PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

AIDE MEMOIR TO MEMBERS OF THE COMMITTEE FOR S194 ENQUIRY

IN RESPECT OF

ITS DELIBERATIONS OF THE CHARGES OF MISCONDUCT AND/OR INCOMPETENCE AS ALLEGED AGAINST THE PUBLIC PROTECTOR, ADV B MKHWEBANE, IN THE MOTION BEFORE THE COMMITTEE

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1. **Purpose**

1.1. The purpose of this memorandum is to provide members of the Committee for Section 194 Enquiry **("Committee")** with a reference guide in their deliberation on the charges of misconduct and/or incompetence as alleged against the Public Protector, Adv B Mkhwebane in the Motion adopted by the NA on 16 March 2022.

1.2. In addition, an attempt has been made to highlight issues raised by Adv Mkhwebane in her Part A Statement which the Committee, for purposes of drafting its report, should consider and where necessary offer a view.

1.3. The memorandum does not contain legal advice in respect of the veracity of the charges as that is a matter that falls to be determined by the members whose role it is to assess the charges and formulate recommendations in respect thereof.

2. **Background**

2.1. On 3 December 2019, the NA adopted new rules setting out the process for the removal of office bearers in institutions supporting constitutional democracy. These "**Removal Rules"** establish and broadly set out the process to be followed by the s194 Committee. Adv Mkhwebane alleges in her statement that the rules were developed.

2.2. Rule 129AD sets out the powers and functions of the Committee and provides that it must:

2.2.1. conduct an enquiry and establish the veracity of the charges and report to the NA;

2.2.2. ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe; and

2.2.3. afford the holder of the public office the right to be heard in his or her own defence and to be assisted by a legal practitioner.

2.3. In terms of NA Rule 129AF:

2.3.1. the Committee must report its findings and recommendations, including the reasons for such findings and recommendations, to the NA for consideration and debate;

2.3.2. the NA must schedule the debate with due urgency, given its programme; and

2.3.3. if the report recommends removal, the question must be put to the NA directly for a vote and, if the question is supported by a 2/3 majority, the NA must convey the decision to the President.

2.4. On 21 February 2020, the Chief Whip of the Democratic Alliance, Ms Mazzone tabled a motion **("the Motion")** in terms of the Removal Rules to initiate an enquiry, in terms of section 194 of the Constitution, for the removal of the Public Protector, Adv. Mkhwebane, on the grounds of alleged incompetence and/or misconduct.

2.5. The Motion contains 4 main charges (with various sub charges) relating to the following matters:

2.5.1. **Charge 1- Misconduct in the South African Reserve Bank matter**

a) This charge consists of 9 sub-charges relating to the investigation and subsequent litigation proceedings relating to the review of report 8 of 2017/8.

b) The report is interchangeably referred to as the CIEX Report or the SARB Report or the Lifeboat Report.

2.5.2. **Charge 2- Misconduct in the Vrede Dairy Matter**

a) This charge consists of 5 sub-charges relating to the investigation and subsequent litigation proceedings relating to the review of report 31 of 2017/8.

2.5.3. **Charge 3- Incompetence**

a) This charge alleges incompetence in relation to both the SARB matter and the Vrede Dairy and 2 other matters as captured in para d below.

b) In respect of the SARB matter the charge alleges incompetence in the investigation, report, and subsequent litigation (review proceedings) with reference to 9 sub-charges.

c) In respect of the Vrede matter the charge alleges incompetence in the investigation, report and subsequent litigation (review proceedings) with reference to 6 sub-charges.

d) The Charge also alleges incompetence in the litigation (review proceedings) of the Financial Sector Conduct Authority matter (which was the subject of Report 46 of 2018/19). It contains 2 sub-charges. This matter is also interchangeably referred to as the Tshidi matter.

2.5.4. **Charge 4- Misconduct and/or Incompetence**

a) This charge is a mixed charge which includes misconduct and/or incompetence and contains 2 sub-charges.

b) The first sub-charge (para 10) alleges misconduct in relation to the alleged intimidation, harassment and/or victimisation (either directly or indirectly through the erstwhile CEO, Mr Mahlangu) of staff generally and particularly in respect of 7 staff members as named therein in sub-charges 10.1 to 10.7. These have generally been referred to in the Enquiry as the “HR” issues.

c) The second sub-charge alleges misconduct and/or incompetence and contains 4 sub-charges relating broadly to (i) the management of internal capacity and

resources in the PPSA; (ii) the prevention of fruitless and wastefull and/or unauthorised expenditure in legal costs; (iii) failure to conduct investigations independently and impartially and/or (iv) deliberately avoiding making findings against or directing remedial action against certain public officials while deliberately reaching conclusions of unlawful conduct and imposing far-reaching remedial action in respect of other officials.

e) In support of Charge 4 all the evidence in the Vrede and SARB matters are included. In addition, evidence was submitted in respect of the CR17 matter; the SARS Unit matter (interchangeably referred to as the alleged "Rogue Unit" matter) and the GEMS matter (litigation in respect of a complaint lodged by Mr Ngwato -a member of the public who laid a complaint with the PPSA- against the Government Employee Medica Scheme (GEMS).

