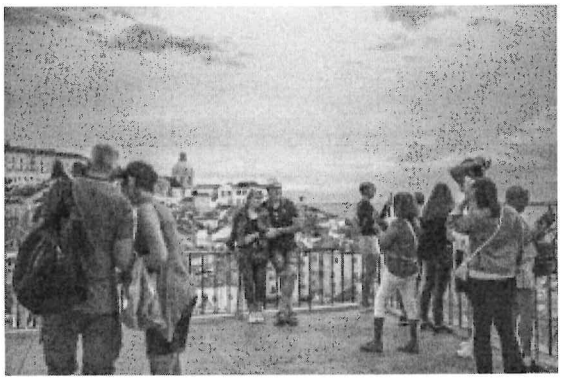
In Zimbabwe, reporter's conviction sparks fears of renewed abuse



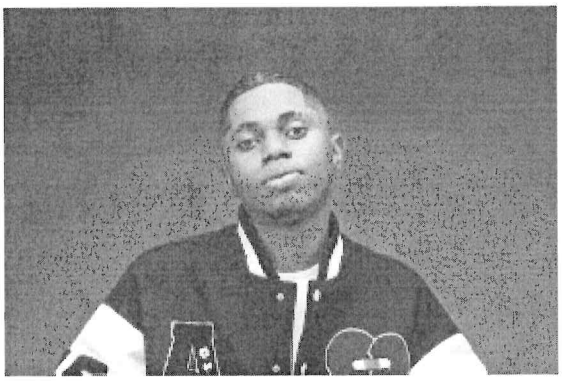
689

A letter to ... the rope that pulled the bodies out

Portugal's COVID deaths grow as tourism season kicks off

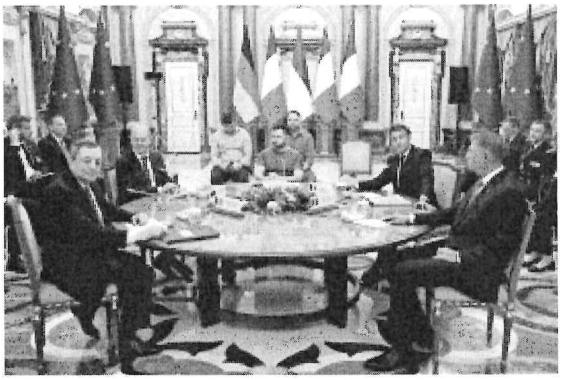


The reclusive TikTok star powering Nigeria's street Afrobeats scene



MOST READ

Ukraine hands sanctions proposals to EU leaders in Kyiv

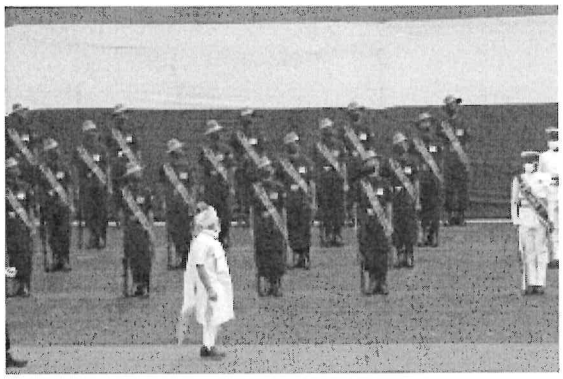


As Russia advances, is Western support

690

for Ukraine faltering?

'Agnipath': What is India's new military recruitment system?



Russian spy caught seeking to infiltrate ICC: Netherlands

About

Connect

Our Channels

Our Network

691

Follow Al Jazeera English:





"BM8" "SPRGD" 692

REPUBLIC OF NAMIBIA
MINISTRY OF HOME AFFAIRS, IMMIGRATION, SAFETY AND SECURITY
OFFICE OF THE INSPECTOR-GENERAL
NAMIBIAN POLICE FORCE

Tel. No.: (+264 61) 209 3202
Fax No.: (+264 61) 228 533
E-mail:
Enquiries: Lt-Gen. S.H. Ndeitunga/ Dep. Comm. Shikwambi
Our Ref.:
Your ref.: 8/2/6/2

Private Bag 12024
Ausspannplatz
WINDHOEK
Namibia

16 June 2022

PRESS RELEASE

(For immediate release)

TO: ALL MEDIA HOUSES
NAMIBIA

(KINDLY PUBLISH / BROADCAST THE FOLLOWING INFORMATION IN YOUR RESPECTIVE MEDIA OUTLETS)

NAMIBIAN POLICE FORCE UPDATE ON THE ARREST OF IMANUWELA DAVID

1. The Namibian Police Force has taken note of the talk of the nation and or public concern on the arrest of Mr. Imanuwela David in Namibia during 2020. These undesirable comments are noted on social media as well as newspapers; and these comments have the potential to erode public confidence in the Namibian Police Force as it could be understood to mean that the Force that is entrusted with the responsibility of upholding the law and protecting the rights of all citizens indeed has failed to act in accordance with the laws and to disseminate accurate information in the case of Mr. Imanuwela David.

2. As the custodian of law and order, we vehemently refute the allegations in the media that states and I quote, **"The Namibian Police Force did dirty work for President Ramaphosa"**. Furthermore, we refute allegations of **torture and or abduction of the suspect (Mr. Imanuwela David)** and that currently **there is a joint investigation underway between the Namibian Police Force and the South African Police Service.** Mr. Imanuwela David was arrested and charged for contravening the law and the matter followed the normal due process up to its conclusion as will become apparent in this statement.

3. The Namibian Police Force upholds and respects the right of public access to information, similarly fully supports press freedom which includes the mass media, and hence would not deliberately or for any other purpose withhold any relevant crime related information or underreport on the extend of criminal activities in Namibia.

