REPORT

PRELIMINARY ASSESSMENT AND RECOMMENDATIONS OF THE INDEPENDENT PANEL ESTABLISHED IN TERMS OF THE RULES OF THE NATIONAL ASSEMBLY ON THE REMOVAL FROM OFFICE, IN TERMS OF SECTION 194 OF THE CONSTITUTION, OF A HOLDER OF PUBLIC OFFICE IN A STATE INSTITUTION SUPPORTING CONSTITUTIONAL DEMOCRACY

In re:

A motion from Mrs NWA Mazzone, MP to initiate an enquiry in terms of section 194(1) of the Constitution of the Republic of South Africa, 1996 for the removal of Adv Mkhwebane from the office of the Public Protector on grounds of misconduct and/or incompetence

24 February 2021

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A. INTRODUCTION

[1] On 21 February 2020 Mrs NWA Mazzone MP, Chief Whip of the Democratic Alliance (DA), submitted a motion in terms of rule 129R of the National Assembly rules (NA rules) for the initiation of proceedings under section 194(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution), more particularly for an enquiry to determine whether the current Public Protector, Adv B Mkhwebane, should be removed from office on the grounds of misconduct and/or incompetence. Adv B Mkhwebane is referred to in this report as "the PP". Mrs NWA Mazzone is referred to as "the Member".

[2] Following the declaration by the Speaker that the motion was in order, an independent panel (the Panel) was appointed in terms of the NA rules to conduct and finalise a preliminary assessment to determine whether, on the information made available, there is *prima facie* evidence showing that the PP has committed misconduct, or is incompetent and to make recommendations in the report to the Speaker.

[3] It needs to be stressed from the outset that the Panel is not tasked to conduct a section 194 inquiry for the removal from office of the PP. The task, if it is so resolved, is for a committee of the NA.[1]

[4] The Panel complied with its functions in terms of the NA rules regarding, *inter alia*, affording the PP a reasonable opportunity to respond, in writing, to all relevant allegations contained in the recorded information placed before it. The PP successfully asked for an extension of time from the Panel and subsequently made submissions containing, *inter alia,* legal objections and requesting a stay of the Panel's work. This report tackles (i) the request by the PP for discontinuation or temporary suspension of the Panel's process and (ii) the merits.

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[1] S 194(1)(b) read with (c) of the Constitution.

B. CONSTITUTIONAL AND LEGAL FRAMEWORK

(i) The Constitution

[5] The starting point is the Constitution. The foundational values of the Constitution include the "[s]upremacy of the constitution and the rule of law", and "[a] multi-party system of democratic government, to ensure accountability, responsiveness and openness."[2]

[6] Section 2 of the Constitution reads: "[T]he Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." The Bill of Rights entrenched in the Constitution binds the PP as an "[o]rgan of state" as defined in section 239 of the Constitution.[3]

[7] Two of the fundamental principles of our law, both our common law and our relatively more recently developed public law, are the duties to hear both sides of a story, i.e. to act procedurally fairly and to avoid bias.[4] These principles are of particular relevance for the purpose of this report.

[8] The state institutions established to strengthen constitutional democracy include the PP.[5] The institution of the PP is set up along the lines of the traditional ombudsman. It was originally established in terms of the Interim

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[2] S 1 of the Constitution.

[3] "[O]rgan of state" means–
(a) ... .
(b) Any other functionary or institution–
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public or performing a public function in terms of any legislation,
but does not include a court or a judicial officer."

In this regard see also s 8 (1) and (2) of the Constitution.

[4] Procedural fairness under the common law was reflected in the rules of natural justice that embodied two fundamental principles, the right to be heard (*audi alteram partem*) and the rule against bias (*nemo iudex in sua causa*). See, *SA Jewish Board of Deputies v Sutherland NO* 2004 (4) SA 368 (W) para 32.

[5] S 181(a) of the Constitution.

Constitution(IC).[6] The said institutions, including the PP, "[a]re independent and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their function without fear, favour or prejudice."[7] They are accountable to the NA.[8]

[9] As has often been said, the PP's constitutional and statutory brief is to "[w]atch the watchers"[9] by, *inter alia*, monitoring the performance of the executive and investigating complaints that the elected representatives are unable to address. This is to ensure that the government discharges its responsibilities without fear, favour or prejudice.

[10] According to the Constitutional Court the PP "[i]s one of the true crusaders and champions of anti-corruption and clean governance. She has indeed very wide powers that leave no lever of government power above scrutiny, coincidental embarrassment and censure."[10] The Constitutional Court has described this as "[a] necessary service because state resources belong to the public as does state power. The repositories of these resources and powers are to use them, on behalf and for the benefit of the public. Where this is suspected or known not to be so, then the public deserves protection and that protection has been constitutionally entrusted to the [PP]."[11]

[11] The PP "[m]ust not only discover the truth, but must also inspire confidence that the truth has been discovered. There is no justification for saying to the public that it must simply accept that there has not been conduct of that kind only because evidence has not been advanced that proves the contrary. Before the [PP] assures the public that there has been no such conduct s/he must be sure that it has not occurred . . .. The function of the [PP] is as much

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[6] The Constitution of the Republic of South Africa Act, 200 of 1993 (Interim Constitution). S 243 provides for the transition between the statutory body of the Ombudsman and the PP.
[7] S 181(2) of the Constitution.
[8] S 181(5) of the Constitution.
[9] Stu Woolman *The Selfless Constitution, Experimentalism and Flourishing as Foundations of South Africa's Basic Law*, Juta, p. 274.
[10] *EFF v Speaker, NA* 2016 (3) SA 580 (CC) at paras 52 – 53.
[11] *Ibid* at para 53.

about public confidence that the truth has been discovered as it is about discovering the truth."[12]

[12] The PP's special role in our constitutional dispensation explains why she requires special protection.