2.6. The former Speaker certified the Motion to be compliant as required by National Assembly **("NA")** Rule 129R of the Assembly Rules governing the removal from office of a holder of a public office in a State Institution supporting Constitutional Democracy ("**the Removal Rules**").

2.7. The former speaker further, acting in terms of NA Rule 129U, established an independent panel ("**IP**") comprising retired Justice Nkabinde, Adv Ntsebeza SC and Adv de Waal SC to conduct a preliminary assessment to determine whether there is *prima facie* evidence that Adv Mkhwebane has committed misconduct and/or is incompetent as alleged in the Motion.

2.8. The IP submitted a report in which it found prima facie evidence of:

2.8.1. Incompetence and misconduct in respect of both the SARB and Vrede Dairy matters as contained in Charge 1 and 2;
2.8.2. Incompetence in respect of the SARB matter, Vrede matter and FSCA matter as contained in Charge 3;
2.8.3. Incompetence in respect of the CR 17, SARS Unit matter and the GEMS matter as contained in Charge 4; and
2.8.4. Misconduct in respect of the FSCA matter; CR 17, the Vrede Dairy Matter and the SARS Unit matter as contained in Charge 4.

2.9. The IP did not make findings of *prima facie* evidence in respect of every sub-charge in relation to each Charge. It found there was *no prima facie* evidence in support of the HR matters as contained in Para 10 of Charge 4.

2.10. The report of the IP served before the NA on 16 March 2021 and the NA resolved to proceed with a section 194 enquiry.

2.11. Accordingly, the matter was referred to the Committee to conduct an enquiry into the veracity of the charges and to make a finding on whether the PP should be removed **("the Enquiry")**. The Committee, though constituted in 2021, began the hearing portion of the enquiry on 11 July 2022.

3. **Terms of Reference**

3.1. On 22 February 2022, the Committee adopted terms of reference **("TOR")** setting out, among other things, the background to its task; the format for proceedings, including the way in which it will receive evidence from witnesses; matters relating to public participation; transparency of the proceedings; and resources that will be availed to the Committee.

3.2. The TOR emphasised that the process is a constitutional process that is inquisitorial in nature.

3.3. It provided for the appointment of an external evidence leader to assist the Committee by presenting the evidence and putting questions to Adv Mkhwebane and other witnesses, for purposes of empowering the Committee to perform its functions. The evidence leader does not play a prosecutorial role.

3.4. The TOR provide further content to Adv Mkhwebane's *audi* rights by permitting her legal representative the right to:

3.4.1. make opening and closing arguments;

3.4.2. cross-examine witnesses; and

3.4.3. raise any matter related to the process, subject to the reasonable timeframes as imposed by the Chairperson.

3.5. In addition, the Terms of Reference provide that Adv Mkhwebane will be afforded a right to comment on the Committee's draft report before it adopts and tables same in the NA.

4. **Scope of Enquiry**

4.1. The IP's findings and recommendations were limited in that:

4.1.1. it was not entitled to hold oral hearings: its assessment was limited to the written and recorded information placed before it;[1] and

4.1.2. it could not and did not conduct any independent investigation that could lead to a determinative conclusion on whether or not there has been misconduct or incompetence.

4.2. The IP did not have the power and therefore did not conclude that only some charges should be investigated for determination by the Committee, or that some charges should be excluded from consideration. In fact, it made it clear that:

> *"It needs to be stressed from the outset that the Panel is not tasked to conduct a section 194 inquiry for the removal from office of the PP. The task, if it is so resolved, is for a committee of the NA."*[2]

4.3. In addition, the Motion in its entirety was referred to the Committee. Therefore as previously advised, the Committee is duty bound to investigate, and make findings in

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1 Rule 129(x)(1)(c)(iv).

2 Para 5 of the IP Report.

respect of, the Motion in its entirety and not only Charges 1.1, 1.2.1.2, 1.1.5, 4.1, 4.3, 4.4, 4.2, 11.3 and 11.4 in respect of which *prima facie* findings of misconduct were made by the Independent Panel and with reference to Charges 7.1.1, 7.1.2, 7.1.7, 7.2.1, 7.3.1, 11.4,11.3, 11.1 and 11.2 in relation to *prima facie* findings of incompetence made by the Independent Panel.[3]

5. **The Constitutional Provisions Applicable to the Public Protector**

5.1. S181(1) establishes the Public Protector as a state institution strengthening constitutional democracy in the Republic (**"Chapter 9 institutions**").

