IN THE SECTION 194 ENQUIRY

HELD AT THE NATIONAL ASSEMBLY, CAPE TOWN

In respect of

THE PUBLIC PROTECTOR OF SOUTH AFRICA

APPLICATION FOR THE NECESSARY ADJOURNMENT OF THE SECTION 194(1) ENQUIRY PROCEEDINGS PENDING THE JUDICIAL REVIEW OF THE NON-RECUSAL DECISIONS

"In appropriate circumstances … an authority should halt its actions when it is aware the review proceedings are to be instituted against it. Failure to do so may render the official concerned liable for contempt of court."[1]

A: INTRODUCTION

1. At the invitation of the Chairperson of the section 194(1) Committee and following the relevant notice having been given by the Public Protector, we hereby submit a brief application for the required adjournment / postponement of the current section 194(1) proceedings pending a legal challenge to the decision(s) taken on 17 October 2022, by:-

    1.1. the Chairperson Mr Qubudile Dyantyi MP;

    1.2. Honourable Mileham MP, a member of the Committee; and

[1] Passage quote with approval by Judge Du Plessis in Pikoli v President of the RSA 2010 (1) SA 400 GNP at page 408, paragraph [D]

1.3. the Committee itself.

2. The impugned decisions were in respect of the non-recusal upon the Public Protector's application to do so, of Messrs Dyantyi and Mileham.

3. Following the decision(s), the Public Protector indicated in writing that she has instructed her legal representatives urgently to launch judicial review proceedings essentially to review and set aside the impugned non-recusal decision(s).

4. The purpose of this application is to request the Committee to make a decision to adjourn the proceedings until such time that the said review proceedings have been decided by the courts.

5. In his letter the Chairperson framed the issues to include the following:

> "*In this application kindly indicate by what date you intend launching such recusal (sic) application, if any, and whether you seek a stay pending a High Court application or final determination by the Constitutional Court, as well as provide an indication of your assessment if such stay is granted when it would be anticipated that the Committee would be able to resume*."

6. In what follows we seek to address these and other related issues.

B: GENERAL GROUNDS FOR THE APPLICATION

7. The Committee will be familiar with the events which have led to this point in the proceedings. These have been extensively traversed in the papers dealing with the recusal application which was presented on 23 September 2022.

8. Since then, the Public Protector gave written notice of her intention to bring this application and, in reply, the Chairperson ruled that the application be submitted on Monday 24 October 2022 and be orally presented to the Committee on Thursday 27 October 2022.

9. It is important to state it clearly and upfront that in bringing this application before the Committee as presently composed the Public Protector does not thereby abandon or in any way waive her right to forcefully argue that the Committee is not entitled to sit at all once it has been made aware of her intention to challenge its composition and jurisdiction in the envisaged judicial review proceedings.

10. On the contrary, the Public Protector will participate in the sitting scheduled for 27 October 2022 purely for the purposes of moving this application and in an endeavour to give the Committee an opportunity to do the right thing by suspending the proceedings and to comply with the duty to exhaust internal remedies.

11. Her participation is therefore not acquiescence in the legal capacity of the Committee to proceed with any other business, which capacity is hereby specifically disputed.

B1: <u>The Proposed Court Application for Judicial Review</u>

12. The various decisions referred to above will be challenged in court proceedings which will be lodged shortly after the Committee will have made a decision on this application. It is reasonably anticipated that the necessary application will be delivered by no later than 31 October 2022.

13. The basis of the application will be essentially to request the court to declare the non-recusal decision(s) to be unlawful, unconstitutional and/or invalid coupled with the just and equitable remedy of setting aside or nullifying the said decisions.

14. Secondly and depending on the outcome of this application the Public Protector will seek an order declaring the (reasonably anticipated) decision of the majority of the members of the Committee refusing to adjourn the proceedings, to be also unlawful, unconstitutional and invalid, coupled with the just and equitable remedy of setting it aside.

