IN THE SECTION 194 INQUIRY

HELD AT THE NATIONAL ASSEMBLY, CAPE TOWN

In respect of

THE PUBLIC PROTECTOR OF SOUTH AFRICA

THE PUBLIC PROTECTOR'S APPLICATION FOR THE RECUSAL OF MR DYANTYI AND RELATED RELIEF

A: INTRODUCTION AND NATURE OF THE APPLICATION

"***But there will be no justice, there will be no government of the people, by the people, and for the people, as long as the government and its officials permit bribery in any form".***[1]

"The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. There must be and must give the appearance of being an example of impartiality, independence, and integrity"[2]

1. "***Dyantyi is very very angry that he was not made a Minister … He is my guy … My guy!***" These were some of the shocking words of the late Honourable Tina-Joemat-Pettersson before her untimely and mysterious death. May her soul rest in peace.

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[1] John Jay Hooker (1930 - 2016) American attorney and politician

[2] Lord Phillips Chief Justice of Gibralter (2009) UKPC 43

2. It must be stated at the outset that no amount of deflection and media silence must ever be allowed to distract the public from seeking answers regarding the strange events which preceded the death of Ms Joemat-Pettersson who was a member of this section 194 Committee. While it is indeed so that the relevant issues are being duly investigated by other institutions, their relevance to the current issues facing the Committee cannot await the outcomes of those important investigations. They must be confronted now. Part of the deflection comes in the messages spread by the Chairperson of the Committee in the public domain which include the accusation that the Public Protector is "*playing delaying tactics*" when she seeks accountability for the allegations of corruption. This narrative is clearly intended to deflect the public's attention from the serious allegations of bribery, corruption, and extortion in which the Chairperson was directly implicated by the late Ms Tina Joemat-Pettersson. The focus is now taken away from the death of a human being to the unilaterally determined "*deadlines*" which have been "*missed*" by the Public Protector, as if nothing serious has happened. The application has been prepared at the specific instructions of the Public Protector in the usual manner.

3. This is an application for the recusal of Mr Dyantyi as Chairperson of the Impeachment Enquiry against the Public Protector. He must also be removed as a member of the Committee. The grounds for this recusal application are set out in great detail herein below and will be more fully elaborated upon during the proposed oral presentation of the application. They are mainly centred around the many interactions between Mr Skosana and Ms Joemat-Pettersson, as initiated by the latter.

4. On or about 15 March 2023, the Public Protector's husband, Mr Skosana was approached during the sitting of the Committee by one of the Committee members, the late Honourable Tina Joemat-Pettersson ("Ms Joemat-Pettersson") who arranged meetings between herself and the Public Protector's husband.

5. At the proposal of Ms Joemat-Pettersson, they then physically met on two occasions at O.R Tambo International Airport and also exchanged several WhatsApp messages and telephonic discussions.

6. For ease of reference, the WhatsApp messages, which speak for themselves, are attached to this application, and marked "**BMR1**". They were already sent out to the Committee on 6 June 2023. The two meetings lasted for about one hour altogether. On both occasions, Mr Skosana recorded the conversations between himself and Ms Joemat-Pettersson on his phone. The most relevant parts of the audio recordings will be played at the hearing of this application. Those extracts as well as the full recordings, which have already been handed over to the police (the Hawks) will also be made available for Committee Members to listen at their own time if they so wish.

7. In the recordings, Ms Joemat-Pettersson can be heard soliciting a bribe on behalf of herself, Mr Dyantyi and Ms Majodina, the Chief-Whip of the ANC. She can be heard stating unequivocally that each of them must be given an amount of R200 000.00 and stating clearly that they are very much directly involved in the extortion scheme. A copy of the transcripts of the relevant extracts from the audio recordings, is annexed hereto marked "**BMR2**".

8. She gives detailed reasons for their involvement mainly that they were not made Ministers in the most recent Cabinet reshuffle announced in early March 2023. Ms Joemat-Pettersson can be heard saying that "***yes, tell you something, don't even wait for Sunday, don't, if you can, push that because <u>they</u> are with me now, <u>they</u> will want to know tomorrow how far this is***" which clearly supported her version that she had been sent by "***them***" and that "***they***" were all acting together in extorting a bribe from Mr Skosana in return for a favourable outcome of the Section 194 Enquiry. The references to "***they***" or "***them***" in the WhatsApp messages, the audio recordings and the telephonic conversations was clearly a reference to Mr Dyantyi and Ms Majodina.

9. The Committee has no option but to allow for the oral presentation of this application as well as the oral evidence of Mr Skosana, who will put the documentary evidence and the underlying conversations in their proper perspective.

10. Today the Public Protector is expected to subject herself to a Committee chaired by one of the persons fingered by Ms Joemat-Pettersson and to honour "*deadlines*" set by him, despite his alleged involvement.

<u>The conversations between Mr Skosana and Ms Joemat-Pettersson</u>

11. Ten of the key statements articulated by Ms Joemat-Pettersson include the parts where she stated, among other things, that:-

    11.1. there is a predetermined outcome for the Public Protector's impeachment and that the ANC Chief Whip, Ms Pammy Majodina, is the one who instructs the members of the Committee on what to do in the

Committee. A "***project manager***" has apparently been assigned to that "***project***";

11.2. both Mr Dyantyi and Ms Majodina were very angry that they were not made Ministers and were therefore prepared to frustrate the impeachment process by delaying it until the end of my term of office, but upon being paid a large amount of money. She had met with Mr Dyantyi, and he was prepared to extend the enquiry and "***Richard was angry because he did not become a Minister***." Ms Majodina was particularly angry that the President "***chose***" Noxolo Kiviet who had forged a master's degree certificate. They wanted to know "***tomorrow***" if the deal was on or not;

11.3. the PP's legal team (especially Adv Mpofu SC) must raise points with the aim of delaying the process and "***go on another attack***";

11.4. Cyril Ramaphosa was desperate to make an offer, but the PP must resign. We should talk to "***these people***" but have a 2-pronged approach by also pursuing her proposed approach of bribing members of Parliament;

