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

I, the undersigned,

BUSISIWE MKHWEBANE

do hereby make oath and state that:

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

2. The facts deposed to in this affidavit are within my personal knowledge except where it is evident from the context that they are not. Where I make submissions of a legal nature, I do so on the basis of my own understanding of the law and the advice of my legal representatives which advice I believe to be correct. Such facts are to the best of my recollection and also as more recently revealed in the documentation and evidence led at this Enquiry.

A: PURPOSE OF THIS AFFIDAVIT

3. This is the second and final instalment of my affidavit and witness statement which I submit before this Enquiry, having submitted the first instalment on 14 March 2023. This format was more fully explained in my first affidavit.

4. I will deal with the remainder of the issues as follows:

   4.1. First, I will deal with the defects in the charges and extended scope of the enquiry;

   4.2. CIEX (Charges 1-3);

   4.3. Vrede (Charges 1-3);

   4.4. Other cases, where necessary; and

   4.5. The "*Human Resources*" related issues (Charge 4, paragraph 10).

5. Given the complex and overlapping nature of the charges, I reserve the right to fill up any gaps which may be identified and/or to call further witnesses if necessary.

6. This statement, like the first departs from the premise that the Mazzone Motion is inspired by improper motives and those who support it do so in order to protect the so-called untouchables from due scrutiny. In the CIEX matter former Chief Justice Mogoeng who aptly said:

   "[3] For centuries preceding our constitutional democracy, untouchability was so entrenched or virtually institutionalised that it was unthinkable for some to challenge the apparent or actual criminality, naked injustice or corruption that reigned in our country. So normalised was impunity

and injustice that some citizens were not only expected to accept their unjustly prescribed inferiority, but to also succumb to the "preferred" impermissibility for them to be critical of the untouchables.

[4] Harsh consequences including smear or other writings bereft of intellectual integrity could flow from displaying the nerve to speak or act out against injustice, corruption or sectional beneficial use or abuse of institutional power or public resources. It was potentially career-limiting and even life-threatening for those who were supposed to know their place to seek to have the right thing done by challenging the "entitled" perpetrators of injustice or their allies."

B: INHERENT DEFECTS IN THE CHARGES

7. As a preliminary point I will, in overall argument, demonstrate that the majority of the charges are inherently defective and/or unsustainable as presently articulated in the charge sheet or the Mazzone Motion.

8. It has been my plea from the beginning that Ms Mazzone, the architect of the so-called Mazzone Motion upon which this enquiry is based should be called as a witnesses to assist this Committee, firstly because she is the complainant and secondly because she is the one who crafted the somewhat vague charges against me. It is unfortunate that my plea fell on deaf ears. I should hasten to remind this Committee about the fiasco and embarrassment that occurred when the Evidence Leaders themselves were at a loss regarding the issue of "*legal fees*" versus "*legal costs*" to such an extent that they unnecessarily violated the constitutional rights of my legal team and the many

black legal practitioners who undertook work for the office of the PPSA. That entire saga was seemingly based on their misreading of the charges as crafted by Ms Mazzone.

9. The general importance of drafting the correct charge in the charge sheet, and in this case, a Motion, appears from the following:

> *"A charge should be formulated with great care in order to protect the accused's constitutional right to a fair trial. The purpose of setting out the essential elements of an offence and the alleged misconduct of the accused that brings it within the ambit of the offence, is to safeguard an accused person's fair trial right to be supplied with sufficient information to conduct his or her defence in a proper way."*[1]

10. The key universally applicable principles that can be extracted from the above quotation is that:

10.1. Firstly, a charge must be crafted carefully to ensure that it contains all the averments necessary to sustain a verdict of guilty, when proved;

10.2. Secondly, a properly crafted charge pays homage to and guarantees the accused's constitutional right to be supplied with sufficient information to conduct a defence in a proper way, as guaranteed in the Constitution of the Republic of South Africa, 1996. Put differently, an accused must be provided with sufficient information to enable him

[1] Du Toit: Commentary on the CPA, chapter 14, page 1.

to mount a defence against the charge put to him/her. This applies equally to any punitive process such as the present one;

10.3. Thirdly, and most importantly, a properly crafted charge ensures fairness of process i.e. levels the playing field between the accuser and the accused.

11. The reason why I articulate the above is because the charges, as presently presented in the Mazzone Motion, have been crafted in a vague and embarrassing way and are as such, defective.

12. Even in the context of labour law and related disciplinary proceedings, the requirements of a charge sheet are the following:

12.1. charge sheets usually consist of two components: first, is a description of the incident that is considered misconduct and second the categorisation of that incident as specific misconduct;

12.2. the "*accused*" employee must have reasonable certainty about what the charge is[2]; and

12.3. there must be a relationship between the charges levelled against the employee and the misconduct for which the employee is found guilty[3].

13. Given the fact that no job description or specifications were formulated, it is remarkable that the National Assembly failed to follow the other example from

[2] POPCRU v Minster of Correctional Services 1999 20 ILJ 2416 (LC), para 33
[3] (National Commissioner of SAPS v Myers 2012 JOL 28980 (LAC)

labour relations which required dismissal to be a matter of last resort after such corrective measures *audi* letters, counselling and warnings. This is further evidence that the charges are motivated by vengeance and political considerations rather than the interests of the public.

14. In this regard the National Assembly has failed in its duty to assist and protect the Public protector as prescribed in section 18(3) of the Constitution which provides that:

> *"Other organs of state, through legislative and other measures must assist and protect [the Public Protector] to ensure the independence, impartiality, dignity and effectiveness of [the Public Protector]."*

15. To support my contention I will demonstrate why I maintain that the charges as contained in the Mazzone motion are fatally defective herein below. These issues will be more fully dealt with during the oral argument stage. Here I only highlight them for the immediate attention of the Committee as it assesses my testimony.

Charge 1: Misconduct in South African Reserve Bank matter

16. For the charges to be substantiated they will also have to pass the definitional requirements which govern each type of impeachment offence being evaluated. In the present case only misconduct and incompetence have been relied upon:

16.1. misconduct is defined as: "*the intentional or gross (sic) negligent failure to meet the standard of behaviour or conduct expected of a holder of public office*";

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

(a) *knowledge to carry out; and*

(b) *ability or skill to perform*

his or her duties effectively and efficiently".

17. Lastly the charges are defective in a different sense, namely the fact that the Committee unlawfully insisted that all the original and "*unsifted*" charges be retained. In reality the Committee will be called upon to adjudicate only conduct which has passed through the mechanism of Independent Panel. Those charges are succinctly identified in the "*Conclusions and Findings*" (section E) of the Report, read with Annexure "A" to the report under the heading "*Findings in relation to the Charges*".

18. There can be little doubt, upon a logical reading of the report, that the recommendation to set up an enquiry was confined to the charges duly sifted by Panel. We nevertheless will deal with all the relevant charges, even though it may subsequently be ruled otherwise.

19. Charge 1 reads as follows:

19.1. Adv Mkhwebane is guilty of misconduct in that in her investigation and report into allegations of failure by the South African Government to implement the CIEX report and recover public funds from ABSA bank, (the Public Protectors report 8 of 2017/18) and in the litigation challenging that report Adv Mkhwebane committed the following acts which, separately or cumulatively constitute an intentional or grossly negligent failure to meet the standards of conduct expected of the holder of the office of the Public Protector;

19.2. Adv Mkhwebane adopted a dismissive, high handed, biased and procedurally irrational and unfair approach in the conduct of her investigation in that she:-

19.2.1. met with the presidency and the state Security Agency secretly, without disclosing the fact and import of such meetings in the report 8 of 2017/18 and without furnishing any transcripts of the meeting in the Rule 53 record filed in the application to review that report;

19.2.2. materially broadened the scope of investigation in paragraph 4.2.10 of the final report as compared to the provisional report without giving notice thereof to any affected person, and without furnishing any explanation thereof;

19.2.3. materially altered the remedial action in the final report as compared to the provisional report on the instruction and/or advise of the Presidency and/or the State Security Agency;

and without giving notice and an opportunity to comment their own to the affected persons;

19.2.4. failed in her duty to give affected persons including the speaker and the South African Reserve Bank both prominent role players in the affairs of the state notice and an opportunity for comment on any findings and remedial action she proposed to take with consequences that were severely damaging not only to the economy but to the reputation of her own office;

19.2.5. failed to honour an agreement made with the Reserve Bank to make her final report available to the Reserve Bank five days before its leaks; and

19.2.6. failed to even refer or discuss the submissions made by the Reserve Bank or any other person in response to the provisional report in the final report.

20. It is clear from the reading of the above that Charge 1 is crafted in a very vague and ambiguous manner. It fails to inform me of the misconduct which I am accused of having committed and as a result this affects the manner in which I should respond to the charge. It is to be remembered that the details in the charge sheet inform me of the case against me and the charges I am required to meet.

21. More importantly, the use of the word "*and*" as underlined herein above renders the entire charge defective in that there is no clarity as to what allegations am I required to answer to. At best, it puts the burden on the Evidence Leaders to sustain <u>all</u> the sub-charges, failing which the principal charge cannot possibly be sustained, as a matter of simple logic and unless the charge is amended, which cannot be done at this stage.

22. What is of utmost importance is that since the sub-charges are crafted as one long charge by the inclusion of the word "*and*" then all essential elements of the whole charge should be present in order for me to be found to have committed a misconduct. For example, Mr Tshiwalule at paragraphs 32 and 46 of his affidavit testified that ABSA and the SARB were actually given the provisional report before it was leaked. On this evidence alone, the whole charge collapses. In any event, the drafter of the charges should possibly have used the words "*and/or*" before the last sub-charge, if her intention was indeed to present the charges as alternative counts. Was that indeed her intention? The answer to that question will never be known given the Committee's illegal refusal to call the author of the document. It must therefore be interpreted according to the ordinary objective rules of interpretation of legal documents.

<u>Charge 2 and 3</u>

23. The same thing is repeated in these charges in that the last but one charge connects with the last sub-charge through the word "*and*" which then makes the entire charge and its sub-charges to be one composite charge. The failure of one of the sub-charges collapses the entire principal charge.

24. By way of contrast in Charge 4, the drafter correctly employed the correct conjunctive "*and/or*".

25. I now turn to dealing with the merits of the specific charges.

B: **CHARGES 1 and 3 (CIEX)**

26. These charges relate to allegations of misconduct and incompetence against me in respect of the South African Reserve Bank ("SARB") matter in that I committed these acts of misconduct and incompetence during my investigation and the litigation challenging the report. I am further accused of having demonstrated a sustained lack of knowledge to carry out an ability and skill to perform my duties effectively and efficiently. In respect of this investigation and report the allegations are that I,

26.1. grossly overreached and exceeded the bounds of my authority by directing the Chairperson of the Portfolio Committee on Justice and Correctional Services to initiate a process to amend section 224 of the Constitution with a view to altering the primary objective of the South African Reserve Bank;

26.2. materially broadened the scope of the investigation without giving notice to any affected person and without furnishing any explanation, therefore;

26.3. materially altered the remedial action in the final report on the instruction and/or advise of the President and/or SSA Capital and

without giving notice and opportunity to the affected persons to comment thereon;

26.4. failed in my duty to give affected persons notice and an opportunity to comment on any findings and remedial action I proposed to take, with consequences that were severely damaging, not only to the economy but to the reputation of my office;

26.5. failed to honour an agreement made with the SARB to make my final report available five days before its release;

26.6. failed in the final report to discuss the submissions made by the SARB and others in response to the provisional report;

26.7. demonstrated a rationality forensic weakness in coherence, confusion and misunderstanding of the applicable contractual, constitutional and administrative law principles; and

26.8. I demonstrated that I do not fully understand the constitutional duty to be impartial and to perform my functions without fear, favour and prejudice and that I demonstrated failure to appreciate my heightened duty towards the court as a public litigant.

27. When I assumed my duties at the Public Protector offices on the 17 October 2016, the CIEX matter had been under investigation for more than five years. The investigation was initiated by my predecessor Prof Madonsela and there was a provisional report that had already been drafted by the investigator who later left the Office of the Public Protector. Having had the benefit of Prof

Madonsela's evidence before this enquiry who testified on 6 March 2023 that, she worked with a trainee investigator and that she personally conducted the investigation, according to her evidence she considered this investigation a "*slam dunk*". However, she admitted that the investigation later turned to be a very complex investigation. She could not explain why she continued even when it became clear that this was not a simple investigation and when the relevant structures of PPSA, such as Think Tank, rejected the continuation of the investigation.

28. On 19 June 2017, I released report number 8 of 2017/2018 that dealt with allegations of maladministration, corruption, misappropriation of public funds and failure by the South African government to implement the CIEX report and to recover public funds from ABSA bank.

29. At the outset, I state that the issues that my predecessor Prof Madonsela initially investigated remained the same, however the proposed remedial action in the draft provisional report were indeed changed although not significantly. I was entitled to do this as I am a different person and accordingly could have a different take on the issues. There is nothing untoward or unusual, let alone impeachable, about that. It is in fact what is required in terms of the **Mail and Guardian** case.

30. Often such alterations are inevitably necessitated by the very responses obtained from the role players in the process of affording them their right to be heard. Contrary to what is clearly suggested in the charges the inputs of SARB, National Treasury and ABSA were specifically taken into account and

referred to at paragraphs 5.2.8, 5.2.20 and 5.2.25 of the CIEX Report, respectively.

31. Further proof that I did consider the inputs of all parties comes from the fact that, due to the appropriate response I received from the National Treasury, I removed the remedial action previously proposed by my predecessor to the effect that there was a need to amend the Reserve Bank Act. This could not have happened if the input had been ignored.

32. With the benefit of hindsight it may well be so that after making all the adjustments from the inputs received it would have been a good idea to revise the provisional report and recirculate it to the parties. My failure to do so did not stem from any ill-intent but from my genuine belief that there had already been adequate consultation or that the charges were not so substantial as to necessitate further delays in releasing this long-awaited report.

33. The remedial action about the need to investigate alleged apartheid corruption as outlined in the CIEX report and taking necessary measures was highlighted in the initial draft provisional report and the remedial action to investigate alleged apartheid corruption as outlined in the CIEX provisional report formed part of my final report.

34. The issue about ABSA paying back the misappropriated funds to the South African public purse was canvassed in the initial draft provisional report however, I only changed the recovery mode of the misappropriated funds in my final report. While my predecessor had proposed that the matter be referred to a Commission of Enquiry, I recommended referral to the SIU. This

was purely because there was ongoing litigation in which the issue of the Commissions of Enquiry was being disputed, in relation to the state capture report.

