ORIGINAL

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 2107 | 2020

In the matter between:

THE PUBLIC PROTECTOR	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	1st Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	3rd Respondent
THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES	4th Respondent
THE COMMISSION FOR GENDER EQUALITY	5th Respondent
THE AUDITOR-GENERAL OF SOUTH AFRICA	6th Respondent
THE INDEPENDENT ELECTORAL COMMISSION	7th Respondent
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	8th Respondent
ALL POLITICAL PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	9th to 22nd Respondents

OFFICE OF THE CHIEF JUSTICE
PRIVATE BAG X9020
CAPE TOWN 8000
2020 -02- 04
CENTRAL OFFICE
CAPE HIGH COURT

FILING SHEET

KINDLY TAKE NOTICE that the Applicant hereby files the following: -

DOCUMENT: **NOTICE OF MOTION AND FOUNDING AFFIDAVIT**

FILED BY: **SEANEGO ATTORNEYS INC.** c/o **DIALE MOGASHOA ATTORNEYS INC.**

Dated and signed at CAPE TOWN on this the 4TH day of FEBRUARY 2020.

SEANEGO ATTORNEYS INC
Attorneys for the Applicant
BLOCK B, SUITE C,
1ST FLOOR, 53 KYALAMI BOULEVARD
KYALAMI BUSINESS PARK
MIDRAND, 1684
TEL: 011 466 0442
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EMAIL: info@seanego.co.za;
theo@seanego.co.za; AND
sinenhlanhla@seanego.co.za
C/O DIALE MOGASHOA ATTORNEYS INC
8TH FLOOR CONVENTION TOWER
CNR HEERENGRACHT & WALTER SISULU AVENUE
FORSHORE
CAPE TOWN
TEL: 021 100 3530
FAX: 086 260 7135
EMAIL: srish@dm-inc.co.za

TO:
THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
CAPE TOWN

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 9107/2020

In the matter between:

THE PUBLIC PROTECTOR	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	1st Respondent
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THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	3rd Respondent
THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES	4th Respondent
THE COMMISSION FOR GENDER EQUALITY	5th Respondent
THE AUDITOR-GENERAL OF SOUTH AFRICA	6th Respondent
THE INDEPENDENT ELECTORAL COMMISSION	7th Respondent
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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 2107 /2020

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OFFICE OF THE CHIEF JUSTICE
CAPE TOWN 8000
2020 -02- 04
WESTERN CAPE HIGH COURT

NOTICE OF MOTION

PLEASE TAKE NOTICE that the applicant intends to apply to the above Honourable Court at **10h00** on **17 MARCH 2020**, or as soon thereafter as the parties and the Honourable Judge President may agree or determine, for an order as set out in Part A hereunder:

PART A

Pending the final outcome of the main relief set out in Part B below, this court hereby grants an order:

1. Dispensing with the normal rules and hearing this application as one of urgency in terms of Rule 6(12) (a);
2. Interdicting and prohibiting the first respondent from taking any further steps in the implementation of the processes envisaged in section 194 of the Constitution and conducted in terms of the impugned Rules;

Alternatively to Prayer 2 above:

3. Interdicting those respondents, and/or their members, who have a conflict of interest from voting and/or participating in any way in the processes carried out in terms of section 194 of the Constitution and the Rules;

4. Directing the conflicted persons referred to in Prayer 3 to declare such interests to the Speaker of the National Assembly;
5. Directing the Speaker to furnish the applicant with the requested reasons for the approval decision made / announced on 24 January 2020;
6. Ordering only the respondents who have entered a notice to oppose to pay the costs of the application;
7. Leave to supplement the papers in respect of the Part B application; and;
8. Such further, alternative, just and/or equitable relief as the court may deem appropriate.

PART B

1. Declaring the Rules for the removal to be unlawful, unconstitutional, invalid, null and void;

Alternatively to Prayer 1 above:

2. Declaring that the Rules do not operate with retrospective effect against the applicant;
3. Reviewing and setting aside the decision of the National Assembly in adopting the Rules; alternatively the decision of the Speaker in approving the motion for the removal of the applicant;
4. Such further, alternative, just and/or equitable relief as the court may deem appropriate;

5. Costs of opposition.

TAKE NOTICE FURTHER that the affidavit of **BUSISIWE MKHWEBANE**, annexed hereto, will be used in support of this application.

TAKE NOTICE FURTHER THAT the applicant has appointed the address of its attorneys, as set out below, at which it will accept service of all processes in these proceedings.

TAKE FURTHER NOTICE FURTHER that if any of the respondents intends opposing this application, they are required:

(a) to notify the applicant's attorneys in writing by filing a notice of intention to oppose on or before **16h00** on **10 FEBRUARY 2020**; and to appoint in such notification an address at which notice and service of all documents in these proceedings shall be accepted; and

(b) on or before **16h00** on **17 FEBRUARY 2020**, to file their answering affidavit, if any.

If no such notice is given, application will be made on **17 MARCH 2020** at **10h00** or so soon thereafter as Counsel may be heard.

KINDLY SET THE MATTER DOWN ACCORDINGLY.

SIGNED at **CAPE TOWN** on this the 4TH day of **FEBRUARY 2020.**

SEANEGO ATTORNEYS INC
Attorneys for the Applicant
BLOCK B, SUITE C,
1ST FLOOR, 53 KYALAMI BOULEVARD
KYALAMI BUSINESS PARK
MIDRAND, 1684
TEL: 011 466 0442
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C/O DIALE MOGASHOA ATTORNEYS INC
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CNR HEERENGRACHT & WALTER SISULU AVENUE
FORSHORE
CAPE TOWN
TEL: 021 100 3530
FAX: 086 260 7135
EMAIL: srish@dm-inc.co.za

TO:
THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
CAPE TOWN

AND TO:
THE SPEAKER OF THE NATIONAL ASSEMBLY
FIRST RESPONDENT
PARLIAMENT BUILDING
ROOM E118
PARLIAMENT STREET
CAPE TOWN
PHONE: 021 403 2595
FAX: 021 461 9462

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Received copy hereof this
____ day of February 2020

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AND TO:
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
SECOND RESPONDENT
TUYNHYS
PLEIN STREET
CAPE TOWN
WESTERN CAPE

AND TO:
THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION
THIRD RESPONDENT
BRAAMPARK FORUM 3
33 HOOFD STREET
BRAAMFONTEIN
JOHANNESBURG
2017
TEL: 011 877 3600

Received copy hereof this
____ day of February 2020

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AND TO:
THE COMMISSION OF PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL RELIGIOUS AND LINGUSITICS COMMUNITIES
FOURTH RESPONDENT
33 HOOFD STREET
FORUM 4
BRAAMPARK OFFICE PARK
BRAAMFONTEIN
JOHANNESBURG
2017
TEL: 011 358 9100

FAX: 011 403 2098

Received copy hereof this
____ day of February 2020

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AND TO:
THE COMMISSION FOR GENDER EQUALITY
FIFTH RESPONDENT
OLD WOMEN'S JAIL
CONSTITUTIONAL HILL
2 KOTZE STREET
BRAAMFONTEIN
JOHANNESBURG
2017
TEL: 011 403 7182
FAX: 011 403 7188

Received copy hereof this
____ day of February 2020

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AND TO:
THE AUDITOR GENERAL
SIXTH RESPONDENT
300 MIDDEL STREET
BROOKLYN
PRETORIA
TEL: 012 426 8000
FAX: 012 426 8257

Received copy hereof this
____ day of February 2020

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AND TO:
THE INDEPENDENT ELECTORAL COMMISSION
SEVENTH RESPONDENT
ELECTION HOUSE

8

RIVERSIDE OFFICE PARK
1303 HEUWEL AVENUE
CENTURION
0157

Received copy hereof this
____ day of February 2020

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AND TO:
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
EIGHTH RESPONDENT
380 WITCH-HAZEL AVENUE,
ECO PARK ESTATE,
CENTURION,
GAUTENG

Received copy hereof this
____ day of February 2020

_____

AND TO:
ALL THE POLITICAL PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY (AND AS LISTED IN ANNEXURE "PPFA1")
9th TO 22nd RESPONDENTS
C/O THE SPEAKER OF THE NATIONAL ASSEMBLY
PARLIAMENT BUILDING
ROOM E118
PARLIAMENT STREET
CAPE TOWN
PHONE: 021 403 2595
FAX: 021 461 9462

Received copy hereof this

____ day of February 2020

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AND TO:
AFRICAN NATIONAL CONGRESS
9TH RESPONDENT

AND TO:
DEMOCRATIC ALLIANCE
10TH RESPONDENT
MARK'S BUILDING
ROOM M 217
90 PLEIN STREET
CAPE TOWN
PHONE: 021 4032910

AND TO:
ECONOMIC FREEDOM FIGHTERS
11TH RESPONDENT

AND TO:
INKATHA FREEDOM PARTY
12TH RESPONDENT
MARK'S BUILDING
M 106, 1ST FLOOR
90 PLEIN STREET
PARLIAMENT OF SOUTH AFRICA
CAPE TOWN
PHONE: 021 4032915

AND TO:
FREEDOM FRONT PLUS
13TH RESPONDENT
GOOD HOPE BUILDING
DH 99/100
120 PLEIN STREET
CAPE TOWN
PHONE: 021 4038653

AND TO:
AFRICAN CHRISTIAN DEMOCRATIC PARTY
14TH RESPONDENT
GOOD HOPE BUILDING
GH 123, 1ST FLOOR
120 PLEIN STREET
CAPE TOWN
PHONE: 021 4033977

AND TO:
UNITED DEMOCRATIC MOVEMENT
15TH RESPONDENT
MARK'S BUILDING
M 552
90 PLEIN STREET
PARLIAMENT OF SOUTH AFRICA
CAPETOWN
PHONE: 021 403 8759

AND TO:
AFRICAN TRANSFORMATION MOVEMENT
16TH RESPONDENT

AND TO:
GOOD
17TH RESPONDENT
OLD ASSEMBLY
NO: 207, 2ND FLOOR
PLEIN STREET
CAPE TOWN
PHONE: 021 4033117

AND TO:
NATIONAL FREEDOM PARTY
18TH RESPONDENT

AND TO:
AFRICAN INDEPENDENT CONGRESS
19TH RESPONDENT

AND TO:
CONGRESS OF THE PEOPLE
20TH RESPONDENT

AND TO:
PAN AFRICANIST CONGRESS OF AZANIA
21ST RESPONDENT

AND TO:
ALJAMA
22ND RESPONDENT

AND TO:
THE STATE ATTORNEY: CAPE TOWN
FLOOR 4 LIBERTY LIFE CENTRE
22 LONG ST
CENTRAL
CAPE TOWN

Received copy hereof this
____ day of February 2020

_____

AND TO:
THE STATE ATTORNEY: PRETORIA
316 THABO SEHUME STREET
PRETORIA CBD
PRETORIA

Received copy hereof this
____ day of February 2020

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 2107/2020

In the matter between:

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THE INDEPENDENT ELECTORAL COMMISSION	7th Respondent
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	8th Respondent
ALL POLITICAL PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	9th to 22nd Respondents

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FOUNDING AFFIDAVIT

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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. I am the Applicant in this application in my aforementioned capacity as the Public Protector. I am authorised to depose to this affidavit.