11.5. she had never attended the enquiry physically but did so because PP's sister was there, with whom she was previously very close;

11.6. she had gone to see "***Richard***" because they had both "***worked for Cyril***" at the recent ANC conference held at NASREC. She had "***saved (Cyril) at NASREC***" and stood against "***Nomvula***" and he also did not make her a Minister;

11.7. Mr Skosana must not tell the PP and Advocate Dali Mpofu SC about the proposed deal but keep it "***between the two of us***". She also said that her career would be over because she would have accepted a bribe;

11.8. Richard Dyantyi had changed and was no longer hostile to the Public Protector;

11.9. we needed to demand an audit of the Committee members attendance because sometimes they were sitting in two or three meetings at the same time; and

11.10. Mr Skosana should make "***an offer***". She can also be heard saying: "***How about R200 000***"; "***Pammy is greedy***"; "***The ANC is dead***".

12. However, the most concerning remark from her which stands out was when she observed, correctly, that this process could kill the PP. To that Mr Skosana agreed and added that if it were up to him, the PP would have resigned months ago to avoid the agony but that she had insisted on getting the opportunity to tell her side of the story, which is true. He also expressed frustration at the technicalities and the hanging and undecided court processes. The significant reaction from Ms Joemat-Pettersson was "***But the courts are with Ramaphosa***". She repeated this chilling statement twice.

13. When these recordings of the meetings are considered together with the WhatsApp messages exchanged between the two persons then the issue is put beyond any doubt. What is significant is that Mr Skosana was insisting on a meeting with any one of the other two recipients of the bribe. Ms Joemat-

Pettersson asked "***How must I get them there if they have conditions***" to this Mr Skosana replied, "***I'm ready for the condition***." The discord occurred when Mr Skosana was angered by the rude behaviour of Mr Dyantyi on 4 April 2023 when he ordered that the Public Protector be muted after having agreed that she must take the platform. He threatened to call a press conference and expose the entire scheme. Ms Joemat-Pettersson discouraged him from doing so and warned that this would be "***bad for everyone***". She also said, "***I am very sorry that you want to destroy ME because of your anger***".

14. Notably, Ms Joemat-Pettersson warned Mr Skosana of three very important aspects to this Enquiry, which when considered, have all come to fruition.

14.1. **Firstly**, she stated in March already that there was a plan and an instruction to shorten the proceedings towards "***the desired outcome***" by no longer affording the PP an opportunity to complete my oral evidence but switching to written statements or affidavit and shortening the period for closing arguments. On 9 June 2023, Mr Dyantyi read from an externally prepared document and announced exactly this. The plan was clearly generated outside of the Committee. As she put it "***That's what they told him***."

14.2. **Secondly**, Ms Joemat-Pettersson had indicated that one of the reasons Mr Dyantyi required to be paid a bribe was that he might be "***kicked out***" while he wanted to be the ANC Chair of the Western Cape province. On 7 June 2023 the Sunday Times named 3 contenders for that position. Top of the list was Mr Richard Dyantyi. This was exactly in line with what she had said about the current political ambitions of Mr Dyantyi, whom

she described as a close ally and "***my guy***". Subsequently the Western Cape ANC held its elective conference and Mr Dyantyi was indeed one of the contenders, although he failed to make the threshold number of 25% support from the conference, as soon as his name was called out for nominations, the delegates, who started chanting "***Loadshedding***!" and his name was unfortunately removed from the contest. He had accepted nomination just as Ms Joemat-Pettersson had indicated that he wanted the position.

14.3. Thirdly, Ms Joemat-Pettersson had referred to a conversation she had with the PP's sister in the corridors of Parliament which has also been confirmed. She indeed knew the PP's sister from her previous position as Energy Minister. If necessary, the sister in question will be called to testify as to their relationship and the conversation they had within the precinct of Parliament on 15 March 2023.

15. Based on these and other related facts which were shared with the South African public on 13 June 2023, the Chairperson has been placed in an untenable situation of having potentially has a personal and/or financial interest in the Enquiry. As such this will lead any independent observer or person in the position of the Public Protector, to reasonably suspect that he will be biased or reasonably apprehended to do so. Alternatively, he is in fact biased and personally interested in the outcome of the enquiry. A copy of the media statement released by the Public Protector dealing with the relevant issues is annexed hereto and marked "**BMR3**".

16. Recent developments have shown that the circumstances in which recusal is necessary are far from being exhaustive, hence the category of possible recusal grounds is not closed. It must also be borne in mind that the grounds of recusal which were raised in October 2022 have since been referred to the Supreme Court of Appeal for determination.

17. In addition to the pleaded grounds of recusal, the Public Protector's impression is that the Chairperson has further demonstrated bias by amending the Directives in clear violation of the Rules and the Constitutional Court judgment which guarantees the Public Protector's right to legal representation. The Directives were amended on 9 June 2023 at a time when the Public Protector was not legally represented. On that exact date the mandate of the appointed attorneys of the Public Protector, HM Chaane Attorneys, had been unceremoniously terminated by PPSA (as with the previous attorneys, Seanego Attorneys) and the State Attorney explained to the Committee why they could not represent the PP due to a perceived and known conflict of interests.

18. To put the matter beyond doubt, the Public Protector put it on record on 9 June 2023 that she rejected the new unilateral and illegal imposed procedure.

19. Furthermore, the Directives have been amended to deny the Public Protector the right to appear personally and in public to give oral evidence. This amendment places the Enquiry in contravention of Section 34 of the Constitution which guarantees a fair hearing, read with the Rules of the National Assembly.

20. Access to courts/tribunals that function fairly and in public is a basic right. Section 34 provides the following:

> ***"34 access to courts***
>
> *everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate* ***another independent and impartial tribunal or forum****."*

21. No person would appear before any tribunal presided over by someone in respect of whom there is prima facie evidence of soliciting a bribe, whether directly or indirectly via another person. Once tangible allegations of bribery surface against a head of a tribunal, who is enjoined to act fairly, such a person should do the honourable and recuse him/herself.