35. Therefore, there was no significant change to the initial draft provisional report and my final report accept paragraph 7.2 of the final report, which further stated that: -

"The Chairperson of the Portfolio Committee on Justice and Correctional Services must initiate a process that will result in the amendment of section 224 of the Constitution, in pursuit of improving socio- economic conditions of the citizens of the Republic, by introducing a motion in terms of section 73(2) of the Constitution in the National Assembly and thereafter deal with the matter in terms of section 74(5) of the Constitution:

Section 224 of the Constitution should thus read:

(1) The primary object of the South African Reserve Bank is to promote balanced and sustainable economic growth in the Republic, while ensuring that the socio- economic well- being of the citizens are protected.

(2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, while ensuring that there must be regular consultation between the Bank and Parliament to achieve meaningful socio-economic transformation."

36. In crafting the abovementioned remedial action, which is the one which caused a hullaballoo and attracted such negative litigation from ABSA and the SARB, I only had good intentions to benefit all South Africans, especially the poor and marginalised. I had genuinely identified the root cause of the lifeboat saga as the SARB's obsession with the protection of the rand above all else which in turn was traceable to its current skewed mandate. This view was supported or corroborated by the internal research conducted within PPSA and/or economic experts familiar with the SARB environment such as Mr Goodson and Mr Moodley who happened to be by then working for the SSA which was a mere coincidence.

37. The remedial action was never intended to be prescriptive of the outcome of the proposed process. That would have been illogical and unimplementable. Having said that and with the benefit of hindsight I subsequently accepted as I still do that the use of the word "*will*" instead of "*may*" in the remedial action could cause confusion and suggest that the remedial action was prescriptive of outcome. So could proposing a wording for the amended section, although that was certainly not my intention. These were some of the factors which informed my decision to withdraw opposition to the setting aside of this remedial action.

38. A sufficient number of witnesses, including Adv Neels van der Merwe who did the relevant research, albeit not completed, confirmed that Parliament would still need to obtain the required majority to pass any such amendment. This

ought to have been obvious to anyone considering the remedial action, including "*the market*".

39. The true motive for the overreaction and pursuing the litigation so vigorously was to intimidate me and anyone who dared to speak out for the poor. The model I was proposing is consistent with vast majority of countries in the world and it is not in itself subversive or cause for alarm and panic.

40. Subsequently, the Governor, ABSA and the Speaker all challenged the constitutionality of my remedial action. Their challenge was premised on the argument that I have no power to "*instruct*" Parliament to make an amendment to the Constitution. It was further argued that section 224 can only be amended with a supporting vote of at least two thirds of the members of the National Assembly, and therefore, the remedial action violates the doctrine of the separation of powers guaranteed by section 1(c) of the Constitution, it was argued that an order directing Parliament to amend the Constitution and going so far as to prescribe the wording of that amendment offends the principle of the separation of powers. I filed an answering affidavit[4] in which I consented to the order sought by the Reserve Bank. The purpose of my answering affidavit was to explain how and for what reasons I arrived at the remedial action. I was also motivated by the general duty to assist the courts.

41. I pause here and refer this August House to the evidence of Honourable Sokoni who testified before this enquiry in her capacities as the Public Protector of Zambia and an expert in ombudsman's matters. She testified that

[4] Bundle A page 787-880

in many jurisdictions the ombudsman has the authority to recommend for the amendment of the Constitution and/or legislation. Although my recommendation for the amendment of the Constitution process was read as being couched in peremptory terms in that I used the word "*must*". The intention was not to impose an amendment of the Constitution but for the portfolio committee to follow its normal processes in passing such amendments. I have never claimed to have the powers and the authority to amend the Constitution and my remedial action was never intended to impose an amendment. I have always known this obvious fact.

42. It is an incontestable fact that the powers of the Public Protector are very wide. There is no reason in principle why a constitutional amendment may not be proposed where it is necessary to do so.

43. In this regard, I would like to refer to the Replying Affidavit of the Reserve Bank Governor, Mr Lesetja Kganyago which he filed on behalf of the South African Reserve Bank review proceedings. In paragraph 18 of the Affidavit he states the following:

> *"The mandate of the Reserve Bank should be left alone unless the elected representatives of the people through constitutionally ordained processes wish to change it. It is not place of the Public Protector to meddle in these matters".*

44. I submit that there are similarities between the evidence of Honourable Sokoni on the Ombudsman having authority to recommend for amendments of the Constitution, Mr Kganyago's statement that the mandate of the Reserve Bank

can be changed although he emphasises that can only be done through the elected representatives of the people (Parliament) and this is what I envisaged in my recommendation in paragraph 7.2 of the report where I recommended that "*The Chairperson of the Portfolio Committee on Justice and Correctional Services must initiate* ***a process*** *that will result in the amendment of section 224 of the Constitution.*" Any error in this wording was linguistical and not legal or economic, as wrongly suggested.

45. On the allegation that I widened the scope of the investigation I wish to refer to the Mail and Guardian judgement which is the authority on this issue and the court was clear that as a Public Protector I must approach an investigation with an enquiring mind and that I can widen the scope by following further evidence which is not necessarily confined to the scope of the complaint. Unfortunately, the charges are inherently contradictory in that under this charge I am accused of having widened the scope of the investigation however under charge 2 sub- paragraph 4.1 I am accused of having narrowed the scope of the investigation. It is going to be argued that the basis of these charges is meritless.

46. The **EFF v Speaker (Nkandla)** judgment also makes it clear that the principal duties of the Public Protector involve the identification by her of the root cause of the complaint to which the appropriate remedy is thereafter applied. This is exactly what I did. Neither the court nor this Committee can substitute the Public Protector's duly identified root cause. Nor is it prescribed that one Public Protector will identify the same root cause as the next one. Such reasoning is fallacious and ignorant of the applicable law.

47. I have no recollection of entering into an agreement with the SARB to share the final report 5 days before its release at the time of the issuing of the report. We relied on section 7(9) of the act and our interpretation of this section was that you can only share the provisional report with the implicated institutions and/or officials but the position has since changed after the courts pronouncement in the **PP v The President of South Africa** matter in which the court ruled that a hearing must be given before the remedial action is recommended. According to the evidence of Mr Kekana the 5-day agreement must have been entered with my predecessor. According to Mr Tshiwalule that undertaking was made in September 2013. He testified that the issue was adequately dealt with in the response which he drafted for me and which was then sent to Dr de Jager of the SARB. In addition the provisional report was indeed sent to them. This complaint therefore makes no sense and it is baseless. I can do no better than the quote directly from Mr Tshiwalule's affidavit, at paragraph 22:-

> *"The SARB was once again enquiring about the release of the provisional report, with reference to an agreement it said had been made by Adv Madonsela at a meeting held on 2 September 2013, wherein she undertook to afford the SARB ten days to comment on the provisional report and then only to release the finalised report after 5 days' notice to the SARB. I forwarded the SARB's correspondent to the PP, who requested me to draft a response for her signature".*

48. How I must now be removed from office or impeached for breaching this agreement is totally unfathomable.

49. On the issue of failure to incorporate the response of the SARB into my final report, it is not clear to me as to which part of the response is not incorporated into my report because as a norm, the purpose of section 7(9) is to afford a person or an institution under investigation an opportunity to respond to the adverse findings to be made and the responses are incorporated into the final report. Furthermore both my predecessor and I had given them a hearing. The issue of the "*second audi*" was not yet settled in our courts at that stage. Importantly, my view that no second *audis* were necessary was independently confirmed in the legal opinion given to me by Mr Nemasisi. No ill-intent can be attributed to me. These facts are conveniently forgotten when this accusation is frequently made in relation to the various reports.

50. I am further accused that, I demonstrated a rationality forensic weakness in coherence, confusion and misunderstanding of the applicable contractual, constitutional and administrative law principles. This charge is vague and meritless, and no evidence was led in support thereof. If reliance will be placed on the true facts, I am advised that it will be refuted during oral argument.

51. In dealing with the evidence in relation to the CIEX investigation, I would like to emphasise the following point that the CIEX investigation started under the auspices of my predecessor Prof Madonsela in 2010. In 7 years she had remarkably failed to produce even a provisional report. The records relating to the investigation went missing and it was necessary for me to have a meeting

with the SSA to get their narrative on the issues surrounding the investigation. This explains why I had to meet with representatives of the SSA as the body which had signed the CIEX agreement on behalf of the South African government. Mr Kekana in his testimony refers to the meeting I had with Minister Mahlobo, the then Minister of State Security. He testified that he found it odd that I had a secret meeting with the aforesaid Minister but under cross examination, Mr Kekana conceded that he did not witness the meeting and did not know how long it lasted. I deny that I had a secret meeting with the Minister however, I did have a customary meet and greet meeting with him which lasted a few minutes. At the meeting there was Mr James Ramabulane, Mr Arthur Fraser and Minister Mahlobo. The meeting was held on 3 May 2017 at the PPSA offices. Mr Kekana testified that I instructed him not to take notes in the meeting we had with the SSA and in his view, this was very improper as every meeting we had, we either take notes or record the contents of the meeting. Mr Kekana is correct that for every meeting we either take notes or record the meeting. However my meeting with the Minister and the SSA team was not for the purposes of investigation at the time, as stated above, that since the information relating to CIEX went missing, the purpose of the meeting with the SSA was to get background information. This much is confirmed by Mr Kekana himself at paragraph 17 of his affidavit. The mystery here is that although Mr Kekana claims he was instructed not to record mechanically, he went ahead to take notes and his handwritten notes formed part of the Rule 53 record. It is this absurdity which was correctly highlighted in the minority judgment of Chief Justice Mogoeng and Justice Goliath. If the meeting was being concealed why would the notes have been included in the

Rule 53 record. No intelligible answer has ever been given to this simple question. As a matter of fact, I do not get involved in the compilation of the records in terms of Rule 53. In this regard, Mr Kekana had a free hand and sole responsibility in the compilation of the Rule 53 record. It is a pity that at the end of the day the court mulcted me with personal costs for something that did not fall within my responsibilities. Countless witnesses called by the Evidence Leaders have confirmed that I generally and understandably have no involvement in the compilation of Rule 53 records. This applies to all executive authorities such as Ministers, MEC's and the like.

52. I have also been punished with a cost order on the basis that I allegedly lied about my meeting with President Zuma. I still insist that I have never met with President Zuma in connection with the CIEX matter. The court missed the point that I had met with the people from the Presidency at their invitation. Mr Kekana himself confirmed in his testimony that there was no meeting with President Zuma. Unfortunately, the court mixed the issues up even though in my answering affidavit I was clear that I met with the people from the Presidency and not with the President. It is also patently false that I altered the remedial action pertaining to the Reserve Bank mandate at the instruction of the Presidency and/or the SSA. Even the Independent Panel referred, incorrectly, to "*the PP's failure to reveal that she had meetings with the President and the SSA*". (See paragraph 257 of the Report)

53. On 21 December 2016 a provisional report on the CIEX investigation was allegedly leaked and Mr Kekana testified that the leaked provisional report had never been quality assured prior to it being leaked to the Public however, Mr

Kekana was ultimately responsible for the provisional report and its quality assurance. The email evidence confirms my constant appeals to conduct quality assurance. It was always known that this was a very high profile investigation involving very powerful players in South African society.

54. Mr Kekana in his evidence, tried to develop a theory that the whole issue of constitutional amendment simply came from the SSA ignoring the extensive work that had been done by my office on the issue of different economic models particularly in relation to the constitutional regimes of Reserve Banks in other countries as compared to South Africa. There were inputs on this issue that came from Mr Van Der Merwe who was the Public Protector Manager; Knowledge Management and Research, and that Mr Kekana had been interacting with him throughout the course of the investigation particularly on the economic model issue. The book by Mr Steven Mitford Goodson titled "*Inside the South African Reserve Bank; its origins and secrets exposed*" was also used as a point of reference for the investigation. There was also a personal engagement with the author in Cape Town.

55. It is also important to note that the CIEX report was owned and managed by the Department of Intelligence or the SSA or NIA. CIEX undertook to provide intelligence in the form of evidence to the South African government and advise in relation to various issues including trying to recover the money that belonged to the people of South Africa therefore the contract was between the government through the NIA or the SSA and CIEX. It is indeed curious that my predecessor testified that she had meetings with Mr Masetlha and even Mr

Oatley in London but she has never been labelled as a "*spy*" as a result thereof.

56. As a matter of fact in June 2017, I released the report and found that the South African Reserve Bank's R1.125 billion rands bail out of Bankrop between 1985 and 1995 was unlawful and that ABSA should pay back the money in November of the same year. The South African Reserve Bank approached the North Gauteng High Court for a declaratory order premised on the fact that I abused the Office of the Public Protector and wanted me to be mulcted with personal costs. However, Prof Madonsela in her testimony before the enquiry confirmed that even though the capital amount loaned to Bankrop was recovered but an amount of R 1.25 billion in interest had not been recovered and that it was still owing as a result of an illegal gift given to Bankrop/ABSA bank. I note that Prof Madonsela's testimony was in line with my findings that an interest on money in billions was still owing, although she had identified prescription as a good defence.

57. This matter ended up in the Constitutional Court where the issue of the personal costs had to be determined. The majority judgement by Justices Khampepe and Theron found that my conduct warranted a personal cost order.

58. The basis of the findings by the majority judgment was that there was a plan or intention to deceive or malice or crass dishonesty on my part however the Chief Justice makes important observations which I would like this enquiry and the public to consider. Chief Justice Mogoeng's view is that the dishonesty

finding against me by the majority is irreconcilable with my disclosure of both the correct and incorrect stage at which Dr Mokoka's views were sought and the production of his report that did not support my initial stance. This relates to the allegation that I failed to disclose that I relied on experts reports in particular Dr Mokoka, for my findings and recommendations in the CIEX matter. The Chief Justice was of the view that my errors have been blown out of proportion, Chief Justice also emphasised the need to examine all facts and issues in a detached and fair way. He found that the Reserve Bank was in law required to prove its case rather than be allowed to effortlessly ride on waves of suspicion or unsubstantiated conclusions to its desired destination. He emphasised that this was not a case of being caught or found out. I laid it bare myself that a dishonest conspirator as I am made out to be would in all probability have shredded or concealed the documentation. He found that the notion that I was being partial or acted in bad faith and that it was the only reasonable inference to be drawn from my failure to disclose this information and to not consult with the banks lacked substance. He further found that it must be emphasised that the conclusion that I was dishonest or deceitful is belied by my declassification notes of my meeting with the SSA my somewhat belated disclosure of all the other information including the dates of the meetings, my contemporaneous notes of what was discussed and the effect of the meeting with the Presidency on the choice of the vehicle for investigation. Interestingly Chief Justice Mogoeng concluded that ordinary personal costs on an attorney and client scale cannot be awarded merely because the Public Protector unwisely or in a manner that smacks of poor judgement initially withheld information that she eventually disclosed. I

deserve to be criticised for this but absent proof or a reasoned explanation of deliberate wrongdoing designed to prejudice others, there can be no justification for any form of personal costs on grounds of bad faith. A court must work with what has been placed before it and in terms of the law. It is not open to it to read a lot more into or out of what is before it to arrive at a conclusion. It also cannot disregard what is favourable to a litigant because of her errors. Mogoeng CJ in paragraph 85 of the judgement makes the following conclusions "*More importantly in coherent as the Public Protectors explanation of her failures or deliberate omissions are or might be there are a irreconcilable with gross negligence and bad faith I repeat nobody who is deeply involved in or who is a kind pin of a fraudulent, malicious, perverse or intentionally deceptive scheme to the disadvantage of others who would reasonably expected to disclose to them without duress that which would expose the fraud, malice or calculated deception as the Public Protector did disclose*". The judgment can be found under Bundle C, folder 3 (Public Protector Judgments), Item 37.