[13] Section 182 of the Constitution deals with the functions of the PP. It reads:

> "(1) [The PP] has the power, as regulated by national legislation –
>
> (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice;
>
> (b) to report on that conduct; and
>
> (c) to take appropriate remedial action.
>
> (2) [The PP] has the additional powers and functions prescribed by national legislation.
>
> (3) [The PP] may not investigate court decisions.
>
> (4) [The PP] must be accessible to all persons and communities.
>
> (5) Any report issued by [the PP] must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential."

[14] For the purpose of this report, the national legislation envisaged in sections 182 and 193, in relation to the PP, is the Public Protector Act[13] (the PPA). The relevant provisions of the PPA will be dealt with in a moment.

[15] The general provisions of the Constitution provide for the appointment of a holder of public office in a state institution. This includes the PP. In terms of section 193 of the Constitution the PP "must", among other things, be a "[f]it and proper person to hold a particular office" and comply with any other requirements prescribed by national legislation. The National Assembly is enjoined, in terms of subsection (5) to recommend persons –

> "(a) nominated by the committee of the assembly proportionally composed of members of all parties represented in the Assembly; and

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[12] *Public Protector v Mail & Guardian Ltd & Others* 2011 (4) SA 420 (SCA) at para 19.
[13] 23 of 1994.

(b) approved by the Assembly by a resolution adopted with a supporting vote –

(i) of at least 60 per cent of the members of the assembly, if the recommendation concerns the appointment of [the PP] and the Auditor-General; or

. . .".

[16] Section 194 of the Constitution provides for the removal from office of, among others, the PP. In relevant parts, it reads:

"(1) [The PP] ... may be removed from office only on –

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

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

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

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

(a) [the PP] ... must be adopted with a supporting vote of at least two thirds 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."

[17] Evidently, the safeguard provided in section 194 concerning the removal from office of the PP and the Auditor-General differs from the safeguard in relation to the removal of a member of a Commission. The incumbents of the former two institutions have special protection. This already emerged from pronouncements in the *First Certification* case of the New Constitution when the Constitutional Court considered the 34 Constitutional Principles (CP) including CP XXIX concerning, among others, the office of the PP, on 6 September 1996.[14]

[14] *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (6 September 1996).

[18] In terms of CP XXIX, the office of the PP was established to ensure that there is an effective public service that maintains a high standard of professional ethics. For ease of reference, CP XXIX reads:

> "The independence and impartiality of a . . . Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service."

[19] The court was of the view that the safeguard of a simple majority in the IC concerning the removal of the PP[15] did not meet the standard demanded by CP XXIX. It held, among other things, that the PP's office "[i]nherently entails investigation of sensitive and potentially embarrassing affairs of government".[16] The court said that while the New Text of section 194 did provide some protection to ensure the independence of the office of the PP, the protection "[w]as not sufficient in the light of the emphatic wording of CP XXIX which requires both provision for and safeguard of independence and impartiality".[17]

[20] The court therefore declined to certify that the terms of CP XXIX were met in respect of the PP. This decision resulted in the amendment of the text and the subsequent *Second Certification* case.[18] The Panel is mindful of the sentiments in these pronouncements and does bear in mind that the PP's functions involve sensitive investigations into government affairs. Indeed, her powers and functions inescapably involve investigations of allegations of corruption against, *inter alia*, members of the Executive, including the President, who is the head of the Executive. The targets of her investigations wield immense power in government affairs.

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[15] Including that of the Auditor-General.
[16] *First Certification* (supra) at para [163].
[17] *Ibid.*
[18] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) (4 December 1996).

[21] Certain basic principles governing public administration need to be highlighted. They are set out in section 195 of the Constitution, which provides as follows in relevant parts:

> "(1) Public administration must be governed by the democratic value and principles enshrined in the Constitution, including the following principle:
>
> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted.
>
> (c) . . .
>
> (d) Services must be provided impartially, fairly, equitably and without bias.
>
> (e) People's needs must be responded to . . . .
>
> (f) Public administration must be accountable.
>
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information."

These principles apply, among others, to the term "[o]rgan of state" as defined.[19]

[22] Also relevant is the principle of separation of powers and the respect owed by organs of state to the functions performed by one another. The PP should refrain from unduly interfering with the functions entrusted to other organs of state and they should, in turn, respect her constitutionally entrenched role and function. Just like the other organs of state, the PP is required to perform all her constitutional obligations diligently,[20] impartially, fairly, equitably and without bias.[21]

(ii) The PPA

[23] The preamble to the PPA mirrors the constitutional provisions in sections 181 to 183 regarding the establishment of the office of the PP; her appointment;[22]

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[19] S 239 of the Constitution.
[20] S 237 of the Constitution.
[21] S 195(1)(d) of the Constitution.
[22] S 1A of the PPA.

and her powers to investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to have resulted in any impropriety or prejudice.[23] The PP must report on that conduct and take appropriate remedial action, in order to strengthen and support constitutional democracy in the Republic.

[24] For the purpose of conducting an investigation, the PP has the discretionary power to direct by way of a subpoena any person to submit an affidavit or affirmed declaration or to appear before her to give evidence or to produce any document in their possession or under their control which has a bearing on the matter being investigated, and may examine such a person.[24]

[25] If any person is found by the PP to be implicated in the matter being investigated to the detriment of that person or if an adverse finding pertaining to that person may result, the PP is obliged to afford such person an opportunity to respond in connection therewith in any manner that may be expedient in the circumstances.[25] Additionally, if such implication forms part of the evidence already submitted to the PP, she is obliged to afford such a person an opportunity to be heard by way of giving evidence in connection therewith.[26]

[26] The PP has further wide powers of search and seizure. In terms of section 7A(1) of the PPA, the PP is competent to enter a building or premises

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[23] S 6 of the PPA.