22. These allegations not only taint the section 194 proceedings of which Mr Dyantyi is a Chairperson, or the Parliament of the Republic of South Africa but make a mockery of the democracy which countless South African, attained through their sweat, blood, and years of incarceration. The very same democracy that is being abused by those who never sacrificed even a strand of hair for. By not supporting the public calls for the Chairperson's recusal, the PP will be betraying the spirits of those fallen heroes and "*sheroes*" of our struggle. It is remarkable that even conservative state praise-singers like the Sunday times newspaper have called for Mr Dyantyi to "*consider his position*" and do the right thing.

23. Those who drafted the Rules of the National Assembly had foresight of the fact that greed, bias, and all sorts of malfeasance are possible in the conduct of an inquiry of this nature, hence RULE 129AD, which states as follows:-

"***The Committee must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe***."

24. It is unfortunate, that the very first Section 194 Enquiry to be held since the "*dawn*" of "democracy" has been entrusted to members who find that amongst them are potential wolves dressed in sheepskins. Greed, bias, rudeness is the order of day. Anarchy is the golden thread that runs through the Enquiry. The Committee unilaterally violates its very own directives and the Constitution at every turn without remorse and PP is not given a chance to participate or to have a say regarding the changes. The rules are changed midstream and while she is still on the stand giving her oral testimony like all the other 25 witnesses.

25. In this matter section 34 of the Constitution has also been violated in the following ways:-

25.1. by the arbitrary and unilateral imposition of a R4 million limit on the legal representation of the Public Protector without any rational explanation as to how that amount was arrived at. This clearly amounts to an irrational limitation of the right to <u>full</u> legal representation as confirmed by the Constitutional Court; and

25.2. by refusing to grant the reasonable request of the new attorneys to peruse the record so as to be in a position to discharge their professional duties; and

25.3. by illogically imposing the State Attorney in addition to the chosen attorneys of the Public Protector and in spite of a disqualifying conflict of

interests on the part of the State Attorney. The Committee has a duty to avoid the threatened withdrawal of HM Chaane Attorneys unless they are treated with due respect and the recognition of their obligations to the client.

26. Turning to the business of the day, the Chairperson as well as the Committee need to be reminded that in terms of clause 10.2 of the Directives issued by the Chairperson of the Section 194(1) Committee dated 14 July 2022 which states that:

"***Any person wishing to make an application to the Committee, which is not otherwise provided for in this Procedure, or in the Assembly Rules, must do so in writing to the Chairperson***."

27. This rule must be read together with the established procedure and practice that the Chairperson gives directives as to when the oral presentation of such an interlocutory application must be presented to the Committee. This is particularly necessary in a case where the application is for the recusal of the Chairperson. He cannot lawfully and legitimately take the decision alone without the Committee.

28. In this particular case, it has already been communicated that due to the earlier public utterances of the Chairperson in dubbing the WhatsApp evidence as "***hearsay***" and the subsequent introduction of the audio recordings, Mr Skosana has agreed to give sworn direct evidence to the Committee regarding all his interactions with Ms Joemat-Pettersson.

29. The Public Protector together with the ATM, UDM, EFF and to some extent The Good Party have asked the Chairperson, to voluntarily recuse himself to no avail. He unreasonably insisted on a written application. This is then the application.

30. Furthermore, the Committee has been repeatedly warned on behalf of the PP since the start of the enquiry proceedings on 11 July 2022 and more specifically on 26 August 2022 and 13 September 2022, that the process was inherently unfair and biased. It also became clear that the majority of the members, made up of the ANC and the DA came with a predetermined outcome. This is now corroborated by the evidence that the enquiry is being remotely controlled by the ANC Chief Whip, Ms Majodina who is also one of the alleged extortionists.

31. It is in view of the above and more specifically the warnings that the Chairperson failed and continue to fail to heed that PP make this application that the Chairperson recuses himself from both the chairpersonship and membership of the Committee.

32. On 9 June 2023, the Public Protector addressed a letter to the Chairperson demanding that he voluntarily recuses himself with a deadline to respond on 12 June 2023. A copy of the aforesaid letter is attached hereto as "**BMR4**".

33. On 12 June 2023, the Chairperson addressed a letter to the Public Protector indicating that he will not recuse himself without a written application. A copy of the aforesaid letter is attached hereto as "**BMR5**".

34. Since then, the call has been repeated in further correspondence, all to no avail.

35. The Public Protector therefore was left with no choice but to either bring this application or be subject to the illegal "*deadlines*" for an enquiry presided over by the alleged solicitor of a bribe related to the very same enquiry. This is an absolute absurdity.

B: <u>THE PREVIOUS APPLICATION FOR RECUSAL</u>

36. It would be appropriate to mention that this is not the first recusal application that was made against Mr Dyantyi. On 21 September 2022 the Public Protector applied for the recusal of the Chairperson citing 10 grounds for such recusal. She also simultaneously applied for the recusal of Mr Mileham who is married to the complainant. A written application such as this one, was duly accompanied by the oral presentation thereof before the Committee. The ruling only came three weeks later and both Mr Dyantyi and Mr Mileham refused to recuse themselves.

37. On 13 March 2023, the Full Court of Western Cape High Court heard the application to review the Chairperson's decision refusing to recuse himself. Unfortunately, the Full Court improperly wrongly shied away from dealing with the merits of the review application which resulted in the dismissal of the review application on a technical point of *in media res*, i.e., on those facts, the application should be brought at the end of the enquiry.

38. Consequently, on 30 May 2023 an application for leave to appeal against the whole judgement and order of the Full Court was launched. On 1 June 2023, the Full court granted leave to appeal stating that the court may have erred in arriving at the decision to the dismiss the said review application without dealing with the grounds of recusal raised by the Public Protector. A copy of the written

Judgment granting leave to the Supreme Court is attached hereto as Annexure "**BMR6**".