4. Therefore, in the spirit of transparency and openness, the Namibian Police Force hereby shares the sequence of events following the illegal entry of Mr. Imanuwela David into Namibia as follows:

5. On 12 June 2020, Mr. Imanuwela David illegally entered Namibia through an ungazetted entry point near Noordoewer, //Karas Region by canoe via the Orange River. On the same day, he was assisted by a police officer identified as **Sgt Hendrick Hidipo Nghede** attached to the Tourism Protection Sub-Division in Lüderitz and by **Mr. Paulus Alfeus Ngalangi,** the Acting CEO of FishCor in Luderitz, to get to Windhoek. The trio drove to Windhoek in the acting CEO's BMW X5 and arrived after midnight. Mr. Imanuwela David spent the night at Faith City Flats, Apartment No: 18 in Rocky Crest.

6. On 13 June 2020, Mr. Imanuwela David was arrested at Hotel 77 Independence Avenue in Windhoek on charges of violating the Immigration Control Act, Act 7 of 1993 and the State of Emergency Regulations that were in place at the time. He was found in possession of Three Hundred Namibia Dollars (N$300), 11x 100 US Dollar notes, a TAG Hauer watch worth N$28 000, a Rolex watch worth N$280 000, a Gold Chain worth N$163 000 and four (4) cellphones.

7. Upon arrest, Mr. Imanuwela David was subjected to a COVID-19 test and his results came out positive. He was thereafter detained and quarantined at the Hosea Kutako International Airport Police Station holding cells.

8. After he was released from quarantine, Mr. Imanuwela David was then transferred to Noordoewer to appear in court and answer to charges he was arrested for. On 13 November 2020, Mr. Imanuwela David pleaded guilty in the Noordoewer Magistrate Court on **Count 1:** C/s 6 r/w Sec 1,2,4,7,8,34,53,56 and 57 of the Immigration Control Act, Act 7/1993 Entry into Namibia at any place other than a port of entry, and **Count 2:** C/s 14 (1)(a) r/w Sec 1,14(b), 14(2), 14(3), 91, 100 and 105 of the Customs and Excise Act, Act 20/1998 - failure to declare goods.

9. He was subsequently found guilty as charged and sentenced as follows: **Count 1:** Five Thousand Namibia Dollars (N$ 5 000) or twelve (12) months imprisonment and for **Count 2:** Fifteen Thousand Namibia Dollars (N$15 000) or twenty-four (24) months imprisonment. Mr. Imanuwela David ultimately paid a fine of N$ 20 000 in respect of his sentence and was released on the same day. A 48 hours' notice was issued to him by Immigration Officials to leave the country and he subsequently left Namibia via Noordoewer Border Post on 14 November 2020 at about 08H00.

10. The other accused, **Mr. Paulus Alfeus Ngalangi** and **Sgt. Hendrik Hidipo Nghede** were also arrested, charged and all pleaded not guilty to Contravening Section 56 (a) r/w Sec 1,2,4,7,8,34,53,56 and 57 of the Immigration Control Act, Act 7 of 1993, Aiding and abetting an illegal immigrant (common purpose), and Contravening Section34(a) r/w Sec 32,46,49 and 51 of the Anti-Corruption Act, Act 8/2003, Corruptly giving gratification to an agent as an inducement (common purpose), Alternative Charge: Contravening Section 35 (2) (a) r/w Sec 32,35(2), 46,49, and 51 of the Anti-Corruption Act, Act 8/2003 – Corruptly giving gratification to an agent as an inducement (common purpose). A separation of trial was made and their matter was postponed to 06-09 June 2022 for trial at Noordoewer Magistrate Court, however when the matter appeared in June 2022, it could not be finalized thus it was postponed for continuation of trial from 15 – 19 August 2022.

11. It is worth noting that indeed the two police authorities met on 19 June 2020 at what is termed "no-mans" land near Noordoewer, //Karas Region to share operational information pertaining to Mr. David Imanuwela and other Namibian nationals suspected to have stolen money in South Africa and fled to Namibia.

12. It should be clear that the meeting venue was determined by restriction measures of COVID-19 at the time. The meeting resolved for the two police authorities to investigate the matter within their jurisdiction.

13. The Namibian Police Force identified individuals, bank accounts and various properties including lodges, houses and vehicles suspected to have been purchased with proceeds of crime; and consulted the Office of the Prosecutor General to consider a preservation order of the assets.

14. A preservation order was issued and a formal request was made through the Ministry of Justice to South Africa to confirm whether or not a crime was registered in South Africa. However, no response was received from South African authorities, resulting in the cancellation of the preservation order and release of assets.

15. It is known and understood that policing issues attract significant media attention hence the public interest. It must therefore also be known and shared with the public that in terms of justice, Namibia is a country that follows the rule of law. Therefore, in terms of any proceedings that transpires within our courts, including the arrest and prosecution of the accused, the records are open and accessible to every citizen.

16. The Namibian Police Force wishes to take this opportunity to thank public members for their continuous support granted to law enforcement and the fight against crime, and encourage such support to continue in our quest to make Namibia a safe place for us all.

Thank you for your continuous assistance in educating and informing the Namibian nation.

Sincerely Yours

NAMIBIAN POLICE
WINDHOEK
16 JUN 2022
INSPECTOR GENERAL

14/06/22

: LT. GEN.

S.H. NDEITUNGA, OMS
INSPECTOR-GENERAL OF THE NAMIBIAN POLICE FORCE

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

AFRICAN TRANSFORMATION MOVEMENT
ATM
TRANSFORMING SOCIETY FOR A BETTER TOMORROW

Office of the Public Protector
Hillcrest Office Park
175 Lunnon Road
Hillcrest
Pretoria
0002

03 June 2022

Dear Public Protector

Re: Request for investigation to establish whether President Ramaphosa breached any of the provisions of Executive Members Ethics Act and the Codes for Executive Members Ethics, read with s96 of the Constitution.