[24] S 7(4) read with subsection (5) of the PPA. The PP's discretion to opt-out is limited to the following circumstances:

> "(3) The Public Protector may refuse to investigate a matter reported to him or her, if the person ostensibly prejudiced in the matter is-
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> (a) an officer or employee in the service of the State or is a person to whom the provisions of the Public Service Act, 1994 (Proclamation 103 of 1994), are applicable and has, in connection with such matter, not taken all reasonable steps to exhaust the remedies conferred upon him or her in terms of the said Public Service Act, 1994; or
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> (b) prejudiced by conduct referred to in subsections (4) and (5) and has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter."

[25] S 7(9) (a) of the PPA.

[26] S 7(9) (b) of the PPA.

or to authorise any person to do so for the purpose of an investigation as she deems fit and to seize anything which, in her opinion, has a bearing on the investigation.

[27] Furthermore, the PP may publicise her findings and point of view or recommendation in respect of a matter she has investigated.[27] She is indeed obliged to report on her activities and findings to the NA.[28] In terms of section 8(3), the PP is obliged to make her findings available to the complainant or to any person implicated as soon as possible.

(iii) The NA rules

[28] The NA rules were adopted to give effect, *inter alia*, to the provisions of section 194 of the Constitution.[29] The process to be followed in respect of an enquiry in terms of section 194 is set out in rules 129R – 129AF, entitled "[P]art 4: Removal from office of a holder of a public office in a State institution supporting constitutional democracy". For our purpose, the relevant parts are rules 129R to 129Y.[30]

[29] Whilst section 194 of the Constitution sets out the three grounds for removal, it does not explicitly give meaning to the terms "misconduct", "incapacity" or "incompetence". These expressions are, however, defined in NA rules as follows:

> "'**misconduct**' means the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office.
>
> '**incapacity**' includes –
>
> (a) a permanent or temporary condition that impairs a holder of a public office's ability to perform his or her work; and

[27] S 8 (1)(a) of the PPA.
[28] S 8(2) of the PPA.
[29] In terms of s 57 of the Constitution, the NA was obliged to adopt such rules. See, by way of analogy *EFF v Speaker of the NA* 2018 (2) SA 571 (CC) at para [196] "[I]n the result I conclude that s 89(1) implicitly imposes an obligation on the Assembly to make rules specially tailored for an impeachment process contemplated in that section. And, I hold that the Assembly has in breach of s 89(1) of the Constitution failed to make rules regulating the impeachment process envisaged in that section."
[30] Rule 129Y makes provision for a quorum as including the chairperson and one other panellist.

(b) any legal impediment to employment;

'**incompetence**' in relation to a holder of a public office, includes a demonstrated and sustained lack of –

(a) knowledge to carry out; and

(b) ability or skill to perform,

his or her duties effectively and efficiently."

[30] The NA rules make provision for the following stages:

30.1. The initiation of the section 194 enquiry by way of a notice of a substantive motion in terms of rule 124(6).[31]

30.2. The Speaker may then consult the member to ensure the motion complies with the criteria set out in the rule.[32]

30.3. When the motion is in order the Speaker must –

(a) immediately refer the motion, and any supporting documentation provided by the member, to an independent panel appointed by the Speaker for a preliminary assessment of the matter; and

(b) inform the Assembly and the President of such referral without delay.[33]

30.4. The independent panel established in terms of rule 129U is then required to conduct a preliminary enquiry on a motion initiated in a section 194 enquiry. Rule 129V deals with the composition and appointment of the panel. It reads:

"(1) The panel must consist of three fit and proper South African citizens, which may include a judge, and who collectively

[31] Rule 129R.
[32] Rule 129S.
[33] Rule 129T.

possess the necessary legal and other competencies and experience to conduct such an assessment.

(2) The Speaker must appoint the panel after giving political parties represented in the Assembly a reasonable opportunity to put forward nominees for consideration for the panel, and after the Speaker has given due consideration to all persons so nominated.

(3) If a judge is appointed to the panel, the Speaker must do so in consultation with the Chief Justice."

30.5. One of the members of the panel shall be appointed by the Speaker as chairperson.[34]

[31] Rule 129X sets out the functions and powers of the panel as including an impartial application of the Constitution, the law and rules without fear, favour or prejudice.[35] The panel is tasked to conduct and finalise its preliminary assessment relating to the motion within 30 days of its appointment to determine. The assessment is whether there is *prima facie* evidence demonstrating that the PP has committed a misconduct, is incapacitated or is incompetent.[36]

[32] In terms of rule 129(1)(c)(i) the panel has a discretion whether any member should be afforded an opportunity to place relevant written or recorded information before it within a specified period.

[33] Additionally, the panel is enjoined to provide the holder of a public office – the PP in this instance – with copies of all information available to it relating to the assessment[37] and a reasonable opportunity to respond, in writing, to all relevant allegations against them. The rules specifically preclude any oral hearing.[38] The panel is enjoined to limit its assessment to the relevant written

[34] Rule 129W.
[35] Rule 129(X)(1)(a).
[36] Rule 129(X)(1)(b).
[37] Rule 129X (c) (ii).
[38] Rule 129 X (c) (iv).

and recorded information placed before it[39] and must include recommendations as well as any minority view of any panellist in its report.[40]

(iv) Brief background regarding the extension of the 30-day timeframe

[34] The Panel was appointed on 25 November 2020. Upon a cursory perusal of the motion and voluminous record of supporting documentation, it became plain to the Panel that it would be impossible for it to comply with the 30-day time limit set out in the NA rules. The reasons for this were –