5.2. Chapter 9 Institutions are governed, in terms of s181 (2) to 181 (5), by the following principles:

a) These institutions are independent, and subject only to the Constitution and the law;
b) They must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice;
c) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions; and
d) No person or organ of state may interfere with the functioning of these institutions.

5.3. Chapter 9 institutions are accountable to the NA and must report on their activities and the performance of their functions to the Assembly at least once a year.

5.4. The Functions of the Public Protector are captured in s182 as follows:

"182. Functions of Public Protector. -
(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

[3] Paras 262 and 263 of the IP Report.

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."

5.5. In terms of s183 the tenure of the Public Protector a non-renewable period of seven years.

5.6. Section 193 of the Constitution deals with the appointment of Chapter-9 office-bearers. Subsection (1) reads:

"193. The Public Protector and the members of any Commission established by this Chapter must be women or men who –

(a) are South African citizens;

(b) are fit and proper persons to hold the particular office; and

(c) comply with any other requirements prescribed by national legislation."

5.7. Section 194 of the Constitution regulates, inter alia, the removal of the Public Protector from office. It reads:

"194. The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on –

(a) the ground of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly; and

(c) the adoption by the Assembly of a resolution calling for that person's removal from office.'

6. **Misconduct and incompetence in the Removal Rules**

6.1. The Constitution does not define misconduct or incompetence. However, those concepts have been defined in the Removal Rules.

6.2. The definitions in the Removal Rules must be applied. Individual members of the Committee may not determine their own definitions for what constitutes '*incompetence'* or '*misconduct'*.

Defining and Establishing Misconduct

6.3. The Rules define '*misconduct*' as –

> *the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office.*

6.4. In respect of misconduct as defined in the Rules, the following questions must be answered:

a) What was the standard of conduct or behaviour expected of a holder of public office?
b) Did Adv Mkhwebane meet that standard?
c) If not, was her failure intentional or grossly negligent?

6.5. Intention is subjective i.e., it is concerned with what the individual in question personally understood would happen. Intention can take one out of three forms:

6.5.1. Where the individual deliberately aims at causing the consequence in question e.g., X fires a gun at Y with the intention of the bullet harming Y. Lawyers call this 'dolus directus'.

6.5.2. Where the individual aims at causing a particular consequence but knows that another consequence will also be inevitable e.g., X fires a gun at a cardboard

cut-out with the intention of putting a bullet through the cut-out but knows that Y is standing directly behind the cut-out and will therefore also be hit by the bullet. Lawyers call this 'dolus indirectus'.

6.5.3. Where the individual aims at causing a particular consequence, foresees the possibility that another consequence could result, but reconciles himself to that possibility and proceeds anyway e.g., X fires a gun at a metal pole with the aim of hitting the pole, foresees the possibility that the bullet could ricochet and hit Y, reconciles himself to the possibility that Y could get shot and fires the bullet anyway.

6.6. Negligence is assessed objectively i.e., not based on what a particular individual thought or understood, but based on what a reasonably person would have understood and done. The Public Protector would have been negligent if –

a) a reasonable person in her position would have foreseen the possibility of certain consequences arising;
b) that same person would have taken reasonable steps to guard against the consequences; and
c) the Public Protector failed to take those steps.

6.7 Gross negligence occurs where there is *'an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences.*'[4]

[4] This is the uncontradicted evidence from Mr Hassen Ebrahim's affidavit: Bundle D, Item 1, pp58-59, paras 94.5-94.6. Reference is made to: Kruger v Coetzee 1966 (2) SA 428 (A) at 430; Msimang NO and Another v Katuliiba and Others [2013] 1 All SA 580 (GSJ) at para 37; S v Dhlamini 1988 (2) SA 302 (A) at 308D-E.

Defining and Establishing Incompetence

6.8 The NA rules do not provide an exhaustive definition of 'incompetence'. The Rules define '*incompetence*' as including –

"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."

6.9 In respect of incompetence as defined in the Rules, the following questions must be answered:

a) What were Adv Mkhwebane's duties?

b) Did Adv Mkhwebane –

i. Display a lack of knowledge to carry out those duties effectively and efficiently; and

ii. Display a lack of ability or skill to perform those duties effectively and efficiently?

iii. Was the lack of knowledge and ability or skill 'demonstrated and sustained'?

7 Test and threshold for removal

7.1 The definitions of misconduct and incompetence in the Removal rules must be understood purposively. They are the threshold requirements for determining whether a Chapter-9 office-bearer – who has constitutionally entrenched independence and fulfils the vital function of ensuring accountability in the public sphere – should be removed from office. There can be no question that removal is a very serious matter.

7.2 Accordingly, to ensure the proper functioning and protection of Chapter 9 Institutions, a high standard should be adopted: incompetence or misconduct should not lightly be accepted as having been established.

7.3 The Committee is exercising a public power- that of making a finding and recommendation the NA on whether there are grounds justifying the removal of Adv Mkhwebane. This exercise of power must be rational and not arbitrary. 'Rationality' can be understood as a rational relationship between the measures adopted and a legitimate governmental purpose. [5]'Rationality' calls for an objective enquiry.