59. During my testimony I will further demonstrate why the minority judgment is to be preferred. I will also argue that the mission of the courts is different to that of the Committee. I will again emphasise the fallacy in the view that the role of this Committee is simply to rubberstamp the opinion of the courts. The Committee is called upon to enquire afresh into the facts and to evaluate my explanations which emanates from this enquiry. The Committee is also not a court of appeal confined to assessing the correctness or otherwise of past judgments. It is a separate and stand-alone enquiry.

60. On any objective and fair assessment of the evidence and the application of the relevant legal and constitutional principles to the proven facts, none of the allegations of misconduct and/or incompetence levelled against me in the Mazzone Motion and related to the CIEX matter, can be substantiated.

C: CHARGE 2: MISCONDUCT: VREDE DAIRY MATTER

61. This charge relates to the Vrede Dairy Project. It is alleged that I failed to conduct a lawful and meaningful investigation and to grant appropriate remedial action, that I failed to appreciate my legal duty to come to the aid of the vulnerable and marginalized members of society.

62. It is no exaggeration to state upfront that as far as the Mazzone Motion is concerned, the Vrede matter represents the weakest link. The charges are all contrived and impossible to sustain. The main witnesses relied upon by the Evidence Leaders in Messrs Kekana, Samuel and Raedani rank among the worst performing witnesses in the area of credibility.

63. This matter has a long history. There is Vrede 1 and Vrede 2. After the Vrede 1 report was issued, the said report was taken on review by the DA and the Council for Advancement of the South African Constitution (CASAC). The DA's main contention was that my investigation was inadequate and ineffective and that one of the complaints was not investigated. The third complaint in particular implicated the then Premier, Mr. Ace Magashule and Mr. Zwane, the then MEC for Agriculture. According to the DA, this complaint was not

investigated at all. At the outset, I wish to state categorically that this is not true.

64. Part of my evidence deals with Premier Magashule. I have followed the evidence of three witnesses who in their evidence mention Mr. Magashule, the names of those witnesses are Mr. Sphelo Samuel, Mr. Reginald Ndou and Mr. Nditsheni Raedani. I have also considered the findings of the court in relation to the Vrede investigation.

65. The evidence of Mr. Samuel was contradictory in many respects. No wonder under cross examination his evidence crumbled. He gave unsustainable testimony to the effect that the investigation and or allegations regarding Messrs Magashule and Zwane were swept under the carpet and never investigated by my office, me in particular. I deny that I did not investigate Mr. Magashule however Mr. Zwane at the time of the investigation was no longer the MEC for Agriculture. I am going to show below that Mr. Magashule was indeed investigated to the point where he was issued with the section 7(9) notice. I pause here to state that a section 7(9) notice is issued when according to the preliminary findings adverse findings can be made against a person who is being investigated. I refer to Bundle E, Item 6, File 2, page 942 a notice issued in terms of section 7(9) notice dated 7 June 2017 addressed and served on Mr Magashule. The section 7(9) notice was in relation to the investigation that was carried out against Mr Magashule and others in respect of non-adherence to treasury prescripts and lack of financial control in the administration of the Vrede integrated project.

66. My evidence that Mr. Magashule was investigated and eventually served with a section 7(9) notice is corroborated by the evidence of both Mr. Ndou who was the Executive Manager, responsible for provinces and Mr. Raedani who was later involved to quality assure the report. It is also supported by the objective evidence.

67. I am aware of the previous investigations conducted prior to my assumption of office as the Public Protector in particular an investigation conducted by my predecessor and the National Treasury which investigation revealed various irregularities with recommendations of disciplinary procedures against the HOD and the CFO which had been ignored by the provincial government and the Premier.

68. Throughout the investigation the initial complaint was limited largely to financial mismanagement and irregular procurement processes. The focus therefore was on these issues specifically. As such section 7(9) notices were amongst others, issued to the premier of the Free State, MEC and Head of the Department.

69. The Premier in response to the section 7(9) said, by the time he received the National Treasury Report recommendations, the office of the Public Protector was already investigating the same issue. Hence, he never implemented it, waiting for the PP report or finalisation of the investigation. I was satisfied with this explanation.

70. In his Response to the section 7(9) Mr Magashule stated, inter alia, on paragraph 2 of his response that the National Treasury was supposed to carry

out the rest of the recommendations of the Accountant General. He further stated that the Executive Council of the Free State Provincial Government resolved on 03 March 2014 that the project should be taken over by the FDC in close collaboration with the Department of Agriculture and Rural Development and the Provincial Treasury. I refer to Bundle E, Item 6, File 2, page 1002, Mr Magashule's response to my section 7(9) notice dated 14 July 2017.

71. The only issue implicating the Premier was his failure to take disciplinary action against the HOD. The Premier was the only person empowered to take disciplinary action against the HOD given the particulars of the contract of employment with the HOD. There was nothing in the complaints nor the provisional report which implicated the Premier.

72. Once an implicated person deals adequately with the issues in his or her response to a section 7(9) notice, the Public Protector has no choice but to refrain from imposing any remedial action on them. This principle ought properly to be so trite as not to warrant any repetition. It is exactly what happened in the Vrede case.

73. The HOD, Free State Department of Agriculture and Rural Development was an implicated official. I directed, in my remedial action that the Premier take disciplinary action against all implicated officials by referring to implicated officials. I wanted to ensure that all officials who worked on the project are not excluded from disciplinary action which I directed in my remedial action.

74. There are issues which were not investigated, for instance the issue of whether or not value for money had been obtained by the government in terms of the agreement because this issue had been investigated by the National Treasury; Accounting General. Other issues were not investigated due to financial constraints which were being experienced at that particular point in time.

75. Finally, I wish to dispute the false suggestion by Mr. Samuel in his evidence that my meeting with Mr. Magashule in the absence of the PP's team suggested something untoward or irregular. In fact what had happened was that whilst the PP team was waiting at the waiting area, I was called by the Premier's professional assistant to his office to meet and greet him at his invitation. The meeting did not even last much more than 10 minutes, because it did not concern any investigation as suggested by Mr Samuel. It was part of my stakeholder outreach and nothing more than the "*tea*" meeting which my predecessor testified to have held with Mr Magashule in her own office. It is understandable that such a meeting is also not recorded anywhere.

76. In actual fact, after this contrary meeting the team and I proceeded to hold the actual reason for being there which was to hold a formal meeting with the Speaker of the Legislature. This meeting was duly conducted in the usual way. Its aim was to discuss and prepare with the Speaker the programme for the roadshow and stakeholder engagement planned for that day. It was only at that engagements that the DA Leader enquired about the status of the Vrede investigation in view of what he referred to as empty promises having been made as far back as 2015.

77. It will be remembered that the initial complaint regarding the Vrede investigation did not implicate the politicians regardless, during the investigation the name of Mr Magashule was mentioned, as we conduct our investigations with an open mind, we decided to follow the evidence somehow implicating Mr Magashule which resulted in the issuing of the section 7(9) notice as stated above.

78. The report in respect of the first part of the investigation in which Mr Magashule responded to the section 7(9) notice was issued. However, on 6 March 2018 the Portfolio Committee of Justice and Correctional Services raised concerns about the report and requested me to consider the role of politicians in the Vrede Dairy project. In response to the Portfolio Committee's concern, I instructed Mr Ndou who must have in turn instructed Mr Raedani to investigate the matter with a focus on the role of politicians even though in the first investigation the politicians had been investigated to the stage of issuing and serving them with the section 7(9) notices. The instruction also included the investigation of plight of the beneficiaries.

79. According to Mr Raedani's evidence, the first person he arranged to speak to was Mr Magashule. In October 2018, I met with Mr Magashule in the presence of both Mr Ndou and Mr Raedani. Mr Ndou and Mr Raedani being the investigators of the matter had prepared questions which I had to put to Mr Magashule. I might as well mention that I was chairing this meeting, hence the arrangement that I should put the questions to Mr Magashule. Mr Magashule responded to some of the questions but indicated that he would like to respond

fully to all questions in writing. Thereafter the meeting was adjourned, however, Mr Magashule remained behind as he had other issues to discuss with me which were not related to the investigation. Mr Raedani in his evidence testified that the meeting was rushed and alludes to the fact that the meeting should have been recorded as it was related to an investigation. I want to clarify two important things here, firstly, that it was the first part of the meeting that related to an investigation, and it was as such recorded. The second part of the meeting which I had with Mr Magashule alone did not relate to an investigation, which explains the reason why it was not recorded.

80. With regards to the first part of the Vrede investigation, the task team was established in 2017 to fast track and finalise the investigation and the report. Mr Kekana , Mr Raedani, Mr Sithole and Mr Ndou were all members of this task team. Mr Kekana had been involved in the Vrede investigation at an earlier stage. Mr Kekana as part of his evidence alleged that he was informed by Mr Ndou that I instructed Mr Ndou not to make any findings against any politicians in the report and that they were accordingly forced to remove any adverse findings against any politicians including Mr Magashule and Mr Zwane. I wish to respond to these allegations as follows, first, I am advised by my legal representatives that this piece of evidence of Mr Kekana constitutes hearsay evidence and therefore inadmissible, second, I deny having instructed him to not make findings against any politicians. An investigation against Mr Magashule was conducted to a point where a section 7(9) notice was issued to which Mr Magashule responded. On the basis of Mr Magashule's response, a decision was taken not to make adverse findings

against him as his involvement was only limited to oversight. This evidence belies the false "*instruction*".

81. Regarding the alleged failure and/or refusal to meet the beneficiaries, I have pointed out that Mr Maimane had undertaken to do so and to present a report to all stakeholders. Prof Madonsela had neglected to visit the beneficiaries in breach of an undertaking to do so. Mr Maimane also failed to make good on his promise. There was no deliberate exclusion of the beneficiaries as implied in the Motion.

82. In so far as Mr Kekana's testimony that I gave instructions that the material relating to the Gupta leaks, inflation of goods and beneficiaries be removed, I deny that I gave such instructions. On the issue of the Gupta leaks it was Adv Cilliers who took a decision not to include the Gupta leaks. Regarding the inflation of prices, I have no idea of what Mr Kekana is talking about because to his knowledge the Accountant General had dealt with the issue and we lacked the financial resources to hire experts to redo the same exercise. This is indicated at page 11 of the Report.

83. On the allegation that the prices of goods and services procured were inflated, the allegations were investigated, however, it was difficult to make a determination due to various reasons including the fact that Estina did not follow public procurement processes when procuring the services of service providers and the project[5].

[5] Public Protector's Report 31 of 2017/18, Bundle A pg. 1219 paragraphs c and aa

84. Yet another one of the Charge 2 sub-charges I am facing is that I materially altered the remedial action proposed in the provisional report prepared by Prof Madonsela before issuing the final report without providing any rationale or proper explanation. I understand this sub-charge to be emanating from Judge Tolmay who in her 2019 judgement ruled that I had altered the Vrede report and that there was *prima facie* evidence of corrupt activity and that I had failed in my duties under the Public Protector Act and the Constitution, however, Prof Madonsela in her oral testimony before the section 194 enquiry testified that she did not issue nor sign a provisional report in respect of the Vrede investigation. Based on Prof Madonsela's testimony, it is going to be argued that there is no merit in this charge. This further calls into question Judge Tolmay's findings.

85. I am further accused of having narrowed the scope of the investigation required by the complainants which had been commenced by Prof Madonsela without providing any rationale or proper explanation, therefore. This sub-charge is a variation of the alleged failure to investigate politicians[6] and failure to investigate the third complaint which are dealt with above.

86. Regarding the allegation of failing to investigate the third complaint I can explain that the issues raised therein largely overlapped with the first and second complaints. The exception was the issue of the shareholding of the beneficiaries. This issue was left out because the investigation was at an advanced stage and the issue had not been incorporated in the 6 months

[6] Charge 2 sub-charge 4.1 of the Mazzone Motion

preceding my occupation of the office. This failure must be placed at the door of Mr Samuel and Prof Madonsela.

87. I have already demonstrated above the extent to which the investigation covered the politicians. I understand this charge to also be connected to the Constitutional Court judgement of July 2019 in which the Constitutional Court upheld punitive and personal cost orders against me on the basis that I have been dishonest and that my conduct fell short of the high standards required of my office. Over and above my explanation that the politicians were indeed investigated I place the following information before this enquiry; that Adv Cilliers who was the lead senior investigator in the Vrede matter had written several versions of the report and could not find any politicians linked to the investigation. Prof Madonsela herself testified that she thought and considered that politicians should be investigated but never went to interview them nor did she visit the site. It should further be noted that the initial complaint did not extend to the investigation of politicians, Mr Samuel in his testimony at this enquiry testified that Prof Madonsela sent the report back several times and instructed them to find the political link and still no politician was found to be linked to any irregularity. Prof Madonsela in her testimony at this enquiry also stated that I should have investigated the politicians based on allegations in the media.

88. Mr Kekana further falsely testified that Adv Cilliers was removed from the case because she was a DA member. If Mr Kekana's testimony is to be believed it is interesting to note that although Adv Cilliers was a DA member investigating a DA complaint, she did not find anything against the politicians herself. She

is also the person who opposed my proposal to include the Gupta leaks.The fact of the matter is that, in the provisional report which was prepared during my term of office the section 7(9) served on the Premier, MEC and HOD showed that they were implicated for failure on oversight as per the findings of National Treasury including failure to act on the National Treasury recommendations. As has already been stated above that the Premier was served with the section 7(9) notice and in his response, he stated that he did not act on the National Treasury recommendations because the DA subsequently lodged complaints on the same issue with my office and that he waited for finalization of the matter by my office. This explanation was considered and accepted by my office hence in the final report the Magashule issue was omitted.