39. This clearly demonstrate that the perception of bias by the Chairperson developed over a period of time, and it is not only one single incident that finally led to the current application, albeit on different grounds. His alleged involvement in bribery, corruption, and extortion and even potentially the likely murder of Ms Joemat-Pettersson cannot be brushed aside. It forms part of a long pattern of bias. The present matter is presently under serious and ongoing investigations by:-

39.1. The Hawks;

39.2. The Parliamentary Joint Committee on Ethics; and

39.3. The inquest into the suspicious death of Ms Joemat-Pettersson.

40. It is likely that any one of these investigations will result in an adverse finding against Mr Dyantyi. It is equally likely that he may be exonerated. Either way, the mere possibility of a negative finding on such serious allegations is sufficient ground for his present recusal, pending such outcomes. That is the heart of this application. It does not depend on the outcome of the investigations, but it brought in relation to what ought properly to happen pending these serious investigations.

41. In the previous application, a great deal of time was spent enlightening and explaining to the Chairperson and the Committee about the meaning of fairness in the context of the present enquiry. It is common cause that the Rules prescribe that a fair process must be followed.

B1: <u>The meaning of fairness</u>

42. It is not easy to define fairness and unfairness. It is however very easy to identify or perceive unfairness and injustice when it is directed at one.

43. The legal standard of fairness derives from the well-established two rules of natural justice. They are:-

43.1. the *audi alteram partem* rule which simply means the other side must be heard; and

43.2. *nemo iudex* in *rem sua* also known as the rule against bias, which simply means that no person can be a judge in his or her own cause. It is also referred to as the conflict-of-interest rule which is applied in many situations involving the exercise of power and decision-making conduct. Finally, it is also the rule which prohibits predetermined or prejudiced outcomes in respect of processes in which fairness is an inherent prerequisite.

44. There is always an irresistible overlap between the two rules of natural justice. This present application is no exception. However, in this application major reliance will be placed more on the *nemo iudex* rule. Other issues raised herein, such as the denial of effective legal representation, are more related to the *audi alteram partem* rule.

45. In addition to the two rules of natural justice, the Public Protector will also place reliance on the doctrine of legitimate expectations in terms of which she is legally entitled to expect fairness from the Chairperson, the Committee of which they are members. The basic features and requirements of this rule will be

further explained during the oral hearing. In short it refers to a situation such as the present case where the applicable rules or previous conduct or promises to create a legitimate expectation that fairness will be afforded. A failure to do so is then in breach of the doctrine as well as the relevant duties of the public body in question.

46. For example, based on the manner in which all previous interlocutory applications have been handled, the Public Protector has a legitimate expectation that she will be granted the opportunity to present this application orally before the Committee. More so because of the nature of the application, which was previously, and correctly, subjected to a decision of the Committee.

C: THE SEVEN GROUNDS OF RECUSAL

47. We will now deal with the seven grounds on which this application rests. At the risk of stating the obvious, the recusal application is not premised on the truthfulness of what Ms Joemat-Pettersson said to Mr Skosana. That is still to be determined by the ongoing investigations. The application is based on the mere fact that the meetings took place at all and in those meetings and conversations, statements implicating the Chairperson were made by a member of the Committee.

C1: First Ground: ALLEGATIONS OF BRIBERY, CORRUPTION AND/OR EXTORTION AGAINST THE PRESIDING OFFICER

"***If bribery is good enough for Congress, it's good enough for me.***"[3]

[3] Eddie Griffin

48. As a matter of fact, the allegations of bribery which form the basis of this application are contained in a sworn statement of Mr Skosana, the Public Protector's husband, which he made to the Hawks, which statement forms the basis of police investigations against, among others Mr Dyantyi.

49. As appears in the letter dated 4 July 2023 addressed to Chaane attorneys, the Public Protector's attorneys of record, Mr Dyantyi has already incorrectly rejected Mr Skosana's version as "*hearsay*" evidence. A copy of such letter is attached hereto as "**BMR7**".

50. It is not for the accused Chairperson to make such a determination on the issues of admissibility of evidence, in particular hearsay evidence. This application does not seek a determination on the issues of admissibility of evidence, that is the duty of the criminal court which will hear this matter in due course. The only case that the Public Protector seeks to make, is that on prima facie basis, based on Mr Skosana's sworn statement, Mr Dyantyi and Ms Majodina have a case to answer, which led the Hawks and the Parliamentary Ethics Committee to investigate. It is not necessary to find them "*guilty*" at this stage.

51. The spurious defence of "*hearsay*" raised by Mr Dyantyi also betrays his lack of understanding of the hearsay rule of evidence. More importantly he clearly does not understand the purpose of the rule, its applicability, and the well-established exceptions to the rule. The hearsay rule is applicable to criminal or civil proceedings, which these are not. Even if it also applied to parliamentary proceedings, the present situation would fall under the statutory exceptions which allow for the admissibility of the evidence here.

52. The general hearsay rule as defined in Section 3 of the Law of Evidence Amendment Act of 1998 is:

"*Subject to the provisions of any other law, hearsay evidence may not be admitted as evidence at criminal or civil proceedings, unless:-*

(a) each party against whom the evidence is to be adduced agrees to the admissibility thereof;

(b) the person upon whose credibility the probative value of such evidence depends, him or herself testifies at such proceedings; or

(c) *the court, having regard to (seven listed factors, including, the nature of the proceedings and the purpose for which the evidence is tendered) is of the opinion that such evidence should be admitted in the interests of justice*."

53. It will be explained that:-

53.1. Mr Dyantyi cannot be a judge in his own case;

53.2. the nature of the proceedings being inquisitorial, the ordinary rules of evidence do not apply;

53.3. the purpose for which the evidence is tendered favours its admission; and/or

53.4. in any event, the oral evidence of Mr Skosana will constitute direct evidence depending on his own credibility.

54. Accordingly, the WhatsApp and audio evidence is not hit by the hearsay rule. The defence raised by Mr Dyantyi even before the recordings were introduced,

cannot be taken into account in the determination of this application. This aspect will be more fully elaborated during the oral presentation of this application.