8 **Rationality vis-à-vis the standards and conduct required of a Public Protector**

8.1 Rationality entails a consideration of the evidence before the Committee vis-à-vis the standards of conduct expected of a Public Protector.

8.2 The Committee heard from 2 witnesses who were called by the evidence leaders and Adv Mkhwebane respectively to speak on issues related to the conduct expected of a Public Protector, namely Mr Hassan Ebrahim and Ms Zulu-Sokoni, the Ombudsman of Zambia.

8.3 After canvassing the Constitution, statutes and case law, Mr Ebrahim proposed 47 obligations that a Public Protector, with reference to the applicable legal framework requires her, must comply with in the discharge of their office. These are as follows:

8.3.1 respect the supremacy of the Constitution and the rule of law;

8.3.2 strengthen constitutional democracy;

[5] Christian Courtis "*Rationality, Reasonableness, Proportionality: Testing The Use Of Standards Of Scrutiny In The Constitutional Review Of Legislation*", (2011) 4 Constitutional Court Review

8.3.3 focus on ensuring the discharge of public functions that is accountable, responsive and open;

8.3.4 respect the separation of powers and the legitimate sphere of operation of each branch of government and in so doing respect the decisions of the Executive, Legislature and Judiciary;

8.3.5 be independent and impartial, and perform functions without fear, favour or prejudice;

8.3.6 be dignified and effective;

8.3.7 be dedicated and conscientious;

8.3.8 discharge her functions diligently and without delay;

8.3.9 exercise only those powers that are conferred by law;

8.3.10 not assume the powers or functions of any other public functionary or encroach on its integrity;

8.3.11 adhere to a high standard of professional ethics;

8.3.12 ensure the efficient, economic and effective use of resources;

8.3.13 ensure that services are provided fairly and without bias;

8.3.14 foster transparency;

8.3.15 be accessible;

8.3.16 cultivate good human-resource management and be capable of managing an office that comprises hundreds of personnel and numerous departments / units;

8.3.17 exercise appropriate and effective control over the Deputy Public Protector and the staff of the Public Protector's office;

8.3.18 delegate powers to the Deputy Public Protector to exercise;

8.3.19 be capable of undertaking and managing numerous investigations, and of understanding and applying the Constitution and the laws that regulate the public administration and affairs of State;

8.3.20 maintain an office that is accessible to members of the public;

8.3.21 discharge functions so as to ensure ethical and effective public administration generally;

8.3.22 monitor the performance of the executive, which includes investigating alleged maladministration, abuse of power, discourtesy, undue delay, improper or dishonest conduct, improper enrichment and improper or unlawful prejudice;

8.3.23 work to ensure that the public administration carries out its tasks without corruption or prejudice;

8.3.24 be the last defence for the public against bureaucratic oppression, corruption and malfeasance – in other words, to protect the public;

8.3.25 investigate complaints from members of the public in respect of State affairs or the public administration, report on the conduct complained of, and take appropriate remedial action;

8.3.26 decline to investigate conduct that occurred more than two years prior to the complaint, unless there are special circumstances that distinguish the complaint;

8.3.27 consider a range of options in addressing a complaint, including mediation or negotiation; advising the complainant regarding appropriate remedies; and reporting an offence or particular conduct to the appropriate authorities;

8.3.28 in determining appropriate remedial action, not order an organ of state to do something that is outside of its own powers;

8.3.29 make clear rather than vague determinations;

8.3.30 be objectively fit and proper to render the constitutional functions of office;

8.3.31 be appropriately experienced in the law, the administration of justice, public administration and/or the legislature;

8.3.32 be a person of stature and beyond reproach;

8.3.33 be suitably qualified;

8.3.34 be scrupulously honest and have absolute personal integrity;

8.3.35 disclose all material facts and evidence, and behave with utmost good faith, when litigating and dealing with the courts;

8.3.36 not exploit loopholes, or show disregard for the law, or mislead in any way, or make charges without supporting evidence;

8.3.37 ensure that all statements of the law are accurate, and not misconstrue the law;

8.3.38 be a good constitutional citizen;

8.3.39 be willing and capable of taking on sensitive investigations that might antagonise the powerful;

8.3.40 observe the requirements of procedural fairness and confidentiality during investigations and allow potentially affected persons a proper opportunity to make meaningful representations;

8.3.41 conduct investigations with an open and enquiring mind and follow wherever the evidence leads;

8.3.42 discover the truth and continue digging until the true picture emerges;

8.3.43 not extend investigations beyond the affairs of State, into the affairs of private parties;

8.3.44 not expand an investigation without lawful justification;

8.3.45 be cognisant of the serious consequences that can flow from an investigation;

8.3.46 inspire confidence in the integrity and completeness of investigations; and

8.3.47 account to the NA.