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 is correct.

The parties

3. The First Respondent is The Speaker of the National Assembly, Thandi Modise, who is cited in that capacity, elected to office in terms of Section 52 of the Constitution. The Speaker is cited in her official capacity as Speaker and as nominal respondent on behalf of the National Assembly in

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terms of section 23 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 2 of 2004, read with section 23 of the State Liability Act 20 of 1957. Her official work address is at Parliament Building, Room E, 118 Parliament Street, Cape Town, which address is within the jurisdiction of this Court.

4. The Second Respondent is the PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA, who is the head of state and the national executive of government of the Republic of South Africa, duly elected in accordance with section 86 of the Constitution and, the incumbent being His Excellency Cyril Matamela Ramaphosa, with his official seat and administrative office at Tuynhys, Plein Street, Cape Town.

5. The Third to Eighth Respondents are all institutions created pursuant to Chapter 9 of the Constitution of the Republic of South Africa, commonly referred to as "Chapter 9 Institutions".

6. The Third Respondent is THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION, a chapter 9 institution established in terms of the then Human Rights Commission Act 54 of 1994, which has since been repealed and replaced by the South African Human Rights Commission Act 40 of 2013 with its head office situated at: Braampark Forum 3, 33 Hoofd Street, Braamfontein, Johannesburg.

7: The Fourth Respondent is THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL RELIGIOUS AND LINGUISTIC COMMUNITIES, a chapter 9 institution established in terms of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 with its head office at: 33 Hoofd Street, Forum 4, Braampark Office Park, Braamfontein, Johannesburg.

8. The Fifth Respondent is THE COMMISSION FOR GENDER EQUALITY, a chapter 9 institution established in terms of the Commission on Gender Equality Act 39 of 1996 with its head office at: Old Women's Jail, Constitutional Hill, 2 Kotze Street, Braamfontein, Johannesburg.

9. The Sixth Respondent is THE AUDITOR GENERAL OF SOUTH AFRICA, a chapter 9 institution established by the Public Audit Act, No. 25 of 2004, with its head office situated at: 300 Middel Street, Brooklyn, Pretoria.

10. The Seventh Respondent is THE INDEPENDENT ELECTORAL COMMISSION, a chapter 9 institution established in terms of the Electoral Commission Act 51 of 1996, with its head office at: Election House, Riverside Office, Park, 1303 Heuwel Avenue, Centurion.

11. The Eighth Respondent is the INDEPENDENT COMMUNICATION AUTHORITY OF SOUTH AFRICA, a chapter 9 institution established in

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terms of the Independent Communications Authority of South Africa Act 2 of 2014 with its head office at: 380 Witch-Hazel Avenue, Eco Park Estate, Centurion, Gauteng.

12. The Ninth to Twenty-second Respondents are all the political parties represented in the National Assembly of the Parliament of the Republic of South Africa, with their offices situate at the Houses of Parliament at 120 Plein Street, Cape Town, alternatively their registered addresses and principal places of business are reflected in the notice of motion. They are listed in annexure "**PPFA1**" hereto in the order of their electoral size.

13. The Respondents are cited in this application as interested parties. No order is sought against those who will abide the decision of the court and/or those who will support the application. An adverse cost order will however be sought against those who will enter notice(s) to oppose the application.

A: NATURE OF THE APPLICATION

14. How the National Assembly and the Speaker should discharge their constitutional responsibilities and duties, and whether in a particular case they did so properly, lies at the heart of this matter. **So too does the constitutional values of democracy, fairness, ubuntu and the rule of law but, above all, accountability**. One of the cornerstones of the constitutional principle of accountability is to make it very difficult for

politicians to control and remove, at a whim, those who are entrusted with the role of being the watchdogs of the public, be they judges or other holders of similar offices such as ombuds.

15. It is the very first time ever, in our young democracy that a serious attempt is being made to remove and dethrone the head of a watchdog institution by impeachment. Section 194 of the Constitution will receive its maiden judicial interpretation and much required scrutiny.

16. This is an application primarily for urgent interim interdictory relief primarily to prohibit the Speaker of Parliament, acting in her official capacity, from taking any further steps in the ongoing process in terms of section 194 of the Constitution, which is currently being implemented in terms of the impugned Rules, the lawfulness, constitutionality and validity of which is the subject of a legal challenge in the form of declaratory and judicial review proceedings to be later instituted in Part B of this application. As applicant, I specifically reserve my rights to supplement these papers before the set down and hearing of Part B. Alternatively, to bar those of the Respondents and/or their members who are conflicted, to be identified hereinunder, from participating in any way in the process aimed at my removal from office in terms of section 194 of the Constitution.

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17. Furthermore, I also seek relief in the form of a mandatory interdict or *mandamus* directing the Speaker to furnish me with reasons for her decision to approve the relevant motion submitted by the Chief Whip of the DA and to do so forthwith and before the finalisation of the Part B review papers, for obvious reasons. It is common cause that, despite demand, she has failed and/or refused to furnish me with adequate reasons and copies of the complaint motion of the DA, with supporting documents.

18. Part B will be primarily concerned with judicial review proceedings based on alleged violations of the rationality / legality principle, which is an incident of the rule of law, together with other related ancillary relief.

19. The constitutional issues raised in this application are weighty, novel and of very wide, direct and indirect public interest. The application also concerns constitutional interpretation particularly of the words contained in section 194 (1) of the Constitution, such as "misconduct" and "incompetence". Accordingly, a notice will be issued in terms of Rule 16A(9) of the Uniform Rules of Court at the time of the filing hereof, but with truncated timelines due to the urgency of the application, which is being instituted under the general rubric of Rule 6(12)(a).

20. Due to the relative complexity of the issues raised herein, the extreme public importance of this matter, the obvious need for finality as well as the

anticipated proliferation of parties, I have instructed my legal representatives to approach the Judge President of this Honourable Court in writing with a view to allocating the hearing of this application to a Full Bench panel on the set-down date reflected in the notice of motion or a date which will have been negotiated by the participating and/or opposing parties, if any.

B: FACTUAL BACKGROUND AND CONTEXT

21. The office of the Public Protector was established in terms of section 181 of the Constitution of South Africa ("the Constitution"), read with the Public Protector Act, Act 23 of 1994. The Constitution enjoins the office of the Public Protector to be independent and to carry out its mandate without fear favour or prejudice. Furthermore, the Constitution requires other organs of state to assist and protect the office of the Public Protector. Its history, role and importance has been well documented in several judgments of the Constitutional Court and need not be repeated herein.

22. I was appointed Public Protector in October 2016 following a rigorous and highly contested process. All the political parties then represented in the National Assembly, with the exception of the Democratic Alliance ("the **DA**" or "the **10th Respondent**"), voted in favour of my appointment.

Spy allegations

23. Despite the huge obligations imposed upon the Office of the Public Protector and other organs of the state, my appointment to the office of the Public Protector was made out to be a problem from the beginning due to the fact that the official opposition party, the Democratic Alliance, which had opposed my appointment, labelled me with baseless accusations and insults, including spurious and baseless allegation that I was a "spy". I have since challenged them in court proceedings, in respect of which the DA has appealed in the Supreme Court of Appeal, to bring about proof that I was a "spy". To date they have failed to do so. It has never been clarified which party, institution or person I allegedly spied for or against. The accusation is palpably false. Accordingly, I am confident that the conduct of the DA in making these accusations will ultimately be found to be unlawful, malicious and false.

24. In knowingly making these false accusations before and particularly after my appointment, the DA failed to heed the relevant provisions of section 181 of the Constitution which I will quote later in this affidavit.

Alleged incompetence

25. When the spy allegations did not work, the DA has from the start and on several occasions since my appointment, addressed letters to the Speaker

of the National Assembly that I should be removed from office initially due to allegations that I was allegedly "incompetent" and not fit to hold office of Public Protector. These accusations have also gone on and on for a long time.

26. The incompetence allegations were made to the exclusion of the independently determined excellent job that I have otherwise done since I took office coupled with the fact that the office of the Public Protector has obtained unqualified audits from the Auditor General year after year under my tenure. The question that begs an answer is whether an "incompetent" person could achieve the statistics that the office of the Public Protector has achieved under my tenure as evidenced by annexure **"PPFA2"** attached herein above.

27. The DA's accusation of incompetence on my part is demonstrably false, baseless and malicious. The DA has been selective in that it does not give an overall or objective view of my performance as per the required and acceptable standards. For instance, it only refers to less than 5 matters which I have lost in court ignoring the true statistics, for example, that:

27.1. since my appointment as the Public Protector in 2016, 55 429 complaints have been lodged with my office (i.e. between October 2016 and September 2019);

27.2. the total number of complaints finalised between October 2016 and September 2019 is 40 240;

27.3. the number for investigation reports released between October 2016 and September 2019, only 135;

27.4. the total number of investigations reports successfully reviewed between October 2016 and September 2019, only 3;

27.5. the total number of investigations reports successfully defended in Court between October 2016 and September 2019, 4;

27.6. the total number of investigations reports currently before the Courts for review are 62; and

27.7. the total number of investigation reports that remain unchallenged in Court are 66. I refer to a copy of the Public Protector's statistics for the period October 2016 to September 2019 which is already annexed hereto above as Annexure **"PPFA2"**.

28. If I were to be judged according to these statistics, my performance is clearly above board and excellent. This is also coupled with the fact that for successive years I have received clean audits from the Auditor-General. I submit that my competence as envisaged under Section 194 of the Constitution should be weighed against the attached statistics and the

clean audit report I have received for years and not on specific cases which the politicians choose to select for political point scoring and to avoid accountability for their actions. The politicians should not be allowed to use double standards for measuring my performance. The DA in particular in matters where I ruled in its favour, neither does it criticise my decision nor question the level of my competence.

Alleged misconduct

29. More recently, the DA has been singing a new tune as the alleged basis for my desired removal. This time it says that I am not only a "spy" who is "incompetent" but I am also guilty of "misconduct". The only ground they have not yet invoked is incapacity. It would come as no surprise if they are also considering it as a last resort.

30. The abovementioned revised and recycled allegations of misconduct were solely based on the merits of my findings, the vast majority of which were still pending before the courts of law.