55. Furthermore, the Public Protector reasonably perceives bias against the Chairperson on the basis of these allegations, which constitutes a test for bias. For the sake of completeness, there is merit in these allegations in that the late Ms Joemat-Pettersson's assertions are now corroborated by what is currently playing out in the Enquiry as stated herein above. Everything she said is currently happening now. She foretold that the PP's oral hearing would be abandoned in favour of written questions, which has happened 3 months later and when she had already died.

56. As a result, it is only fair that Mr Dyantyi recuses himself as a Chairperson of the Section 194 Enquiry, in order to preserve dignity and integrity to the Section 194 Enquiry. A replacement Chairperson must be appointed by the Speaker as soon as possible. No further steps can be legally taken before that happens.

57. Moreover, and even if the hearsay rule applied against Ms Joemat-Pettersson or the Public Protector, which is denied, it cannot possibly apply against Mr Skosana who was a direct participant in the conversations. Hence, he is available to testify.

C2: <u>Second Ground: THE CHAIRPERSON IS A SUBJECT OF A PENDING INVESTIGATIONS BY PARLIAMENT'S ETHICS COMMITEE</u>

58. In May and upon learning later about all these shocking revelations from Mr Skosana, the PP advised him to report the matter to the police. On 22 May

2023, the Public Protector proceeded to write a confidential letter to the Speaker of Parliament, requesting an urgent meeting so that she could blow the whistle on these large-scale corruption allegations within the institution which she heads as the de facto CEO. A copy of the aforesaid letter is attached herein as **"BMR8".** Unfortunately, on 24 May 2023 the Speaker completely declined to meet the PP and referred her to the Ethics Committee instead. A copy of her letter refusing to meet with the Public Protector is annexed hereto as **"BMR9".** On 28 May 2023, the Speaker, through the Parliamentary spokesperson, issued a media statement confirming that the Speaker refused to meet with the Public Protector and referred her to the Ethics Committee. A copy of the media statement is annexed hereto as **"BMR10**".

59. On 5 June 2023 the Public Protector lodged a complaint against the Chairperson and the two Members of Parliament named above in the extortion, bribery, and corruption allegations with the Ethics Committee. A copy of the complaint is attached hereto as **"BMR11".**

60. On 7 June 2023 the Public Protector received a letter from the Ethics Committee informing her that they have registered the complaint against the Chairperson, Ms Majodina and the late Ms Joemat-Pettersson and that they are investigating the matter. As a result, the Chairperson may not continue to be a member of the Section 194 Committee, let alone be the Chairperson when he is the subject of investigations by the Ethics Committee, which investigations was triggered by the Public Protector.

61. The decision by the Ethics Committee to investigate this matter is indicative of the fact that there is *prima facie* merit in the allegations of bribery. Whether Mr

Dyantyi is guilty or not is not relevant at this point, the point being made is that until Mr Dyantyi is cleared of these allegations, the Public Protector reasonably apprehends bias on his part. It is this simple fact that Mr Dyantyi misses the most, probably deliberately so or out of ignorance.

62. It is impossible that Mr Dyantyi will bring an objective and impartial mind to bear under the circumstances. On this ground alone, the Chairperson should recuse himself.

63. He also falls foul of the most basic rule of the rule against bias, namely that: "***Justice must not only be done but it must be seen to be done***".

C3: <u>Third Ground: CHAIRPERSON IS A SUBJECT OF A PENDING POLICE INVESTIGATIONS</u>

64. Mr Skosana laid charges with the South African Police Service against the Chairperson, Ms Majodina and the late Ms Joemat-Pettersson. The Police have since opened a case in which the Chairperson is a subject of the investigations. The case has been opened under case number ORTIA CAS 90/5/2023. A copy of Mr Skosana's sworn statement to the Hawks is attached hereto as "**BMR12".**

65. The Head of Hawks has confirmed in public that an order has been sought and obtained from a Judge to allow the police to obtain the telephone records of Ms Joemat-Pettersson and her alleged partners-in-crime, including Mr Dyantyi. It is most likely that Mr Dyantyi has or will be required to give a statement to the Hawks as a suspect.

66. As an accused person, the Chairperson cannot continue to be a member of the Section 194 Committee, let alone be the Chair as this will bring the credibility of the Committee into scrutiny by members of the public. These proceedings have to be handled in a manner that outwardly depicts fairness and integrity. The Chairperson's alleged conduct has not only brought the section 194 Committee into disrepute but the Parliament of the Republic of South Africa.

67. The Public Protector will not receive a fair hearing from an implicated/accused person or suspect who is being investigated by the police at the instance of her husband. This ought to be fairly obvious.

C4: <u>Fourth Ground: DISPARAGING MEDIA STATEMENTS AND INTERVIEWS</u>

68. It is unfortunate that the Chairperson has complicated the whole issue by making, false and deliberately one-sided biased statements in the media about the process and about the Public Protector which indicates that he is pursuing a pre-determined outcome. The Chairperson is no longer fit to preside over the Committee.

69. On 28 June 2023 in an interview with Athi Mtongana on Newzroom Africa, the Chairperson said that the "*claims by the Public Protector's perceived unfair treatment by the Committee probing her fitness to hold office is self-inflicted*" he said that the PP has been given a chance to respond by the 19th of June 2023 whether she will give oral or written responses and she chose not to. The Chairperson said the above knowing very well that the PP had no legal team to represent her and advise her accordingly. The Chairperson's statement is misleading to the members of the public.

70. On 29 May 2023 the Chairperson is quoted in Newzroom Africa saying "*No amount of shenanigans will deter us from executing the Parliamentary work that we have been assigned to do*". He was referring to the bribery allegations. The Chairperson's statement is unfortunate.

71. The Chairperson's public insistence that the refusal by the attorneys to brief counsel on the merits of the enquiry before familiarising themselves with record, must be blamed on the Public Protector is malicious. The attorneys have told him specifically that it is them, and **not** the Public Protector who are not prepared, for professional reasons, to abandon their duties to acquaint themselves with the record.