It has become public information that Mr Arthur Fraser, the former Director General of the State Security Agency laid alarming criminal charges against President Ramaphosa at the South African Police Service station in Rosebank, Gauteng.

In his media statement Mr Arthur Fraser alleges that on 09 February 2020 there was a theft of millions of US dollars, (in excess of four million US dollars) concealed within the premises of the President's Phala Phala farm in Waterberg, Limpopo, by criminals who were colluding with Mr Ramaphosa's domestic worker. Included in the media statement is the defeating of the ends of justice, kidnapping of suspects, their interrogation on his property and bribery. Furthermore, the President is alleged to have concealed this crime from the South African Police and/or South African Revenue Services ("SARS") and thereafter paid the culprits for their silence. Mr Fraser's allegations have included video footages, photographs, bank accounts and names in the statement that he filed with the Rosebank Police Station in Gauteng.

President Ramaphosa in a media statement issued on the 2nd June 2022 confirmed the robbery in his property as per the statement of Mr. Fraser. At the time of writing this letter no South African Police Station (SAPS) had confirmed that Mr Ramaphosa opened a case for robbery neither did he say he went to any SAPS to open a robbery case.
"Section 96 of the Constitution demands that members of the Cabinet must act in accordance with a code of ethics set out by national legislation. As the President is the head of the Cabinet, he is bound by the Act and the Code.

In particular the ATM draws your attention to s96(2)(a) of the Constitution which prohibits members of Cabinet from undertaking any other paid work. It is the view of the ATM that anyone with cash amounting to millions of US Dollars can only be involved in trading whose legitimacy needs to be established. Whether the trading is legit or not it constitutes paid work and thus a violation of the said section of the Constitution. Please investigate.

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

AFRICAN TRANSFORMATION MOVEMENT
TRANSFORMING SOCIETY FOR A BETTER TOMORROW

In addition, s96(2)(b) of the Constitution, prohibits Members of Cabinet from acting in a way that is inconsistent with their office or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests. It is not clear whether the information in the public domain that Mr Ramaphosa stopped his business dealings upon assuming his role as Deputy President in the 5th administration is true or not. If indeed the President is no longer actively pursuing his private interests, why then did it become the President's direct responsibility to report the robbery to the Head of the Presidential Protection Unit (PPU)? Also, does the mandate of the Presidential Protection Unit include looking after security matters of the farm of the President? Does the use of the PPU for the President farm security not constitute abuse of state resources? Please investigate.

Should you find other transgressions that may not be within your mandate to investigate, please do not hesitate to refer those to appropriate authorities as you see fit.

If after your investigation you find that the allegations of Mr Fraser are substantiated, we request you to recommend appropriate remedial actions.

Given the seriousness of this complaint, the ATM wishes to remind you that S3(2) of the Executive Members Ethics Act compels you to report on alleged breaches of the Code within 30 days.

Regards

Hon. Vuyo Zungula:
ATM President

"BM10" "SPT 7B" 697

PUBLIC PROTECTOR
SOUTH AFRICA
Accountability • Integrity • Responsiveness

PRIVATE OFFICE
175 Lunnon Street
Hillcrest Office Park
Pretoria, 0083

Private Bag X677
Pretoria, 0001

Toll Free: 0800 11 20 40
Tel: 012 366 7108
Fax: 012 362 8918
Email: Ephraimk@pprotect.org
Website: pprotect.org
Facebook: Public Protector South Africa
Twitter: @PublicProtector

Please quote this references in your reply: 7/2-005084/22

His Excellency MC Ramaphosa
The President of the Republic of South Africa
Union Buildings
Government Avenue
PRETORIA
0001

Dear President Ramaphosa

INVESTIGATION INTO ALLEGATIONS OF A VIOLATION OF THE EXECUTIVE ETHICS CODE AGAINST THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA HIS EXCELLENCY MR MC RAMAPHOSA

1. On 3 June 2022, the Public Protector received a complaint from the Member of Parliament (MP) Honourable Vuyo Zungula, the President of African Transformation Movement ("the Complainant") in connection with allegations that you have violated the Executive Ethics Code 2000 published by proclamation in Government Gazette: No 21399 Notice No 41 Regulation 6853 ("Code") in that on 09 February 2020 there was a theft of millions of US dollars, (in excess of four million US dollars) stashed within your premises at Phala Phala farm in Waterberg, Limpopo.

2. Mr Zungula alleges that criminals colluded with your domestic worker and that you concealed this crime from the South African Police Service (SAPS) and/or South African Revenue Services ("SARS") and thereafter paid the culprits for their silence.

3. The Complainant filed this complaint based on public information that Mr Arthur Fraser (Mr Fraser), the former Director General of the State Security Agency laid alarming criminal charges against you at the Rosebank SAPS in Gauteng. Mr Fraser's allegations are said to include a video footage, photographs, bank accounts and names in the statement that he filed at the Rosebank police station in Gauteng. The Complainant further submitted in a media statement issued on the 2nd June 2022, that you confirmed the robbery in your property as per the statement of Mr Fraser.

4. **PLEASE BE ADVISED THAT** the Public Protector is conducting a preliminary investigation in terms of section 7(1) of the Public Protector Act, read with Rules 20 to 22 of the Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018 ("Public Protector Rules") into the allegations, to determine the merits of the complaint and how the matter should be dealt with.

5. The investigation is conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (Constitution), read with section 3 of the Executive Members' Ethics Act, 82 of 1998 ("EMEA") and sections 6 and 7 of the Public Protector Act, 23 of 1994 ("the Public Protector Act").

6. The Public Protector may exercise her discretion in terms of section 6(9) of the Public Protector Act to entertain matters which arose more than two (2) years from the date of occurrence of the incident. In deciding the "special circumstances" that may be taken into account in exercising such discretion favourably in accepting complaints, consideration is given to the nature of the complaint and the seriousness of the allegations, whether the matter can be successfully investigated and with due consideration to the availability of evidence and / or records relating to the incident(s).