The role played by certain members of the National Assembly

31. On two prior occasions I have been subjected to a parliamentary process requiring me to respond to requests by members of Parliament from the Democratic Alliance for my removal from office. On 06 March 2018, the

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former chairperson of the Portfolio Committee on Justice and Correctional Services, Dr Mathole Motshekga (ANC), presided over a meeting to discuss the Public Protector's "*report into the Vrede Dairy Farm in the Free State; the adverse findings against her in two separate court judgments in the Gauteng High Court, which set aside aspects of her remedial action in the ABSA matter and the order to Parliament to amend the Constitution to change the South African Reserve Bank mandate.*"

32. Minutes of the Committee meeting reflect that highly pejorative and bigoted remarks were made about me as the Public Protector and that "the *whole Committee expressed disappointment, frustration and even anger at the responses of the Public Protector and the manner in which she conducted the Vrede investigation.*" Members said my report *"had failed to investigate politicians and the Gupta family who are at the centre of the Vrede scandal...The Public Protector ...had dismally failed in that..."* In clear violation of the Constitution's provisions guaranteeing the Public Protector broader powers to determine the scope and methods of investigations, the Committee members purported to berate me for "*failing to consult the intended beneficiaries of the project*" and opined that such failure is "*at odds with her constitutional duty.*" Such comments clearly went beyond oversight into the actual merits of how an investigation ought to have been conducted

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in a particular case, a matter which rests solely in my discretion. A copy of the relevant minutes is annexed hereto marked "**PPFA3**".

33. Further, the Committee opined that it *"is unacceptable for the Public Protector to state that personal cost orders undermine her independence. For far too long public officials have adopted an unduly combative attitude to litigation and it is time they personally bear the costs of the taxpayer."* Further, members responded *"as a result of her remedial action severe damage had been dealt to the independence of the SARB, her office and the economy as a whole. The full bench judgment stated the Public Protector had acted in a disingenuous manner by trying to pass off what was clearly a peremptory order to change the Constitution to amend the mandate of SARB as merely permissive."* I was also accused by the members of having engaged in *"litigation that is clearly vexatious and frivolous as illustrated by the two High Court judgments."* Members said it was *"unacceptable for the Public Protector to publicly state that the judges in the matter had failed to apply their minds in an impartial and objective manner. It is shocking that the Public Protector, herself an officer of the Court, could express such statements which border on contempt of court."* Notably, I was "*asked by some members if she could still reasonably expect people to believe that she is a fit and proper person to occupy her*

Office. She should consider doing the honourable thing and should resign, just as the former President had done."

34. If these comments do not amount to prejudging and predetermining the very issue of my removal, then nothing will ever fit that description. More specifically, and to the knowledge of Dr Motshekga and the other members, at the time of the Committee's highly publicised political attacks on myself, very well knew that there was an appeal to the SCA and application for direct access to the Constitutional Court regarding the High Court decisions impugning the Public Protector's findings and remedial measures. To be more specific, the "Estina Vrede dairy" matter was at the time pending a decision before Judge Tolmay. Such important rules of law as the *sub judice* rule and the principle of separation of powers, to mention a few, were thereby fundamentally undermined and violated.

35. The last time I checked, Parliament was specifically prohibited from pronouncing so definitively, or at all, upon matters which are *sub judice*. The reasons for this salutary rule are obvious. These members of the National Assembly, the majority of which remain members, flagrantly breached this rule. It would be fanciful to expect them to approach the issue of my removal with the requisite open mind which is an essential ingredient for a fair process.

36. Thereafter and as a consequence of the complaint laid by the DA's Mr Steenhuisen, Dr Motshekga wrote me a letter dated 21 June 2018 regarding a "*request to expedite procedure to remove the Public Protector from office.*"

37. A copy of such letter is annexed hereto marked "**PPFA4**". I responded to the Committee in writing and pointed out that I was guided by a number of constitutional principles including accountability to Parliament, (section 55(2)) and others which relate to Public Protector's independence. A copy of my detailed response letter dated 5 July 2018 is annexed hereto marked "**PPFA5**".

38. I pointed out to the Committee that I was informed by the language, context and purpose of sections 181 and 182 of the Constitution regarding the legal status or effect of the Public Protector's power to take remedial action. I also pointed out that the Public Protector is required to be independent and subject only to the Constitution and the law, to be impartial and exercise her powers and perform her functions without fear, favour or prejudice. I also pointed out the principles underlying finality of court judgments (sections 165 and 166) and the Public Protectors constitutional rights to due process and access to court (section 34). Most importantly, I pointed out that the National Assembly and the complainant

MP, Mr. Steenhuisen have constitutional responsibilities and obligations imposed by sections 55(2) and 181(3) of the Constitution.

39. I also pointed out that the Committee was attempting to undermine the judgment of Constitutional Court in **Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others** 2016 (5) BCLR 618 (CC) and the decisional independence of the Public Protector. Both the Speaker and the Committee adopted the view that a judicial review setting aside a decision of the Public Protector can be used as a basis to threaten her with removal for alleged incompetence. I pointed out that such a move would be unconstitutional as it threatens my decisional independence and punishes me in a way that judges who make erroneous judgments are not.

40. I pointed out further procedural flaws in the Committee's approach as follows. The Committee knew that there was an appeal to the SCA and application for direct access to the Constitutional Court regarding the High Court decisions impugning the Public Protector's findings and remedial measures. I pointed out that any attempt to pre-empt the said appeal processes or to embark on a parallel process to essentially threaten or punish the Public Protector for matters pending before the courts is unlawful and amounts to usurpation of judicial authority by members of the Committee and National Assembly. The Committee has not been given

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such dangerous power to be used in a manner that would impair the independence of the Public Protector. Indeed, the Constitution envisioned decisional independence of the Public Protector as a means of ensuring accountability not to the partisan clamour of the day, but to lasting legal principles that were to be neutrally applied to all members of the community.

41. It is impermissible for the personal interests, partisan affiliations, or fear of public reprisal to cloud the decisional process of the Public Protector. Accountability to Parliament does not mean submitting to a system where threat and fear of removal become intertwined to constrain the Public Protector from investigating and deciding cases in an absolutely independent manner. Parliament's removal processes cannot be used as an *in terrorem* means to curtail the decisional independence of the Public Protector. Our Constitution is designed to prevent that from happening. The often-repeated phrase "without fear, favour or prejudice" used for judges and other watchdogs is dependent on the strength of the independence ensuring protections contained in the constitutional scheme.

42. Apart from the violation of rules of the National Assembly Rules, the Committee's continued discussion of the adverse High Court rulings evinces disrespect for the judiciary and Section 165 and 166 of the

Constitution. Subsequent to the two decisions trumpeted by Mr. Steenhuisen and on 15 March 2018, the Supreme Court of Appeal in **Minister of Home Affairs v. The Public Protector** 2018 (3) SA 380 SCA expressly overruled the premise of the two cases Mr. Steenhuisen was wrongly relying on. The Court pointed out that a PAJA review is available only if the impugned action is administrative action as defined in the PAJA. The Court specifically referred to the judgment of Murphy J **South African Reserve Bank v Public Protector & Others** 2017 (6) SA 198 (GP) and the **Absa Bank Limited & Others** (2018) ZAGPHC where both judgments concluded that the remedial action ordered by the Public Protector was subject to review in terms of the PAJA. The SCA concluded that:

> "The *Office of the Public Protector is not a department of state or administration and neither can it be said to be part of the national, provincial or local spheres of government. It is an independent body that is answerable only to the National Assembly…It is, however, an institution that exercises both constitutional powers and public powers in terms of legislation.*"

Further the SCA opined that the Office of Public Protector:

> "*does not fit into the institutions of public administration but stands apart from them*" and that "*it is a purpose-built watch-dog that is independent and answerable not to the executive branch of government but to the National Assembly.*"

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43. Further the SCA pointed out that the Public Protector's function *"is not to administer but to investigate, report on and remedy maladministration."* Given that the major premise of the two High Court judgments (regarding applicability of PAJA) was rejected by the SCA it was highly improper for the Committee to ignore the SCA judgment, presumably for political expediency and to curry favour with their political principals, who are the subjects of Public Protector investigations for alleged impropriety.

44. The Committee relied exclusively on Steenhuisen's letter, annexed hereto marked "**PPFA6**", to advance a novel theory which relies on a constrained definition of "incompetence" which it claims justifies the removal of the Public Protector from office. At that stage, it was not asserting that the Public Protector is guilty of "misconduct" or suffers from "incapacity" as defined in Section 194 of the Constitution. Rather, the Committee held the view that an adverse judicial criticism of the Public Protector and setting aside of her remedial orders are sufficient to establish the "*incompetence*" of the Public Protector, presumably regardless of any subsequent judgments on appeal rejecting the adverse High Court judgments and regardless of the decision of the Constitutional Court to grant the Public Protector direct access to deal with the very same matters.

45. That skewed and novel definition of "*incompetence*" adopted by the Committee is contrary to the rule of law, undermines the independence

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(decisional and institutional) of the Public Protector and violates the constitutional guarantee of security of tenure for the Public Protector.

46. As the SCA has effectively ruled, no Committee or the National Assembly has the power to override or micro-manage the Public Protector's investigation. According to the SCA, the Public Protector,

> *"is given broad discretionary powers as to what complaints to accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order- as close as one can get to a free hand to fulfil the mandate of the Constitution."*

47. It goes without saying that the politically driven clamour to dictate to the Public Protector as to "what allegations of maladministration to investigate, how to investigate them and what remedial action to order" amounts to usurpation of her constitutional powers by politicians on the Committee and is thus unlawful. She has exclusive "free hand to fulfil the mandate of the Constitution" and she cannot be impeded, second-guessed or interfered with in the performance of her duties.

48. I respectfully submit that the track record of the Committee of Parliament in launching unbridled and thinly veiled political attacks on the Public Protector shows a dogged determination by some members of Parliament to undermine the office of the Public Protector. Section 181 of the Constitution is dealt with in full later in this affidavit.

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49. According to the rules of natural justice and fairness, such delinquent members, having prejudged the issues, ought to play no role in the process intended to look objectively into the very allegations they made.

The role of the Speaker

50. On or about 29 May 2019, the Speaker unlawfully and unjustifiably entertained the DA's abovementioned request to have me removed from the office of the Public Protector. It was later not processed solely due to the fact that I pointed it out to the Speaker of the National Assembly the obvious fact that there were no Rules that deal with such an issue and that their actions would have been in violation of the Constitution, which the Speaker conceded. Needless to say, the position will be the same if the rules are invalid and unconstitutional.

51. I did so in the spirit of constructive engagement, co-operative governance among organs and institutions of state (section 41 of the Constitution). I was then and remain now fully cognisant of the fact that in our very young democracy of only 25 years, South Africa; has no previous experience of embarking on a process of the actual impeachment of a President (section 59 of the Constitution), a judge (section 177 thereof), let alone the head of a Chapter 9 institution (section 194). These processes are bound to be

full of pitfalls and to provide an opportunity for learning as a country. Like most things in real life, we are unlikely to get it right the first time.