72. The examples of public statements and interviews given by the Chairperson even after the revelations made by Ms Joemat-Pettersson and her death, are too many to refer to here. Suffice to state that he has been on a concerted media campaign to cast the Public Protector in a false and bad light in the eyes of the public. This is highly inappropriate in the circumstances of this case.

73. It is improper for the Chairperson, who is supposed to be a neutral arbiter, to position himself as the opponent and critic of the Public Protector while the enquiry is underway. This is not done even under normal circumstances, let alone in a situation where the presiding officer is already accused of involvement in corruption regarding the very hearing he is chairing. It should be obvious that the Committee ought to find a different spokesperson without any personal interest to protect.

74. On the basis of his false and accusatory statements made against the Public Protector alone, Mr Dyantyi ought to recuse himself.

C5: <u>Fifth Ground: COMMITTEE AND/OR CHAIRPERSON IS PROCEEDING DESPITE PUBLIC PROTECTOR'S LACK OF LEGAL REPRESENTATION.</u>

75. In May 2023, my erstwhile attorneys of record, Seanego attorneys withdrew as attorneys of record representing me at the Section 194 Enquiry and as a result, my preferred choice of Chaane attorneys were appointed as my new attorneys of record.

76. On 2 June 2023, the Chairperson addressed a letter to Chaane attorneys titled "*Resumption of the Section 194 Enquiry*". In this letter the Chairperson attached a draft program for the continuation of the Enquiry. A copy of the aforesaid letter is attached hereto marked **"BMR13".**

77. On 4 June 2023, Chaane attorneys addressed a letter to the Secretary of the Section 194 Committee stating that:

> *"4 …On 2 June 2023, our client and us had to learn through the media that her inquiry has been scheduled to continue on 5 June 2023. It was only after the announcement was made to the media that we were notified that this inquiry is set down for 5 June 2023. This conduct is not fair to us and to our client.*
>
> *5. Kindly note that due to prior commitments we are not available for 5 June 2023. We are also not ready to proceed to represent our client fully on five June 2023 for the following reasons-*

5.1 Our firm was only given access to Dropbox by yourselves on 1 June 2023, which has voluminous documents which we are required to consider to adequately advise our client, instruct council and prepare for the inquiry;

5.2 We have not fully considered the documents on Dropbox for us to adequately advise and represent our client in this matter;

5.3 we were informed of the set down of this inquiry only on the afternoon of 2 June 2023. We believe that this is not sufficient time to allow us and our client to prepare for the appearance of 5 June 2023.

6. furthermore, counsel have not been and cannot be formally briefed without at the minimum: -

6.1 the attorneys being in a position to understand the scope of their work and to give instructions to Counsel.

6.2 clarification on the R4M cap and payment terms.

6.3. the client agreeing or committing to foot the bill once the R4M dries up.

6.4 agreement on the duration of the remainder of the inquiry against the dictates of fairness and the Terms of reference, Directives as well as the applicable Rules.

7. Counsel's briefs will only be sent out once all of the above issues have been addressed.

9. In light of what we have stated above we respectfully request that the inquiry scheduled for Monday, 5 June 2023 be postponed indefinitely until such time as the issues raised above have been addressed."

78. A copy of the aforesaid letter is attached hereto as **"BMR14".**

79. On 4 June 2023, the Chairperson respondent to the aforesaid letter accusing the Public Protector of either not giving necessary the instructions to brief Counsel or has instructed me not to brief Counsel. The Chairperson also indicated that Chaane Attorneys "*misunderstood*" their role as attorneys of record. The letter states.

> "*Indeed a briefing of the very Counsel you have not been instructed to brief would have readily been able to provide you with a briefing of the inquiry proceeding given that they have been steeped in this matter and various court applications and legal proceedings related to it as indicated by the State Attorney… in your letter of appointment you are a "correspondent attorney" you serve as the necessary conduit for the appointment of your client's legal representative of choice who is Advocate Mpofu SC".*

80. In the aforesaid letter, the Chairperson indicates that the Counsel should be the one to brief the attorneys and not the other way round. He specifically says that Chaane attorneys have "*no right*" at all to familiarize themselves with the matter. He then says that he is giving Chaane attorneys a reprieve until 07 June 2023 to proceed. A copy of the aforesaid letter is attached hereto as "**BMR15".**

81. On 5 June 2023 the Ms Seepane of Chaane attorneys addressed a letter to the Secretariat of the Committee informing them that Mr Chaane has taken ill and has been admitted to hospital and as such, no other person in the firm can take over the matter since the matter is fairly new and that no one can be able to

attend the Enquiry. A copy of the aforesaid letter is attached hereto as **"BMR16".**

82. On 5 June 2023, the Chairperson responded to the aforesaid letter addressed another letter to Chaane Attorneys. In this letter, the Chairperson states:

> *"(k) I have now decided that I will acquiesce to the proposal that the Committee resume with the PP answering questions on matters which she has already been led on, namely CR17/BOSASA and the SARS Unit matter."*

83. In this letter the Chairperson also attached the draft amended Directives which were compiled without the input from the PP and ignorant of the fact that she does not have full legal representation. The Chairperson also improperly insulted Chaane attorneys by calling them "Johnny *come lately attorneys*." A copy of the aforesaid letter is attached hereto as **"BMR17".**

84. On 6 June 2023, the PP addressed a letter to the Chairperson reiterating that Mr Chaane has been hospitalized. She further impressed upon the Chairperson that the impediments remain which are a hindrance to briefing Counsel and that they need to be sorted out before such could happen. PP also indicated that the procedure that has now been adopted by the PP is the same procedure that the late Ms Joemat-Pettersson had alluded to before her death. She further indicated that the delays were caused by the office of the PPSA who terminated her legal team by their letter of 01 March 2023. A copy of the aforesaid letter is attached hereto as "**BMR18**". A copy of termination of Chaane attorneys mandate is attached as **"BMR19".**

85. The PP attended the Enquiry virtually on 7 June 2023 and 10:00. Lo and behold, at 10:10 The PP received a letter from the State Attorney indicating that Chaane attorney's mandate has been terminated by PPSA. The mandate was terminated when Mr Chaane was still lying in hospital. A note from his doctor confirming his condition was furnished to the Chairperson. In spite of this and in subsequent correspondence, the Chairperson has continued to insult Mr Chaane by casting aspersions on the issue of the illness, suggesting that it was feigned. To call this insensitive would be an understatement.