15. Although the adjournment application is still to be made, past experience has made it easy to predict that, whatever the merits of the application, the majority will almost certainly find against the Public Protector, especially if the Evidence Leaders oppose the application. In the unlikely event of a different decision, this prayer will simply be abandoned or not pursued.

16. Thirdly, the Public Protector will seek the relief of substitution which simply means that she will request the court to correct the incorrect and unlawful decisions because remitting them back to the Committee would, in the circumstances described above, serve no purpose as the outcome would be a *fait accompli*. This is one of the principal grounds for substitution. Another one is bias on the part of the decision maker, which has long been established.

17. The application is premised on the notion that it would be gravely unjust to expect the Public Protector, pending her court challenge to the composition and unfairness of the Committee, to be subjected to an enquiry before the very

same Committee. In the event that she succeeds in court the entire exercise would have been futile and wasteful.

18. Without necessarily revisiting the recusal application it will be recalled that 12 grounds were advanced for the recusal of the Chairperson and two for the recusal of Honourable Mileham. It will take the upholding of even one of those grounds to produce the futility referred to above. Once disqualifying bias is established then the court will have no option but to nullify the underlying decisions. Reference will be made to the recent decision of the Western cape High Court which further down the court made other pertinent observations which will be referred to during the oral hearing, of this application, time permitting.

19. Suffice for now to ascertain that South African courts have long established the principle that where prejudice can be shown to be the likely result of a decision by a presiding officer to recuse himself or herself, the aggrieved party is entitled to bring judicial review proceedings before the continuation and/or conclusion of the proceedings. This rule is not confined to court proceedings but other tribunals to which fairness applies.

C: ILLUSTRATE CASE LAW

20. There are dozens of case authorities which deal with fairness in respect of the rule against bias. However, for the purposes of this application and in the interests of time we will refer this Committee to only four primary cases, namely three decisions of the South African superior courts which are all on point, one from the High Court, the next from the Supreme Court of Appeal and another

from the Constitutional Court. The fourth one is from the House of Lords in the United Kingdom (see paragraphs 49 and 50 below).

21. Firstly guidance may be sought form the directly relevant and recent decision of the Western Cape High Court in which this Committee was a party. The Full Court of 3 Judges found that the Public Protector is the victim of dishonesty, bias, ulterior motives, bad faith and/or corruption from the highest office in the land. It was based on those findings in the main that the court felt it necessary to set aside, which means to nullify as non-existence, the suspension of the Public Protector. If even half of the 12 grounds raised in the recusal application are upheld, then the relevant decisions of proceedings and/or decisions of this Committee will be set aside as if they never took place – That is our law.

22. The dictum in the case of Pikoli (supra) which is quoted in the preamble is also of relevance to this debate.

23. Secondly, the SCA decision is called **Basson v Hugo 2018 (3) SA 46 (SCA).** It involves the well-known apartheid chemical or biological warfare medical practitioner, Wouter Basson who was being disciplined and sought to be removed from the roll of medical practitioners by a Committee of the Health Professionals Council. Even somebody so objectionable and cruel must enjoy the full protections afforded by our Constitution, let alone a Public Protector whose only sin is seemingly her enthusiasm in chasing backlogs, ensuring service delivery to the poor and investigating alleged Presidential misconduct.

24. In that matter the Committee had dismissed a recusal application but decided to proceed with the hearing while aware that Basson had approached the court

for review of its non-recusal application. A number of issues were raised in the matter including the need to exhaust internal remedies. One of the other issues which arose was the legal nature of the proceedings after the point of non-recusal. The Acting President of the SCA, Justice Shongwe said:

> *"If a presiding officer should have recused himself, proceedings conducted after dismissal of an application for recusal must be regarded as never having taken place at all (Mönnig supra at 495A-D). In the instant case, the appellant 's complaint was not that the finding of the Committee is an irregularity committed by an otherwise competent tribunal. Instead, his complaint was that the Committee lacked competence from the outset, because of actual or reasonable apprehension of bias on the part of two of its members. Stated differently, the appellant alleged that by virtue of its composition, the Committee could not exercise jurisdiction over him. So, this is not a case where the Committee wrongly acted within its jurisdiction: the appellant alleged that it had no jurisdiction from the start. The issue is one of elementary justice."* (emphasis added)

25. It is this principle which we wish to rely on in support of this application.

26. Thirdly, another relevant passage comes from Chief Justice Ngcobo. It is instructive and helpful given the resemblance of the issues raised to the present matter. The Chief Justice said in **Bernert v Absa Bank 2011 (3) SA 92 (CC)**, at paragraph 28:

"*It is, by now, axiomatic that a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, the judicial officer is either actually biased or there exists a reasonable apprehension that the judicial officer might be biased, acts in a manner that is inconsistent with the Constitution. This case concerns the apprehension of bias. The apprehension of bias may arise, either from the association or interest that the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial*." (emphasis added)

27. The fourth case, a well known international matter is discussed below. It is known as the Pinochet case and deals with the issue of bias extensively.

D: PROSPECTS OF SUCCESS IN THE REVIEW

28. We shall resist the temptation to use this section to reargue the recusal application. That would be a futile exercise. We argued the application and the Committee has made its decision. Nothing will change that at this level.

29. The purpose of this section is merely to demonstrate, by using only a few examples that the Public Protector's case is virtually unanswerable and therefore it has excellent prospects of success on review.

30. We shall do so by citing only a few examples for illustrative purposes. The remaining grounds of the 12 originally advanced will still be pursued. Also, for the sake of progress only we shall pitch this argument only at the level of a reasonable apprehension of bias and not necessarily actual bias. Again, this should not be interpreted as any abandonment of the arguments based on actual bias.

31. Before dealing with the examples we point out that on a number of the pleaded grounds, both the legal opinion and the Chairperson's reasons simply fail to provide any defence. The only excuse given for this is lack of information. Yet the "*independent*" legal practitioners, did not see it fit to seek the relevant or missing information from the Public Protector. Yet, they specifically solicited and received supplementary factual information from the Evidence Leaders, which information was never presented to the Committee nor was the Public Protector invited to even comment on or dispute the information.

32. In any event, it is difficult to determine how the authors of the opinion reached the conclusion that all 12 grounds were baseless, when they did not have sufficient information in respect of all 12. We now turn to dealing with the illustrative grounds.

33. Firstly, in respect of the ground of recusal based on the Chairperson's past utterances regarding the alleged incompetence of the Public Protector, the legal experts give no valid answer except to say that the remarks were made before the start of the enquiry and that the Chairperson has taken the oath of the Members of the National Assembly.

34. Both of these "*defences*" are not valid in law. In the case of **Bernert** cited above reference is clearly made, by the Constitutional Court, to "*utterances (made) before or during the proceedings*". The Chairperson admits having made the utterances, less than one year before the motion for impeachment was submitted. That is sufficient for the purposes of establishing bias.

35. Secondly, the taking of the oath of office, even by a judge, has never been seen as immunity from being recused for bias. There are therefore no logical reasons given for a finding of no disqualifying bias on this score.

36. Thirdly, and in relation to the continuation of the hearing in the physical absence of the Public Protector and the refusal to postpone the proceedings has been fudged in that the Chairperson's explanation, which is full of holes, has been accepted as the gospel truth.

37. Fourthly, no explanation is given for flouting the Directives by allowing members' questions prior to cross-examination when the Directives make it clear that this should occur after all other questioning.

38. These facts speak for themselves and illustrate the relative strength of the Public Protector's case on review. In this regard it bears emphasis that the starting point in a matter of this kind is section 34 of the Constitution, which says "*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.*" (emphasis added)

E: OTHER GROUNDS OF REVIEW

39. It must be mentioned that, apart from bias, the Public Protector will also rely on other aspects of PAJA such as material error of law, failure to apply the mind and/or breaking the empowering provision which is the Rules.