8.4 During cross-examination, Mr Ebrahim's expertise, and the relevance of his experience and expertise to the Committee's work, were called into question. However, it was not established that any of the abovementioned principles were incorrect or inapplicable.

8.5 Mr Ebrahim did concede that a Public Protector has the power to limit or extend the scope of an investigation, provided that there are reasonable and justifiable grounds for so doing.

8.6 Ms Zulu-Sokoni's evidence covered the principles and standards that an ombudsman should adhere to or uphold, as well as protections that an ombudsman should be afforded and observations in this regard. They are dealt with separately below and should be read with particular reference to the OR Tambo Declaration and the Venice Principles:

8.6.1 To determine whether a Public Protector has committed misconduct or has shown incompetence, regard must be had for the office's standards and duties, including notions of what it means to be 'fit and proper'.

8.6.2 A Public Protector who does not 'play by the rules' could be subject to impeachment.

8.6.3 The Public Protector should adhere to natural justice and procedural fairness.

8.6.4 The principles of natural justice and procedural fairness does not just extend to the Ombudsman when the Ombudsman is investigating but also extends to the relationships of the Ombudsman and members of staff.

8.6.5 The Public Protector's office should 'be the example par excellence. We should ensure that we are leading by example all other institutions.'

8.6.6 The Public Protector's office must exhibit the highest tenets of integrity, professionalism, transparency, accountability, the cause of justice, the rule of law and the Constitution.

8.6.7 The Public Protector must act in a manner that shows she is independent, so that people perceive her independence. In this regard it is 'non-negotiable' for a Public Protector to be independent and impartial.

8.6.8 The Public Protector must take responsibility for every report her office issues.

8.6.9 The Public Protector has a special responsibility to tell the truth to courts, and to file affidavits truthfully before the courts.

8.6.10 The Public Protector's reports should be honest, and the evidence referred to in those reports should be complete.

8.6.11 The Public Protector's reports should reflect an understanding of the law. She should have the legal acumen of a judge.

8.6.12 A Public Protector should not do anything to give the impression to members of the public that she has colluded or behaved improperly with a member of the executive branch of government.

8.6.13 While a Public Protector must have a high standard of ethics, transparency and lawfulness, she is also a human being – 'there may be lapses here and there and that is the reason why the decisions of an Ombudsman can be subjected to judicial review.'

8.6.14 When the Public Protector's decision is successfully taken on judicial review, 'it is the duty of the Ombudsman, to interrogate that judgment and ensure that they do not repeat the sorts of errors that were caused in that particular report.' In this way, judicial review is 'a cleansing process' and a 'quality-control process'. Ms Zulu-Sokoni was clear that she would not expect a Public Protector to repeat the same mistakes once the error had been established in the courts. Furthermore, she testified that it was not good for an Ombud's reputation 'to have judgments coming out continuously on the same issue, especially on the same matter, the same error, the same mistake'.

8.6.15 A court holding an Ombudsman's decision to have been wrong is a way of ensuring excellence in the work of the Ombudsman. However, an Ombudsman who is aware of the principles and ethics of their job will take note of what the

courts are saying and implement it in their work to ensure that the error does not happen again.

8.6.16 The Office of the Ombudsman should be above reproach.

8.7 Ms Zulu-Sokoni emphasized the protections that an Ombudsman should be afforded, particularly with reference to the Venice Principles and the OR Tambo principles, which are fully captured in her statement and copies of which have form part of the record. She noted the following:

8.7.1 The OR Tambo Declaration on the Minimum Standards for an Effective Ombudsman Institution ("OR Tambo Declaration") was adopted in February 2014 in Johannesburg by the African Ombudsman and Mediators Association (AOMA). The OR Tambo Declaration is of persuasive value only and not binding on South Africa.

8.7.2 The Principles for the Protection and Promotion of the Institution of the Ombudsman (Venice Principles) were adopted by the Venice Commission in March 2019. The Venice Principles are of persuasive value only and not binding on South Africa.

8.7.3 The OR Tambo Principles, the Venice Principles, the IOI bylaws and the United Nations resolutions all emphasise the need to protect the independence of the Ombudsman as the Ombudsman investigates the very office which created it, funds it, and which is supposed to pay the salaries of the members of staff and the Ombudsman themselves. To this extent the OR Tambo Declaration states at 1.1 '*The independence and autonomy of these institutions must be guaranteed by the Constitution'*.

8.7.4 The Venice Principles refer to functional autonomy of the Ombudsman, meaning that the Ombudsman must not be charged concerning their constitutional, legislative or administrative functions.

8.7.5 The Ombudsman must be accorded the highest level of administrative and legal support to ensure that there is procedural fairness when any issue to deal with the institution is under the purview of any of the arms of government.