86. Mr Chowe of the State Attorney attended the proceeding and confirmed that indeed no brief has been issued to Counsel due to a perceived conflict of interests on the part of the Public Protector and that he was unable to proceed. He impressed upon the chairperson that the PP had not done anything wrong but as a matter of professional ethics, he was not able to proceed.

87. On 8 June 2023, the PP received a letter from the State Attorney indicating that they had been appointed to be her attorneys of record. A copy of the aforesaid letter is attached hereto as **"BMR20".**

88. On 8 June 2023, the PP addressed a letter to the State Attorney indicating that she was surprised at the turn of events and that the Solicitor General had previously and independently informed the Committee that there is a conflict of interest. A copy of the aforesaid letter is attached hereto as **"BMR21".**

89. On 12 June 2023 Mr Chaane received a message from Mr. Chowe inquiring whether he was available to act on behalf of the PP. Mr Chaane indicated his availability.

90. On 13 June 2023, the Chairperson addressed a long letter to the PP titled Resumption of proceedings. In this letter the Chairperson indicated that the Enquiry is proceeding, and he attached an outline of how the matter would proceed together with deadlines for each step to be taken. He stated that the members and the Evidence Leaders would forward their questions to the PP which should be responded to by the 6 July 2023 despite the fact that the issue of legal representation had not yet been resolved and that counsel had not been briefed. Indeed approximately 1000 questions have been sent to the PP and she was given approximately one week to answer. This is in line with what the late Ms Joemat-Pettersson had warned about.

91. HM Chaane attorneys were unilaterally and inexplicably re-appointed on 14 June 2024 as per a letter addressed to the PP by the State Attorney as well as the letter addressed to Mr Chaane on the same date. A copy of the aforesaid letter is attached hereto as **"BMR22".**

92. Ironically, it was the Chairperson himself who first proposed that HM Chaane attorneys should rather enlist the assistance of counsel, who is familiar with the proceedings, in conducting the process of familiarization. This was indeed a sensible proposal hence it was readily adopted by the attorneys. However, and as soon as it was being implemented, the Chairperson turned around and refused for that process to happen. Instead, he stuck to his illogical and unrealistic "*deadlines*" without allowing for the familiarization process which he had recommended. To call such conduct irrational would be a gross understatement.

93. The above additional and related conduct constitutes a violation of the PP's right to legal representation and the Chairperson should recuse himself.

94. The Chairperson has also acted outside of the scope of his mandate by centrally involving himself in the issue of the arbitrary R4 million limit illegally imposed by PPSA to such an extent as to sacrifice the rules of fairness and the requirements of the Constitution and the Rules of the National Assembly.

95. More importantly, the Chairperson's irrational misrepresentations of fact and his refusal to accede to the reasonable requests of the attorneys for time are in themselves grounds for his disqualification.

C6: <u>Sixth Ground: THE ROLE OF MS JOEMAT-PETTERSSON AS A MEMBER OF THE COMMITTEE</u>

96. It needs to be highlighted that, irrespective of the allegations directed at Mr Dyantyi himself, the mere fact that they emanate from Ms Joemat-Pettersson who herself was a member of the section 194 Committee until her untimely and mysterious death, should be sufficient cause for concern and aggravation for the Committee.

97. The situation can be likened to one of a panel of judges or other impartial adjudicators, approaching one of the parties with a request for a bribe for himself or herself and/or the presiding officer. It should be obvious that the party involved could never reasonably be expected to continue to perceive such a panel or any of the implicated members to be capable of bringing a neutral mind to bear on the proceedings.

98. It is therefore submitted that the revelations made by Ms Joemat-Pettersson plus the mere fact that she initiated inappropriate meetings with the husband of the Public Protector while the proceedings are in progress, being a member of the decision-making panel are sufficient grounds for the disqualification of the panel and/or its Chairperson.

99. In actual fact, every adverse decision which was previously made by the Committee with the participation of Ms Joemat-Pettersson cannot possibly withstand legal scrutiny and must be discarded.

100. It is also crucial to determine the truthfulness of her allegations regarding, for example:-

100.1. the role played by Ms Majodina in remotely controlling the enquiry;

100.2. the absence of a quorum at crucial stages of the hearing; and

100.3. the existence of a predetermined outcome.

C7: <u>Seventh Ground: THE ROLE OF MS MAJODINA AS THE ANC CHIEF WHIP</u>

101. As already pointed out, the alleged role of Ms Majodina, if true, will serve to nullify the proceedings.

102. More importantly, and linked to the 6th ground above, it needs to be ascertained by this Committee whether, and if so, how and when, Ms Joemat-Pettersson will be replaced as a member of the 36-member Committee. If not, why not? This raises the question whether the Committee will still be properly constituted if it is reduced to 34 or 35 members, either due to the death or recusal of a member.

103. The most disturbing feature of this matter in that regard is that, as we understand it, Ms Majodina as the ANC Chief Whip will be centrally involved in the process of such replacement. The disastrous impact of that on the entire process is plain to discern.

104. The remaining ANC members of the Committee may have to make public declarations as to the allegations of their external manipulation and influence by Ms Majodina.

105. In this regard and in respect of all the implicated persons, their alleged conduct must also be viewed against their constitutional duties as public representatives as well as their oath of office, both of which have been seriously breached.

D: THE KEY APPLICABLE AND RELEVANT PRINCIPLES

106. In the previous application against the Chairperson, the relevant applicable and relevant principles were referred to which are incorporate herein. These are well-established principles which are applicable to recusal applications and on which reliance will be placed to support the recusal application in this and any other appropriate forum.

