



**Committee for Section 194 Enquiry
Chairperson: Mr QR Dyantyi, MP**

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5 June 2023

Mr Chaane

By email: 

Dear Sir

Your letter of 5 June 2023 and my decision in respect of way forward

1. In my correspondence dated 2 and 4 June 2023, I indicated that I am considering a request relating to the finalisation of evidence in relation to Part A of your client's written statement. I had invited your client to respond to the proposal by no later than Sunday 4 June at 13h00, which she elected not to do. I then granted a further extension (although not requested to do so) until 14h00 today.
2. The second deadline has come and gone, and I have received no response from your client in respect of the proposed way forward. However, I was informed at approximately 16:40 today that your Ms Seepane, a director of the firm, sent an email indicating that you have taken ill and have been in hospital since this morning and for that reason the firm was still in the process of taking instructions. We wish you a speedy recovery.
3. Ms Seepane's communication was followed by a formal letter stating that no one else can deal with this matter in your absence. I can see no reason why Ms Seepane could not have taken the necessary instructions in the meantime, in your absence, given that from what I understand the rates negotiated between yourselves and Solicitor General for undertaking this work caters not only for you but also for another attorney in your firm. These developments are the reason why my letter now is slightly later than my self-imposed close of business deadline.

4. Nevertheless, I cannot continue to delay matters and therefore after having given the issue much thought, you are informed that the hearings will proceed with questions being put to the PP by the Evidence Leaders and Members in relation to the CR17/BOSASA and SARS Unit matter when we resume on Wednesday, 7 June 2023.
5. Given the delays, the complaints your client has publicly levelled in relation to the Evidence Leaders having addressed the Committee and the need to complete the process as speedily as possible this decision will enable the necessary work of producing a draft report to continue, whilst the Part B written statement is being considered in the Inquiry. This is further elaborated upon below.

Background

6. Before I set out my reasons for same it is useful to recap, for purposes of putting this decision into context, where we were when the Enquiry adjourned on 31 March 2023 and the days that followed:
 - a) The Evidence Leaders and the PP had led all their witnesses (I say this cognisant of the fact that the PP has taken issue with the Committee's refusal to grant her application to subpoena certain persons whose appearance the Committee determined not to be necessary for purposes of considering the Motion).
 - b) The PP submitted her sworn written statement responding to the charges in the motion. This statement was submitted in two parts. Her oral testimony commenced thereafter during which she sought to amplify information contained in the sworn statement.
 - c) The PP had been led for 6 days after which her legal team indicated that they had now completed leading her in terms of her evidence in respect of the first part of her sworn statement, which included the CR17/BOSASA and the so-called SARS "Rogue Unit" matter as Adv Mpofu refers to it. Adv Mpofu had indicated that the PP's oral evidence would traverse CR17/BOSASA; SARS "Rogue Unit", ABSA/CIEX; Vrede Dairy and lastly the so called "HR" and other matters. He specifically indicated that they will not be guided by the sequencing of the motion (which contains 4 charges and numerous sub-charges) but instead will focus on what he termed cases relating to the 'untouchables'. The first two issues were then traversed over the course of the 6 days, together with other matters as evident from the affidavit and transcripts.