34.1. The numerous charges and extensive volume of evidence;

34.2. A need arose to afford the Member an opportunity to supplement the evidence she had submitted together with the motion on 21 February 2020. The evidence attached to the motion consisted largely of affidavits and annexures filed as part of court proceedings. By the time the Panel was seized with the matter (25 November 2020) it was a matter of public record that, after 21 February 2020, some important judgments had been handed down in the matters raised by the Member. In terms of NA rule 129X(1)(c)(i) the Panel accordingly exercised its discretion to afford the Member an opportunity, if she so wished, to submit additional written or recorded information within specified timeframes with a view to supplement the evidence relied on. That was a necessary step that would take additional time to complete;

34.3. There was also a duty to afford the PP a reasonable opportunity to respond, in writing, to all relevant allegations made against her. Representations could only be invited from the PP after the Member had exercised the option to supplement the information she relied

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[39] *Ibid.*
[40] Rule 129X (c) (v).

upon. It was realised that not enough time would have been left to afford the PP a reasonable opportunity to make representations. The duty to provide the PP with a reasonable opportunity to respond is not only entrenched in the NA rules but it is also a fundamental constitutional principle. Any effort by the Panel to adhere to the 30-day period could have had the effect of undermining that constitutional principle; and

34.4. The Panel was obliged to hold meetings to discuss, among other things, working methods and deliberate on the issues after receiving the written response from the PP. Not enough time would have been left for these necessary interactions either.

[35] During a Panel meeting held on 2 December 2020 the said difficulties were discussed. The Panel observed that the NA rules do not provide for the eventuality that the motion and evidence may, in certain circumstances, be complicated and voluminous to the extent that the preliminary assessment may not be fairly conducted within the prescribed 30-day period. The provisions of NA rule 6[41] were however drawn to the Panel's attention. That rule allows the Speaker to frame a rule in respect of any eventuality for which the NA rules or orders do not provide.

[36] The Panel therefore requested the Speaker to consider framing a rule extending the 30-day period stipulated in rule 129X(1)(b).

[37] In a letter, dated 4 December 2020, the Speaker conveyed to the Panel that she had framed such a new sub-rule which allows her to provide for an additional period to the independent Panel on good cause shown. The Speaker further

[41] "6. Unforeseen eventualities
(1) The Speaker may give a ruling or frame a rule in respect of any eventuality for which these rules or orders of the House do not provide, having due regard to the procedures, precedents, practices and conventions developed by the House and on the basis of constitutional values and principles underpinning an open, accountable and democratic society.
(2) A rule framed by the Speaker remains in force until the House, based on a recommendation of the Rules Committee, has decided thereon."

informed the Panel that the timeframe for its work had been extended from 30 to 90 days in terms of the new sub-rule. The 90-day period lapses on 24 February 2021.

C. THE PP'S REPRESENTATIONS

(i) Introduction

[38] We have already referred to the Panel's decision to afford the Member an opportunity to supplement the evidence submitted in support of the motion. On 7 December 2020, the Panel conveyed to the Member that, having exercised its discretionary power under NA rule 129X (1)(c)(i), the Member was afforded an opportunity to place before the Panel any further relevant written or recorded information on or before 11 December 2020.

[39] Further written information was submitted timeously by the Member. The further information runs to some 5 990 pages bringing the total number of pages to approximately 9 236.

[40] The Panel caused the documents submitted by the Member to be paginated and indexed and, in a letter dated 17 December 2020, afforded the PP an opportunity to respond to the "[c]harges"[42] and allegations contained in the documentation. The PP's written response was due by 20 January 2021, i.e. within 30 calendar days. The PP had been advised that if no response were received, the Panel would proceed to assess the matter in default of such response.

[41] In a letter dated 5 January 2021, the PP requested a one week's extension for the submission of her response, i.e. an extension of time up to 27 January 2021. The requested extension was granted by the Panel on 8 January 2021.

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[42] The term "charge" is used in the Rule 129R(2).

[42] The PP timeously delivered her representations and supporting evidence by 27 January 2021. In her representations, she refers to and appears to rely on the court papers and judgment of the High Court regarding Part A in the matter of *The Public Protector v The Speaker of the National Assembly & Others* Case WCHC No: 2107/2020. Mention is made that the proceedings in relation to Part B remain pending in the High Court.

[43] At a meeting held on 28 January 2021, the Panel decided to provide the PP a further opportunity to submit the documents referred to above which she duly did during the course of the next day.

[44] Before she dealt with the merits of the individual charges, the PP set out, at paragraph 99 of her representations, 10 considerations in support of what she terms "[t]he principal submission … [as bases for the Panel to find] in favour of discontinuation of the current process". They are –

44.1. the validity of the charge (the Speaker failed to make an assessment of the substantive validity of the motion and only confined herself to the question of form);[43]

44.2. the retrospectivity issue (the NA rules are not retrospective and charges relating to conduct prior to their adoption on 3 December 2019 cannot be taken into consideration);[44]

44.3. double jeopardy and /or duplications of convictions (she has already been punished by way of punitive and personal costs orders and the same conduct is used to justify more than one charge);[45]

[43] PP's representations at p. 5, para 13ff.
[44] PP's representations at p. 12, para 34ff.
[45] PP's representations at p. 13, para 41ff.