107. Bias can be classified into actual bias and a reasonable apprehension of bias on the part of the affected party, in this case the Public Protector. Although it sometimes happens that actual bias is proved, the majority of cases involve a reasonable suspicion or apprehension of bias, which has the same legal effect as actual bias. Accordingly, this is a classical case in which there should not even have been any need for a recusal application. The Chairperson ought

properly to have responded positively to the calls for his voluntary recusal. His failure to do so is in itself a disqualifying factor.

108. Recusal applications must not be brought lightly. While it is legally permissible for legal practitioners to bring and/or to threaten to bring recusal applications, they must do so, as in the present case, as a matter of last resort and only once the situation truly becomes untenable. In the very recent case of **Bennett v the State**[4] the following was correctly stated:

> "***More and more recusal applications are brought as a tactical device or simply because the litigant does not like the outcome of an interim order made during the course of the trial. The seeming alacrity with which legal practitioners bring or threaten to bring recusal applications is cause for concern. The recusal of a presiding officer, whether it be a magistrate or a judge, should not become standard equipment in a litigant's arsenal, but should be exercised for its true intended objective, which is to secure a fair trial in the interests of justice in order to maintain both the integrity of the courts and the position they ought to hold in the minds of the people whom they serve***".

109. The following pronouncement by Ngcobo CJ sitting in the Constitutional Court[5] which is relevant against the Chairperson demonstrates that to continue to sit under the circumstances described above is a breach of the Constitution:

> "***The apprehension of bias may arise from the association or interest that the judicial officer has in one of the litigants or in the outcome of the***

[4] Bennet v The State 2021 (2) SA 439 (GJ) at paragraph [113]
[5] Bernert v Absa Bank 2011 (3) SA 92 (CC) at paragraph [28]

case. Or it may also arise from <u>conduct or utterances</u> by a judicial officer prior to or during (the) proceedings. In all these situations a judicial officer <u>must</u> ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principle that courts must be independent and impartial."

110. In this regard it must be added that enmity and/or hostility towards a party also constitutes sufficient reason for recusal. In the present case, the adversarial public posture of the Chairperson against the Public Protector is a ground for his recusal.

111. Where the presiding officer has communication with either party in the absence of the other party in relation to issues directly affecting that other party, this also constitutes a good ground for recusal. Sending Ms Joemat-Pettersson to engage privately with Mr Skosana, for whatever reasons, would constitute a violation of this rule of fairness. This is exactly the allegation made against Mr Dyantyi.

112. In contrast to the televised conduct of Honourable Dyantyi, the propriety of the Public Protector and/or her legal representative's motives in bringing a recusal application or other objections, should not be lightly questioned. The gratuitous suggestion of misconduct on the part of such representatives is a ground for recusal by its maker. Judge Kotze in **State v Bam**[6] put it like this:

"***It should always be borne in mind that an accused or his representative, who finds it necessary to apply for the recusal of a judicial officer is***

[6] 1972 (4) SA 41 (E) at 43H-44A

confronted with an unenviable task and <u>the propriety of his motives should not be lightly questioned</u>. The proceedings in the magistrates' court are set aside."

113. Another crucial dilemma is usually whether to bring the application as soon as possible or to wait until an adverse outcome before raising the issue of recusal. The better view was articulated by the Constitutional Court as follows:-

"***It is not in the interests of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. It is undesirable to cause parties to litigation to live with the uncertainty that, after the outcome of the case is known, there is a possibility that litigation may be commenced afresh, because a late application for recusal which should have been brought earlier. To do otherwise would undermine the administration of justice***."[7]

114. This application is therefore ripe for consideration by the Committee even before the predetermined outcome actually materialises.

115. Finally, it is important to note that the High Court will intervene in unfinished proceedings if grave justice would otherwise result or where justice may not be obtained by other alternative means. Hence the Western Cape High Court arrived at a conclusion that the court may have erred in dismissing the Review application based on the contrary view.

[7] Per Ngcobo CJ in the Bernert case (supra), at paragraph [75]

116. In the present case, the futility of waiting for the matter to be illegally referred to the National Assembly before raising the manifest bias in the process itself, ought to be self-evident.

E: CONCLUSION AND RELIEF SOUGHT

117. This application would not have been necessary had the Chairperson heeded the request to voluntarily recuse himself. However, because of his remissness, it is regrettable that the limited resources and time that Mr Dyantyi always refers to have been wasted. The Public Protector did everything in her power to avoid this wasteful exercise, all to no avail.

118. Applying these and other related well-established principles which will be expanded upon during the oral presentation of the application, it seems self-evident that the present circumstances present multiple grounds and bases for the recusal application to be granted upon any one or more or all of the grounds which cannot be refuted on the common cause facts. To emphasise, whether or not actual bias exists is immaterial. What cannot be denied is that there is sufficient objective upon which a reasonable person in the Public Protector's position may perceive, apprehend and/or suspect bias on the part of the Chairperson.

119. The application must accordingly be granted. In the present circumstances of multiple and material grounds going to the root of the fairness of the proceedings, it would be both untenable and undesirable to simply brush off these grave concerns and happened. That would mount to a serious violation of the rights conferred by the Directives, the Rules of the National Assembly,

the applicable legislation and more importantly the rights and values enshrined in the South African Constitution.

120. The question of the need to replace Ms Joemat-Pettersson and/or Mr Dyantyi as members of the Committee must also be answered, one way or the other.

121. In the circumstances, the Public Protector seeks the following relief:

121.1. Recusal of the Chairperson pending the finalisation of these investigation, alternatively, we seek for permanent recusal of the Chairperson and appointment of a new Chairperson; and/or

121.2. The clear articulation of the method and procedure, if any, by which the late Ms Joemat-Pettersson and/or Mr Dyantyi will be replaced as members of the Committee, if necessary.

COMPILED ON BEHALF OF THE PUBLIC PROTECTOR, ADV MKHWEBANE, BY:-

D.C. MPOFU SC

B. SHABALALA

H. MATLHAPE
Counsel for the Public Protector
Instructed by: HM Chaane Attorneys
12 July 2023