7. In the context of section 6(9) of the Public Protector Act, the Public Protector will need to be satisfied that the circumstances are truly exceptional before entertaining a matter not reported within two years from the date of occurrence of the incident. This section is intended to enable the Public Protector to deal

with a situation where otherwise injustice might result. It is not merely to indulge complainants who lodged complaints outside the prescribed time frames.

8. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a wild discretion, rather the existence of special circumstances is a matter of factual enquiry which must be decided accordingly.

9. What is ordinarily contemplated by the words *'exceptional circumstances'* is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different. To be exceptional the circumstances concerned must arise out of, or be incidental to the particular case.

10. It suffices to add in support of the exercise of the discretion vested to the Public Protector by section 6(9) of the Public Protector Act that the huge *public interest* generated by this case both in the country and in diaspora as evidenced by various media reports[1] and *an opportunity to address injustice which may result* if the matter is not investigated, were amongst the determinative factors considered. Furthermore *the availability of supporting evidence or records*

---

1 https://www.iol.co.za/pretoria-news/news/cyril-ramaphosa-denies-involvement-in-crime-after-r60m-stolen-from-his-phala-phala-farm accessed on 06 May 2022;
https://www.sabcnews.com/sabcnews/alleged-theft-at-president-ramaphosas-farm-under-investigation-deputy-minister accessed on 06 May 2022;
https://www.citizen.co.za/news/south-africa/politics/3113330/ive-never-stolen-money-from-our-taxpayers-ramaphosa-on-theft-of-game-farm-millions accessed on 06 May 2022;
https://www.jacarandafm.com/news/news/opposition-parties-demand-ramaphosa-come-clean-phala-phala-millions accessed on 06 May 2022;
https://www.ghanamma.com/za/2022/06/05/watch-video-of-thieves-stealing-millions-at-president-cyril-ramaphosas-farm-phalaphala accessed on 06 May 2022;
https://www.dailysun.co.za/dailysun/news/how-r62m-was-stolen-from-ramaphosas-farm accessed on 06 May 2022;
https://www.heraldlive.co.za/news/2022-06-06-watch-inside-ramaphosas-rare-game-farm-and-previous-controversy accessed on 06 May 2022;
https://www.dailymaverick.co.za/article/2022-06-04-ramaphosas-stolen-millions-the-namibian-connection accessed on 06 May 2022;
https://www.enca.com/news/ramaphosa-farm-theft-watch-udm-calls-probe-stolen-millions and many more media reports.

furnished by Mr Fraser also made it practical to entertain this matter, and lastly, the *seriousness of the allegations involved namely; money laundering, tax evasion, kidnapping and defeating the ends of justice* are all too mammoth to let go without investigating.

11. Section 182(1) of the Constitution provides for the functions of the Public Protector as follows:

12. The Public Protector has the power, as regulated by national legislation- *"(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; (b) to report on that conduct; and (c) to take appropriate remedial action. (2) The Public Protector has the additional powers and functions prescribed by national legislation. (3) The Public Protector may not investigate court decisions".*

13. Section 96 of the Constitution of provides that:

    (1) "Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

    (2) Members of the Cabinet and Deputy Ministers may not—

        (a) Undertake any other paid work;
        (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
        (c) *use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.*"

14. **PLEASE TAKE NOTE** that the national legislation referred above is the EMEA.

15. Section 4 of EMEA reads thus:

    (1) "The Public Protector must investigate, in accordance with section 3, an alleged ***breach of the code of ethics*** *on receipt of a complaint by—*

(a) *the President, a* ***member of the National Assembly*** *or a permanent delegate to the National Council of Provinces, if the complaint is against a* ***Cabinet member*** *or Deputy Minister: or*

(b) *the Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province.*

(2) *The complaint must be in writing and must contain—*

(a) *the* ***name and address of the complainant****;*

(b) ***full particulars of the alleged conduct of the Cabinet member****, Deputy Minister or MEC; and*

(c) *such other information as may be required by the Public Protector or prescribed in the code of ethics.*

16. It is important to note that the Public Protector is ostensibly required in terms of section 3(2) of EMEA to "*submit a report on the alleged breach of the code of ethics within 30 days of receipt of the complaint*".

17. Section 3(4) of EMEA reads: "*When conducting an investigation in terms of this section, the Public Protector has all the powers vested in the Public Protector in terms of the Public Protector Act, 1994.*"

18. **PLEASE NOTE** that section 1(ii) of the EMEA provides that a Cabinet member includes the President. Therefore, the Public Protector can investigate breach of the Code attributable to the President in terms of section 3 of EMEA.

19. It is also important to note that the investigation envisaged in section 4(1) of the EMEA must relate to the violation of the Code, by Cabinet members, Deputy Ministers and members of the Executive Council (MECs).

20. Paragraph 1 of the Code provides that "*member of the Executives means a Cabinet member, a Deputy Minister or a Member of a Provincial Executive Committee, and "member' and 'Executive' have corresponding meanings.*"

21. Paragraph 2.1 of the Code encapsulates the general standards which the members of the Executive must comply with, to the satisfaction of the President or the Premier which ever case is applicable.