52. As recently observed, even in mature democracy some with a lifespan of almost 250 years they are still grappling with the exact standards which need to be satisfied for a successful impeachment. It is a very complicated topic as demonstrated in the recent judgment of the Constitutional Court when it tackled the subject for the first time, *albeit* in the different context of a Presidential impeachment.

53. It is therefore unwarranted for the Speaker to take the posture that the impugned Rules are perfect and beyond reproach. A more realistic view is that the Rules can only be confidently applied after the courts have scrutinised if they are indeed fit for purpose. Any sensible person or party should welcome with humility the opportunity presented by the present application for the Rules to pass or fail the test of judicial scrutiny. Disputes such as this one, by definition, provide the necessary oxygen to breathe life into the skeletal framework which is the Constitution – more so in a young democracy.

54. More specifically, I gave the advice to the Speaker in the hope that constructive engagement would prevail and long and unnecessary litigation could be avoided, prevention being always better than cure. It

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now seems like in that regard, my success at co-operative governance was temporary. The facts of this application will demonstrate that even bigger mistakes have been committed but, this time, my friendly advice and warning and attempts at amicable dialogue have not been heeded. I remain of the firm view that a negotiated process would have provided a good compromise and healthy temporary measure for managing the interim period before the outcome of Part B.

55. On the 3rd of December 2019 the National Assembly again violated its constitutional obligations under Sections 1, 181, 182 and 194 of the Constitution, read with Section 7 of the Public Protector Act, 23 of 1994, by the irrational adoption of a set of new Rules for the removal of a holder of a public office in State institutions supporting Constitutional Democracy, which patently do not pass constitutional scrutiny and violate the rule of law and the principle of legality, in the multiple manners and ways which will be described more fully hereunder and more elaborately in the Part B papers for final relief.. A copy of the impugned rules is annexed hereto marked **"PPFA7"**.

56. Notably, the aforementioned rules are drafted in a manner that creates the potential to undermine and compromise the independence and the proper functioning of the office of the Public Protector as envisaged by the Constitution of the Republic.

57. Although the rules are couched in general terms to deal with heads of so-called Chapter 9 institutions, they are a direct product of the permanent vendetta of the DA against my appointment and are therefore targeted at me personally. In some media circles, they have even been correctly described as *"the rules for the removal of Mkhwebane"*.

58. The most embarrassing revelation was that these rules have in actual fact been "drafted" by means of a cut-and-paste job from the recently adopted rules for the impeachment of the President, which were formulated in direct response to the well-known impeachment case judgment of the Constitutional Court. This issue is dealt with later herein.

The DA complaint motion

59. On 6 December 2019, merely three days later, the DA Chief Whip Natasha Mazzone reportedly put in a request to the Speaker to consider my removal as a matter of urgency stating that I was unfit to hold office, a view which the DA held even before and shortly after my lawful appointment. The DA, which is an official opposition party has consistently held this view. It was clear from the beginning that the DA wanted to reduce the chapter 9 institution to advance their narrow political narrative, notwithstanding the fact that my appointment was as a result of a gruelling, open, transparent and democratic process.

60. Although I have not yet had sight of the complaint despite requesting the same from the Speaker, who has to date refused to furnish me therewith, I understand from anecdotal evidence and media reports that the charges brought in the DA motion are "incompetence" and "misconduct", in terms of and as defined in the newly adopted Rules.

61. The submission of the complaint was shortly followed by the December break and holidays and was apparently revisited by the Speaker immediately upon her resumption of duties in January 2020, as will become clearer from what is stated hereinbelow.

Context

62. At the time of my appointment by the National Assembly, it is remarkable that my selection received the approval of all the twelve political parties then represented in the National Assembly, with the exception of the DA and COPE (which abstained), which opposed my election.

63. As it preceded any investigation I conducted or any report I issued, it should be self-evident that the view of the DA regarding my alleged unfitness for office is not causally or logically connected to any report subsequently issued by me. The claim to the contrary is plainly contrived and a smokescreen designed to deceive.

64. I note with alarm the glaring resemblance of the rules for removal from office as proposed by the DA and the rules as adopted by the National Assembly, including the sequence and structure. This calls for concern and should leave any reasonable person unsettled. The reasonable inference is that the rules as proposed by the DA were adopted as is by the National Assembly. In confirmation of the above I attach herein a copy of the proposed rules as Annexure "**PPFA8**". The same should be compared with annexure "**PPFA12**" mentioned hereunder.

65. The Speaker and the National Assembly dismally failed to uphold the constitution by failing to be impartial in the execution of their duties. It is my respectful submission that this conduct by the National Assembly is a betrayal of the rights of each and every citizen of the Republic of South Africa who entrusted the national assembly to jealously guard and protect the Constitution. The similarities in the two documents clearly point to a fatal failure by the Speaker and/or the National Assembly to apply their mind(s). By the look of things, the National Assembly simply swallowed hook, line and sinker the shoddy cut-and-paste job of the DA, which was known to have been carrying out an unrelenting vendetta to get rid of me from even before the proverbial day one.

66. I strongly doubt if the views of other political parties which differed from the DA's hurried draft were taken into account.

67. It is apposite that the DA itself participated in the democratic process which resulted in my appointment by the National Assembly. My appointment is a product of a democratic process. The DA never questioned the process which resulted in my appointment but immediately after I was recommended as the successful candidate, the DA started attacking me. The DA's attack on me has consistently been facilitated through the office of its Chief Whips, i.e. previously John Steenhuisen and more recently Natasha Mazzone. Needless to say, the DA's attitude sought to undermine the Constitution. The Constitution entrenches the office of the Public Protector as an independent institution. The office of the Public Protector should be impartial and should exercise its powers and perform its functions without any fear, favour or prejudice. Furthermore, the Constitution places a duty on other organs of State to assist and protect the Chapter 9 institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions. No person or organ of State may interfere with the functioning of these institutions. Unashamedly the DA has consistently sought to undermine the Constitution in that respect.

68. I am not aware of any instance where the Speaker sought to intervene to protect my office and reprimand the DA's Chief Whips for their unconstitutional behaviour. It is not surprising that the Speaker has approved the motion to initiate proceedings for my removal. It is also not

surprising that the motion was lodged by the DA's Chief Whip. It is also not surprising that the motion for my removal is initiated in terms of the new Rules governing the removal from office of a holder of a public office in a state institution supporting constitutional democracy. I maintain that the aforementioned rules were *ab initio* developed and adopted solely for the purpose of removing me personally from office as I have always been the target of the DA, which now comes in its new guise as a "complainant".

69. It is also hardly surprising that I learnt of the looming Parliamentary removal proceedings against me through the media. To date, the Speaker has not formally informed me about her decision. Although I was appointed through a transparent process, now the process initiated for my removal is done and facilitated in the dark and through the media. What we see now is a manifestation of the process that started on the 3rd of December 2019 when the unconstitutional rules which were tailor-made for my removal from office were adopted by the National Assembly.

70. Even in the private sector, an appointing body has a reciprocal right to dismiss or remove. Both processes must be done fairly and transparently. *A fortiori*, a public institution such as the National Assembly must carry at least the same duties and obligations of fairness towards its own appointees.

71. It is important to note that the envisaged proceedings for my removal will be conducted in terms of the rules adopted on the 3rd December 2019, the rules which I seek to challenge on the grounds that they are unconstitutional and unlawful. In terms of the rules, the next step for the Speaker would be to establish an independent panel to conduct a preliminary inquiry on a motion initiated. Once the panel has made its recommendations the Speaker must schedule the representations for noting by the Assembly with due urgency given the programme of the Assembly. Once the Assembly has noted the report it must then be referred to the committee to consider the motion initiated in terms of section 194 of the Constitution. Another option is that in the event that the National Assembly resolves that the section 194 inquiry be proceeded with, the matter must be referred to a committee for formal inquiry. The Speaker must inform the President of any action and decision emanating from the recommendations thereof, and the President may suspend the Public Protector from office. This is now about to be accomplished.

72. In short, the rules envisage a four-stage process, designed as follows:

72.1. The submission and approval of the complaint motion (Stage 1);

72.2. The referral and consideration of the complaint by an independent panel (Stage 2);

72.3. The consideration of the matter by a committee of the National Assembly (Stage 3); and

72.4. The tabling of a motion of removal in the National Assembly (Stage 4).

73. Stage 1 has now occurred and the Speaker has firmly indicated her current determination to proceed to stage 2 by imposing a deadline of 7 February 2020 on political parties to submit preferred candidates for appointment onto the independent panel, unless the relief sought herein is granted.

74. It is against this background and facts that I seek protection of the court by way of an interdict to preserve the status quo until such time that the glaring illegalities which accompany this process have been declared to be indeed illegal, reviewed and set aside, as envisaged in Part B or not.

75. From the correspondence referred to below, it is clear that the Speaker is intending and determined to take further steps in pursuance of my removal from office. This is exacerbated by the fact that the Speaker sees no reason to communicate with me – I get the information through the media and the information comes after the fact, more particularly her intention to forge ahead irrespective of the clear and present dangers, is signalled by her refusal to accede to my letter of demand and extension of the amicable hand of mutual engagement contained therein.

76. I have already mentioned herein above that these rules are contrary to the Constitution of the Republic of South Africa and that they should be declared unconstitutional. The prospects of success in that regard are overwhelming, as will be demonstrated in sections C, D and E of this affidavit below.

The most recent developments in January 2020

77. On Friday 24 January 2020, shortly after the resumption of normal business, the Speaker issued a media statement indicating, *inter alia*, that she had approved the DA complaint motion in terms of the new Rules. She also stated that political parties represented in the National Assembly were being given until 7 February 2020 to submit the names of candidates for selection onto the independent panel of three envisaged in the Rules.

78. I was taken aback by these developments as I had still not been contacted by either the complainants or the Speaker regarding the matter. Nor was I even in possession of the new Rules, let alone being furnished with a copy of the complaint. I was understandably inundated with enquiries from the media and staff members following the Speaker's media statement.

79. Nevertheless, I utilised that weekend to hurriedly seek legal advice and to source whatever relevant background documents I could gather from

public information so as to obtain legal advice. I received the urgent advice on Monday 27 January 2020.

80. In the morning of Tuesday, 28 January 2020, my attorneys duly sent a letter to the Speaker explaining some of the grounds for holding that the Rules were unconstitutional, requesting reasons for her approval decision and proposing an amicable solution and a moratorium on the implementation of the Rules. A copy of the self-explanatory letter is annexed hereto marked "**PPFA9**". I beg leave that the contents thereof be read as if specifically incorporated herein.