8.7.6 The office of the Ombudsman is inherently vulnerable as it investigates very powerful people.

8.7.7 The Office of the Ombudsman should be accountable to Parliament because, through the system of checks and balances of the separation of powers, one wants to ensure that the Ombudsman reports to a body which it does not investigate. [It must be noted that in South Africa, the Public Protector is legally empowered to investigate members of Parliament who serve in the Executive].

8.7.8 The Venice Principles stress that the protection and promotion of human rights and fundamental freedoms should also be extended to the Ombudsman and deputies and their staff.

8.7.9 The Judiciary protects the Ombudsman in that, when the Ombud's reports are tabled before the Judiciary, the Judiciary provides 'extra scrutiny' and 'independent scrutiny' on the reports of the Ombudsman.

8.7.10 Procedural fairness requires that when a body is dealing with adverse court judgements against an Ombudsman, there must be equal attention given by that body that is hearing the matter to favourable judgements.

8.7.11 Prior to being suspended, an Ombudsman must be made aware of the charges that are against them and they must be given a fair hearing.

8.7.12 The legislature should assist an Office who is accountable to them and accord the appropriate protections if they are available.

8.7.13 Functional autonomy, as referred to in the Venice Principles, requires that in investigations carried out by the Public Protector, there shall not be any interference by any arm of government or from any person. This is codified in section 181 (3) and (4) of the Constitution.

8.7.14 As stated in the OR Tambo Declaration and the recommendations in most of the international instruments, at a minimum, the Office of the Ombudsman must be equated to that of a judge.

8.7.15 From personal experience the classical model where the effect of the Ombudsman's reports is mere recommendations (as opposed to binding recommendations like in South Africa), is the better and stronger model as it entrenches independence for the Ombudsman.

8.7.16 Principle 11 of the Venice Principles require state: *"The Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of incapacity, inability to perform the functions of office, misbehaviour or misconduct, which shall be narrowly interpreted."* Interpreting any of these provisions: "incapacity, inability to perform the functions of office or misbehavior," too broadly would amount to *"encouraging people who are either shopping for the job or shopping to have an incumbent removed from office for personal reasons."* The purpose is therefore to discourage petty reasons being used to remove an incumbent from office.

8.7.17 Whether an incumbent who has a short amount of time in office left should be charged would depend on the gravity of the charges that have been pressed against that particular Ombudsman.

8.7.18 An ombudsman performs officially in their Office and is not carrying out a personal duty. Accordingly, it compromises the independence and integrity of

the Office, for the officer to be asked to take personal responsibility for actions that were carried out in an official capacity.

8.7.19 Adverse cost orders should be borne by the respondent institution, and not the Public Protector personally. If criminal charges arise out of the same set of circumstances where a personal cost order has been granted this *"sounds like victimisation*" as an Ombudsman is a single person who is constituted as a corporate sole and is being asked to shoulder the responsibility of an entire organisation. Personal costs forms part of judicial harassment and is totally unacceptable.

8.7.20 The time limit for submitting complaints to the Office of the Public Protector must not be read very narrowly, because there are always exceptions to that rule and the Public Protector has a lot of discretion. For example, *"for poor people who come from the rural areas, they may not know that they can actually appeal. They may not have the money to actually reach the Office of the Ombudsman. And they may take more than two years to bring complaints to the office of the Ombudsman."*

8.7.21 Unlawful or retaliatory suspension is administrative or judicial harassment.

8.7.22 The binding decision model make the Ombudsman amenable to review of their decisions by courts of law. The courts also seem to feel threatened by the judicial powers of the Ombudsman and there is always a temptation by any one of the three arms of government to trim down the powers of the Ombudsman, as evidenced by matters in Zambia and South Africa. Once the powers of Ombudsman seem to overlap or to be shared by any one of the three branches inevitably the institution of the Ombudsman may have to be reined in by the arm which feels challenged."

8.7.23 It is very important that during the course of investigation an Ombudsman has the complete cooperation of the respondent institutions, being the Executive.

8.7.24 The Ombudsman is the only institution which the poor man can call upon. We *"shouldn't allow those poor people to lose heart and to lose faith in this institution that has been set up for them."*

8.7.25 If a process in a particular country involved the refusal to call essential witnesses or relevant witnesses that are specifically mentioned in charges, thereby denying the accused person an opportunity to clear their names, that would not be in conformity with the fundamental principles of natural justice. A person's right firstly, to be properly represented, secondly, to properly defend themselves, should be respected and upheld in any constitutional democracy.