22. Further thereto, paragraph 2.3 of the Code prohibits members of the Executive from:

(a) *"wilfully mislead the legislature to which they are accountable;*
(b) *wilfully mislead the President or Premier, as the case may be;*
(c) ***act in a way that is inconsistent with their position**;*
(d) *use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;*
(e) *use information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties;*
(f) ***expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;***
(g) ***receive remuneration for any work or service other than for the performance of their functions as members of the Executive;** or*
(h) *make improper use of any allowance or payment properly made to them, or disregard the administrative rules which apply to such allowances or payments."*

23. In paragraph 11 of the ***Public Protector and Others v President of the Republic of South Africa and Others*** **[2021] ZACC [19]** the court denoted that:

"Section 3 empowers the Public Protector to investigate any breach of the code. The scheme that emerges from the reading of this provision is that the Public Protector's power to investigate is subject to a formal complaint. This suggests that the scope of an investigation is determined by the breach of the code contained in the complaint. It is important to note that section 3 does not authorise the Public Protector to investigate a violation of the Act itself but limits her authority to investigating a breach of the code."

24. **PLEASE ALSO TAKE NOTE THAT** section 7(4)(b) of the Public Protector Act provides that, the Public Protector or any person duly authorised thereto by him or her may request an explanation from any person whom he or she reasonably suspects of having information on a matter being or to be investigated

25. THE COMPLAINT

25.1 In his complaint, the Complainant informed the Public Protector that on 09 February 2020 there was a theft of millions of US dollars, (in excess of four million US dollars) stashed within your premises at Phala Phala farm in Waterberg, Limpopo by criminals who colluded with your domestic worker and that you concealed this crime from the South African Police Service (SAPS) and/or South African Revenue Services ("SARS") and thereafter paid the culprits for their silence. The Complainant further stated the following in his complaint:

"Section 96 of the Constitution demands that members of the Cabinet must act in accordance with a code of ethics set out by national legislation. As the President is the head of the Cabinet, he is bound by the Act and the Code.
In particular the ATM draws your attention to s96(2)(a) of the Constitution which prohibits members of Cabinet from undertaking any other paid work. It is the view of the ATM that anyone with cash amounting to millions of US Dollars can only be involved in trading whose legitimacy needs to be established. Whether the trading is legit or not it constitutes paid work and thus a violation of the said section of the Constitution. Please investigate.

In addition, s96(2)(b) of the Constitution, prohibits Members of Cabinet from acting in a way that is inconsistent with their office or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests. It is not clear whether the information in the public domain that Mr Ramaphosa stopped his business dealings upon assuming his role as Deputy President in the 5th administration is true or not. If indeed the President is no longer actively pursuing his private interests, why then did it become the President's direct responsibility to report the robbery to the Head of the Presidential Protection Unit (PPU)? Also, does the mandate of the Presidential Protection Unit include looking after security matters of the farm of the President? Does the use of the PPU for the President farm security not constitute abuse of state resources? Please investigate.

Should you find other transgressions that may not be within your mandate to investigate, please do not hesitate to refer those to appropriate authorities as you see fit.

If after your investigation you find that the allegations of Mr Fraser are substantiated, we request you to recommend appropriate remedial actions.

Given the seriousness of this complaint, the ATM wishes to remind you that S3(2) of the Executive Members Ethics Act compels you to report on alleged breaches of the Code within 30 days (sic)".

26. Having analysed the complaint, the following issue was identified to inform and focus the investigation:

26.1 Whether the President of the Republic of South Africa violated the Executive Ethics Code and the Constitution in that on 09 February 2020 there was a theft of millions of US dollars, (in excess of four million US dollars) stashed within his premises at Phala Phala farm in Waterberg, Limpopo by criminals who colluded with his domestic worker and that he concealed this crime from the South African Police Service (SAPS) and/or South African Revenue Services ("SARS") and thereafter paid the culprits for their silence.

27. To assist the Public Protector in expediting the finalisation of the investigation on this matter and issue a report on the outcome thereof, you are kindly requested to provide a detailed response to the above allegations mentioned above as well as documentation and/or information listed hereunder which may be in your possession and/or under your control which may have a bearing on the investigation:

27.1 A detailed statement providing an explanation regarding whether your conduct was in contravention of the Code of Ethics, section 96 of the Constitution or any other legal obligation as may be imposed by other relevant legislations;

27.2 Kindly indicate if you have any financial interests in the Phala Phala farm in Waterberg and if yes, whether you have declared such interest to Parliament;

as required by the Code of Ethics;

27.3 You are further requested to indicate the nature and value of any financial interests held by you in the Phala Phala farm in Waterberg as a commercial entity;

27.4 Whether the said premises or the property at Phala Phala farm in Waterberg, Limpopo belong to you or is registered under your name or under the name of any of your company where you own a stake; kindly explain the nature of this business;

27.5 Whether there was any cash to the tune of millions of US dollars, (in excess of four million US dollars) stashed within your premises at Phala Phala farm in Waterberg, Limpopo and if yes, please clarify the following:

(a) The source of such cash,
(b) Any register, receipt or other proof to indicate the source of such cash, the nature of the trade transaction from which it emanated or the purpose of such cash;
(c) The name of the countries and persons you were trading with and who paid the money in this regard;
(d) The permits for such trade at the time and if there is any please attach copy thereof;
(e) Does such permit or regulations allow an auctioneer to accept hard cash on site;
(f) The exact amount in Rands of such other Foreign Currency and proof thereof;
(g) The date(s) on which such cash was received at Phala Phala farm in Waterberg and the name of the person(s) who received it;
(h) The exact manner in which this cash was kept or stored at Phala Phala farm in Waterberg e.g. safe or furniture;
(i) The reason(s) as to why the cash was kept or stored at Phala Phala farm in Waterberg and not at the bank;
(j) How long has that cash been kept on premises;
(k) Was the cash declared to South African Revenue Services (SARS) and if

yes please attach proof;

(l) Does the Phala Phala farm pay the tax as required by SARS for sales or auction of any stock, if yes please provide proof;

(m) Does Phala Phala farm in Waterberg hold any bank account and if yes, please provide the Public Protector with the name of the details of the bank account;

27.6 Whether there was a robbery and/or theft of cash at the Phala Phala farm in Waterberg on 9 February 2020, and if yes,how much was stolen;