- d) The PP's first statement and the evidence led to date as indicated above therefore covered, in the main, her response to the following issues raised in parts of Charge 4: CR 17 / Bosasa; and the SARS Unit evidence. She did deal with other issues, including an extensive 'landscaping' submission by Adv Mpofu, and the issue of the number of reports taken on review, but those were the main issues.
- e) On 29 March 2023, specifically after the conclusion of the PP's oral evidence in Bosasa / CR17, Adv Bawa requested that the Evidence Leaders be permitted to put questions to the PP before Adv Mpofu proceeded to deal with the next topic which would have been the SARS Unit matter. Adv Bawa gave a number of reasons for her request, including that at that point the evidence was still fresh in Members minds; it was voluminous, and it would be a more efficient way of dealing with the evidence. I do not quote her words verbatim, but this was the essence of the motivation in support of the request.
- f) I allowed Adv Mpofu an opportunity to respond to this request. He was opposed to it for all the reasons that are reflected in the transcript of that date. He specifically noted that it was unheard of in any court of law and that it would be cumbersome, unwieldy and unworkable. In this regard he referred me to the Directive which provides that witnesses complete their testimony before being 'cross-examined' or having questions put to them by Members or Evidence Leaders as the case may be. Certainly, until this point this is exactly how the hearings have unfolded. He also raised the issue of the need to do 'landscaping' then more than once as some of the issues would be cross-cutting as this would result in delays. Fortunately, I have his objections on record and was able to factor this in my decision making.
- g) Although I was sympathetic to Adv Bawa's concerns regarding the voluminous nature of the material that the Evidence Leaders needed to deal with and by extension the PP and the Committee, I nevertheless ruled against granting Adv Bawa's request at the time mainly because I was anxious not to interrupt the flow of the PP's evidence. I was, of course, not aware that the Committee would soon thereafter lose a period of more than 2 months due to various obstacles. I point out that the proceedings of this Committee are not akin to a court of law, and further that the PP is not a witness in these proceedings, but rather the person to whom the Inquiry relates and is the subject of the oversight exercise which the Committee is undertaking.
- h) I was more inclined to allow the PP to then proceed to the next topic in her evidence, broadly speaking of the matters relating to Minister Gordhan and the

SARS Unit. Even though I had specifically stated that I will remain open to discussions on the issue of dealing with questions on a per topic basis when Adv Bawa stated that she may repeat her request again after evidence on the next section is led, and had the PP proceeded at that point to her Part B sworn statement immediately, I would probably then have refused such a request again.

- i) However, as it turns out this was not to be. After 31 March 2023 there were then the funding difficulties which resulted in the hearings being forcibly postponed whilst numerous efforts were made to secure additional funds. From 3 April onwards, for a period of 5 days (not six as Adv Mkhwebane has represented publicly and under oath to the Constitutional Court), I instructed the Evidence Leaders to take the Committee through the evidence relating to the CR17 matter Gordhan/SARS related unit, more particularly, as emerging from the court records and the sworn statements that served before the Courts relevant to these matters. This was in line with their mandate which includes empowering the Committee to unpack the evidence. I have already provided the PP with reasons for my decision to proceed in that manner which includes the fact that this course of action found support in clause 5 of the TOR, read together with clause 3.6.4 of the Directives which provides *"3.6.4. Affidavits and/or evidence presented by the Evidence Leaders which form part of court records may be regarded as being sufficient for its purposes as presented, without oral evidence being led in relation thereto."* I received positive feedback from members from different political parties in respect of this presentation. As several Committee members are not legally trained, they found the presentation extremely helpful in assisting them in gaining a better understanding of the court proceedings.
- j) In the meeting of the Committee on 2 June 2023, whilst no direct reference was made to the proposal that had emanated from Adv Bawa, the issue of dealing with evidence already before the Committee was raised again. As indicated, I have considered the matter and have been pondering over it since the meeting as I can see both the arguments for and against in respect of the issue of attending to the evidence in a piecemeal basis.
- k) I have now decided that I will acquiesce to the proposal that the Committee resume with the PP answering questions on matters on which she has already been led on—namely CR17/BOSASSA and the SARS Unit matter, but I am cognisant of what Adv Mpofu had pointed out that it cannot only be the questions from the Evidence Leaders and Members but it would have to be the re-examination as well. I have hence instructed that the directives be amended to take that into.

Reasons for the decision to proceed with questions from Evidence Leaders and Members on evidence already led and other steps as encapsulated in the proposed draft directives for comment

7. My reasons are as follows:

7.1. Firstly, the procedures of this Committee are underpinned by the provisions of the Constitution, the NA Rules, the TORs and the oral hearings, more specifically by the Directives, which I am empowered to issue in terms of Rule 183 of the Assembly. The Assembly Rules provide that directions and procedures may be determined by a Chairperson in respect of any person, including counsel and attorneys, who may appear before a committee. The purpose is, inter alia, to ensure that committees can perform their functions effectively and efficiently. I may amend or issue new directions provided I abide by the principle of fairness. The process has permuted in many forms since commencement as we deal with completely novel questions and challenges that Parliament has no blueprint for and the existing directives are of itself marking a novel approach.