44.4. prematurity (the current proceedings should be suspended pending the outcome of criminal proceedings against the PP for perjury and civil proceedings regarding the validity of the NA rules);[46]

44.5. the jurisdiction of the Panel (the Speaker has no constitutional power to appoint a judge to perform a non-judicial task);[47]

44.6. the scope of the Panel's mandate in terms of rule 129 (if approached holistically, the Panel cannot give the go-ahead for the continuation of a process which is inherently and patently unfair, prejudicial, *ultra vires* and unconstitutional);[48]

44.7. opinion evidence and the rule in the English judgment in *Hollington v Hewthorn* (the judgment of a court is inadmissible in subsequent proceedings as evidence of the truth of its contents);[49]

44.8. the rule against self-incrimination (the privilege against self-incrimination is not confined to criminal proceedings and it applies in civil proceedings as well);[50]

44.9. separation of powers (reliance on court judgments constitutes a blatant breach of the separation of powers principle as the section 194 process is the sole and exclusive terrain of the legislature in which the judicial arm of the State can play no role);[51] and

44.10. the impermissible expansion of the definition of offences (the NA impermissibly exceeded its powers in expanding the definitions of

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[46] PP's representations at p. 18, para 56.
[47] PP's representations at p. 22, para 72ff.
[48] PP's representations at p. 24, para 77ff.
[49] PP's representations at p. 27, para 87.
[50] PP's representations at p. 19, para 63.
[51] PP's representations at p. 28, para 92.

the impeachable offences listed in section 194(1) of the Constitution).[52]

[45] It is not entirely clear whether all 10 contentions are made solely in support of discontinuation. Three of them (retrospectivity; *Hollington* and self-incrimination) seem to be self-standing contentions directed at excluding some of the evidence before the Panel. We accordingly deal with them separately in this part.

(ii) Discontinuation of the process

[46] The Panel is "[s]ubject only to the Constitution, the law and the [NA] rules".[53]

[47] In this part, the Panel considers the request by the PP to discontinue or suspend (temporarily) its functions and powers to make the preliminary assessment. It does so against the above constitutional and legislative backdrop.

[48] The PP's written response includes what she characterises as "[f]airly uncharted waters of principles that should guide the Panel in determining whether there is *prima facie* evidence of guilty as charged"[54] and representations on the merits of the individual charges. She describes different approaches that the Panel may adopt in respect of the merits and suggests that a holistic approach is most appropriate.

[49] Essentially, the PP seeks to stay the Panel's process until the pending lawsuits she is involved in are finalised. Properly understood, the effect of the submission is to freeze all processes under section 194 of the Constitution until the PP has exhausted all her legal remedies in the courts. However, and in the same breath, she accepts that the Panel is entitled to proceed from the

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[52] PP's representations at p. 29, para 94.
[53] Rule 129X(1)(a).
[54] PP's representations at p. 1, para 1.

premise that the impugned rules are constitutionally valid until declared invalid and set aside.[55]

[50] The PP is currently involved in various legal proceedings including criminal proceedings emanating from certain pronouncements by the courts.[56] She is also involved in other lawsuits where she is challenging the constitutionality of the NA rules that inform the mandate of the Panel.[57] In respect of the latter proceedings, we understand the pleadings in Part A of the application for an interdictory relief, to be aimed at restraining the Speaker from proceeding with the section 194 process. That application was dismissed by the Western Cape High Court.[58]

[51] The Panel holds a view that the stay request is not appropriately made to it. Differently put, the stay request does not fall within the jurisdiction of the Panel.

[52] The Constitutional Court is the apex court to pronounce finally on most of the constitutional issues raised in some of the legal objections raised by the PP, including the challenge to the constitutionality of the NA rules. If granted, the stay request will mean that the section 194 inquiry including the Panel's preliminary assessment will be postponed for an indeterminate period pending the finalisation of the legal battles in which the PP is involved. In effect, if the PP is correct in her submissions that this Panel has the jurisdiction to pronounce on the legal points raised and the Panel is persuaded, the NA's hands will be tied simply because constitutional and legal challenges have been made regarding its processes.

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[55] PP's representations at p. 4, para 10.
[56] PP's representations at p. 18, paras 58 – 60.
[57] PP's representations at p. 21, para 66.
[58] *The Public Protector v The Speaker of the National Assembly & Others* Case WCHC No: 2107/2020.

[53] The PP's request for a termination or temporary suspension or discontinuation of the Panel's mandate on the basis of the *lis alibi pendens*[59] doctrine does not assist her either. This doctrine permits a court to refuse exercising jurisdiction on a matter when there is a parallel litigation pending in another court confronted with the same facts and seeking a similar relief.

[54] However, this Panel is not "a court" as contemplated under the doctrine. As a matter of fact, the Panel is created by the NA rules as part of a process of compliance by Parliament in discharging its constitutional obligations under section 194. The Panel's powers are limited to making a preliminary assessment and recommendations on whether there is a *prima facie* evidence showing that the PP has committed a misconduct or is incompetent. Nothing more.

[55] It bears mentioning that the Panel is also not cited as one of the parties in any of the said pending legal processes and no relief has been sought against it.

[56] In the discharge of its mandate under the NA rules, the Panel is entitled to assume, as it does, that the NA rules and processes conducted thereunder pass muster until declared invalid and set aside. That much has been conceded by the PP in her submissions. No declaration of invalidity regarding the NA rules has thus far been made by any court.

[57] The same applies to the PP's challenge to the Speaker's acceptance of the motion; the double jeopardy argument; the objection to the appointment of a Judge to the Panel; and the alleged impermissible expansion of the definitions of offences. The Panel is a creature of statute and has no inherent jurisdiction. The Panel's functions and powers are set out in NA rule 129X. It has no power to decide the above points.

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[59] PP's representations at p. 30, para 98. The Latin maxim means "dispute elsewhere pending".