27.7 Whether the theft or crime in connection with this cash was reported to the SAPS and if yes, please provide the date on which the matter was reported, the name of the police station and the CAS number. If not, please explain why was the matter was not reported the police station;

27.8 Whether the stolen money was recovered or not, and if yes:

(a) how much was recovered;
(b) when was it recovered;
(c) where was it recovered;
(d) who recovered it;
(e) from whom was it recovered and
(f) was any person(s) interviewed, interrogated, arrested and charged for such crime;

27.9 You are also requested to provide the Public Protector with the name(s) of your domestic worker(s) who were then based on the said farm, including the one(s) that were present on the premises on the day of the alleged robbery/theft;

27.10 Clarity as to whether you gave the Head of Presidential Security Unit, Major-General Wally Rhoode, specific instructions to deal with this matter without reporting it to the police station and if yes, what were those instructions and please explain whether General Rhoode gave you regular updates on his investigation of this matter;

27.11 Any other steps you have taken to ensure that the alleged theft of cash is

thoroughly investigated;

27.12 Any other information you may deem appropriate to bring to the attention of the Public Protector in order to assist in speedy finalisation of this matter.

28. We are at an information gathering stage of the investigation with a view of assessing the information and evidence obtained in the matter and will be approaching you with a request for further assistance with regard to interviews, which we intend conducting as soon as possible, should it be necessary.

29. We will appreciate receipt of your response and the requested information and documentation at your earliest convenience but **not later than fourteen (14) working days** upon receipt of this correspondence to enable the Public Protector to conclude the investigation and issue the report on the outcome thereof as soon as possible.

30. For any further enquiries regarding this matter, kindly contact my Personal Assistant, Mr Ephraim Kabinde at 012 366 7108 or e-mail Ephraimk@pprotect.org or the Investigations Branch of the Public Protector South Africa, Chief Investigator: Mr Vusumuzi Xolani Dlamini, at (012) 366 7244 or email at vusumuzid@pprotect.org

Yours sincerely,

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 07/06/2022

"BM11" "SPP8" 708

PUBLIC PROTECTOR SOUTH AFRICA
Accountability · Integrity · Responsiveness
Justice Good Governance

VISION 2023

taking the services of the Public Protector to the GRASSROOTS

"BM 11"

Public Protector confirms receipt of complaint against the President, clarifies powers under Executive Members' Ethics Act

Public Protector Adv. Busisiwe Mkhwebane wishes to confirm receipt of a complaint lodged in terms of the Executive Members' Ethics Act No. 82 of 1998 (EMEA) against President Cyril Ramaphosa for allegedly breaching the Executive Code of Ethics.

709

The complaint, which relates to President Ramaphosa's alleged conduct in respect of allegations of criminal activities at one of his properties, was received last Friday from Mr Vuyo Zungula, MP, President of the African Transformation Movement (ATM). The ATM is a political party represented in Parliament. The Public Protector gets a lot of unfair criticism when it comes to investigations conducted in terms of the EMEA, with some media organisations and politicians often accusing the office of "targeting" certain Members of the Executive and getting involved in party politics.

Accordingly, the office wishes to draw the attention of the public to the following realities:

a) The Public Protector is the only institution in the country empowered to enforce the Executive Code of Ethics;

b) Under the EMEA, only Members of the Executive and Members of Parliament or Provincial Legislatures can lodge complaints of alleged breaches of the Executive Code of Ethics;

c) On receipt of such a complaint, the Public Protector must investigate and must submit a report on the alleged breach of the Executive Code of Ethics within 30 days of the complaint to the President if the complaint was against a member of Cabinet, a Premier or Deputy Minister;

d) If the complaint was against a Member of the Executive Council (MEC) at the provincial sphere of government, the Public Protector must submit the report to the Premier of the province concerned; and

e) On receipt of the report, the President or Premier must within a reasonable time but no later than 14 days submit a copy, any comments on the content and any action taken or to be taken to the National Assembly/ National Council of Provinces, or the Provincial Legislature.

Due to the silence of the EMEA when it comes to the appropriate recipient of the report in case the complaint is against the President, the Public Protector has previously had to improvise and send it to the Speaker of the National Assembly. The investigation concerning Mr Zungula, MP's complaint has commenced, with allegations letters already written to sources of information, including President Ramaphosa.

End

Published Date: Wednesday, June 8, 2022

Head Office
Private Bag X677
Pretoria
0001

Head Office
175 Lunnon Street
Hillcrest Office Park
0083

Tel: (012) 366 7000
Fax: (012) 362 3473
Toll-free: 0800112040

710

Email:
registration2@pprotect.org

Thursday, 09 June 2022

Dear Madam Public Protector,

RE: SECTION 194 PROCEEDINGS IN THE NATIONAL ASSEMBLY

1. Your submissions to me in relation to my powers in terms of section 194(3)(a) of the Constitution refer.

2. At the outset allow me to thank you for your response to my request for these submissions. Please accept that I have taken account of and carefully considered all the submissions you have made to my office (in your letters of 22 March 2022 and of 26 May 2022).

3. You had asked my office, through our respective attorneys, for an undertaking that I would defer any decision regarding your possible suspension pending a decision on Part B of your High Court application. I am not amenable to giving such an undertaking.

4. I have considered each and every element of your submissions carefully. I have also taken into account the nature of your office, and my own Constitutional obligations, including those applicable to how I ought to make decisions of this nature, and my obligations towards your office and towards the National Assembly.

5. I have decided that you ought to be suspended pending the finalisation of the process taking place in the National Assembly in terms of section 194 of the Constitution, for reasons that I detail below. I make this decision on the assumption and understanding that it will not in any way impede your ability to access information from the Office of the Public Protector that you may require for the purposes of your participation in the section 194 process.