81. Later on that day and at a pre-planned media briefing for the release of unrelated investigation reports, I commented on the latest developments relevant to this application, essentially along the lines outlined in the letter of demand.

82. On 30 January 2020, the Speaker responded by stating *inter alia* that (in her view), *"the substantive motion complied with the form requirements in the rules"* (my emphasis). This wording is highly instructive and important in the determination of the issues raised in this affidavit regarding the glaring illegalities in the execution of stage 1. A copy of the Speakers response is attached hereto marked "**PPFA10**".

83. Needless to say, this response is inadequate as the proviso in Rule 129R(1) relates to substance and not just to form. The motion must be compliant in both form and substance an approval which is solely based on the self-confessed elevation of form over substance, is *ipso facto* unlawful.

84. She further confirmed that the motion was not assessed for whether or not it disclosed a *prima facie* ground for impeachment as this would only be done in stage 2. This is another cardinal error.

85. Most importantly and in spite of the deficiencies set out in my letter of demand, she expressed her view that the rules were compliant with the Constitution. This marked the exact point at which the present dispute arose between me and the First Respondent, the Speaker.

86. She did not address all the other demands made at paragraph 16 onwards of the letter of demand. She must therefore be taken to have refused, for example, to furnish me with a copy of the motion and the reasons for her decision, as requested.

87. On 31 January 2020 and based on the above dispute, I indicated to the Speaker in writing that her response to my demands was deficient and inadequate and therefore I had no option but to approach the court for the

relief sought herein. A copy of the said letter is annexed hereto marked **"PPFA11"**

C: THE APPLICABLE REGULATORY FRAMEWORK

88. The legal principles which are of primary application in this application derive from various sources of law. The emphasis is mine.

Constitutional provisions

89. The following constitutional provisions will be relied on in this application:

89.1. Section 1(c), which provides for the rule of law and the principle of rationality;

"Supremacy of the constitution and the rule of law."

89.2. Section 10, which provides for human dignity and/or ubuntu;

"Everyone has inherent dignity and the right to have their dignity respected and protected."

89.3. Section 34, which provides that;

"Everyone has the right to have <u>any dispute that can be resolved by the application of law</u> decided in a <u>fair public hearing</u> before a court or, <u>where appropriate, another independent and impartial tribunal or forum</u>."

89.4. Section 181, which provides that:

"(1) The following state institutions strengthen constitutional democracy in the Republic:...

(2) These institutions are independent and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year."

89.5. Section 183, which provides for security of tenure, as follows:

"the Public Protector is appointed for a non-renewable period of seven years."

89.6. Section 194, which provides that:

"(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on:

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

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

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

(2) A resolution of the National Assembly concerning the removal from office of:

(a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or

(b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President:

(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

(b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal."

Statutory powers

90. The following statutory provision will, *inter alia*, be referred to:

90.1. Section 2(2) of the Public Protector Act 23 of 1994 ("the **PP Act**"), which provides that:

> *"The remuneration and other terms and conditions of employment of the Public Protector shall from time to time be determined by the National Assembly upon the advice of the committee. Provided that such remuneration shall not be less than that of a judge of a High Court and shall not be reduced, nor shall the terms and conditions of employment be altered adversely during his or her term of office."*

90.2. Section 5(3) of the PP Act provides that:

> *"Neither a member of the office of the Public Protector nor the office of the Public Protector shall be liable in respect of anything reflected in any report, finding, point of view or recommendation, made or expressed in good faith and submitted to Parliament or made known in terms of this Act or the Constitutions."*

The Common Law

91. *Inter alia*, the common law provisions which will be invoked include:

91.1. the *audi alteram partem* rule in the context of rationality, i.e. procedural rationality;

91.2. the principle of *nulla poena sine lege*, according to which there can be no punishment without a valid legal instrument; and

79.3 the presumption against retrospectivity.

92. These common law rules have since acquired constitutional status, with specific reference to the rule of law.

Relevant Case Law

93. The relevant case law, which is the source of some of the principles and rights which I intend to assert, which includes, notably:

93.1. **President of the RSA v Public Protector** 2018 (2) SA 100 (GP);

93.2. **EFF v The Speaker of the National Assembly** 2016 (5) BCLR (CC);

93.3. **EFF v Speaker, National Assembly** 2018 (2) SA 571 (CC).

NA Rules of the National Assembly

94. In addition to the impugned Rules of removal, reliance will also be placed on the general Rules of the National Assembly which are relevant to this application notably:

94.1. Rule 88 of the National Assembly entitled: **"Reflections upon judges and certain other holders of public office"** which is very explicit and categorically states that:

> **"No member may reflect upon the competence or integrity of a judge of a superior court, the holder of a public office in a state institution supporting constitutional democracy referred to in Section 194 of the Constitution, or any other holder of an office (other than a member of the government) whose removal from such office is dependent upon a decision of the House, except upon a separate substantive motion in the House presenting clearly formulated and properly substantiated charges which, if true, would in the opinion of the Speaker prima facie warrant such a decision"**; and

94.2. Rule 89 governing matters ***"sub judice."*** The rule states unequivocally that:

> ***"No member may reflect upon the merits of any matter on which a judicial decision in a court of law is pending."***

95. The abovementioned legal instruments and provisions will also form the springboard from which the requirements of *prima facie* (in Part A) and/or

clear rights (in Part B) will be traced. Accordingly, this section C of my affidavit must be read together with sections D and E below, so as to avoid the need for unnecessary repetition.

D: APPLYING THE LAW TO THE FACTS

96. Before dealing more specifically with the requirements for interim interdictory relief, I now proceed briefly to deal with the application of the aforestated law to the facts which have been set out in section B above. I do so briefly because I am advised that further elaboration on the law will be done by counsel at the stages of written and/or oral argument. Some of the relevant legal analysis is already contained with the factual background mapped out above due to its interconnectedness therewith. This section outlines some of the key additional legal grounds upon which the relief ought will be premised. These grounds must not be viewed in isolation. There are invariable overlaps between them since they came from the same set of integrated rules. They are separated out hereunder into ten specific topics so as to facilitate their legal assessment and adjudication.

The *audi alteram partem* rule and procedural irrationality

97. The impugned Rules run contrary to the rules of natural justice in that not only are they inconsistent with the Constitution but they also deny me the

benefit of the *audi alteram partem* rule in that they do not make any provision for me to be notified formally by the Speaker of the National Assembly of a complaint in the form of a motion that has been lodged against me. As has already transpired, I only learnt through the media that the DA had tabled a motion or made a request for my removal and that such has been accepted by the Speaker. The right of an accused or implicated person to be formally notified of such a complaint is one of the most basic features of the right to fairness and justice.

98. Whenever the National Assembly performs a duty under section 194 of the Constitution, it is performing a quasi-judicial function. Its impartiality and fairness become of permanent importance in terms of section 34 of the Constitution, which broadly deals with access to justice.

99. The National Assembly also acts as the "employer" of the Public Protector. Viewed in this context, the new Rules introduce new conditions of employment and/or disciplinary rules affecting all heads of Chapter 9 institutions, which were not in place at the time of their employment. In such circumstances, it was incumbent on the National Assembly to consult or even merely inform me and the other heads about the intended introduction of the rules or their finalisation prior to my learning in the media for the first time that I was being subjected to some new and hitherto unknown rules.

100. I have also to date never been furnished with a copy of the complaint made by the DA which has triggered the current process. I have merely learnt, again from the media, that the Speaker has "approved" that unknown complaint motion. Despite demand, the Speaker has hitherto refused to furnish me with the said complaint. How this can be taken to be in accordance with the requirements of procedural rationality remains a mystery.

101. Furthermore and in terms of Rule 129R(a):

> **"the motion must be limited to a clearly formulated and substantiated charge on the grounds specified in section 194, which must prima facie show that the holder of a public office:**
> **(i) committed misconduct;**
> **(ii) is incapacitated; or**
> **(iii) is incompetent."**

102. I have never been involved in, let alone being informed of, any process to determine my *prima facie* guilt, which will be conducted at the next stage by the independent panel. But this is no answer. The rules provide for a double filter mechanism of *prima facie* guilt, firstly at the point of the approval of the motion and secondly by the independent panel. My current grievances regarding the approval stage (stage 1) must be separated from any other legitimate concerns I harbour regarding the independent panel stage (stage 2). I deal with the issues of stage 2 later below.

103. In any event, the requirements for the motion to be in order cannot possibly mean, as the Speaker suggest, that hers is merely to act as a post-box or an inspector of only the form but not the substance of the motion. That narrow interpretation is not borne out by the wording of Rule 129, which clearly requires the Speaker to ensure that *"the motion is compliant with the criteria set out in this rule"*. That is a clear reference to the criteria set out in Rule 129R, read with the definitions section. By her own admission, the Speaker failed to comply with Rule 129S.

104. I am particularly interested to see what "evidence" was attached to the motion, as required in Rule 129R(c) and in what may the Speaker satisfy herself that the motion was "*consistent with the Constitution, the law and these rules*", as required in Rule 129R(d). It is doubtful and highly unlikely that these provisions were complied with by either the DA or the Speaker.

105. Regarding stage 2, I am of the view that the preliminary stage ought properly to allow for oral evidence, or at worst the option of leading oral evidence and that in so far as the rules rule out that option, they are unlawful and offend against the *audi* principle. In this regard I am in the process of conducting a comparative analysis with the South African rules which apply to the impeachment of the President and judges, as well as international examples and found that, in the vast majority of cases, oral evidence is not disallowed at the comparative preliminary stage. The rules

applicable to the removal of judges are to be found in the Judicial Services Commission Act 9 of 1994, to which reference will be made in argument.

106. These and other aspects of the violation of the *audi* rule will be more elaborated upon in Part B.

Deviations from established procedure

107. The completed study will be made available to this Honourable Court in the replying affidavit and/or certainly in respect of Part B. At this early stage, it is already clear that the standard practice and acceptable norms include, *inter alia*:

107.1. the right to be informed of the charge and its details at the earliest available opportunity in the process;

107.2. the right to refute the existence of the requisite grounds at an early stage and at the point of the first determination of a *prima facie* case to answer;

107.3. the right to reasons; and

107.4. the option to be allowed full legal representation.

108. By comparison, the impugned rules flout most of these provisions and more. Due to the urgency of this application, a more detailed analysis will be presented in due course.

109. The analysis has also revealed serious discrepancies with the rules for the removal of judges. It has also revealed that the present rules were cut and pasted from the new Rules for the removal of the President, which have themselves not undergone any judicial scrutiny or sanction and may well be unconstitutional. The most glaring example of this is to be found in the quorum provision, which, in the present case, results in an unworkable quorum of two members without providing for a deadlock-breaking mechanism. This provision was clearly and merely uplifted from the section 89 rules, specifically Rule 129H, which provides for a quorum of three, without any application of the mind. For ease of reference, I attach hereto marked **"PPFA12"** a copy of the said section 89 rules.