[58] To recap for convenience and ease of reference, the Panel's functions are –

58.1. to apply the Constitution, the law and the NA rules impartially and without fear, favour or prejudice;

58.2. on the evidence made available, to conduct and finalise a preliminary assessment relating to the motion proposing a section 194 enquiry;

58.3. to determine whether there is *prima facie* evidence showing that the PP has committed a misconduct or is incompetent;

58.4. to exercise its discretion in deciding whether to afford any member an opportunity to place written or recorded information before it within a specified timeframe;

58.5. to provide the PP with copies of all information available to it relating to the assessment;

58.6. to provide the PP with a reasonable opportunity to respond in writing to all relevant allegations against her;

58.7. not to hear oral evidence; and

58.8. to make recommendation in its report including reasons for it.

[59] In addition, the Panel may determine its working methods strictly within the parameters of the procedures provided for in the NA rules.

[60] Manifestly, the said functions do not include a determination of most, if not all, of the preliminary legal objections. Given the Panel's lack of jurisdiction, no purpose would be served by considering these objections because the

Panel's decision "... [w]ould bind no one *de jure* and would immediately be vulnerable to be nullified by a decision of a court of law".[60]

[61] The Panel is fortified in coming to this conclusion because the PP herself[61] anticipates that this would be the approach of the Panel.

[62] The Panel holds the view that the proper forum to seek a stay is the court. Unless there is an interdictory order by a court of law restraining the Panel from exercising its powers to perform its functions, the Panel considers that it must proceed to conduct the preliminary assessment of whether, on the information before it, there is *prima facie* evidence to show that the PP committed misconduct or is incompetent.

(iii) Retrospectivity

[63] Under this heading the PP contends that the alleged "transgressions" which form the subject of charges 1 to 4 took place before the promulgation of the NA rules on 3 December 2019. Based on the "legal rule" or presumption against retrospectivity, the PP contends that:

63.1. On the first motion of the DA submitted on 6 December 2019, the only transgressions which could have been raised would have been those committed between 3 and 6 December 2020 [this should presumably read 2019].[62]

63.2. The Member's motion could only deal with transgressions committed between 3 December 2019 and 21 February 2020 [when the Member submitted her new motion].[63]

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[60] *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 751D-I.
[61] PP's representations at p. 4, para 10.
[62] PP's representations at p. 12, para 35.
[63] PP's representations at p. 12, para 35.

[64] The PP further contends that the Speaker failed to realise this irregularity because she failed to assess the substantive validity of the motion and failed to provide the PP an opportunity to be heard before ruling the motion to be in order.[64]

[65] In short, the PP contends that her conduct, which is alleged to constitute misconduct or incompetence, predates the enactment of the NA rules and thus cannot be the subject matter of a motion in terms of the NA rules.

[66] We disagree and the following clarification is necessary:

66.1. Firstly, the NA rules merely create a procedure for considering the removal from office of the Public Protector. The grounds and requirements for removal are set out in section 194 of the Constitution. Whilst the distinction between the impact on substantive rights and procedural rights is no longer decisive when determining whether a new rule should be regarded as retrospective,[65] in the present instance there can be little doubt that the new NA rules were meant to apply to conduct which preceded their adoption. The NA rules were indeed adopted in order to deal with the lacuna regarding the removal from office of the Public Protector. No unfairness will result from these rules being applied to conduct which preceded their adoption. If anything, the new rules confer on the PP important procedural rights which she may utilise in order to defend herself against the charges. Indeed, even in relation to the present process, the PP has not suggested that the period she was given to submit representations was not reasonable.

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[64] PP's representations at p. 13, para 40

[65] In *Sigcau v President of the Republic of South Africa and Other* 2013 (9) BCLR 1091 (CC) ([2013] ZACC 18), the CC adopted the position espoused by the SCA in *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others* 1999 (4) SA 1 (SCA). See para 15 of the latter, in particular.

As a matter of fact, she provided other reasons for seeking an extension of one week.

66.2. Secondly, a rule or statute is not retrospective merely because a part of the requisites for its action is drawn from time antecedent to its passing.[66] Thus, even if the rules clarify or expand on the meaning of the terms "misconduct" and "incompetence", then they are not retrospective merely because conduct of the PP which preceded the enactment is drawn upon.

[67] For these reasons, we do not believe that there is merit in the PP's argument to exclude evidence on the basis of the principle against retrospectivity.

(iv) The rule in *Hollington*

[68] The PP states that, given the "general" rule that the judgment of a court is inadmissible in subsequent proceedings as evidence of the truth of its contents, it is doubtful whether the DA's sole reliance on court judgments constitutes admissible evidence, let alone *prima facie* evidence in respect of the impeachment proceedings.[67] In this regard, the PP relies on the English case of *Hollington v Hewthorn* [1943] 2 All ER 35 (CA), which she contends forms part of South African law "[a]lbeit not without controversy".

[69] The applicability of the rule in *Hollington* was comprehensively analysed in *Institute For Accountability in Southern Africa v Public Protector and Others* 2020 (5) SA 179 (GP) (CIFASA) in the context of an application that the PP was no longer a fit and proper person to hold the office, as required by section 193(1)(b) of the Constitution, alternatively an order declaring that she had abused her office. The High Court, per Copping J, held that the ratio in *Hollington* ought to be strictly confined to the facts that had to be decided in

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[66] *Gihwala v Grancy Property Ltd* 2017 (2) SA 337 (SCA) para 141.
[67] PP's representations at p. 27, para 87.

that case, essentially concerning the admissibility of a criminal conviction in subsequent civil proceedings. The High Court further held that the rule in *Hollington* did not apply but exercised its discretion against the grant of the declaratory relief because the current process for the removal of the PP had already begun.

[70] Our task is not to assess the admissibility of a criminal conviction in civil proceedings. For this reason alone, the rule in *Hollington* would not apply.