6. The reasons for my decision are as follows:

6.1. As I had indicated in my letter to you of 23 March 2022, I disagree that there is a conflict of interest that prevents me from exercising my powers in terms of section 194(3)(a) of the Constitution at this time.

6.2. You have not demonstrated that any conflict of interest exists. I too am of the view that there is no such conflict of interests.

6.3. No litigation is pending between ourselves and nor does pending litigation alone (without more) constitute a basis for a conflict of interest. I reiterate my view that the mere existence of a pending investigation does not in and of itself create a conflict of interest. This is evident from the fact that there are reports from your office in which allegations had initially been made against me that you concluded without making any findings against me, or which decided on remedial action that I am in agreement with.

6.4. I reiterate that, should you be correct, the Public Protector could immunise herself against the processes envisaged by section 194 of the Constitution by initiating investigations against those organs of state or those individuals she considers to be a threat to her.

6.5. The pending litigation that you refer to is neither relevant nor does it affect my power to make the decision to suspend you.

6.6. I am not and have not been an active party to the matter in the Constitutional Court at present – I abided its decision, no relief was sought or granted against me. Furthermore, the rescission applications have no bearing on my powers under section 194(3)(a) of the Constitution, and I maintain that, at the time that I sent you the letter dated 17 March 2022, proceedings of a committee of the National Assembly for your removal had started. The Section 194 Committee informed me of this.

6.7. Before the High Court you have sought an interdict to stop a number of processes. You have not as yet obtained any such interdict. My courtesy to you in recent weeks is not and never was a change in my position that no such interdict ought to be granted. As will be outlined below my own constitutional obligations enjoin me to make this decision as soon as possible.

6.8. Rule 89 of the National Assembly rules does not apply to me and my acting in terms of powers set out in section 194(3)(a) of the Constitution.

6.9. It is not, with respect, for me to dissect or question the National Assembly in the exercise of its powers. I have in any event considered this issue and I am satisfied that proceedings in terms of section 194 of the Constitution have started.

6.10. In your letter to me of 22 March 2022, you expressly asked me to consider your letter to the Speaker of 18 March 2022, which you had copied to me. At paragraph 8 of your letter to the Speaker you state that any "*refusal by [the Speaker] and/or the [section 194 ad hoc] Committee to accede to the requests made [that the letter of 10 March 2022 sent to the President be withdrawn and the Committee proceedings be halted pending determination of various court proceedings] will, inter alia, trigger the ... risk of suspension.*" I understand from this sentence and the remainder of the letter that you accept that my powers are triggered by the decision of the National Assembly to proceed with the section 194 inquiry.

6.11. The decision of the National Assembly to go ahead with the investigation in terms of section 194 of the Constitution, and the report of the Panel on the basis of which that resolution was taken by the National Assembly, stand. The Committee that the National Assembly has tasked with this work is consistent that its work continues. There is no basis to argue that my taking the decision to suspend you is premature.

6.12. As regards your arguments on the National Assembly rules governing their internal processes in terms of section 194 of the Constitution, they are not for me to judge. Mine is to support the National Assembly in its endeavours and respect the separation of powers.

6.13. The Office of the Public Protector as a constitutionally created institution will and must continue to function without you or any other member of its leadership present. I cannot accept your insistence that its work will come to a halt or be jeopardised by your absence or that none of the work can be delegated or left to the Office, as an institution the Constitutional existence and mandate of which endures, beyond the tenure of its incumbent.

6.14. As you are no doubt aware, in terms of section 2A(7) of the Public Protector Act, whenever the Public Protector is, for any reason, unable to perform the functions of his or her office, or while the appointment of a person to the office of Public Protector is pending, the Deputy Public Protector shall perform such functions. It follows from this that if your office seeks to initiate or pursue any investigation against me (or any other person), your absence from office will not impede that process; the Deputy Public Protector may continue those functions.

6.15. Your submissions in relation to the imminent expiry of your term of office are unclear. The powers in section 194 are not fettered because your term of office is coming to an end in less than 2 years. Furthermore, the time taken between the filing of a complaint and the basis of which the section 194 process was triggered is not relevant to my decision – the proceedings have, in fact, started.

6.16. As for your submission that the motion that may or may not be brought to the National Assembly on your possible impeachment is unlikely to succeed, it is not a factor I should factor into my decision on how best to manage the process leading to this possible vote.

6.17. As for the allegations of judicial capture, I reject them. You are aware of this. You have furthermore not sent me any such complaint nor to my knowledge made any findings in their regard. The mere existence of such a complaint does not prevent me from acting as I do in this letter.

7. The Public Protector is not an employee. I cannot ignore the significance of the office you hold in making this decision. The complaint that the committee is investigating is detailed and complex. It is not, in my view for me to make a judgment on its merits, but to take into account: (a) the importance of your office; (b) the seriousness of the charges; and (c) the prima facie assessment that has been undertaken by the Panel at this stage. In this regard:

7.1. As a point of departure, I must emphasise that the position you hold as Public Protector is a critical one that is indispensable to our constitutional democracy. The integrity of the person who holds such office is fundamental to its operations.

7.2. I have had careful regard to the Report entitled "Preliminary Assessment and Recommendation of the Independent Panel Established in terms of the Rules of the National Assembly on the Removal from Office, in terms of section 194 of the Constitution, of a Holder of Public Office in a State Institution Supporting Constitutional Democracy" dated 24 February 2021 ("the Report") and authored by Justice Nkabinde, Adv Ntsebeza SC and Adv De Waal SC ("the Panel"). I accept that the Report was not to conduct a section 194 inquiry for your removal from office (that is a function that rests with the Section 194 Committee). Instead, its purpose was to conduct and finalise a preliminary assessment to determine whether, on the information made available, there is prima facie evidence showing that you committed misconduct or are

incompetent and to make recommendations to the Speaker. I readily accept that what is contained in the Report may or may not be confirmed in the full investigation. However, pending the outcome of that investigation, I cannot ignore the fact that: (a) the Report made a prima facie assessment; and (b) reached some conclusions which are of a serious nature. Irrespective of whether those conclusions are vindicated at a later stage, based on the information presently available to me, I cannot ignore them. They are serious and bear on whether you should be suspended.