The right to legal representation

110. The rules are also unfair in that they do not grant a full or effective right to legal representation.

111. Rule 129 AD (3) provides that:

> **"The committee must afford the holder of a public office the right to be heard in his or her own defence and to be assisted by a legal practitioner and other expert of his or her choice, provided that the legal practitioner or other expert may not participate in the committee."**

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112. This provision is vague and needs to be further clarified in the rules to determine whether it includes or excludes participation during the leading of evidence, cross-examination of witnesses and the like or whether it only excludes the participation of the legal practitioner in the deliberations of the committee. If it is the former meaning, then it will be challenged in Part B.

113. This issue is obviously related to the abovementioned issue of oral evidence. If oral evidence is allowed then the case for legal representation will be stronger.

Unlawful and premature referral

114. Rule 129S provides that:

> *"Once a member has been given notice of a motion to initiate proceedings in a section 194 enquiry, the Speaker may consult the member to ensure the motion is compliant with the provision of this rule (sic)."* The last phrase is an obvious reference to "these rules".

115. Rule 129T provides that:

> **"Once the motion is in order, the Speaker must:**
>
> **Immediately refer the motion, and any supporting documentation provided by the member, to an independent**

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panel appointed by the Speaker for a preliminary assessment of the matter; and

Inform the Assembly and the President of such referral without any delay."

116. Rule 129X confers discretion upon the independent panel to "afford any member an opportunity to place relevant written or recorded information before it within specific timelines". The above has the effect that the Independent Panel may decide to exercise its sole discretion and not afford the member the opportunity to place any submissions before it. It is respectfully submitted that the above is inconsistent with the Constitution. Such a provision should be peremptory and not discretionary, as should be the case in respect of any punitive process. This is one of the most basic and ancient requirements of the rule of law, dating back from Roman times to the present-day constitutional era.

117. These three rules, read together, make it abundantly clear that the prior determination of whether the motion is compliant or "in order" is a pre-condition and a *sine qua non* for the referral thereof to the independent panel. This principle can also be gleaned from the comparative analysis with the rules for the removal of judges.

118. The Speaker is duty bound also to determine that there is *prima facie* evidence of intention in the form of *dolus*. It would be virtually impossible

to do so from reading court judgments, without abdicating that duty to the judiciary and without conducting a hearing of any oral evidence.

119. The version of the Speaker which suggests that her legal duties in this regard are confined to the form and not the substance of the resolution are clearly misplaced. So is her view that her duties do not include the assessment of the existence of a *prima facie* or "winnable" case. In this limited sense, her position at this stage can be compared to that of a prosecutor.

The rule against retrospectivity

120. The Speaker further conducted herself unlawfully in making the decision that the DA's complaint motion was "in order", despite its patent and flagrant violation of the rule against retrospectivity, which is an incident of fairness and the rule of law. According to that rule or presumption, I can only be subjected to the rules for an alleged transgression which took place only after their promulgation. Given the fact that the rules were adopted on 3 December 2019, a competent transgression would have had to have been committed in the three-day period between 3 and 6 December 2019, failing which it certainly violates the presumption of retrospectivity.

121. Had the Speaker either properly applied her mind and/or duly consulted me, then this violation would have been easily avoided and she would not

have unlawfully approved the motion. I am advised that further legal argument will be advanced at the hearing in this regard.

Recusal and the right to be protected from conflicts of interest

122. It is in the nature of the work of the Public Protector that at any given time, we are dealing with a number of complaints, investigations and/or reports which implicate members of the Executive (Cabinet) in serious allegations or findings of impropriety and/or wrongdoing. This is also the case at present.

123. Some of the individuals referred to above are also involved in acrimonious ongoing litigation against the Public Protector involving their individual alleged wrongdoing.

124. In addition, there are members who by association are implicated in the unlawful conduct of the Speaker, as described hereinabove.

125. The President himself is currently mired in litigation as a person individually implicated in the so-called well-known BOSASA report of the Public Protector involving serious allegations of money-laundering, deliberately misleading Parliament and the like. As if that is not enough, both the Speaker and Deputy Speaker have unnecessarily decided to take sides in the dispute between the President and the Public Protector by siding with

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the President against the Public Protector, instead of maintaining their independence.

126. All the persons identified above are indisputably conflicted in relation to the question posed in the complaint motion.

127. The courts ought to exercise extra vigilance in scrutinising such processes, more particularly by the careful evaluation of the real motives of "complainants" and various members of the National Assembly as well as the President, in the processes envisaged in the Constitution and the Rules.

128. Clearly, impartial investigations and adjudication turns on the independence of the Public Protector. Perhaps the most fundamental precept of independent investigation and judging is that the Public Protector be free from outside influence in decision making. Indeed, courts have held that due process demands as much. Clearly, Public Protectors cannot investigate, adjudicate and resolve issues impartially if members of the legislature lobby them for a particular result or if the same lawmakers threaten to remove them from office or withhold support, contingent upon a particular outcome of a case. Nor can they operate free from the fear of such self-serving removals, as the Constitution seeks to ensure in

providing for the various protections contained in section 181 and 183 of the Constitution, read with the Public Protector Act 23 of 1994.

129. Any rules of removal directed at Chapter 9 Institutions which fail to make provision for filtering malicious and/or dishonest "complaints" by conflicted compromised individuals or any other abuse-of-process manoeuvres are not worth the paper they are written on and ought to be set aside as irrational on that ground alone. It is a fatal omission which must be cured by the courts in the spirit of our constitutional system of checks and balances.

130. Our Constitution guarantees security of tenure for the Public Protector in a unique way. The Public Protector is appointed for a non-renewable period of seven years in terms of the provision of section 183. Security of tenure is another well-known protection which is employed worldwide.

The right to decisional and institutional independence

131. I respectfully submit that the Constitution confers upon the Public Protector a status almost similar to members of the judiciary insofar as the crucial issue of decisional independence is concerned. There is much constitutional logic in that approach.

132. In the case of the judiciary, through appellate review, courts can ensure that lower court judges have neither misstated the law, nor misapplied it. Judges review lower court decisions to determine whether those judges abused or misconceived their discretion in resolving cases or controversies. However, there is an ironclad rule that a judge whose decision has been overturned on appeal or who was subject to scathing criticism by the higher court cannot suffer retaliation or threat of removal based simply on the judgment later proven to be erroneous or even tainted by bias, real or perceived.

133. In the same vein, for the Public Protector as well, impartial adjudication is critical. Members of the National Assembly or politicians should not be able to meddle in individual cases or pending court cases under the guise of holding the Public Protector to account. In short, for both judges and the Public Protector, freedom from external influence is critical to the judicial and Public Protector function and seeking to discipline or remove them solely on the basis of the merits their decisions is constitutionally impermissible.

134. The above comparisons are also additionally borne out by the contempt provisions contained in section 9 of the Public Protector Act, read with section 11 thereof, which provisions seek to protect the integrity of the Public Protector on pain of imprisonment for contempt, a protection usually

reserved strictly for judges. Section 2 of the PP Act has already been referred to and is relevant to this point. Recent jurisprudence giving a binding effect to remedial action only serves to strengthen the force of these comparisons, without literally equating the two offices or institutions. Obviously, there are also important differences between the two.

135. Decision-making and institutional independence are critical to assure litigants that judicial results are as free from external influence as possible. Public Protectors and judges cannot function effectively if their decisions are viewed as the product of threats of removal by the National Assembly or lobbying by some with ulterior purposes. Moreover, the appearance of propriety may, in fact, matter as much as the reality. Litigants or the members of the public served by the Public Protector must have faith in the unbiased nature of the litigation or the Public Protector's remedial orders. The Committee's interests in political accountability must not be allowed to trump the Public Protector's decisional independence.

The interpretation of section 194(1), read with the Rules

136. The issue of decisional independence is closely related to the next topic of the proper meaning and interpretation which must be given to the transgressions or grounds listed in section 194(1). This matter is key to the adjudication of this application.

137. At the risk of stating the obvious, it should be conceded as self-evident that is not every instance of ordinary "misconduct" or "incompetence" in the labour law sense of the words which meets the threshold for impeachment in terms of section 194(1). The s194 standard was clearly intended to be as high as the "gross misconduct" and "gross competence" standards contained in sections 89 and 177 of the Constitution. It should be something in between the labour law standard and the presidential or judicial standard of dismissal or removal, as the case may be.

138. However, the impugned Rules define:

138.1. "misconduct" to mean: *"the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office"*; and

138.2. "incompetence" to mean "*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."

139. By using adjectives such as "demonstrated" and "sustained" for incompetence and "intentional" and "gross" for misconduct, the National Assembly has brought the required standard back to the presidential and

judicial standard. This is in breach of the clear intent of the drafters of the Constitution.

140. Ironically, the same National Assembly Rules elsewhere define "a serious misconduct" to mean "*unlawful, dishonest or improper behaviour performed by the President in bad faith*". I am advised that it will be argued that similar or closely related words in the same legal instrument ought to carry the same meaning.

141. I am furthermore advised that the definition of impeachable misconduct, gross or otherwise, on the part of a judge may not include the merits of his or her judgment or how scathing the criticism thereof might be in the view of the higher courts. Similarly, the definition of "misconduct" in section 194 cannot possibly include the merits of a particular report or the scathing remarks of a court, let alone when such remarks are still the subject matter of a further appeal. I am advised that it will be argued further that, in this regard, even the remarks made by the Constitutional Court remain as the opinion of that court in terms of the rules of the law of evidence. Further legal argument will be advanced by counsel in respect of these issues.

142. To the extent that the DA motion therefore based in an incompetent charge, it is not "in order".

143. The Rules that were adopted on the 3rd of December 2019 are contrary to the spirit and the letter of the Constitution in that they stray beyond the interpretational and jurisdictional limits circumscribed by section 194 of the Constitution.

144. Most importantly, I also pointed out that the National Assembly had failed to put in place mechanisms and processes to scrutinize performance of the Public Protector and had not adopted rules aimed at assisting and protecting her independence, impartiality, dignity and effectiveness. I relied on the Constitutional Court's majority judgment in **Economic Freedom Fighters v Speaker of the National Assembly** 2018 (2) SA 571 (CC), which is relevant hereto and where the Court noted the serious consequences of impeachment proceedings which empower the Assembly alone, by a vote of two thirds of its members, to remove the President from office. A prerequisite for such removal was contingent on a prior factual enquiry into whether one of the three listed grounds in section 89(1) were present i.e. a serious violation of the Constitution or the law, serious misconduct and an inability to perform the functions of office. It was held that the Assembly would, except in certain exceptional circumstances, prior to impeachment proceedings being launched, be required to determine, in a preliminary enquiry, whether one of the listed grounds for impeachment existed. Without rules catering for such a prior

enquiry, it would not be possible lawfully to implement a section 89 process. It was considered whether the Assembly had such rules in place. The Court rejected the argument by the Acting Speaker that the current rules of the Assembly could be used to deal with the section 89 process. It called for the development of tailormade rules aimed at a section 89 process. Section 194 ought to be treated in exactly the same manner, in that rules tailormade for the relevant removals ought to be thoughtfully developed and not by simply mimicking rules designed for a different purpose.