[71] But there is a further consideration. In the course of its judgment, the High Court in CIFASA referred to *Hassim (also known as Essack) v Incorporated Law Society of Natal* 1977 (2) SA 757 (A), which concerns an application that an attorney be struck off the roll. On the issue of whether the findings in a preceding criminal case could be used in the striking-off application, the High Court held as follows:

> "I should explain that counsel conceded in argument that, if the rule in Hollington v Hewthorn applies at all to applications for the striking off of attorneys, then, strictly speaking, it would apply in unopposed applications as well as in opposed applications. However, be that as it may, it seems to me that the argument just mentioned above begs the question. Accepting that the court acts judicially in matters such as the present then, once it is decided that applications for the striking off of attorneys are not legal proceedings within the contemplation of sec. 42 of Act 25 of 1965, the rule in Hollington v. Hewthorn does not apply. That being so, I can see no valid reason why the court, in undertaking an enquiry which is clearly of a disciplinary nature, should not be entitled to accept evidence of the conviction for the limited purpose which it does, namely as *prima facie* proof of the commission of the offence, leaving it to the attorney concerned to prove that he was wrongly convicted. To me it seems not only a sensible and practical procedure, but it is also fair in that the attorney is allowed a proper opportunity of meeting the charge brought against him."

[72] The same applies with much greater force to the present proceedings. They are not legal proceedings as envisaged in Act 25 of 1965 and this is another reason why the rule in *Hollington* does not apply.

[73] Further, as will become clear below, the Panel does not place sole reliance on the judgments submitted by the Member but it has also had regard to the

underlying evidence in the affidavits and annexures which were before the courts that delivered those judgments.

(v) Self-incrimination

[74] The PP further contends that the privilege against self-incrimination is not confined to criminal proceedings and that it applies in civil proceedings as well. According to the PP this means that, at least in respect of charge 1, the proceedings are premature.

[75] We do not believe that there is any merit in this point. It is well-established that a civil proceeding should only be stayed, if criminal proceedings are pending on the same facts, when the individual faces compulsion to speak in the civil proceedings and where he or she will likely be prejudiced in the criminal proceedings.[68]

[76] Here, there is no compulsion to speak. The PP has a choice whether or not to put her version to the Panel. If the PP, acting freely and in the exercise of an informed choice, elects to put her version to the Panel, the right to silence and against self-incrimination is in no way impaired.[69]

[77] In light of the aforegoing, the Panel is entitled and obliged to continue with the process to conduct a preliminary assessment in terms of the NA rules.

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[68] *Law Society of The Cape of Good Hope v Randell* 2013 (3) SA 437 (SCA).
[69] *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).

D. THE MERITS: WHETHER THERE IS *PRIMA FACIE* EVIDENCE OF MISCONDUCT AND INCOMPETENCE

(i) Introduction

[78] The function and powers of this Panel are restricted to that provided for in rule 129X of the NA rules. At the risk of repetition, this rule, which is on the whole couched in peremptory language, save for sub-rule (1)(c)(i) and sub-rule 2, reads:

> "(1) The Panel –
>
> (a) *must* be independent and subject only to the Constitution, the law, and these rules, which *it must apply impartially and without fear, favour or prejudice*;
>
> (b) *must*. . . conduct and finalise a preliminary assessment relating to the motion proposing a section 194 enquiry to determine whether there is *prima facie* evidence to show that the holder of a public office –
>
> (i) committed misconduct;
>
> (ii) is incapacitated; or
>
> (iii) is incompetent; and
>
> (c) In considering the matter –
>
> (i) may, in its sole discretion, afford any member an opportunity to place relevant written or recorded information before it within a specific timeframe;
>
> (ii) *must* without delay provide the holder of a public office with copies of all information available to the panel relating to the assessment;
>
> (iii) *must* provide the holder of a public office with a reasonable opportunity to respond, in writing, to all relevant allegations against him or her;
>
> (iv) *must* not hold oral hearings and *must* limit its assessment to the relevant written and recorded information placed before it by members, or by the holder of a public office, in terms of this rule; and
>
> (v) *must* include in its report any recommendations, including the reasons for such recommendations, as well as any minority view of any panellist. (emphasis added)
>
> (2) The panel may determine its own working arrangements strictly within the parameters of the procedures provided for in this rule."

[79] The Panel conducts a preliminary assessment as envisaged in NA rule 129X(1). It does so with an open mind, that is to say a state of mind that is open to all possibilities on the information provided. This state of mind is neither unduly suspicious nor unduly believing but one that simply ascertains whether the information at its disposal is out of place or fits within the parameters of the charges. The Panel performs its task against the backdrop of the relevant constitutional and legislative provisions and the NA rules. These guiding principles, when properly applied on the evidence as a whole, will ensure objectivity and obviate any unwarranted excessive zeal simply to uphold constitutional democracy.

[80] Fairness is what the Constitution and the law require. We mention this from the outset because there are certain descriptions of the PP, for example, as an incumbent who "[w]ish to defeat our constitutional project; who is attempting to deceive South Africa; and who is joining a pattern of people who seek to return South Africa to the dark path of lawlessness, corruption and securitisation.[70] We could not find evidence of the PP having such a wish or find proof that she attempted to return South Africa to a dark path.

[81] If, on the evidence before this Panel (which consists primarily of reports, court pleadings in the form of affidavits and judgments) it is found that the information provided by the Member – considered against the constitutional and legislative backdrop – does not establish *prima facie* evidence of misconduct, incapacity or incompetence to warrant a recommendation to the Speaker of the NA to appoint a committee to commence a section 194 inquiry then, in that event, there will be no such recommendation. Conversely, if it does establish *prima facie* evidence, then an appropriate recommendation will be made.

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[70] See Record at pp. 4140 – 4142, paras 14, 15 and 19.