89. I further state that there is no merit in the allegation that I gave a directly contradictory explanation under oath for my failure to investigate the politicians. The politicians were clearly investigated as stated above however, as I am empowered in terms of the Act to determine the conduct and procedure of the investigation combined with the financial constraints the Vrede investigation was carried out in two parts.

90. It is also telling that once the Portfolio Committee expressed its own displeasure about the scope of the investigation I did not hesitate to initiate and conduct the so-called Vrede 2 investigation. To date that investigation has also not yielded any liability on the part of politicians.

91. Finally, it is indeed so that the Independent panel went on to say:-

91.1. *"Samuel then alleges that the investigation was swept under the carpet despite some findings in respect of Messrs Magashule and Zwane being made in staff reports submitted to her (the PP). The same Mr Zwane is said to have supported the PP by attending her 50th birthday party that she hosted"*. (Paragraph 183 of the Report)

91.2. *"We should add that it is not entirely clear from the affidavit of Samuel whether he had personal knowledge of the attendance of Zwane at the PP's birthday party. It was an allegation based on hearsay, we would have expected the PP to have dealt with this issue in greater detail, but she did not deal with the allegation at all. She may of course do so if the matter proceeds to a committee for a formal enquiry."*

92. The outrageous suggestion that the investigation of politicians was swept under the carpet, when their investigation went as far as the issuing of section 7(9) notices, has already been sufficiently dealt with.

93. To the extent that this enquiry may be seriously expected to deal with newspaper gossip, I have put it to Mr Samuel, who could not dispute it and I do repeat it here that: I did not invite Mr Zwane to my birthday party which was attended by more than 200 invited and uninvited guests, including unknown partners of invited guests. Mr Zwane arrived at the party as a partner of one of the invited guests. Any person who has ever attended such an occasion, especially in a setting dominated by African people, will agree that I could not chase him away. Nor was there a valid reason for me to do so. He had been investigated only in a representative capacity and in a position which he no

longer held. The relevant section 7(9) notice had actually been sent to his successor in title due to the nature of the allegations.

94. The unescapable truth is that the Vrede matter represents part of the mess and unacceptably neglected matters which I found on my desk. This investigation should never have taken 4 to 5 years to complete. I did all I could to attend to it and there is no evidence of the alleged agenda to shield certain politicians which is at the heart of this charge.

D: HUMAN RESOURCES RELATED CHARGE

D1: INTRODUCTION

95. The saying "*When all else fails, there is always delusion*" by Conan O'Brien became a reality for the Section 194 Committee and the Evidence Leaders. When it must have become clear that the Mazzone Motion was more than 90% based on past judgments, all of which are fundamentally flawed and premised on the incorrect facts, a quick Plan B had to be found in Human Resource issues, turning this Enquiry into a mini-version of the CCMA or the Labour Court where those issues truly belong. However, only aberration set in.

96. As with charges 1 to 3, I will preliminary demonstrate that Charge 4, and in particular the HR related charges are still-born and cannot be sustained due to some inherent structural or legal dealing with the specific merits of the charges or sub-charges. A proper reading of the Independent Panel Report

demonstrates that the HR charges are in fact very limited to material which can be summarily disposed of in view of the evidence actually led.

97. The charges preferred against me were referred to the Independent Panel for what the Speaker of Parliament termed a "*sifting mechanism*" in one of her affidavits before the Western Cape High Court.

98. The Independent Panel interrogated the charges to determine whether there was *prima facie* evidence of misconduct. The human resource charge against me emanated from an affidavit of Mr Samuel, whom I will demonstrate to be merely a disgruntled employee and an unrepentant liar. It is the same affidavit that Ms Mazzone used to substantiate her "*second motion*" once it was made clear that the charges based on judgments were all likely to be scrapped on the principle of retrospectivity.

99. The Independent Panel describes the charges as the charges formulated by the member, meaning that all the charges contained in the motion were formulated by Ms Mazzone. See paragraph 95 of the Independent Panel Report, Page 10430 (Bundle A).

100. The cornerstone of the work of the Public Protector is the Constitution of the Republic of South Africa, I urge members of this Committee to always be mindful of what is required of me as the incumbent PP in terms of section 195 of the Constitution which enjoins an institution such as the PPSA to operate from a high standard of professional ethics as well as promoting efficient, economic and effective use of resources. It would be impossible to achieve the above in an environment where members of staff fail to adhere to service

delivery and/ or the batho pele principles. In examining the charge against me, regard should be had to the fact that members of the public approach the office of PPSA as a last resort, they would have been disappointed by the service or lack thereof that they would have received in other departments. As a result, the PPSA becomes their beacon of hope.

101. I intend to deal with these issues as follows:

101.1. First, I will state what the charge says;

101.2. Second, I will demonstrate the essence and import Independent Panel's finding regarding these charge;

101.3. Third, I will deal with the objection that I raised at the beginning of the Enquiry regarding the relevance of the testimony;

101.4. Fourth, I will demonstrate that the Committee and/or the Evidence Leaders unduly and unlawfully extended the scope of the Enquiry by including evidence which the Independent Panel had correctly rejected in crafting its recommendations;

101.5. Fifth, I will give a summary of each witnesses' testimony in respect of the key HR issues raised in the original Mazzone Motion;

101.6. Sixth, I will give my version regarding the testimony of each witness; and

101.7. Seventh, I will demonstrate to the Committee why, in the context of impeachment proceedings, this charge should be disregarded as an

absurdity as it does not belong to a parliamentary enquiry but to the mechanisms designed in our law for labour issues, in which incidentally the alleged "*victims*" did in fact enjoy all available remedies.

102. More than any other charge the HR related allegations represent everything which is wrong with this Enquiry. In spite of its inappropriateness as a ground of impeachment and its almost total obliteration by the Independent Panel, the Evidence Leaders called the vast majority of their witnesses, to the tune of more than 80%, to give evidence essentially related to this charge. The majority of these witnesses confirmed or conceded that there was no basis to this charge.

D1: CHARGE 4: Misconduct and or Incompetence

103. The relevant charge is articulated in the Mazzone Motion at paragraph 10, as follows: (the emphasis is mine):-

> *"10 Adv Mkhwebane is guilty of misconduct in that she 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 /or trumped up charges:*

10.1 provincial representative of the public protector Free State: Mr. (Sphelo) Samuel;

10.2 chief investigator, Mr. Abongile Madiba;

10.3 chief investigator Ms Lesedi Sekele;

10.4 executive manager Ms Ponatshego Mogaladi;

10.5 chief operations officer Ms Basani Baloyi;

10.6 senior investigator Mr. Tebogo Kekana; and

10.7 senior investigator advocate Isaac Matlawe."

104. The only persons called to testify in order to demonstrate that they themselves had been "*threatened with or had disciplinary action taken against them unlawfully and/or on trumped up charges*" were:-

104.1. Mr Samuel;

104.2. Mr Tebogo Kekana;

104.3. Ms Ponatshego Mogaladi; and

104.4. Ms Basani Baloyi.

105. Ms Baloyi's evidence can be summarily discarded upon one or both of the following grounds:-

105.1. the Independent Panel correctly ruled that there was *no prima facie* evidence supporting her allegations. The Evidence Leaders never challenged this finding and/or recommendation of the Independent Panel.

105.2. Mr Baloyi refused and was unduly protected from returning to the stand to finish her cross-examination.

106. In any event Ms Baloyi lied on the stand and made herself guilty of perjury on more than one occasion. No reliance can be placed on anything she said.

107. It was sad to hear that following her false testimony she was rewarded with a financial "*settlement*" amounting to an unprecedented 24 months salary plus her litigation costs. Even permanent employees, let alone one who had failed the probation period, seldom ever get such a multi-million award. This was pure abuse of state resources which amounts to a blatant irregularity. Such a travesty would not have occurred if I had not been illegally suspended. It is unlikely to service any audit.

D:2 **<u>The origins of this charge</u>**

108. It is important to situate the origins of this charge. As already alluded to herein above, Ms Mazzone submitted her motion for my removal on the 6 December 2020 to the former Speaker of the National assembly, Ms Thandi Modise. After I had pointed out that the motion was defective, Ms Mazzone then subsequently withdrew her motion and immediately substituted it with a "second" revised motion, to which she attached the February affidavit of Mr Samuel as evidence in a transparent bid to cure the retrospectivity defect inherent in the first motion. That is when Ms Mazzone and Mr Samuel collaborated in formulating a motion that would overcome the patent defect identified by me in the letter to the Speaker dated 28 January 2020. In fact, the Independent Panel said the following:

"[182.3] Further, the fact that Samuel may have been a disgruntled employee who has apparently been dismissed from his position by an independent entity does not mean that he may not submit relevant evidence to a member who may use such evidence when laying a charge in terms of the NA rules". See Page 10478, Bundle A.

109. The above evinces the obvious fact that the above charge is a collaboration effort between Mr Samuel and Ms Mazzone. In any case, I hereby deal with the findings of the independent panel regarding Mr Samuel's first affidavit, dated 11 February 2020 which Ms Mazzone then attached to her "second" motion which is the one before this Committee.

D3: The Independent Panel findings:

Samuel *et al*:

110. Mr Samuel's affidavit stated amongst other things that I have created an unhealthy work environment and have intimidated members of staff. Mr Samuel listed a number of staff members listed herein above. Ms?? whom I have allegedly intimidated but failed to attach their confirmatory affidavits to corroborate or give substance to his allegations. The Independent Panel had this to say in stating categorically that his allegations did not pass the requisite threshold:-

"[182] We do, however, accept that the allegations by Samuel are mostly too vague and general to rise to the level of prima facie evidence of

misconduct or incompetence against the PP. For instance, there could be a number of reasons for the excessive amount spent on legal fees or for the lack of vehicles for investigators and outreach officers.

[183] having regard to the allegations, we find prima facie evidence of misconduct in only one respect, Samuel mentioned that after the query by the Portfolio Committee on Justice and Correctional services the PP undertook to reinvestigate the project with specific focus on the role of politicians in the scheme and to interview the beneficiaries". (See page 10478, Bundle A.)

111. This then means that the Independent Panel, only found prima facie evidence of misconduct regarding the Vrede matter and not on the human resources issue since it found Samuel's "*HR*" allegations to be too vague and general to rise to the level of *prima facie* evidence of misconduct or incompetence. However, this Enquiry wasted so much time and resources dealing with the very issues that the Independent Panel has rejected. This was despite the strong objection of the PP against such a wasteful exercise which she raised on 11 July 2022, literally on day-one of the enquiry. The objection was wrongly rejected by the Committee.

112. The evidence of Samuel in respect of Vrede has already been dealt with. His false "*evidence*" regarding the HR issues should never have been entertained. In any event, it falls to be rejected even on its own merits or lack thereof.

Baloyi:

113. These human resource issues were correctly found by the Independent Panel to fall within the purview of the CEO and not that of the PP. With the Baloyi matter, the Independent Panel found that:

"[192] Although it is not for us to decide, there seem to be merit in the PP's contention that the basis on which she is held responsible for the conduct of the CEO of the office of the Public Protector, (Mahlangu) is not explained. For instance, it is contended by Baloyi that –

[192.1] there is no role for Mahlangu in respect of the merits of investigations and that his interference with the investigations was thus unlawful; and

[192.2] Mahlangu informed her that he would "[g]et [her].

[193] Consequently, in the absence of a clear link between Mahlangu's conduct and the PP, we fail to see how we can take those allegations into account in assessing whether the PP committed misconduct or is incompetent".

114. Regarding Baloyi's allegations about the NDZ campaign and that PP prioritised certain reports or that they were rushed, the Independent Panel had this to say:

"*[196] We do not believe that the allegation that the PP should have investigated the NDZ campaign after the interview with Watson has merit. The circumstances were different. No complaint was received about Minister Nkosazana Dlamini-Zuma misrepresenting to the NA*

the position regarding donations to her personally or her campaign. Furthermore, the allegations that the report did not follow the "normal" process or that they were "rushed" also seem to us too vague and generalised in nature to sustain a prima facie case of either incompetence or misconduct.

[197] in the circumstances we find that the Baloyi matter does not raise prima facie evidence of incompetence or misconduct.

[198] we point out further that the PP, in the case of Baloyi dealt with these allegations in a lengthy and detailed answering affidavit. All the allegations made against PPP are heavily disputed. (See page10483-10484, Bundle A).

115. What is crucial regarding the Baloyi matter is that the Independent Panel ultimately roundly rejected it (with the contempt that it deserves) as follows:

"[197] in the circumstances we find the Baloyi matter <u>does not raise prima facie evidence of incompetence or misconduct</u>.

[198] We point out further that the PP, in the case of Baloyi, dealt with these allegations in a lengthy and detailed answering affidavit. All the allegations made against the PP are heavily disputed."

116. What is more absurd is that in spite of the above, this Enquiry dedicated a whole day to the testimony of Ms Baloyi, wasting precious time and resources, yet I have been accused of stalling the process or not wanting to testify. In any case, I will again, as I did before the Independent Panel, heavily dispute Ms

Baloyi's allegations against me and even appraise this Committee by demonstrating that Ms Baloyi has been heavily rewarded by the PPSA for having come before this Committee to spew lies.

117. The Chairperson of the Enquiry wrongly rejected the Public Protector's valid objection against the relevance of Ms Baloyi as a witness in this Enquiry.

118. In fact, in her evidence before this Committee, Ms Baloyi made many false statements that were disputed by almost everyone who has given their testimony before this Committee. First, she lied about me demanding to be called "*Madam*" by members of staff when they address me. Second, she lied about me demanding that people bow when I enter a room or the boardroom for a meeting. Third, she lied that her under-performance was not addressed while the undisputed evidence of Mr Mahlangu was that her under-performance was addressed several times in meetings and as a result of which her probation was not extended.

119. Ms Baloyi's evidence does not and cannot amount to *prima facie* evidence of incompetence or misconduct on my part, nor does it demonstrate that I have harassed, intimidated or harassed her.

D4: <u>Objections raised at the beginning of this evidence</u>:

120. At the beginning of this part of the proceedings, Adv Mpofu SC, on my behalf, raised serious concerns about the relevance of the testimony regarding the human resources issue. He correctly pointed out that this charge is non-existent in that the Independent Panel found that there was no *prima facie*

evidence that I conducted any misconduct due to the fact that the issues raised fell within the purview of the CEO and not the PP.

121. The issues raised in this part of the evidence did not pass through what the Speaker calls the sifting mechanism. In other words, it was separated out as chaff and not a part of the wheat.

122. Despite these objections the Chairperson ruled that the Committee will deliberate on issues of relevance at the end of these proceedings when the Committee engage in deliberations. As mind-boggling as the ruling was, the Evidence Leaders continued for days on end to lead the aforesaid evidence.