8.7.26 It is an unintended consequence of having the binding model that the cost of litigation automatically shoots up because, people are more likely to challenge decisions that are binding than those that are merely recommendations. However, with reference to her own office Ms Zulu-Sakoni said she confesses that, *"we have actually raised our standards very high because whatever evidence we get, we interrogate each and every piece of evidence thoroughly because we know that when this report comes out, there is a possibility that it might be taken to court. So, it has actually made us a little bit more cautious. It takes us a little bit longer now to issue a report because we have to really do our due diligence and really interrogate our cases so thoroughly."*

9 Intimidation, harassment and victimisation as referred to in Charge 4

9.1 Paragraph 10 of the Motion reads:

"Adv. Mkhwebane is guilty of misconduct in that Adv. Mkhwebane has intimidated, harassed and/or victimised staff, alternatively has failed to protect staff in the office of the Public Protector from intimidation, harassment and/or victimisation by the erstwhile CEO of the Office of the Public Protector, Mr Vussy Mahlangu in particular the following

staff members who have been threatened with or had disciplinary action taken against them unlawfully and on trumped-up charges" [the staff members are named in Para 10.1- 10-7 of the Motion].

9.2 The terms "intimidation", "harassment" and "victimisation" are not defined in the Motion. The following is a brief explanation of these concepts.

Definition of '*harassment*'

9.3 The Oxford Dictionary defines harassment as '*intimidation, bullying, threatening, or coercive behaviour, including manner of speech, usually by a superior toward a subordinate, sometimes by colleagues in an organisation.*'

9.4 In the context of South African labour law, The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('**PEPUDA'**) describes harassment as '*unwanted conduct in the workplace which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences.*'

9.5 The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace ('**the Code**'), issued in terms of the Employment Equity Act 55 of 1998 ('**EEA**') came into effect on 18 March 2022. The Code aims to eliminate all forms of harassment in the workplace by providing guidance on the policies and procedures to be implemented to deal with harassment in the workplace.

9.6 The Code recognises various forms of harassment that may amount to unfair discrimination. It therefore goes beyond the scope of its predecessor, the 2005 Code of Good Practice on the Prevention of Sexual Harassment in the Workplace, which focused only on sexual harassment. The Code therefore provides a useful indication for what the term used in paragraph 10 of the Motion may mean.

9.7 According to section 4.1 of the Code the term '*harassment*' is generally understood to be unwanted (or unwelcome) conduct which:

9.7.1 impairs dignity;

9.7.2 creates a hostile or intimidating work environment for one or more employees, or is calculated to, or has the effect of inducing submission by actual or threatened adverse consequences; and

9.7.3 is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA.[6]

9.8 Examples of harassment, according to the Code, include physical and sexual abuse, but also abuse of a psychological or emotional nature.

9.9 In terms of section 4.4 of the Code, the test to determine whether the conduct constitutes harassment is assessed on an objective basis, from the perspective of the person who alleges the harassment. Section 4.4.5 states that the primary focus should be on the impact of the conduct on the person who alleges it, with reference to the 'reasonable person' test. In other words, would a reasonable person in the position of the complainant view the conduct as harassment.

Definition of '*intimidation*'

9.10 The Cambridge Dictionary defines intimidation as '*the action of frightening or threatening someone, usually in order to persuade them to do something that you want them to do*.'

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[6] 's6 Prohibition of unfair discrimination:
(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.'

9.11 The Code defines intimidation as intentional behaviour that would cause a person of ordinary sensibilities to fear injury or harm.

9.12 In *Adcock Ingram Critical Care v CCMA and others* (2001) 22 ILJ 1799 (LAC), the Court held that, to constitute intimidation words need not be directed at particular persons, and further that words are intimidatory if they are calculated to '*terrify*', '*overawe*' or '*cow*'.

Definition of '*victimisation*'

9.13 The Cambridge Dictionary defines victimisation as the act of treating someone in an intentionally unfair way, especially because of their race, sex, beliefs, etc.

9.14 The statutes regulating Labour Law do not directly define victimisation. However, the Labour Relations Act ('LRA') does deal with the issue of victimisation in an indirect way. For example, section 186(2) deals with certain unfair labour practices that could amount to victimisation, including:

9.14.1 unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee;

9.14.2 the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

9.14.3 a failure or refusal by an employer to reinstate or reemploy a former employee in terms of any agreement; and

9.14.4 an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, on account of the employee having made a protected disclosure defined in that Act.

10 General Issues raised by Adv Mkhwebane in her Part A Statement

10.1 In addition to providing her responses to the charges in the Motion, Adv Mkhwebane also raises several additional concerns and issues which should be considered by the Committee. However, it must be noted that some of these issues have been raised before the Committee by Adv Mkhwebane and/or her legal representatives and dealt with already.

10.2 The summary below aims to capture these matters, but members should read this together with the Part A statement. Headings below are for purposes of summation only and do not reflect the way these issues were categorised by Adv Mkhwebane.

Nature of and flaws of the s194 process

10.3 The process does not represent a genuine impeachment process.

10.4 The process is a political process as emphasised by the Speaker, Chairperson, the President and/or the DA co-operative in court pleadings and not a conventional legal process.

10.5 The process is a politically motivated ‘witch-hunt’.

10.6 The process is a vanity ‘special project’ of the Democratic Alliance aimed at scoring political points as the first party to have caused a head of a Chapter 9 institution to face impeachment.