40. Included among the issues which will be raised before the review court are vexing questions such as whether the enquiry should override the recommendations of the panel and if so why.

41. Another important issue is the issue of the required recalling of witnesses. It is by now not clear whether these witnesses will indeed be recalled. A third issue is the need to call Mr Ramaphosa. There is no intelligible answer given to explain the decision.

42. We raise these issues to make two points. Firstly, it is to show that there are good prospects of success but secondly, to illustrate that it would be untenable if not impossible to continue with the enquiry before these issues have been resolved, at least by the High Court. Thirdly, the Committee will itself benefit from the pronouncement of the Court on these and other issues. For example, the Public Protector cannot be compelled to call her witnesses before all the witnesses called by the Evidence Leaders have been called and/or recalled.

43. Granting this application will be beneficial to the Committee in that the Courts would have given clarity on some grey areas which must be of concern to all objective members of the Committee, more especially given the unprecedented nature of this process and its pioneering role which will define future impeachment proceedings.

F: THE CASE AGAINST MR MILEHAM

44. The most glaring flaw in respect of this particular matter is the statement that the husband-and-wife relationship does not give rise to a reasonable apprehension on my part. This is a startling proposition. This review is unsurprisingly given by Mr Mileham himself, but it is also endorsed in the "*independent*" legal opinion. Both of them are an incorrect misrepresentation of the true legal position, which was succinctly summarised as follows by Hoexter: "*A family relationship, friendship or enmity give rise to a personal interest, real or apparent, that disqualifies the decision-maker*".

45. In the old case of **Liebenberg v Brakpan Liquor Licensing Board 1944 WLD 52** the court set aside the decision to grant a liquor licence to a mayor's brother because the mayor had sat as a member of the decision-making body which was a liquor board and should have, for that reason alone, recused himself.

46. The second set of justifications or reasons go to the conduct of Mr Mileham in innovating repeated public attacks on the Public Protector's lead counsel on Twitter in the process hurling insults at him in the public arena to which the victim had chosen not to react as it would have been clearly inappropriate to do so. Having seemingly agreed that this was improper, the Committee, encouraged by the "*independent*" legal advice, has since seemingly found that such conduct was acceptable on the part of one of them. This is a clear indication of enmity on the part of Mr Mileham and irrational conduct on the part of the Committee.

47. In so doing, the Committee and the opinion both missed the gist of the Public Protector's apprehension of bias. The authors of the opinion went on about how "*in their view"* Advocate Mpofu SC deserved the insults. This is of course

rejected as it is not borne out by the objective facts. However, it is not the basis of the charge of bias. The point is that Mr Mileham's attacks, even if they were totally justified (which is rejected) were inappropriately made in public by a member of the decision-making body whose impartiality must be legitimately expected by the Public Protector. Such public insults and attacks on her legal representative are a clear indication of bias, as apprehended by the Public Protector, not Adv Mpofu SC.

48. On both scores, even putting aside the issue of institutional bias arising from Mr Mileham's membership of a party which declared a public celebration when she was illegally and corruptly suspended, are sufficiently good grounds for judicial review, with very good prospects of success.

49. In this regard it may be appropriate to refer this Committee to the famous international law case of **Pinochet**[2] referred to earlier which established the principle that bias on the part of a single member of a decision-making panel is sufficient ground to disqualify the entire panel. The case is also of application to the entire review application in that it also deals with the importance of the appearance of bias which must be avoided at all costs.

50. Some of the most memorable and applicable quotes from that case are:-

    50.1. *"In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified*

[2] Pinochet, In re [1999] UKHL 1; [2000] 1 AC 119; [1999] 1 All ER 577; [1999] 2 WLR 272 (15th January, 1999)

without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet, Judges on Trial, (1976), p. 303; De Smith, Woolf & Jowel, Judicial Review of Administrative Action, 5th ed. (1995), p. 525. I will call this 'automatic disqualification.'"