D5: **<u>The Committee and/or the Evidence Leaders unlawfully extended the scope of the Enquiry</u>:**

123. As mentioned herein above, the Independent Panel found no evidence of misconduct against me concerning the Human Resource issues and in a world where fairness prevails, the Committee should have excluded this charge all together. However, as the saying quoted herein above goes, when all else fails, delusion sets in.

124. Having dismally failed to find anything of substance regarding the other charges, the Committee and/or the Evidence Leaders, who in this case act as prosecutors, decided to call many witnesses and spend a long period of time, wasting taxpayers' money on issues such as *audi* letters and reluctant employees failing to meet their own set deadlines and compromising service delivery in the process.

125. These employees were given a platform to vilify me while exposing their own weaknesses when it came to service delivery and the ethos of the Office of the Public Protector, especially Vision 2023 and what it advocates. Their testimony amounted to nothing but passage gossip. Fortunately, a large number of other honest witnesses, whose credibility was not challenged at all, gave the truthful version which contradicted all the lies. This should mark the end of the "*HR*" related charges.

E: **<u>Brief evidence of each witness</u>:**

126. The following witnesses were called regarding the human resources issues:

E1: **<u>The evidence of Mr Samuel</u>**

127. As indicated earlier above, Mr Samuel's testimony traverses various issues, the Vrede matter, operational issues such as Think Tank, costs of running the institution, alleged "*reckless litigation*" Mr Seabi's issues as well as general human resources issues. I will deal with this evidence as far as it relates to charge 4 in order to demonstrate that I have never intimidated or purged any member of staff of the PPSA or tasked Mr Vussy Mahlangu to do so on my behalf. It is also important to have regard to the charges that each concerned employee faced during their respective disciplinary hearing in order to determine whether they were trumped up charges. In doing the above, I will first deal with the Seabi Matter. It is important that I remind the Committee that Mr Samuel's evidence was heard over a period of four days, therefore it is important that I deal with all the allegations that he has raised against me. I

will deal with the Vrede issue under the relevant topic when I deal with the Vrede.

Mr Seabi's assault.

128. Mr Samuel's testimony regarding the above matter is to the effect that the assault took place in Polokwane where he was the Provincial Representative of the PPSA at the time. On the day in question, he received a call from the receptionist advising him that the complainant, Mr Seabi was at the reception, and he demanded to see him. At that time because he was busy with head office, he was on the line talking to one of the officials in the HR explaining the reports that he had submitted. Mr Seabi then entered his office, and he took a seat. So, when he finished the call, he then told him that he cannot see him on that day because he was busy with reports. Mr Seabi stood up and accused him of making a fool out of him and then grabbed him by his clothes, by the collar. He tried to push him away then the struggle ensued. He actually managed to push Mr Seabi just outside the door and there was another door with a sliding door, a glass door, he tripped on that, and they both fell because he was still holding on to him.

129. On the other hand, this Committee heard the testimony of Mr Seabi, who testified that after months and months of not getting any feedback or satisfactory assistance from the office of the PPSA Polokwane, he then approached the Legal Aid Board for assistance. The official from the Legal Aid Board after having conversed with Mr Samuel, then set up an appointment for Mr Seabi with Mr Samuel. On the fateful day, Mr Seabi was brutally assaulted

by Mr Samuel, at the premises of the PPSA. Mr Samuel attempted to throw Mr Seabi over a balcony. The elderly Mr Seabi was injured and had to seek medical attention. Mr Seabi testified about how relentless he was when it came to making sure that the assault case is properly adjudicated on and Mr Samuel face the might of the law. He testified that Mr Samuel was finally found guilty of the offence of assault, and he was sentenced accordingly. Mr Seabi is currently pursuing damages claim against the office of the PPSA.

130. Going back to the charges that Mr Samuel faced at his disciplinary hearing, one of the charges concerned bringing the office of the PPSA into disrepute by assaulting an elderly member of the public who had visited the office of the PPSA. The reason for the charge is the fact that the office of the PPSA has been sued by Mr Seabi for damages that he suffered as a result of the assault.

131. It is my contention that the charge is not a trumped-up charge. It emanates from the fact that Mr Samuel assaulted a member of public who approached the institution for assistance. Therefore, there is no merit in Mr Samuel's evidence that he is being purged, victimized or intimidated. A court of law found him guilty of assault.

132. When one examines Mr Samuel's CCMA award, one can glean from the reasons thereof that the CCMA commissioner failed to take into account the fact that Mr Samuel had been convicted of the offence of assaulting an elderly member of the public at the offices of the PPSA. I was not able to establish whether the Office is currently seeking to review the finding of the CCMA.

133. Mr Samuel also testified that I was the person behind the charges against him being revived in court so as to set the disciplinary action against him in motion. However, this Committee has heard from Mr Seabi how relentless he was, he repeatedly visited to each Department in Polokwane as well as the NPA head office in Pretoria to make sure that his case would be heard in court. He also issued civil summons against the PPSA, and that is how the Samuel matter came to my attention. Had Mr Seabi not issued civil summons against Mr Samuel, I would not have known about Mr Samuel's assault case. The former PP and the EXCO had already exonerated Mr Samuel of any wrongdoing despite the criminal conviction. According to him she also failed to give him an ear even when he brought the matter to her personal attention.

134. In conclusion, the fact is that in 2017 Mr Samuel was found guilty of assaulting Mr Seabi, he was convicted, and he paid a fine as stated herein above. He knew about the pending internal charges towards the end of 2019, and there were draft charges about the matter before 7 February 2020. Upon learning about his pending disciplinary charges, Mr Samuel then submitted an affidavit to the Speaker making false complaints against me. It is therefore not true that I gained knowledge of his altercation with a citizen because of my alleged background with the SSA. This particular fabrication seems to come directly from the mouth of Ms Mazzone in pursuance of the false narrative that I am a "*spy*" simply because I worked for the Department of Intelligence for a mere 3 months before my appointment as Public Protector.

135. It is therefore absurd that Mr Samuel's allegation that he was only charged years after the assault case and that he was disciplined because the institution

was getting sued. (See the CCMA Award, the DC documents, as well as Mr Seabi's lawsuit documents).

136. The above evidence has been corroborated in the affidavit of Mr Vussy Mahlangu attached hereto in these proceedings under Bundle A, Page 2718, Para 23 where he states:

"*23.1 The issue relating to Mr Samuel was brought to my attention. The PPSA was being sued for R350 000.00 in Limpopo as a consequence of an altercation which had occurred between a civilian and Mr Samuel. To the best of my recollection, Mr Samuel paid an admission of guilt fine of R2000.00. This matter was reported to the Executive (the PP, DPP, and CEO) given that this was not conducted to be associated with the PPSA. As I recall, it was recommended that appropriate disciplinary steps be taken against Mr Samuel".*

137. Furthermore, my version of events is also corroborated by Mr Gumbi Tyelela who testified that Mr. Samuel, being a senior official, should have known that he could not continue to serve as such whilst he has a criminal conviction against him.

138. Mr Tyelela testified that Mr Samuel informed him that the former PP and her EXCO accepted his version that he was the victim and that in truth, Mr Samuel cannot play victim since there is a conviction against him.

139. The bottom line is that it is plainly false that Mr Samuel's disciplinary charges were "*trumped up*" or that they were "*unlawfully*" brought about.

140. As expected, Mr Samuel did not even breath one word about the heart wrenching experience articulated by Mr Seabi where he loudly complained to Prof Madonsela that Mr Samuel had assaulted him and the latter simply ignored him and was whisked away. This episode was not disputed. Its omission from Samuel's evidence says everything about his quality as a witness and his motives of revenge which should by now be clear for all to see. His alleged and apparent association or collusion with Ms Mazzone has also never been explained. It should be a case for concern for any fair-minded member of this Committee or the National Assembly who has taken and intends to abide by their oath of office.

Security clearance

141. In his Affidavit before this Committee, Mr Samuel accuses me of purging members of staff, including the former Deputy Public Protector, Mr Kevin Malunga, and Mr Kaposa. He alleges that in his view, the lack of security clearances were held against people not because it rendered them unable to discharge their OPP functions, but because it provided a reason to have them removed from positions or excluded.

142. The above is patently false. The persons listed above failed to obtain security clearance. Any person who handles classified documents must have security clearance. The evidence of Mr Baldwin Neshunzhi, the security manager, corroborates my evidence to the effect that the office of the PPSA has always had a policy on security. The relevant policy was introduced and signed by the former PP, Prof Madonsela and it required everyone who handles classified

information to have security clearance. This much was confirmed by Prof Madonsela and by the objective evidence.

E2: The evidence of Ms Ponatshego Mogaladi

143. Ms Mogaladi's testimony covers Charge 3 (Incompetence in the FSCA matter) as well as Charge 4 Misconduct and/or incompetence (Human Resources issues): As in the evidence of Mr Samuel above, I will deal with the issues that were raised by Ms Mogaladi as far as human resources issues are concerned. Ms Mogaladi's testimony covers the issues of deadlines, inflexibility or rigidity, Mr Abongile Madiba, Rogue Unit and FSCA matters. My evidence herein is limited to the human resources issues, however, where there are intersections in the evidence, I will then deal with the cases involved herein. I must emphasise the fact that Ms Mogaladi's gross negligence or recklessness in the performance of her duties and/or failure to effectively manage subordinates in relation to the FSCA matter is the root cause of her complaint and is one of the reasons why I face a charge of incompetence regarding the FSCA matter.

The FSCA Matter

144. This matter came about as a complaint by Mr Malema, the Leader of the EFF against the Chief Executive Officer of Financial Sector Conduct Authority (FSCA), Mr. Tshidi wherein it was alleged that Mr Tshidi unduly favoured Mr Mostert as curator, disregarding Black Economic Empowerment prescripts in various pension funds. Mr Mostert in turn briefed his own law firm and

engaged in alleged corrupt activities and as a result syphoned millions of rands in taxpayers' money into the account of his own law firm.

145. I then allocated the matter to Mr Matlawe under the management of Mr Futana Tebele. The investigations were to be completed by November 2017. Ms Mogaladi took over the role of Executive Manager: GGI in November 2018 and I immediately alerted her to the long outstanding Section 7(9) Report on the FSCA matter. When the section 7(9) notice was not forthcoming, I had to even remove the matter from Mr Matlawe and allocated it to a team of three people, Mr Madiba, Ms Van Eeden and Ms Nthoriseng Motsisi.

146. Mr Madiba was given the deadline of 02 July 2018 to produce a section 7(9) Report, he failed to meet the deadline and was given the 02 November 2018. Mr Madiba still failed to meet the second deadline and he resorted to setting his own deadline of 09 November 2018, still he missed it by three weeks. He only submitted the Section 7(9) Report on 21 November 2018.

147. When Ms Mogaladi finally received a Section 7(9) Report from Mr Madiba, she did not peruse it or do any quality assurance on it, in fact she simply passed it on to me without ever working on it.

148. As a result, as soon as the section 7(9) was issued, I received an urgent interdict from Mr Mostert who was one of the parties issued with the Section 7(9) Notice, wherein he was seeking an order against the PPSA and EFF and one Mr Simon Nash from publishing, causing to be published, or in any manner disseminating or causing to be disseminated to any person, the public or in social media platform the contents of the 7(9) Notice. Mr Mostert further

sought an order declaring that PP does not have jurisdiction to investigate the matter as well as reviewing and setting aside the PP's section 7(9) Notice.

149. Weaknesses identified included the fact that findings were made against the Board, however, no section 7(9) notice was served upon the Board.

150. The FSCA also sought an order reviewing and setting aside of the Report as we lacked jurisdiction to investigate.

151. We sought a legal opinion from Senior Counsel who advised that the matter should not be defended. Eventually the matter was successfully reviewed and set aside.

152. As a result, Ms Mogaladi and Ms Sekele faced disciplinary action and the charges against them were:

"*4. Charge 1-4: gross negligence or recklessness in the performance of your duties and or failure to effectively manage subordinates in relation to the FSCA matter.*

4.1 you were the executive manager tasked with managing the investigation into the complaint regarding the financial sector conduct authority ("FSCA"). As such you were required to carry out all the duties and responsibilities associated with this role including the supervising of the investigators and finalising and or approving FSCA Report for the 8 of 2018/2019("the FSCA" Report").

4.2 *you were however grossly negligent or reckless in the performance of your duties and responsibilities and /or failed to effectively manage the investigators in their handling of the FSCA complaint in, inter alia, the following respects, each of which constitute a separate charge of gross misconduct:" (See page77, Bundle F)*

153. Like Mr Kekana and Mr Samuel, Ms Mogaladi was found guilty by an independent Chairperson (Adv Kuboni) during her disciplinary action. She never took the Chairperson's guilty finding on review. The crux of Ms Mogaladi's complaint seems to be that I changed the sanction of the Chairperson, from 3 months suspension without pay to one of dismissal which she alleges is against the labour policy of the PPSA.

154. However, Ms Mogaladi has conceded under cross examination that she has never taken issue with the Chairperson's finding of guilt but only with the sanction. This on its own evinces the fact that she acknowledges wrongdoing and she had to undergo disciplinary action. Her only gripe is the dismissal, which in my view was a suitable sanction under the circumstances. In fact, Ms Mogaladi was even prepared to take a harsher sentence which was a six-month suspension without pay.

155. Ms Mogaladi conceded under cross examination that it was reasonable to expect her to have familiarized herself with the FSCA matter as soon as she was placed in a position to manage it and she also conceded that members of the public are justified to expect efficiency and deliverables from the staff of PPSA in light of the fact that there is poor service delivery in the country.

156. She further conceded the fact that she only attempted to look at the issues of section 6(9) of the PP Act concerning whether PP had the jurisdiction to investigate the matter some 18 months after the Section 7(9) Report had been submitted to me, which was after the fact.

157. How do I justify the fact that a senior member was found guilty of gross negligence or recklessness that resulted in a Report being successfully reviewed. I felt that even the trust relationship between employer and employee had been breached. As a result, I had to let her go. There is nothing to gainsay my version that I held a genuine and honest view in respect of the irretrievable nature of the relationship breakdown.

158. As far as the issue of me changing the recommendation of the Chairperson regarding the sentence, Mr Tyelela conceded that the external Chairperson in this matter recommended a sanction for implementation and that the legal question that had to be answered in this matter was whether the ruling was binding on the institution or whether it was a mere recommendation.