10.7 It is a racially motivated campaign born out of the fear of real change which might actually benefit the poorest and most marginalised of society who are mainly black at the expense of those who benefit from the untransformed economic status quo, who are in the main white and the backbone of the DA constituency.

10.8 The DA has falsely labelled Adv Mkhwebane a spy and has made at least 5 separate attempts to remove her.

10.9 The DA is aided and abetted by the African National Congress (ANC).

10.10 The ANC is motivated by retaliation and revenge for the exposing of corruption and wrongdoing by powerful ANC leaders such as the President (Cr 17 matter and Phala Phala) and Minister Gordhan (so called SARS Rogue Unit matter and the 'fake' retirement of his friend, Mr Pillay).

10.11 There is an 'unholy alliance' between the DA and the ANC and will use their majority power.

10.12 The outcome is predetermined. In addition, the PC: Justice at its meeting of 6 March 2018 prejudged Adv Mkhwebane. The Chairperson who is a member of that committee also made adverse remarks such as "here we have budgeted for incompetence."

10.13 The process is illegal, inherently and irreparably unfair, biased, predetermined and doomed.

10.14 Adv Mkhwebane has participated under protest for the purpose of disproving the popular narrative that she was avoiding or scared of the process.

10.15 The Enquiry is a charade.

10.16 The proceedings are defective as a result of the following:

10.16.1 Refusal to exclude charges in respect of which there was no prima facie findings.

10.16.2 Repeated conducting of proceedings in the absence of Adv Mkhwebane or her legal team.

10.16.3 The refusal of the Chairperson and Mr Mileham, MP to recuse themselves.

10.16.4 The refusal to call the President, Ms Mazzone, MP and Minister Gordhan as witnesses.

10.16.5 Refusal to grant Adv Mkhwebane sufficient time to prepare her evidence.

Suspension

10.17 The suspension is not bona fide.

10.18 The suspension is vengeful, retaliatory and an illegal act by the current president owing to the multiple investigations Adv Mkhwebane was seized with including CR17 and Phala Phala to name a few.

10.19 The suspension is “the real reason why we are here today.”

Witnesses

10.20 Mr Rodney Mataboge was a helpful, co-operative, and truthful witness.

10.21 Prof. Madonsela was a hostile, un-cooperative and untruthful witness.

10.22 The Committee refused to call key witnesses requested by Adv Mkhwebane as mentioned above.

10.23 The Committee refused to recall Mr Van Loggerenberg, Ms Baloyi and Mr Pillay.

The Charges

10.24 The charges are concocted by Ms Mazzone, MP.

10.25 Any objective, fair and reasonable analysis will lead to a conclusion of “not guilty”.

10.26 Witnesses called by evidence leaders have effectively exonerated Adv Mkhwebane of any impeachable wrongdoing in respect of every charge. No fair court will uphold a contrary finding and the impeachment effort is doomed to fail if subjected to fair judicial scrutiny.

10.27 The IP recommended an enquiry in respect of matters where they found *prima facie* evidence only. However, the Committee illegally extended the scope by for example considering the Pillay pension matter and the HR charges.

10.28 The Committee failed to deal with the Motion as filtered.

The Removal Rules

10.29 The rules were crafted as a copy paste job by the DA (based on s89 removal rules).

10.30 The rules were targeted at Adv Mkhwebane. This is evidenced by the fact that it provided for a ‘mummified’ lawyer to sit in the Enquiry.

So called “Glaring Absurdities”

10.31 7 year term end in mid October 2023.

10.32 The Enquiry is estimated to cost the taxpayer approximately R1 Million per day.

10.33 The cost of instability to the Office of the Public Protector South Africa is incalculable.

10.34 Adv Mkhwebane has made several attempts, through the courts, to stop the continuation and/or commencement of this ‘illegal’ process. These efforts, to stop this futile and costly exercise, have been opposed by the Speaker, the Chairperson and the DA.

11 Conclusion

11.1 In determining the veracity of the charges, the Committee should have due regard to the evidence before it which includes witness statements, court records, oral evidence, the statements of the PP, evidence before the IP and evidence tendered as part of the record. The summation serves to summarise the evidence before the Committee, but evidence leaders cannot make findings on behalf of the Committee and have not sought to do so in the summation.

11.2 If the Committee finds that Adv Mkhwebane has misconducted herself and/or is incompetent as alleged such finding must be rational**.**

11.3 In reaching its findings the Committee must be satisfied that the process has met the threshold of fairness as required in the Removal Rules. In this regard the Committee is reminded of the correspondence that has ensued in which Adv Mkhwebane has objected to various issues to date some of which are captured above. Most recently

however, there is the issue of the 2nd recusal application ; Adv Mkhwebane's assertion that the Committee has proceeded in the absence of her legal representatives and that the revised procedure is unlawful.

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