145. In short, the rules were adopted without any appreciation of the clear intention of the drafters of the Constitution to differentiate between the requirements of sections 89 and 194 of the Constitution.

One size fits all

146. Related to the abovementioned topic is another criticism, namely that the present Rules do not fail to differentiate between the impeachment of the President and of heads of Chapter 9 institutions but also fail to differentiate between the heads of Chapter 9 institutions among themselves.

147. This too seems to fly against the intention of the drafters of the Constitution, in that section 194 (2) distinguishes the removal of the Public Protector and Auditor-General (section 194(2)(a)) from the removal of a

member of the Commissions (3rd, 4th, 5th and 7th Respondents herein) by providing for a different threshold for impeachment. In the case of the former the required vote in the National Assembly is two-thirds while in the case of the latter group it is a simple majority.

148. By blurring these differences and adopting and overly uniformed, one-sized-all rules, the National Assembly failed to give effect to the clear intentions of the Constitution.

149. The higher protection given to the Public Protector and the Auditor-General must surely be related to the more powerful and binding effect of their findings and the impact thereof. It ought accordingly to have been given effect and recognition in the rules.

Separation of powers ground

146. As already mentioned, the DA complaint is largely and seemingly based on opinions of the courts in their criticisms of my reports.

147. For that reason, the complaint or motion is incompetent in that it infringes on my decisional independence as alluded to above. Accordingly, it is not "in order" and is incompetent.

148. Even if it was competent, which is still disputed, such a charge would invariably amount to a violation of the separation of powers doctrine in that

the judiciary should play no direct or indirect role in my removal, which is a matter solely confined to the legislature by the Constitution.

149. Secondly, Rule 129V of the relevant new Rules makes provision for the appointment by the Speaker of a judge as a member of the three-person independent panel. The appointment of such a judge must be done in consultation with the Chief Justice, as the head of the judiciary. Such a judge may possibly and more likely even chair the panel. In any event, he or she will invariably hold a decisive vote.

150. This too constitutes a separate violation of the principle of separation of powers in that it introduces a degree of direct participation by the judiciary in a process which ought to fall exclusively under the legislative arm of the state. The applicable principles have been the subject of some judicial attention, for example in the case of **South African Association of Personal Injury Lawyers v Heath and Others** 2001 (1) SA 883, to which reference will be made in argument.

151. These submissions will also be relevant to the OUTA test referred to below.

Legal implications

152. Further legal argument will be advanced at the hearing exposing exactly how and why the abovementioned ten cardinal sins of legal defects,

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considered in respect of both the content and/or proposed implementation of the rules, do violence to the Constitution and what the legal implications thereof in respect of the relief sought in this application.

E: REQUIREMENTS FOR URGENT INTERIM INTERDICT

153. In relation to Part A, I now deal with the well-established requirements for interim interdictory relief, namely:

153.1. *prima facie* right(s);

153.2. irreparable harm;

153.3. no alternative adequate remedy;

153.4. balance of convenience; and

153.5. urgency.

154. Since we are dealing with constitutional powers, the decision of the above will not only be confined to the **Setlogelo** test but also extended to the OUTA test. These concepts will be more fully dealt with in the written and oral argument of counsel.

Prima facie right

155. I submit that insofar as the interim interdict is sought the facts set out above and in the founding affidavit in the main application disclose that I have a *prima facie* right to bring an application for an interdict. Such right also

arises on the basis of the obligation of the Speaker of Parliament and the President to abide by the principles of legality. The attitude of the Speaker and the approval of the motion and her failure to inform me about her decision to approve the motion lodged by the DA, all points to the narrative that the Speaker is acting with an ulterior motive. The unconstitutional and unlawful rules that the Speaker is implementing to guide the proceedings for my removal clearly demonstrates a compromised Speaker whose impartiality is a cause for concern. My right also arises on the basis of a defective nature of the complaint that is used to initiate the removal process and the necessity for expeditious and timely finalisation of this process.

156. This section must be read together with the content appearing under the legal framework outlined above, from which emanate a number of my legal rights which are allegedly violated or threatened.

157. The fact that I am a head of a Chapter 9 institution, who is the current target of the new Rules, gives me *prima facie* right to the interdict being sought. The Rules in question are directed to the head of Chapter 9 Institutions as they are termed "Removal from office of a holder of a public office in Institutions Supporting Constitutional Democracy". The Office of the public Protector is one of such institutions, and I as the Public Protector

am a holder of such a public office which supports Constitutional Democracy.

158. The aforementioned Rules are prejudicial to me in that they do not afford me the *audi alteram* Rule to state my case before a preliminary assessment can be done by the Independent Panel. This right goes hand in glove with my right to be furnished with reasons for decisions taken by the Speaker which are averse to my interests. She has refused and/or failed to give those reasons, adequately or at all.

159. The Rules further do not allow that I be informed of the process or the motion against me right from the initial stage. Instead, I only learn from the media that the Speaker has approved such a motion.

160. This affidavit is replete with numerous rights which I assert and which on the facts have been *prima facie* violated, either by commission or omission.

161. Most importantly, I have a right to remain in my office until 2023 and only to be removed in a process that is lawful and not tainted by unconstitutionality. All the other rights asserted by me herein flow directly from that right.

162. In so far as reliance is also placed on the fundamental rights enshrined for example in sections 10 and 34 of the Constitution, such rights are clearly

existent and it would be redundant to question any *prima facie* entitlement thereto.

163. Above all, the mere fact that section 194 is punitive in nature automatically affects my *prima facie* rights to fairness, both substantively and procedurally, as derived directly and indirectly from sections 23, 34 and 35 of the Constitution.

164. It must never be lost sight of that the office I hold is also my employment and source of livelihood, as clearly articulated in section 2 of the PP Act. My constitutional right to fair labour practice is one of the considerations which must necessarily be taken into account in my removal from office.

165. Similarly, like any other citizen of South Africa, I am *prima facie* entitled to the fair adjudication of any dispute based on the application of law before an impartial tribunal, in terms of section 34.

Irreparable harm

166. The aforementioned Rules have a negative impact upon me in that they interfere with my obligation and mandate to investigate and report cases without fear favour or prejudice, which is an essential prerequisite for discharging my duties.

167. The potential impact of these rules, assuming they are indeed unconstitutional, will be devastating not only to me and other heads of Chapter 9 institutions but the public at large, unless the interim relief sought herein is granted.

168. Such harm will persist until the final determination of Part B.

169. By her refusal to suspend the implementation of the removal process, the Speaker has caused me reasonably to apprehend that, unless the relief sought herein is granted, it is her clear intention to proceed with the immediate implementation of the rules, even before their legal status can be ascertained in Part B.

170. If these Rules are not declared unconstitutional, the President, who has a conflict of interest in that I have made adverse findings against him, will suspend me from office. It is apposite to mention that I made such adverse findings against President Ramaphosa in the (BOSASA) matter which is due to be heard on 4 and 5 February 2020 by the High Court of South Africa, Pretoria Division. As soon as the Speaker of Parliament informs him that she has accepted the motion and or request of the DA the I reasonably fear that the President may have a perverse interest in removing me before the hearing of the BOSASA matter. The constitutional

protections of judges and watchdog bodies, such as the Public Protector's, are intended to cater exactly for such situations.

171. If the aforementioned Rules are not temporarily suspended, I may be removed from office due to a few cases that I have lost and or are still pending before the court of law, and such is not on its own a ground listed in section 194 of the Constitution. Once I am removed from office, I will not be able to restore my status even though the court decision may ultimately be made in my favour.

172. A new Deputy Public Protector was appointed only a few days ago in order to strengthen the office, as required by law. Any destabilisation of her crucial orientation and intended team-building activities will only amount to a reversal of the gains made in her appointment with the public as the ultimate loser. My subsequent vindication or non-removal will be cold comfort to the consumers of the services of the office of the Public Protector, who are mostly poor and vulnerable people who have no interest in the political gamesmanship being played in this ill-fated removal bid. This is also a key consideration in weighing up the balance of convenience.

173. I have a reasonable apprehension of harm in that if the implementation of the rules and the inquiry based on the rules is not interdicted I will be subjected to an unlawful process and stand the risk of suspension

pursuant to a suspended flawed process carried out in terms of rules whose lawfulness and constitutionality are the subject for determination in the pending application before the Court (Part B herein).

174. I further respectfully submit that I have demonstrated that I and others will suffer irreparable harm if the orders that I seek are not granted.

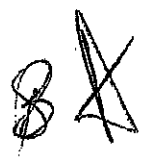
175. On the topic of destabilisation and the nuisance value of the alleged motion, I need to make it clear that the harm which I, members of my staff and the public is likely to suffer is not really so much my intended removal. That is very unlikely to happen given the fact that the DA, which is championing this politically lacks both the numerical strength and credibility to obtain the requisite two-thirds majority for my removal, based particularly on such opinions and incompetent grounds which it has constantly and unsuccessfully trumpeted since my interview for my current position. The DA holds only 84 seats in the 400-member National Assembly. At the time of my appointment the DA was the only political party in Parliament which opposed my appointment. It might have attracted a few opportunistic political fellow travellers since then but not to the extent of conceivably achieving the requisite magic number of 267 votes. Such an outcome cannot be reasonably apprehended. Even in the very unlikely event of the DA somehow spreading its influence by threefold its numerical strength, it will still fall short of the target by 15 votes.

138. Such a miraculous outcome is not the real objective of the DA in my view. The idea is merely to destabilise the office of the Public Protector to vindicate the original opposition to my appointment and for the others, to remove me from a position where I can continue to expose their corruption and other improper activities. It is also intended to intimidate me and instil fear of reprisals, a very futile exercise as I am not in any fear whatsoever but am anxious not to be distracted from the important task of protecting the public from wrongdoing and corruption.

139. However, the destabilisation and diversion of the Public Protector is sufficient cause for this court to grant the relied sought. That destabilisation campaign in and of itself is in breach of the constitutional obligation to ensure dignity and particularly the effectiveness of the Public Protector. The harm caused thereby is irreparable.

140. The bad faith and improper motives of the DA in achieving my removal, for political point-scoring, and the corrupt motives of some of their new-found supporters, ought to be taken into account in the adjudication of this application.

141. I fear that the campaign to destabilise the office of the Public Protector, if not stopped in its tracks, will have a devastating effect on me personally



by stinting my ability to do my work, but also on the employees in the office of the Public Protector and the public at large.