159. He stated that the organization held a different view with regard to whether the recommendation was binding on PPSA. He stated that an opinion was sought from attorneys, who held the same view as the organization. He further testified that it is only recently that the HR Department within the PPSA had now corrected the deficiency in respect of their code not making provision for dealing with instances where a chairperson of a disciplinary hearing makes recommendations. What is very crucial in his testimony is the fact that he

acknowledges that in differing with the recommendation of the Chairperson, I provided reasons for the different view, and I also gave the concerned employee an opportunity to state why the sanction that I deemed appropriate should not be imposed. This on its own shows that I have never victimized Ms Mogaladi. In dealing with the issue of the appropriate sanction I also relied on the independent advice of Advocate Richard Sizani who was at that stage the Chairperson of the Public Service Commission. Had I been motivated by malice as alleged, I would not have sought such advice. Adv Sizani agreed with my approach which fortified my belief as to its correctness.

160. In any case, I must mention the fact that the Mazzone Motion was passed in February 2020 and the Report of the Independent Panel was issued in February 2021. The sanction was delivered afterwards, therefore, this issue is not covered by the Independent Panel and in fact, it is one of the matters that were dismissed by the Independent Panel when it was dealing with the "*HR*" complaints as a whole.

Deadlines

161. Ms Mogaladi testified that she has worked for PPSA for the past 22 years, having joined PPSA as a senior investigator in December 2000. She testified that she has occupied various senior positions including Chief Investigator, Senior Manager: Executive Support.

162. She further testified that In April 2014 she was appointed Executive Manager: Early resolutions which later merged with Executive Manager: Service delivery to form the branch, Administrative Justice and Service delivery (AJSD) and on

24 October 2018 Ms Mogaladi was appointed on an extra role of Executive Manager: Good Governance and Integrity (GGI). She had twenty-two people reporting under her, including 11 Senior Investigators.

163. Ms Mogaladi alleges in her testimony that I set unrealistic deadlines and that I am inflexible. She further alleges that I used Mr Mahlangu to victimize her by ordering Mr Mahlangu to issue her with a final written warning. She further testified that Mr Mahlangu issued her with an audi letter instead of a final warning. The audi letter is dated 20/11/2018.

164. She further testified that she was not given any support by the institution, work was unbearable, and she had to work weekends as well. I have to refute these allegations. Ms Mogaladi was offered all the help and tools that she needed to do her work. For example, in the FSCA matter, I gave her a team of three people to deal with the matter and she as the Supervisor was the fourth one, but still, she failed to discharge her duties.

165. What perplexes me about Ms Mogaladi's testimony is the fact that she readily conceded under cross examination that at that time, she had 21 people reporting under her and about 12 of them were senior staff members and that should she not manage their performance, her own performance could be hampered, as a result she also sets deadlines for them. In this regard, it seems that when it is Ms Mogaladi setting deadlines for her subordinates, then all is well, but I must not dare set any deadlines for her.

166. I must bring to this Committee's attention that Ms Mogaladi is one of the senior members of staff and therefore I expected her to lead by example and to share

in the vision of the institution. It took Ms Mogaladi a period of 4 to 5 years to complete the PEU Report instead of the set period of two years. What was I supposed to do in this instance? I had to make sure that she is accountable for her actions, it is called consequence management. I have never intentionally, without reason intimidated or purged her.

Mr Madiba situation

167. Ms Mogaladi testified that Mr Madiba was ill and suffered a stroke in 2018 which left him with one sided paralysis and that I had no sympathy and expected Mr Madiba to still perform and deliver on his work.

168. I refute these allegations with the contempt which they deserve. I have always been very sympathetic and understanding of the late Mr Madiba's situation. I have given him all the tools to support him and always encouraged him to look after himself and to put his health first. When I joined the institution, Mr Madiba had been sick already. I protected him and even when colleagues would expect me to take disciplinary steps against him, I did not.

169. Contrary to the false evidence of Ms Mogaladi, this Committee heard the evidence of Mr Lamola who testified that Mr Madiba called him a cockroach, which really saddened him. He testified that he was disappointed when I did not take any action against Mr Madiba and felt that I was too soft on Mr Madiba. That on its own demonstrates the fact that I was very sympathetic towards him. There is, therefore, no merit in the allegations that I victimized or caused Mr Mahlangu to harass and/or victimize Mr Madiba, Ms Sekele or Ms

Mogaladi. It is a total fabrication which is not corroborated but is contradicted by my evidence which is corroborated by Mr Lamola.

E3: EVIDENCE OF Mr GUMBI TYELELA

170. The evidence of Mr Tyelela relates to the charge in question in that in his testimony, he deals with individuals that I am accused of having intimidated and or harassed, either personally or through Mr Mahlangu. He also gives insight into the reason behind the so called "*Audi letters*". In fact, Mr Tyelela's evidence covers almost all the human resources issues, and it gives a good perspective of how the organization functions in the human resources' space. I therefore deem it necessary to deal with his evidence in relation to the charge at hand at length.

Audi letters

171. Mr. Tyelela testified that an audi letter gives the recipient an opportunity to answer certain allegations that has been leveled against them and that as soon as they provide an adequate explanation for allegations contained therein, that would be the end of the matter. He conceded that the issuing of *audi* letters is a line management function and doesn't have to be reported at the head office. He elaborated to state that the only time that the issue of *audi* letters would come to the head office is where no adequate explanation is given by the person issued with the Audi letter and they are to be charged.

172. He testified that in terms of Ms Mogaladi, Ms Sekele and the late Mr Madiba, the chairperson of the DC was clear that he was making a recommendation.

He conceded that in these circumstances, a recommendation in those terms then eventually depends on the actual decision maker to approve or disapprove. Reasons must be given for the decision. He conceded that I gave my reasons as to why I did not accept the Chairperson's recommendation. My conduct in that regard was accordingly unassailable.

Matter of Samuel:

173. Mr Tyelela testified that I asked him to issue an Audi letter in respect of the employee's possible insubordination. He then informed me that the issue was being taken care of at the level of Mr. Samuel's line manager and that after that I never asked any further questions regarding that matter than to simply state that they were slow in attending to the issue and that was the end of it.

174. Most importantly, Mr Tyelela testified that as Executive Authority, there is nothing stopping me from complaining and asking for steps to be taken in an instance where I am personally affected by an alleged labour misconduct. I confirm this to be true. However even in such instances the disciplinary action, if any, would still be taken by the accounting officer and not me.

Mr. Malunga:

175. As far as the Malunga issue is concerned, Mr Tyelela testified that it is within my powers, in terms of the statute, to delegate whatever powers I wanted to delegate, and the extent of the delegation as long as such is within the Public Protector's powers. I must reiterate that as per Mr Malunga's affidavit, there

was no hostility between the two of us as Samuel alleged and that is the end of the matter. I have never intimidated or harassed him.

176. If I had done so there would have been no reason for him to inform the Committee even after it had unlawfully solicited his evidence as a unilaterally determined "*substitute*" for Advocate Gcaleka whom I sought to call as a witness.

Mr. Kaposa

177. As far as the issue of Mr Kaposa is concerned, Mr Tyelela testified that I was not involved in the settlement agreement regarding Mr. Kaposa, who had to leave the organization because as the CFO he signed a lease agreement for a building without following the Supply Chain Policy. During his disciplinary process it transpired that the SSA had declined his application for security clearance. I proposed that instead of employing a replacement, a person should be seconded from within the public service in order to fill Mr Kaposa's post in a bid to mitigate the loss of the money paid to Mr. Kaposa. The first state organ which we approached was National Treasury and only when they were unable to help did we turn to SSA. I reiterate the fact that I have never harassed, victimized or intimidated Mr Kaposa.

Mr. Ndou:

178. Although I will deal with Mr Ndou's testimony in relation to the charge that I am facing, Mr Tyelela corroborated my evidence that there were no trumped-up charges against Mr Ndou. Instead, Mr. Ndou was charged for a serious

offence, being sexual harassment. Mr Tyelela even correctly conceded that sexual harassment case has no expiry date.

Mr. Kekana:

179. Similarly, although I will deal with the issue of Mr Kekana later on herein below, it is important that I remind this Committee of the evidence of Mr Tyelela who testified that Mr. Kekana received confidential information that was not meant for him. There was a mix up of names and Mr. Kekana incorrectly shared the information with third parties. His alleged conduct was in contravention of certain policies within the PPSA relating to the handling of information. He was therefore correctly subjected to disciplinary action. He was then found guilty by an external advocate. This is a far cry from "*trumped up*" charges supposedly manufactured by me and/or Mr Mahlangu.

180. The overwhelming evidence points to Mr Kekana being another disgruntled employee who seeks to implicate me falsely as a form of revenge.

Ms. Baloyi:

181. I have dealt with Ms Baloyi's matter and what the finding of the Independent Panel is. Mr. Tyelela testified that Ms. Baloyi was on probation and the issue she raised was that she was not made permanent after her probation ended.

182. Mr Tyelela testified that Ms. Baloyi's issue was a slip-up on the part of HR, in the sense that the information relating to the end of Ms. Baloyi's 6 months' probation was sent to me and not to the CEO. The CEO became aware of

this, two months later and by that time, Ms. Baloyi had resultantly been on probation for eight months.

Mr. Matlawe

183. Mr. Tyelelela testified that the disciplinary hearing against Mr Matlawe had nothing to do with me since it happened as a result of Mr. Mahlangu's instruction. He conceded that he was not aware of anything in relation to Mr. Matlawe's matter being instigated by me. This on its own demonstrated that I have never victimized Mr Matlawe.

184. I indeed confirm that I never victimised, intimidated or harassed Mr Matlawe. Nor did I have any reason to do so.

E4: EVIDENCE OF MR KEKANA

185. Mr Kekana's evidence also traverses a number of issues such as the CIEX investigations, Vrede Dairy Investigations as well as the human resource issues wherein he testifies about his alleged harassment by the office of the PPSA. I will therefore only refute his allegations as they relate to the human resources' issues because the CIEX issue is dealt with elsewhere in this affidavit.

186. In his affidavit dated 12 December 2019, Mr Kekana alleges that he was harassed by the office of the PPSA in that he was allegedly subjected to an interview by Diale Mogashoa Attorneys who had been mandated by the office of the PPSA to conduct a fact-finding investigation into communications between Mr Baldwin Neshunzhi, the Senior Manager: Security and Mr Isaac

Matlawe. He further alleges that he had to hand in his laptop in protest to Diale Mogashoa Attorneys.

187. It is crucial for the members to take note of the fact that nowhere in Mr Kekana's evidence before this Committee or in his affidavit does he say that he was harassed by me. He only refers to having been informed by the human resource officer, Ms Papo, that he had to attend an interview at Diale Mogashoa Attorneys. He was requested to handover his laptop to the Attorneys by the Senior Manager: Human Resources. Be that as it may, I will still respond to Mr Kekana's allegations herein below:

188. Diale Mogashoa Attorneys were appointed to investigate leakage of confidential and sensitive information. During the investigation, it was discovered that Mr Kekana was in fact, in possession of certain confidential information that had erroneously been sent to him and he had actually disseminated some of it to his colleagues.

189. He was then afforded an opportunity to provide reasons or an explanation for disseminating such information. He was placed on precautionary suspension and was later charged for unauthorized disclosure of confidential information.

190. Mr Kekana attended his disciplinary hearing, and he was duly found guilty by an independent Chairperson. I. It is important to mention that amongst other things, Mr Kekana was found to be dishonest. He was dismissed from the institution.

191. The charges against Mr Kekana were genuine and not tramped up. Therefore, I have never victimised, harassed or intimidated Mr Kekana.

E5: EVIDENCE OF MS MOTSITSI

192. Ms Motsitsi's evidence relates to human resource issues, and she also testified about her allegations concerning "rushed reports", audi letters as well as unhealthy working environment. However, her evidence seems to also traverse charge 11.1 which has been vaguely carved by Ms Mazzone as follows:

> "*11. Adv Mkhwebane has committed misconduct and or demonstrated incompetence in the performance of her duties by:*
>
> *11.1 failing intentionally or in a grossly negligent manner to manage the internal capacity and resources of management staff, investigators and outreach officers in the office of the public protector effectively and efficiently."*

***Audi* letters**

193. Ms Motsitsi acknowledges in her affidavit and in her testimony in chief, that audi letters are "*a noble concept, they are a useful tool*". She acknowledges that *audi* letters are an important tool that is used for accountability and that once an adequate explanation is given then no further disciplinary action is taken against an individual. She testified that when she herself was given an audi letter, she gave an adequate explanation and no further disciplinary action was taken against her. (See page 4294, Bundle K)

194. In fact, under cross-examination, Ms Motsisi conceded that when she was still employed at the Department of Home Affairs, she had received two *audi* letters. She testified that *audi* letters are an opportunity to correct what is wrong, to hear the other side and not in themselves objectionable as a corrective tool. In her case at Home Affairs, the *audi* letters were meant for her to ensure that the asset register was in order. She emphasized that an *audi* letter is not in itself disciplinary action. (See page 4342) In fact she went on to say that she would advise someone to be happy should they receive an *audi* better because someone else is saying "*I will listen to you*". This evidence demonstrates that *audi* letters are a responsible and acceptable consequence-management tool. It has been amply demonstrated that in the case of PPSA in the vast majority of cases, once the issues were duly explained in writing, no disciplinary action was taken in respect of the issues raised in a particular *audi* letter. This shows that the tool was not abused or used as an instrument of harassment, intimidation or victimisation.

195. However, it seems that audi letters are good as long as they are not directed at her because she seemed to be unhappy with the fact that I instructed Mr Mahlangu to issue audi letters to her and Ms Mogaladi. I only instructed Mr Mahlangu to issue her and Ms Mogaladi with *audi* letters because they needed to account for their delay in dealing with the PEU matter. I should mention that Ms Motsistsi conceded under cross examination that after the many deadlines missed by Ms Mogaladi, I was justified in issuing the *audi* letters because there was non-compliance in the part of Ms Mogaladi even after she had missed her own deadline. I should mention that I was well within my rights to

do so since they are senior managers. Other than that, Mr Mahlangu issued *audi* letters out of his own accord as was found by the Independent Panel. In the Mogaladi case the issue was indeed issued at my behest because I was the "*complainant*". The complaint was plainly not "*trumped up*" but real.

196. Her evidence shows that none of the staff members were ever taken on disciplinary action because of an audi letter nor was there ever an instance where one of the charges is that one received an audi letter. Ms Motsitsi's evidence in fact clearly demonstrate that I did not harass or victimize Ms Mogaladi, instead Ms Mogaladi obtained an audi letter after I had been very patient with her to a point where she even failed to comply with her own deadlines. More than 20 such self-imposed deadlines were identified.

Outreach

197. Ms Motsitsi testified that due to lack of human and financial resources, the new strategy was implemented conservatively. The new strategy that she alluded to was that outreach would be organized at district municipality (district model) level where you reach a wider audience in various Provinces instead of visiting local municipalities where you only reach fewer people. This strategy was developed in November 2017. She testified that she discovered that there were financial constraints within PPSA when she took over as Acting CEO by December 2017 and that the financial constraints were as a result of overspending on employee costs mainly due to the implementation of OSD pay progression and merit bonuses for the prior two years.