8. Secondly, there are two important principles directing the work of this Committee and which I use as a basis in making any decision, including this one:

- a) the completion of our task which implicitly means at a time which will allow Parliament to make a decision, which is to assess the charges in the motion and report on our findings to the Assembly, within a reasonable timeframe as per the rules and in a diligent manner without delay as per the Constitution. (In this respect I cannot ignore that the PP's term comes to an end in October 2023 and that this process has kept her out of office on suspension for almost a year. The need to finalise the process speedily is thus also in the interest of the PP); and
- b) to conduct our work in a manner that respects the imperative to act fairly towards the PP. As regards fairness this is an issue that cannot be said to be static as it is informed by many factors including time and the principle outlined in a) above and is guided by the exigencies of the situation.

9. At all times throughout this Committee, these two imperatives have needed to be balanced, and the tension between flexibility and rigidity has been a hallmark of the proceedings throughout and especially so after we commenced on 11 July 2022 with oral hearings.

10. In balancing the Constitutional functions of the Committee with the PP's right to fairness, I have had to consider many factors depending on the nature of the decision I or the Committee has had to make. These include time constraints, the principle of cost effectiveness, relevance, prejudice to the PP, my duty to ensure proceedings run smoothly and so on. This task, as the record will show, has not been easy and the Committee has been seized with many stumbling blocks on its journey. All of these, to some degree or another, influence the way proceedings are directed and are to continue within the paradigm of limited time and funds. Having done this balancing exercise, on which I elaborate below, I see no reason to not allow proceedings to continue in the way that I have now instructed in accordance with the draft addendum to the Amended Directive.
11. Thirdly, whilst I initially had reservations in relation to this path, the context within which we find ourselves now has changed substantially. Whilst it may also not be entirely smooth sailing, I am cognisant of the fact that as Chairperson I would be entitled to issue a directive should any stumbling blocks occur that become insurmountable. It has also been so that the PP has taken issue (and in fact lodged an urgent application in the Constitutional Court) with my decision to allow the Evidence Leaders to present on the CR17/BOSASA and SARS Unit matter after she concluded her evidence in respect thereof. In her presentation, Adv Bawa did not weigh in or provide the views of the Evidence Leaders on these matters but did point out where there may have been gaps or contradictions or questions on which clarity would be required. By proceeding with questions from the Evidence Leaders in respect of these matters, the PP will be availed an opportunity sooner rather than later to deal with the matters raised, as the next step, and put anything additional that she may wish to put on record whilst dealing with questions. As it is her legal representatives cannot give evidence on her behalf or answer questions for her. By doing this upfront, there would be no prejudice to her were the new attorneys of choice not familiar with the evidence as they cannot interfere in that questioning process.
12. If after those questions there are issues that have arisen that remain unanswered from the Evidence Leaders' presentation or arising from the questions, Adv Mpofu may then "sweep up" as he would say. In this manner the concerns as raised by the Public Protector would then further be accommodated.
13. Further, Adv Mkhwebane had already given instructions in relation to these issues – and all that remains in relation hereof are the questions from Evidence Leaders and Members. I am mindful that had the Part B statement not existed, the Evidence

Leaders and Members' questions would have automatically followed the completion of the evidence to date, without any further instructions having to be provided. As it would make no sense for me to allow Adv Mpofu an opportunity to spend days presenting to the Committee on these matters in responding to the Evidence Leaders' presentation when he cannot be giving evidence on her behalf or answering the questions which they had indicated may require a response. I say this as you would be aware that as per the Constitutional Court judgment, legal representatives cannot answer questions on the PP's behalf.