142. Well knowing that my ultimate removal is a numerical and political improbability, I am advised and believe that the highest prize and probable outcome which might be sought by the combination of my detractors is to visit me with the embarrassment of an unlawful suspension, along the line and s soon as stage 3 of the process is reached. That may explains the rush and headlong haste with which the process is being bulldozed.

143. In terms of section 194(3) the President may suspend me once the National Assembly Removal Committee has been set up, until the date of the final and decisive vote in the National Assembly. It is not possible to estimate the possible duration of that period.

144. Such a step would not only serve to destabilise the office but also to remove me, *albeit* temporarily, from the scene at a time when some of the most sensitive cases involving members of the Executive, the President personally and his alleged political allies, would be in the process of being decided. My participation in such litigation as the author of the said reports, is of crucial national importance and my temporary absence may provide them with an unfair advantage.

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145. On any analysis of the applicable provisions of the Rules and the Constitution, the key players in my possible suspension would be:

145.1 the President;

145.2 the Speaker; and

145.3 the National Assembly.

146. Needless to say and as set out above, all these players, as matters stand are individually compromised and conflicted in relation to my continuation to hold my office. In the case of the National Assembly the participation of even one conflicted person in the voting process would render the entire process unlawful.

147. The additional fear I hold in respect of possible suspension which will be unlawful and driven by bad faith and corrupt motives is therefore, in the totality of the circumstances, a reasonable one. It can only be relieved by the granting of the interim relief sought so that I will be legally protected until such time that the constitutionality or otherwise of the rules will have been determined in Part B.

148. Even if the suspension itself does not materialise, the idea of causing me to be working under a dark cloud of suspicion will still have been achieved if the process is allowed to drag on for much longer. As a matter of simple

logic at least one of these fears is very likely to eventuate, unless the relief sought in Part A is granted, that is, either an unlawful suspension, alternatively a protracted process with the obvious negative impact on the public.

No alternative remedy

149. The nature and extent of the envisaged harm is such that, if it ensues and unless interim relief is granted, it would be incapable of quantification, recovery or vindication by any other legal means.

150. The indeterminate number of third parties who will be adversely affected if the relief is not granted also serves as proof that no other adequate remedy can appropriately address the harm which is reasonably apprehended in this matter.

151. For the reasons set out above, it is clear that I will have no other satisfactory remedy available. A claim for damages would be impractical and inconsequential in the present context.

152. I am advised that I will not have any other avenue to turn to for assistance other than approaching the Honourable Court as the Constitution does not make provision for recourse in the case of an unlawful removal, other than the *ex post facto* judicial review thereof. Such a review of any removal

done in terms of such flawed rules would certainly succeed but the intended damage will; have been done.

153. The only viable remedy available is that the interim order be granted in my favour and the Respondents will have an opportunity to fully defend Part B of the Application.

154. This application has been mainly necessitated by the fact that the Speaker has elected not to communicate with me and only communicates with the nation about the things that affect me directly through the media. Common sense should dictate that, as in the case of a judicial impeachment, stage 2 of the process ought not properly to be proceeded with without even informing me as "the accused person" of the ongoing process for my removal from office and employment.

155. In the circumstances, the required relief will not be afforded to me if the normal time limits prescribed by the rules of these Courts are followed and if the normal timelines are followed in ordinary urgent applications are afforded. I thus cannot seek substantial redress in the ordinary course, and it is necessary that I approach the above Honourable Court as a matter of urgency. Alternative relief in the form of an application in due course is also not feasible in the present circumstances.

156. I have tried to make overtures for an amicable resolution of the impasse, as can be seen from the relevant correspondence, but all was in vain. The Speaker has dug in her unlawful heels

Balance of convenience

157. Insofar as the balance of convenience is concerned, I point out that I merely request that the process for my removal and/or possible suspension be delayed until the finalisation of the main application. Unless the interim interdict is granted, I will suffer the prejudice of being subjected to the process conducted in terms of the unlawful rules and may also be suspended by the President in terms of the same rules which I firmly believe are unlawful and unconstitutional. At a bare minimum I will be subjected to a reputation impairing dark cloud of suspicion, with a detrimental impact on me and other interested parties. This will happen despite the fact that I have established (on prima facie grounds) that the rules are not only fatally flawed but unlawful and unconstitutional. The damaging effect of subjecting me to unlawful and unconstitutional rules can thereafter not be undone. Even if I may subsequently be successful in nullifying the rules, I and many other people would have been permanently harmed.

158. The prospects of success in Part B are very good, more particularly taking into account the hurried nature of such a complex process.

159. On the other hand, the Speaker of Parliament will merely suffer the minor inconvenience (if I am ultimately not successful in the main application) of having to withhold and delay and/or suspend the process for my removal for a few weeks.

160. The inconvenience which would have been suffered by the public, in the event of my ultimate success in Part B, will be incalculable by comparison to the inconvenience which will be suffered by any person if I am unsuccessful but had remained in office. The undeniably excellent performance and objectively determined results of the office attest to that fact.

161. The Respondents will not suffer any prejudice if Part A of the Notice of Motion is granted in that they will be afforded an opportunity to defend themselves whilst I will suffer great prejudice in that I may be suspended or removed from office by people who have conflict of interests in this matter.

162. I am advised that it will be argued that this is the ideal case in which the public interest must feature in the assessment of the balance of convenience.

163. It is my respectful submission that the balance of convenience favours that the orders that I have sought be granted as opposed to them being denied.

164. I will now deal with some of the additional considerations related to the so-called *OUTA* test, in the event that the court considers that test to apply.

Prospects of success

165. Given the factual complex, the complexity of the issues and the attribution of *mala fides* and corrupt motives on the part of DA, and possibly others whose agendas may be best served by obtaining the destabilisation of my office, the prospects of success in the main review application, and the declarators, are very good. I have been advised that in the interest of maintaining the decorum of my office, it is not yet necessary to mention by name all those whose interest would be served by my absence. Suffice to state broadly that at any given time, my office would be investigating many of the members of the National Assembly and their allies.

Separation of powers harm

166. Although my intended removal is the sole pressure of the legislature as already indicated this case is not *per se* about the actual removal. It is about whether the legal instrument which is intended to be used to remove me from my position is *prima facie* unlawful and in violation of the

Constitution. There is presently no question of seeking to usurp any of the functions of the legislature. There is every intention to assist in the development of proper removal of rules, but to preserve the interests for the public in the interviewing period by preserving the *status quo* until there is good cause to act differently.

167. In any event I am advised that the relief sought in this application is a lot different and much milder than in the famous impeachment case in which majority Constitutional Court judgment rejected the notion that the case implicated or the doctrine of separation of powers. *A fortiori*, this matter does not pose any separation of powers harm.

168. The allegations and submissions made at paragraphs 147 to 151 above, under heading of separation of powers, bear direct reliance to this topic.

169. In fact, in the present case, any evaluation of separation of powers harm must only operate in favour of granting the relief, in that the impugned rules themselves pose a serious threat to the separation of powers doctrine, for all the reasons already discussed in the rest of this affidavit.

170. In the totality of the circumstances, the present case is therefore a classical candidate for the granting of interim relief, as prayed for in the notice of motion.

F: URGENCY

171. Judging by the content of the Rules themselves, the Speaker's media release and the subsequent correspondence between the parties, the urgency of the application is self-evident and incontestable.

172. The undue haste with which the DA has acted in lodging a motion for my removal within 72 hours of the adoption of the Rules, coupled with the clearly prioritised purported approval by the Speaker within a few weeks after the December break, are clear indications that the matter is being dealt with speedily and as a matter of urgency.

173. In line with the above, the Speaker has given political parties only 10 working days or two weeks within which to provide names of candidates for the independent panel, the composition of which is the subject matter of this application.

174. Judging by the past behaviour and utterances, the Speaker is likely to have appointed the panel by the end of February, in which case it must present its work to her by approximately the end of March or beginning of April 2020. In that period, I will be expected to participate in the very same process I am challenging herein and to conform to the impugned rules. This will place me in a prejudicial position. I may also be called upon to

incur unnecessary legal costs in the process. The work of my office will also invariably suffer.

175. Similarly, considerable inconvenience will be caused to Members of Parliament and the nominated and/or appointed candidates for the panel, if such an exercise turns out to have been unlawful and in futility.

176. It is clearly in the public interest that legal certainty be obtained as soon as possible. The current stalemate obviously has a major negative and paralysing effect upon the normal functioning of the office of the Public Protector, with devastating consequences on the public we protect and even on staff morale. The sooner this court brings back a semblance of normality the better.

177. It is not reasonably anticipated that any party will contest the self-evident urgency of this application. However and as precautionary measure, I now go on to give a timeline of my actions to demonstrate that I acted with more than the necessary speed in bringing this application before court:

177.1 On 24 January 2020 the Speaker issued her media statement, indicating for the first time that she had approved the motion (stage 1 of the process) and she intended to embark on stage 2 soon after 7 February 2020, the deadline she gave to political parties to submit candidates for the independent panel.

8 A

177.2 Used up that weekend for seeking and obtaining urgent legal advice. The advice was furnished on Monday 27 January 2020.

177.3 On Tuesday 28 January 2020 I sent the letter of demand giving the Speaker until 30 January to respond.

177.4 On 30 January 2020 I indicated to the Speaker that, based on her response, I would approach this court.

177.5 The next weekend was used up in drafting and settling these extensive papers and a final draft furnished for my comment and approval late on Monday 3 February 2020. I gave such approval in the evening of the same day.

177.6 On Tuesday 4 February 2020, the application was served on the Applicants and filed in this Honourable Court.

177.7 It follows that I acted with deliberate speed to bring this matter to court.

177.8 Furthermore and due to the complexity of the matter and the possible number of cited participating parties, I have been advised to give sufficient time to the Respondents to deliver their answering affidavits, if any, and for me to consider and reply to all such affidavits as well as reserving sufficient time for the drafting

and submission of Heads of Argument well before the hearing, for the convenience of the parties and more importantly of this Honourable Court.

177.9 The proposed timetable remain open for negotiation with the parties, if any, and the directions of the Honourable Judge President and/or presiding judges.

G: CONCLUSION

178. Once the total number of participating parties as been finally determined, I, as the *dominus litis* party, will take the initiate to co-ordinate the reaching of sufficient consensus on the future conduct of this application and to facilitate the communication thereof to the Judge President.

WHEREFORE I pray that it may please the above Honourable Court to grant the orders contained in the notice of motion to which this affidavit is attached.

DEPONENT

SIGNED AND SWORN TO BEFORE ME AT PRETORIA ON THIS 4TH DAY OF FEBRUARY 2020, THE DEPONENT HAVING ACKNOWLEDGED IN MY PRESENCE THAT 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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