198. I wish to explain that when I joined the office of PPSA the one thing that I attended to, was low staff morale due to lack of pay progression. I immediately attended to this issue and made sure that the staff is remunerated in line with their qualifications and years of experience. Even Mr Samuel also testified that the employees were very pleased with the OSD pay progression that I managed to put in place for them, hence the employees of the PPSA count among the top earning government employees in the public sector with Executive Managers earning well above the R1.5 million mark. You have heard the testimony of Ms Motsitsi who testified under cross examination that the OSD progression puts her in the same level as a DDG of a Government Department, earning around R1.6 million. Hence, I expected more from them in terms of service delivery to the majority of our people who mostly report issues of bread and butter to the institution.

199. She further referred to a Memo by the ACFO wherein he states various issues such as budget allocated to the PPSA having been reduced by 10%, the issue of a mismatch in terms of the budget allocated to PPSA and its core activities. These are issues that even previous Public Protectors were complaining about. These are issues beyond my control.

200. She further testified that the Memo refers to soaring legal costs due to cases being taken on review as well as cases relating to labour disputes. I must pause to impress upon this Committee that as Prof Madonsela projected in her 2015/2016 Annual Report, the effect of the Nkandla judgment about the binding effect of the PP's remedial actions, was that more and more cases would be taken on review, resulting in higher legal costs. This was a sensible

and logical projection or prediction which proved to be correct in the ensuing years falling within my term of office.

201. The charge in 11.1 cannot succeed because I am not the one who allocates a budget to the PPSA, it is National Treasury. I have listed herein above the source of financial decline within the PPSA such as the mismatch between the allocated budget and the core functions of the PPSA, including outreach programs. This much is common cause and incontestable. It was confirmed by all the relevant witnesses and repeatedly raised with Parliament.

202. I must also explain that the outreach programs were not abolished, however, they were implemented conservatively and still managed to reach the people that we serve. In 2020/2021 the effects of COVID also had a negative impact on the manner in which outreach is conducted. We then started with webinars and community radio stations in order to reach the communities. This proved to be an even more effective method.

Cleopatra Mosana

203. Ms Motsitsi dealt with this issue in full and indeed I approved the strategy suggested by Ms Motsitsi in a manner of costs containment. The fact that Ms Mosana then changed her mind and decided to approach the CCMA was beyond my control. She did so per advice of Ms Motsitsi who testified to that fact and also conceded that she was a witness at the CCMA.

204. The relationship with Ms Mosana had irretrievably broken down following her acts of insubordination and disrespect, not to mention poor performance.

Allegedly rushed reports

205. Ms Motsitsi testified about rushed reports affecting the quality of reports. What is of importance is the fact that she acknowledges that investigations would take long and the fact that they signed performance agreements which stipulates issues of deadlines.

206. She testified that she was given too many reports on the day that they were due to be given to me. The reason for this is because people were not adhering to their own deadlines and because Ms Motsitsi herself was not ensuring that she gets the reports well in advance. The issue of time constraints was therefore self-created.

207. The quality of reports has never been compromised due to blindly following deadlines. Whenever good reasons were presented, deadlines would be extended. That is the uncontested evidence of witnesses like Mr Ndou, Mr Tebele, Mr Lamola, Ms Mvuyana, to mention a few.

Deadlines

208. Ms Motsitsi testified that she herself set deadlines for her subordinates. She would demand that they submit their Reports to her a week or two before they are due to be given to me. She testified that they would still not comply which made her feel like she was not adding value to the work that is done by the COO, hence she stepped down. Her testimony was that "*so, they (deadlines) were impractical because they (the investigators) are not dealing with one case, they are dealing with several cases, but I really had to put something in*

place (deadlines) to make sure that I also do my work". She confirmed that she was extremely frustrated when they did not meet the deadline. She testified that once an investigator failed to meet a deadline until five months expired, she issued an audi letter to that specific investigator. However, when I impose those deadlines then I am wrong according to her.

Unhealthy Working Environment

209. Ms Motsitsi testified that the various reporting meetings became gatherings of fear in the organization. This is patently untrue. It was contradicted by several other witnesses. I must enlighten the Committee by stating that the meetings with Senior Managers were high level meetings which would have been preceded by the meeting that each Manager would have had with her team to thrush out issues and discuss reports in detail. I expected that by the time we have our meetings, they brief me on the crux of the issues since they would have dealt with the reports or any other issues in detail with their respective teams. However, it appears that some of the managers were not having those meetings or the meetings with their respective teams were not fruitful because they could not expect us to discuss minor details that they could have resolved with their teams. When I took them to task about this, they allege that I am creating a culture of fear. This is simply not true. Mr Lamola gave solid and credible evidence in respect of this issue. If it is accepted, as it must be in the absence of being challenged, then this accusation cannot stand.

210. If the members listened carefully to Ms Motsitsi's evidence, each time she mentions that she was reprimanded, she also acknowledges that work was

long overdue. For example, she testified about the reports which were discussed at a strategic meeting. She conceded that these reports were long overdue. (See page 4314, Bundle K).

211. Ms Motsitsi acknowledged in her testimony that the office of the PPSA is by its nature a pressured environment because we deal with issues of service delivery and that I am also under pressure because at the end of the day, I have to account as well.

212. I therefore refute the notion that I create an unhealthy work environment or that I harassed or victimised members of staff, either personally or through Mr Mahlangu.

E6: EVIDENCE OF FUTANA TEBELE

Deadlines

213. Mr Futana Tebele corroborated my evidence by stating that because I had introduced deadlines in order for employees to perform optimally, the quality of Reports was not compromised at all.

214. He further testified that he has never seen me or Mr Mahlangu victimize employees, and that he, himself has never been victimised. In fact, Mr Tebele testified that in the whole period that he was stationed at private office, being a period from June 2017 to October 2018, he had never seen any employee being harassed, victimised or being purged.

215. I mentioned herein above that PPSA is enjoined by the Constitution to perform professionally at all times. As a result, the nature of the work we do is highly demanding. Mr Futana corroborated my evidence by stating under cross examination that the work of the PPSA is demanding. He further testified that all I ever wanted was for people to put themselves in the shoes of the complainants and as a result I even made them set their own deadlines. He testified that people (employees) were not delivering as expected. They would not meet deadlines. Mr Futana testified that all I did was to encourage people to follow standard operating procedures and that some complainants would even call me personally to complain about lack of service.

216. The credible evidence of Mr Tebele, who was called by the Evidence Leaders was not challenged. It stands as the truth.

Audi letters

217. I want to impress upon this Committee the fact that I treated all the staff members of the PPSA equally. To me it did not matter who you are. All I wanted was service delivery. Mr Futana testified that he himself received an audi letter for failing to submit his performance agreement. He testified that as soon as complied, the audi letter was never pursued. Even he got an audi letter and once he complied and explained his conduct, it was the end of the matter. That is how it should be. That is how it always was.

Quality Assurance and Think Tank

218. Mr Futana corroborated my evidence that Think Tank was abolished as a means to curb costs and improve the quality of reports. He corroborated my evidence as follows: Firstly, Think Tank was abolished because it was too costly as Provincial Representatives had to travel long distances to head office to attend the meetings. They would have to be booked into hotels and they would have to claim travel and subsistence allowance. Secondly, the meeting used to take place quarterly, meaning that there would only be four meetings per year. The Representatives of each province would come and present matters where they could not answer on behalf of the investigators and would have matters stand down until the following Think Tank meeting because they would have to consult with the investigators to seek clarity on certain issues pertaining to investigations. Thirdly, it would take long for matters to be finalised due to the intervals between the meetings. If an issue had not been resolved in four successive sittings of Think Tank, a whole year would have gone by without any progress. This was often the case.

219. After Think Tank was abolished, a forum such as Dashboard and Task Team took over the responsibilities of Think Tank. Reports would be quality assured and scrutinised more frequently. The Task Team was based in the private office and would be responsible for quality assurance of all Reports before they are issued. I should mention that Ms Molelekwa was part of the Quality Assurance which made Mr Matlawe and Mr Kekana unhappy to have someone who was not legally qualified conducting quality assurance, hence she had to be moved to another portfolio within the office. Furthermore, during portfolio meeting, I was asked about her role within the Private office.

220. It is in view of the above that I once again refute any claims that I victimised, harassed or intimidated members of staff. I also refute any allegations that I issued rushed Reports that were not quality assured.

E7: EVIDENCE OF MR NDITSHENI RAEDANI

221. Mr Raedani's testimony is mainly about the Vrede investigations which I have dealt with herein above. As far as the human resource issues are concerned, he testified about audi letters and his perception about harassment and victimisation which I answer to herein below:

Audi Letter

222. He testified that he did receive an audi letter and he complied with what was required and as a result the matter was not pursued further. This vindicates me from being labelled someone who has harassed, victimised or intimidated members of staff. When questioned by Honourable Herron on whether he was ever intimidated, Mr Raedani testified that he felt that he was not wanted. Under no circumstances has he ever testified that I harassed, victimised or harassed him.

223. He was an utterly unreliable witness and lied under oath on more than one occasion.

E8: EVIDENCE OF MR TSHIWALULE

224. He testified that he left the institution out of his own free will. He was never purged or victimised. In fact, on a lighter note, he testified that even if the institution were to match the offer that he had received from the prospective employer, the institution would never be able to afford his services. This evinces the fact that I have never harassed any member of staff, nor have I ever caused Mr Mahlangu or anyone for that matter to do so.

225. He was a reliable witness, and his credibility was correctly never challenged.

E9: EVIDENCE OF MR NDOU

Audi letters

226. Mr Ndou's evidence vindicates me in a number of issues, first, I was accused of removing Adv Cilliers from the Vrede investigations because she was a member of the DA. Mr Ndou testified that he is the one who established a task team, he considered members that were stationed in Pretoria and that is the sole reason why Adv Cilliers was not included in the task team that finalised the Vrede Report because the file had been removed from the Provincial office to Pretoria.

227. Second, Mr Ndou testified that he has received an audi letter from Ms Motsitsi when he returned from leave and that the instruction to issue the audi letter was not from me and he viewed audi letters to be in accordance with the law. He then gave an adequate explanation and that was the end of it.

228. Third, he testified that in fact, even himself, as a manager issued two audi letters to an employee in the Eastern Cape and one stationed at the Mpumalanga office.

Harassment

229. Third, Mr Ndou testified that I have never harassed, purged, victimised or intimidated him. Fourth, according to him I have never demanded that members of staff call me "*Madam*" or that they should bow when I walk into the room. In fact, Mr Ndou testified that it is common practice in Government Departments that when a senior member enters the room everyone stands up. He testified that this used to be the practice even during Prof Madonsela's tenure.

230. Mr Ndou was a largely reliable witness hence his evidence was largely unchallenged. He confirmed crucial issues such as the fact that contrary to Samuel's theory, I was the person who was insistent that the Gupta leaks be used but was overruled by the strong objections of Mrs Cilliers.

231. I therefore refute any allegations that I have intimidated or harassed any member of staff or even subjected them to addressing me as "*madam*" or demanding that they bow when I enter a room.

232. It should also be clear that whenever the evidence of good witnesses such as Mr Ndou and many others has to be weighed against untruthful witnesses such as Samuel, Kekana, Baloyi and Raedani, the former must be accepted and the latter rejected.

E9: EVIDENCE OF MR NESHUNZHI

233. On 4 August 2022 before Mr Neshunzhi could give his evidence, Adv Mpofu raised an objection regarding the relevance of his evidence to the Mazzone motion. The Chairperson ruled that he will allow the evidence and that the issue of relevance will be dealt with during the committee's deliberation. Be that as it may, I will respond to Mr Neshunzhi's evidence herein below. Mr Neshunzhi's evidence traverses issues of security clearance, work environment as well as the relationship between the State Security Agency and the various Government Departments, including the office of the PPSA. There is a myth that has been created that I have overly securitized the office of the PPSA, not by Ms Mazzone at least, but by the evidence leaders and some members of this Committee.

Security clearance

234. As far as issues of security clearance is concerned, Mr Neshunzhi testified that when he joined the institution in 2017, there was already a security policy that was signed by the former PP, Prof Madonsela. This issue was confirmed by Prof Madonsela herself when she testified before this Committee.

235. He further testified that senior officials or officials who work in specific categories of employment need to be vetted because they deal with sensitive information which if that information is not protected, could lead to civil unrest. It could damage the security of the State and as well as putting people whose private information has been wrongly handled into risk.

236. He testified that the above is the requirement for all establishments of the State, and it is mandatory for anybody who works for State to have that type of clearance. He testified that clause 4.3.5.1.1 of the Security Policy requires all employees, contractors and contractors of the office of the PPSA who require access to classified information and critical assets in order to perform their duties, to be vetted by the SSA in order to be granted security clearance at the appropriate level. This testimony debunks the myth that I am the one who introduced issues of security clearance when I took over as PP. In fact, he testified that it is not unusual for a Government Departments to send their employees who hold positions of security managers to undergo skills training at the SSA.

237. The overblown issue of an employee who was seconded from SSA loses sight of the fact that I was entitled to receive such personnel from any department and that I had also approached National Treasury in that case but they had been unable to assist.

238. Mr Neshunzhi never testified about anyone being victimized, harassed or intimidated.

239. In fact, Mr Neshunzhi acknowledges that he was placed on precautionary leave pending his training at SSA and that the delay was occasioned by non-availability of dates at the SSA and not by the office of the PPSA.

E10: <u>EVIDENCE OF MR MAHLANGU</u>

240. Mr Mahlangu corroborated my evidence that Mr Samuel's issue only came to our attention when the legal department alerted us that PPSA was being sued for an amount of R350 000.00 by Mr Seabi who had been assaulted by Mr Samuel in Limpopo in 2011.

241. Mr Mahlangu testified that he is the one who took the decision to subject Mr Samuel to a disciplinary process because how else was he going to explain the expenditure of R350 000,00 when there has never been consequence management as per the advice he received from legal services.

242. Mr Mahlangu testified that he is the one who, during the course and scope of him exercising his duties as CEO, placed Mr Neshunzhi on precautionary suspension and with reason that investigations were being conducted against his office. He also alluded to the fact that he is the one who initiated a disciplinary process against Mr Madiba, Mr Kekana and Mr Matlawe. He testified about the circumstances that led to them facing disciplinary action. What is of outmost importance regarding the evidence of Mr Mahlangu is the fact that he explains that a disciplinary process should not be perceived to mean that a person is already guilty but for the employer to determine whether an employee has done something wrong or not.