14. Fourthly, given that the PP and her legal team have had regard to the content of those presentations, having raised the issue squarely in her application in the Constitutional Court – which could only mean that they had duly considered it, she will be well placed to answer the questions relating to these matters. In fact, in requesting the presentations, I had due regard to the fact that this is not an adversarial process and whereas a prosecutor would not show their hand as it were, the Evidence Leaders do not play such a role, and had no qualms in indicating some of the questions they would want to ask the PP. As such the PP is at an advantage, now being appraised of some of the issues she would need to respond to before the Committee.
15. For the reason above, I cannot see any prejudice to the PP in proceeding in this manner. The fact that this may be 'unheard of' or different is of no consequence, as that is the nature of the entire process. It is unprecedented. I have no wish that the process be regarded as being akin to what occurs in a court of law. In fact, all the role players in this process have acknowledged that it is novel. Whilst the Committee may at times have regard to labour law or criminal law processes it is not bound by same as Parliament determines its own internal proceedings which, as long as they are fair, can be different.
16. Fifthly, the records are voluminous and whilst there may be some cross-cutting, I agree with Adv Mpofu that there is no reason to stick to the sequencing of the motion. In fact, none of the evidence led has been sequentially linked to the charges in the motion anyway. It has always been clear that the motion, by and large, is based on particular reports of the PP and court judgements in relation thereto. I do not agree that by dealing with the evidence of the PP in this manner it will be necessary to repeat the scene setting that has already been done.
17. Sixth, this adjusted order of proceedings will ultimately assist all role players. Members and Evidence Leaders can focus on two specific subjects for their questions and the PP in turn will not be questioned in a haphazard manner on a vast range of matters. In

addition, it will greatly assist the Committee staff whose role includes putting together a draft report for the Committee. The Committee Staff have long voiced to me their concerns about the voluminous workload and the fact that the Committee has sat for far longer than anticipated thereby stretching their capacity thin. This approach will allow them to make some progress on the drafting of a report.

18. Seventh, the Constitutional Court, having regard to the fact that the 194 process is above-all a parliamentary oversight exercise, specifically noted that questions may be put to the PP directly even when she is not under oath. The Apex Court thus clearly envisaged that during the Enquiry proceedings, Members may put questions to her at any stage. Indeed, the Directive had specifically allowed for this but due, amongst others, to it disrupting the flow of other witnesses I first allowed the PP to answer in writing and then took a step further and indicated that questions should be held over to when she is giving evidence. The process I now wish to follow is not out of sync with what the Court had envisaged the process may look like.
19. Lastly, I am cognisant that this process is a means, as pointed out by the Constitutional Court, through which accountability and fidelity to the rule of law can be attained. The hearings have now been continuing intermittently for a period of almost 11 months (and the process itself far longer than that) without the PP having barely answered any substantive questions from Members whose role it is to hold her to account. I cannot in good conscience allow this matter to continue in this manner knowing full well that there are major risks in respect of time and resources which may result in Members being deprived of their right to engage with the PP and put questions to her. The public interest is also better served in this manner as to date we have come under severe criticism for a process in which the PP has not been subjected to oversight questions from the Members who represent the public at large.
20. Moreover, there appears to be criticism in the public domain that the Public Protector is engaged in delaying tactics to avoid having to answer questions. The proposed process may well silence such criticism.

Amended Directives

21. To give effect to the afore-going, I attach hereto draft directives which cater for the format which the proceedings will take going forward. I invite your client to make submissions on these draft directives and will consider same before issuing them.

22. Any comment in this regard should reach me by 19h00 on 6 June 2023. However, please note that the purpose of inviting comments is not to re-open the debate or consideration of how the matter is to proceed but rather to ensure that the directives capture same in a manner that the PP understands, and which caters for anything additional thereto that I may have omitted.

23. I look forward to resuming the hearings on Wednesday, 7 June 2023 and your client is hereby reminded that she is to appear to answer questions from the Evidence Leaders and the Members and that I will strictly administer the times allocated. I trust that she will be accompanied by her legal team as nothing precludes the briefing of counsel and their attendance. Details in respect of the venue will be shared shortly.

Yours faithfully



Mr QR Dyantyi, MP
Chairperson: Committee for Section 194 Enquiry