50.2. *"There is no room for fine distinctions if Lord Hewart's famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

50.3. *"Only in cases where a judge is taking an active role as trustee or Director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest."*

50.4. *"It is no answer for the Judge to say that he is in fact impartial and what that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the application of this rule is so well understood and so consistently*

observed that no case has arisen in the course of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it."

51. It should be clear from these statements that, when applied to the present enquiry, it would be unlawful, futile and wasteful to insist on continuing pending the review application. Such a decision can only come from spite but will in any case not be rational.

G: PRACTICAL PROPOSALS

52. We are mindful of the duty on all parties, including the Public Protector to balance the need to protect her constitutional rights to fairness with the equally important need for the Committee to discharge its duty without undue delay.

53. However, we submit that the inherent delays in this particular matter are neither undue nor avoidable. Holding otherwise will be to elevate the interests of the Committee above those of fairness to the individual. What is needed is a balance and not a winner take all situation.

54. In this regard we welcome the Chairperson's questions seeking further details and clarity in respect of the proposed adjournment. It would have been our wish that the matter be approached in a spirit that seeks to accommodate everybody and to avoid unnecessary and costly interlocutory litigation. We therefore deal with the issues which the Chairperson has raised as follows at paragraph 13.2 of his letter to Seanego Attorneys dated 19 October 2022:

"*In this application kindly indicate by what date you intend launching such recusal (sic) application, if any, and whether you seek a stay pending a High Court application or final determination by the Constitutional Court, as well as provide an indication of your assessment if such stay is granted when it would then be anticipated that the Committee would be able to resume.*"

55. We deal with each of these issues in turn.

G1: <u>The date of launching the review application</u>

56. It is intended to launch the application very shortly after the decision on this adjournment application has been given and preferably by no later than 31 October 2022.

57. The form and content of the application will obviously be largely determined by the outcome of this application. For example, whether or not it may be necessary to seek separate interim relief will depend on the attitude of the Committee.

G2: <u>Pending the High Court or Constitutional Court determination</u>

58. This is a very important question. Ordinarily the Public Protector would obviously seek a stay pending the final determination of the rights of the parties.

59. However mindful of the length of time which it might take to reach that stage and in the proposed spirit of compromise, she will only seek a postponement until the determination of the High Court proceedings.

60. In turn we propose to negotiate the date of setting down the matter, mindful of the various procedural steps which need to be followed in terms of Rule 53 of the Rules of Court.

G3: <u>Own assessment of when the Committee might resume</u>

61. Given the time of the year and the fact that the Judge President is yet to be approached, hopefully jointly, it would seem that the earliest realistic dates for hearing the main review application, assuming that there will be no interdict proceedings, would be between the last week of January 2023 to mid-February (just after the SONA).

62. It may well be possible to secure an earlier date later this year in which case, the outcome may be expected around mid-February still.

63. Allowing for practical arrangements the Committee might then resume at the end of February or the beginning of March 2023.

64. These are obviously indicative dates dependent on a lot of other variables, principally the outcome of this application.

65. Obviously, if no agreement is reached and the matter has to be taken to court in respect of Part A (for the interdict) and Part B (for the review application itself) it would be impossible to predict how long the process might take until it reaches a final judgment in the Constitutional Court. This may well take a year or two.

H: <u>CONCLUSION</u>

66. We will be available to answer any other questions which may facilitate the equitable and fair resolution of the issues raised above.

67. In the totality of the circumstances we therefore submit that the Committee ought properly to either:

67.1. grant the application for adjournment; and/or

67.2. engage the Public Protector and her legal team with the view to reaching a mutually acceptable arrangement to cater for the period between now and the determination of the review application.

D MPOFU SC
B SHABALALA

B MATLHAPE

Applicant's Counsel

Chambers, Johannesburg
24 October 2022