243. Mr Mahlangu also testified about the circumstances that led to Ms Mogaladi, Mr Madiba and Ms Sekele facing disciplinary action. He reiterated the fact that they had boxes of information that would have assisted in the FSCA matter but failed and/or neglected to consider and that this information did not come as a result of a witch-hunt, but the information was discussed during a

dashboard meeting. This testimony demonstrates the fact that I did not at all harass, victimize or intimidate any employee.

244. He confirmed that disciplinary matters fell within his domain and there was no undue interference from me as executive authority.

E11: <u>EVIDENCE OF MS THEJANE</u>

245. I must indicate that Ms Thejane conceded that the allegations contained in her affidavit were authored by the Evidence Leaders and all she did was confirm and sign the affidavit. In fact, Ms Thejane went as far as indicating that the Evidence Leaders themselves provided her with information to support what she had indicated in her affidavit. Her "*evidence*" must therefore be treated with extreme caution and where necessary rejected as fabricated and/or manufactured by others.

246. I must mention that Ms Thejane was referred to a strategic plan document that has been developed by employees and management of the PPSA as contained in Bundle H, item 26 which has been signed by the employees including Ms Thejane. The document indicates the following time frames within which matters should be dealt with and finalised:

246.1. Early resolution matters should be finalised within 6 months;

246.2. Service delivery matters to be finalised within 12 months;

246.3. Good government matters to be finalised within 24 months; and

246.4. Complex good government matters to be finalised within 36 months.

247. I must emphasise the fact that when I request staff to meet deadlines, it is in keeping with the above. My role as Executive Authority is to ensure that the institution adheres to the above timelines because at the end of the day, I am the one who has to account to Parliament and to the people of South Africa.

Audi letters

248. Ms Thejane conceded in her affidavit that she has received three audi letters from three different managers for failure to meet deadlines. It can't be a coincidence. It simply means that Ms Thejane simply cannot meet deadlines as required by the strategic document as quoted herein above. She even went as further as defying the Executive Members Ethics Act which has been passed by Parliament and called it unreasonable.

249. Ms Thejane tried to portray an image that I gave unreasonable deadlines and as a result quality is compromise because people have to rush, however the true picture is that she simply does not want to work, hence the three audi letters. She further confuses lack of training or skill that results in poor quality reports on the one hand and deadlines as a result of poor quality on the other hand. This demonstrates the fact that her affidavit was prepared for her and as result she did not know how to articulate what the Evidence leaders had put in her affidavit.

250. It is embarrassing to have to mention that one of my Managers, Ms Thejane did not even know what intimidation, victimisation or harassment is. She was called to testify on something she had no idea on. She testified that she was

victimized by Ms Sibanyoni and Ms Baloyi when they issued her with audi letters.

251. I must emphasise the fact that Ms Thejane appears to be one of those witnesses who were used by the Evidence Leaders to come before the Committee to perpetuate lies, hence in her so-called affidavit she quoted certain paragraphs of Ms Mogaladi's affidavit, but she conceded under cross examination that she has never read Ms Mogaladi's affidavit. If there is any fairness at all then Ms Thejane's affidavit will be totally disregarded on the basis that the allegations contained in her affidavit are those of the Evidence Leaders and not hers. She also referred to specific charges by their number but conceded under cross-examination that she had never seen the charge sheet!

252. Ms Thejane acknowledges that I have reduced backlog and the institution has received three clean audits under my leadership. In fact, she acknowledges that I have performed better than all my predecessors when it comes to backlog reduction.

253. In light of the above, Ms Thejane's evidence does not raise any prima facie evidence of incompetence or misconduct on my part. Her evidence failed dismally to indicate that I have harassed, victimized or intimidated members of staff. In any case she does not even know the meaning of the words.

254. In any case, she was one of the most unreliable witness called. Her evidence also puts into focus the role of the Evidence Leadership which falls far beneath even that expected of prosecutors.

My version in summary

255. My indisputable version regarding the HR related charges, which is corroborated by the majority of the 15 witnesses called by the Evidence Leaders, (namely Tebele, Mahlangu, Ndou, Tyelela, Sithole Neshunzhi, Van der Merwe and Tshiwalule) plus two of the witnesses called by me (namely Mr Lamola and Ms Mvuyana) can be summarised as follows:

255.1. I found massive backlogs;

255.2. I had vast experience in dealing with backlog;

255.3. I devised systems which succeeded in bringing down the backlogs to unprecedented low levels. Our output was also excellent;

255.4. I expected high levels of performance from management purely for the sake of the public. I was never driven by any other consideration;

255.5. Members of the public such as Mr Nyathela and Mr Seabi testimony to my special passion for neglected and marginalized people;

255.6. I never personally issued audi letters or meted out disciplinary actions. In any event, *audi* letters were a good and acceptable reasons to manage performance;

255.7. Each Manager at the office of the PPSA signs a performance agreement as well as a strategic document which stipulates their conditions of service as well as PPSA turn-around times when it

comes to service delivery. For example EMEA matters are to be finalised within 30 days. This "*unreasonable*" deadline is not set by me but imposed by Parliament;

255.8. The horror pictures painted by some disgruntled employees of a zone of fear and intimidation, harassment and victimisation are false and self-serving. On the contrary, staff interactions were characterised by respect even if the deadlines were being chased firmly;

255.9. The major unprecedented achievements in respect of backlogs and three successive clean audits were attributable to the strict disciplinary and efficiency driven regime;

Mr Isaac Matlawe

256. Mr Matlawe was the Senior Investigator for quality assurance. When he was given all evidence by the EFF in the FSCA matter to enable him to investigate. He took about a year without producing any Section 7(9) Report. I had to remove the matter from him. I allocated it to Mr Madiba (Chief Investigator) and he worked with Carrina Van Eden, who continued with the investigation. It took another six to eight months, they delayed, and I required Ms Motsisi to deal with the reasons for the delay in the matter. Then both Mr Madiba and Ms Van Eden were both moved and reported Ponatshego Mokgaladi. There were tensions between them. Mr Madiba finally drafted the Section 7(9) which was also substandard.

257. The section 7(9) was served to Mr Tshidi who was complaining that they did not include all the evidence that he submitted to the office of the PP. Mr Tshidi then took the final Report on review.

258. The outcome of the disciplinary action in respect the aforementioned officials is as follows:

258.1. Mr Abongile Madiba was found guilty by the Chairperson of the Disciplinary Committee. They have been given an opportunity to address the DC on mitigating factors. I have also uploaded the outcome to Mr Madiba's Disciplinary Enquiry.

Chief Operations Officer, Ms Basani Baloyi:

259. This issue has already been finalised and rejected by the Independent Panel.

260. As far as the allegations that the CEO interfered with her work is concerned, I must bring to the attention of this Committee that the process and value chain from investigations to the final report involves administrative and Human Resources issues falling squarely in the executive mandate of the CEO. Therefore, it is not true that the CEO is not supposed to have sight of investigating reports.

261. Ms Baloyi had some very serious shortcomings when it came to performance of her duties as COO, in most cases, I had to spoon-feed her on the most basic of management issues. I have offered my assistance to

her in many a times, however she was found wanting, hence her probation period was not extended.

262. To demonstrate the above, Ms Baloyi contributed to the office of the PP being dragged before the CCMA for constructive dismissal in the manner in which she handled resignation of one of the former employees. She lacked the tact and know-how of dealing with the basic of issues.

263. In conclusion, Ms Baloyi is also a disgruntled former employee of the office of the PP who is using this Committee to vilify me and cover up her incompetence.

Senior Investigator, Adv. Isaac Matlawe

264. Mr Matlawe has since resigned. Upon his resignation he took to twitter and hailed insults against me. I have since laid criminal charges against him and reported him to the Bar Council in Johannesburg.

265. In conclusion in this matter, I have demonstrated that all employees who faced disciplinary actions did so due to their misconduct. I have never intimidated, harassed or victimized anyone. In a country where the issues of service delivery are a pandemic, this Parliament should be encouraging State employees to perform optimally in service of the people of South Africa instead of entertaining passage gossip of who got an audi letter because they failed to perform and all other CCMA related matters.

F: CONCLUSION

266. On any fair assessment of the evidence adduced in these proceedings when measured against the extravagant and serious sounding claims made in the Mazzone Motion, for example the key accusation of targeting certain innocent politicians and yet absolving other guilty ones, there is not a single basis for the Committee to recommend my impeachment or removal from Office in terms of section 194 of the Constitution.

267. The core allegations of misconduct and/or incompetence are based on the CIEX and Vrede investigations. Both relate to investigations which were unduly and inexplicably neglected by my predecessor for periods of 7 years and 4 years respectively. Both involved very powerful forces in our society which attracted a lot of attention. Both were finalised by me within a relatively short time partly due to the understandable pressure from those implicated or involved.

268. To the extent that there may have been any shortcomings in respect of these investigations, findings and/or relevant remedial actions, these were functions of honest mistakes, staff shortages budgeting constraints, turn of phrase or language, minor errors of law and the like. Such shortcomings, if any are certainly not attributable to any intentional or reckless conduct on my part. Neither was there any sustained incompetence beyond normal human imperfection. I have never claimed to be perfect.

269. In many key respects my achievements in the Public Protector's office far exceed those of all my predecessors.

270. In the critical areas of grassroots outreach, specific interventions in respect of neglected individuals or communities, service delivery, clean governance and international relations my achievements speak for themselves.

271. It is understandable that due to the fearless investigation of some very powerful forces I have ended up being vilified, targeted for specific litigation and even put through a spiteful impeachment process and illegal suspension motivated by retaliation and a desire to dissuade me from doing my work without fear, favour or prejudice. This should come as no surprise if the words of the Constitutional Court in the landmark EFF (Nkandla) case are taken into account, to the effect that such investigations are always bound to attract "*a very unfriendly response from those investigated*".

272. It is no coincidence that none of the charges relate to matters pertaining to the bread and butter issues which we prioritise but to the so-called high profile matters involving the untouchables. The cases of CR17, Rogue Unit, Pillay retirement involve powerful figures in the ANC. The matter of CIEX involves the ideological adherence of the DA against calls for the nationalisation of monetary currency to benefit the poor. The Vrede matter was driven by the DA in the Free State as mobilised by the white farming community in that province which felt threatened by the model being introduced to empower the local black farmworkers. This is not to detract from any maladministration which rightfully had to be uprooted but to explain why these particular matters featured in the related expensive litigation and the massive effort for my removal. This committee is expected to turn a blind eye to any major

achievements on my part for as long as it only related to the Nyathelas and Seabis of this world who had no means to litigate regarding their issues.

273. There has also been a disturbing trend of judicial hostility and antipathy towards me as a targeted litigant. This has unfortunately manifested itself in the North Gauteng Division of the High Court on countless occasions. This has fortunately been verified and deprecated by members of the judiciary itself in such cases as the CR17 matter (the minority judgment of Mogoeng CJ), the CIEX matter (the minority judgment of Mogoeng CJ and Goliath J) and most crucially the Commissioner for SARS judgment (the majority and unanimous decision of Madlanga J).

274. The very idea, which is at the heart of the Mazzone Motion, that court judgments must be willy nilly and unquestioningly rubberstamped by the Committee has no basis in law or logic. Worse of all how can I be labelled as incompetent or guilty of misconduct for holding the exact same views as were demonstrably held by the relevant members of my staff who have never been disciplined for holding those views? More crucially how can that intended result also be achieved when the Chief Justice, other Justices and even the majority of the Constitutional Court have held similar views. Such views may of course be incorrect, objectively speaking, but they cannot conceivably be impeachable in terms of the present definitions of impeachable offences.

275. The Executive, in the form of the President has also singled me out for ill treatment, as indicated in the recent judgment of the Western Cape Full Court in the suspension matter. The Legislature itself has met me with consistent hostility, exemplified by the inexplicable insistence, right up to the

Constitutional Court, that I be deprived of full legal representation in this Enquiry and insistence to extend the Enquiry beyond the recommendations of the Independent Panel which were specifically adopted by the National Assembly, not to mention the conduct of the Chairperson and/or some of the members of the Committee which has manifested itself in countless acts of unfairness and unreasonableness, including the grounds for recusal currently serving before the Western Cape High Court. This completes the circle where all three arms of the sate have undermined the work of the Public Protector.

276. To the extent that there is obviously a pre-determined outcome of the section 194 process by very powerful forces in the state and the mainstream media, contrary to the overwhelming sentiment of the silent and powerless majority, it will be left to the courts to make the final determination about the legality of that pre-determined outcome. Hopefully this will be one of those situations indicated above where the courts have on occasion indeed come to my rescue.

277. In respect of the objective evidence no grounds for impeachment have been established by any stretch of the imagination.

278. The strange approach adopted by the partisan Evidence Leaders also deprives the Committee of any legitimate basis to recommend my removal. While the main thrust of the charges against me relate to allegations of misconduct and/or incompetence based on court judgments, the Evidence Leaders strangely elected to call almost 90% of their witnesses in relation to allegations of HR related events. This strategy was self-defeating because: -

278.1. The Independent Panel rejected the HR related charges save for some minor issues which have been easily dispensed with;

278.2. The majority of the witnesses supported my version that the allegations were false and motivated by disgruntlement;

278.3. Even if true, it is doubtful that these allegations would constitute impeachable conduct;

278.4. I have no direct accountability in relation to HR and management issues; and

278.5. The positive outcomes which come from the performance culture when I introduced and/or encouraged, speak for themselves.

279. It will therefore be appropriate and in the public interest that I be given the necessary space to spend the last few months or so of my term to prepare the ground at the institution for a smooth and proper handover of the office to the next Public Protector so as to ensure that she does not experience the hardships which I have. This will be more so if the person, unlike me, is a total outsider not familiar with the inner workings of such an institution. It is crucial that the office be kept intact and that everything be done to allow my successor to hit the ground running. That is the nature of the office and the institution.

280. To end on a positive note, I hope that this experience, regrettable as it was, has laid a solid basis to ready our young democracy for what may next be a necessary process of impeachment intended to save our democracy rather than conducting an unnecessary, and wasteful and spiteful witch-hunt.

281. Having said all that I remain steadfast, resolute and fearless in my belief that it was necessary to fight back against the evil and well co-ordinated campaign against me. I am guided by the biblical Esther who said, and I repeat: -

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

DEPONENT

SIGNED AND SWORN TO BEFORE ME AT SANDTON ON THIS 27th DAY OF MARCH 2023, THE DEPONENT HAVING ACKNOWLEDGED IN MY PRESENCE THAT ~~HE/~~SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THE PROVISIONS OF GOVERNMENT GAZETTE R1478 OF 11 JULY 1980 AS AMENDED BY GOVERNMENT GAZETTE R774 OF 20 APRIL 1982, CONCERNING THE TAKING OF THE OATH, HAVING BEEN COMPLIED WITH.

COMMISSIONER OF OATHS

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