7.3. I therefore had specific regard to and considered the following conclusions of the Panel to be high relevant to the question of your suspension:

7.3.1. As to the charge of incompetence, the Report concluded:

7.3.1.1. That the incidents of your incompetence stretched over a period of at least three years which, in the view of the Panel amounts to "sustained incompetence."

7.3.1.2. The courts have used epithets such as "patently wrong" in respect of some of the mistakes that you made, indicating a very high degree of incompetence.

7.3.1.3. The mistakes cover a wide range of areas and are not restricted to highly specialised legal fields.

7.3.1.4. That there is "substantial information" that constitutes prima facie evidence of incompetence, citing amongst the most glaring as being the prima facie evidence demonstrating that you grossly overreached and exceeded the bounds of your powers in terms of the Constitution and the Public Protector Act by unconstitutionally trenching on Parliament's exclusive authorities when you directed Parliament to initiate a process to amend the Constitution.

7.3.1.5. That you had made repeated errors of the same kind such as the incorrect interpretation of the law and other patent errors and that you lacked the ability and skill to perform the duties of a Public Protector effectively and efficiently.

7.3.2. As to the charge of misconduct, the Report concluded:

7.3.2.1. Each individual instance may well on its own rise to prima facie evidence of intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office, but that that threshold "is certainly met when the instances are assessed in conjunction with one or more others."

7.3.2.2. That there is sufficient information that constitutes prima facie evidence of misconduct which relates, amongst others to your failure to reveal in the SARB Report that you had meetings with the President and the SSA and the failure to honour an agreement with SARB "thereby displaying non compliance with the high standard of professional ethics as required in terms of section 195(1)(a) of the Constitution."

7.3.2.3. The Vrede Dairy Report where, amongst other things, you altered the final report and gave the Premier, who was implicated, the discretion to determine who the wrongdoers were; you removed the referral to the SIU and the AG from the final report and provided "an untruthful explanation to the review court as to why this was done" and that you failed to investigate the third complaint in breach of your constitutional and statutory duties and functions in section 182 of the Constitution and section 7 of the Public Protector Act.

7.4. To the extent that the principles you list at your paragraph 33 are relevant, I refer to what I have already stated and add:

7.4.1.1. The complaint of misconduct or incompetence stems, among others, from multiple judgments of our courts. This alone suffices to make the charges you face very serious.

7.4.1.2. The judgments furthermore referred to the manner in which you conducted your work, and not just the conclusions you reached. I must assume this will require that members of your staff will be among the witnesses the Committee may call. You are their head. Your mere presence in the offices would potentially be intimidating.

7.4.1.3. As for my obligations to provide you with a fair hearing I believe I have fulfilled them by giving you time and the opportunity to make submissions.

7.5. In light of the position you hold there are a number of other factors that I am enjoined to consider:

7.5.1. The integrity of your office – and of every Chapter 9 institution – must be protected. There can be no doubt cast on the work it does, especially when its head is the subject of a section 194 process.

7.5.2. My obligation to do all in my power to safeguard the work of the National Assembly requires that I consider the impact of your suspension in that process. In my view the significance of the work of your office, the great workload you have alluded and the importance of the work of the National Assembly militate in favour of ensuring you can dedicate your full attention to the section 194 process while it is underway.

8. For the above reasons, you are suspended from office as Public Protector, in terms of section 194(3)(a) of the Constitution, as from the date upon which my office will have emailed an electronic copy of this letter to your office. The Presidential Minute recording this decision, as required by section 101(1) of the Constitution, accompanies this letter. You will remain suspended until the section 194 process in the National Assembly has come to its conclusion. During this period, the Deputy Public Protector will perform the functions of your office, as provided for in section 2A(7) of the Public Protector Act 23 of 1994.

9. We are both enjoined to act in the best interests of the country, in compliance with the Constitution, and cognisant of the need to protect all Constitutional institutions in their work. My decision as conveyed herein in in my view the best way to fulfil these obligations.

Sincerely,

Mr Matamela Cyril Ramaphosa
President of the Republic of South Africa

To: Adv. Busisiwe Mkhwebane
Public Protector of South Africa

And to: Adv. Kholeka Gcaleka
Deputy Public Protector of South Africa

And to: Hon. Nosiviwe Mapisa-Nqakula
Speaker of the National Assembly of the Parliament of South Africa

81/172488(Z 19E)

PRESIDENT'S ACT No. 116 of 2022

I hereby in terms of section 194(3)(a) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), suspend Adv. Busisiwe Mkhwebane from the office of the Public Protector pending the finalisation of the proceedings/inquiry initiated by the Committee of the National Assembly established in terms of section 194 of the Constitution.

Adv. Mkhwebane will continue to receive salary, allowances and other benefits that are attached to the position of the Public Protector during the period of her suspension.

Given under my Hand at ....PRETORIA..... on this ....09.... day of .....June....., Two Thousand and Twenty Two.

PRESIDENT

"BM13" 721

Public Protector In Numbers – October 2016 to February 2022

60 962
Total caseload

58 964
Total finalised

17
Reports reviewed and set aside by the court

9
Reports successfully defended in court

2372
Total public education activities

412
Total investigation reports

Clean Audit
2
Back to back clean audits for 2019/20 and 2020/21

PUBLIC PROTECTOR SOUTH AFRICA
Accountability • Integrity • Responsiveness

from October 2016 to February 2022 (March 22 numbers are not in yet). However, please be aware that the 21/22 numbers have yet to be audited.