(ii) The test

[82] Section 194(1)(a) of the Constitution provides that the PP may be removed from office only on the ground of misconduct; incapacity; or incompetence. In the present matter, the Member has not alleged that the PP is incapacitated. It is however alleged that the PP committed misconduct and is incompetent.

[83] In this part of the assessment, we deal with the meaning of the following concepts referred to in NA rule 129X(1)(b) –

83.1. "commit misconduct";

83.2. "is incompetent" and

83.3. "whether there is *prima facie* evidence to show".

(a) Misconduct

[84] The term "misconduct" is defined as follows in the NA rules -

> "'**misconduct'** means the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office…"

[85] Conduct is intentional not only when a deviation from the required standard of behaviour is desired or subjectively wished for. Conduct would also be intentional if the office bearer foresees the possibility of not meeting the required standard of behaviour, but nevertheless proceeds with the conduct and reconciles herself with the consequence of not meeting the standard.[71]

[86] Conduct is grossly negligent when it is, *inter alia*, reckless.[72] Acting "recklessly" amounts to a failure to give consideration to the consequences of

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[71] This is a form of intentional conduct known as *dolus eventualis*. See *DPP, Gauteng v Pistorius* 2016 (2) SA 317 (SCA) para 25.

[72] See the discussion in *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA), where Howie JA noted that "the ordinary meaning of "recklessly"

one's actions, in other words, a course of action is pursued in reckless disregard of potential consequences.[73] The test for recklessness is objective. This means that, in the present instance, the PP's actions are to be measured against the standard of conduct of the notional reasonable person. That notional being, however, is not an ordinary person but one belonging to the same group or class as the Public Protector, moves in the same spheres and has the same knowledge or means to obtain knowledge.[74] One needs to take into account the experience that the Public Protector must have as set out in section 1A of the PPA.[75] Whilst a higher standard of behaviour or conduct can be expected of a holder of a public office, such as that of the Public Protector[76] a "[h]igh degree of perfection" is not required.[77]

(b) Incompetence

[87] The term "incompetence" is defined as follows in the NA rules -

> "'**incompetence**' in relation to a holder of a public office, includes a demonstrated and sustained lack of—
>
> (a) knowledge to carry out; and
>
> (b) ability or skill to perform…
>
> his or her duties effectively and efficiently…".

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includes gross negligence' (at 143F), and that recklessness itself connotes 'at the very least gross negligence" (at 144A).

[73] *Ebrahim v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) para 14.

[74] *Philotex (Pty) Ltd v Snyman; Braitex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA) at 143H.

[75] S 1A of the PPA provides in the relevant parts as follows:

> "(3) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office, and who-
>
> (a) is a Judge of a High Court; or
>
> (b) is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or
>
> (c) is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at a university; or
>
> (d) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or
>
> (e) has, for a cumulative period of at least 10 years, been a member of Parliament; or
>
> (f) has acquired any combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years."

[76] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) para 237.

[77] *Public Protector v Commissioner for the South African Revenue Service and Others* (CCT63/20) [2020] ZACC 28 (15 December 2020) para 40.

[88] The word "demonstrated" in the above context means no more than that the incompetence must be established on a balance of probabilities.

[89] The word "sustained" is more difficult to interpret in the present context. At the very least, it means that more than one instance of incompetence is required. It also seems to suggest that instances of incompetence must stretch over a period of time. For purposes of our assessment, the Panel adopted a higher test, namely continuous instances of incompetence over a longer period of time. For purposes of the present report, we consider this to be a period of longer than one year.

[90] Finally, the phrase "[k]nowledge to carry out; and ability or skill to perform his or her duties effectively and efficiently... ". The word "and" in this context does not mean that incompetence can only be demonstrated by showing both lack of knowledge and ability or skill. Incompetence may consist of either, i.e. either a lack of knowledge or a lack of ability or skill to perform.

(c) Prima facie evidence

[91] The meaning of "*prima facie*" has been considered by our courts in the context of assessing whether an interim interdict should be granted because the establishment of a *prima facie* case is one of the four requirements for such relief.

[92] The classic formulation of the test in the above context, is as follows:

> "If the phrase used were 'prima facie case' what the court would have to consider would be whether the applicant had furnished proof which, if uncontradicted and believed at the trial, would establish his right. In the grant of a temporary interdict, apart from prejudice involved, the first question for the court in my view is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. Prima facie that has to be shown. The use of the phrase 'prima facie established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of

> approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."[78]

[93] In the above context it has been recognised that less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.[79] If a party goes as far as he or she reasonably can in producing evidence and that evidence "[c]alls for an answer" then, in such case, he or she has produced *prima facie* proof, and, in the absence of an answer from the other side, it becomes conclusive proof. Also, a doubtful or unsatisfactory answer given is equivalent to no answer and the *prima facie* proof, being undestroyed, again becomes full proof.[80]

[94] The above test, duly adjusted when necessary, seems to us to be an appropriate one for this assessment.

(iii) The charges

[95] The Member formulated four main charges and a multitude of sub-charges in support of the motion to remove the PP. In addition, annexures 1 to 7 to the motion contain numerous documents running to some 4 326 pages, which were submitted by the Member as evidence to substantiate the charges. After having been given an opportunity to supplement, annexures 8 to 14B were added by the Member, bringing the motion and supporting evidence to 9 236

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[78] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189. See, also, *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688.
[79] *Gericke v Sack* 1978 (1) SA 821 (A) at 827H.
[80] *Ex parte The Minister of Justice: In re R v W Jacobson and Levy* 1931 AD 466 at 478 – 479.

pages. The response of the PP and the annexures thereto consisted of some 1 160 pages, and resulted in the record before us amounting to 10 396 pages.

[96] We now turn to describe the four categories of charges as formulated by the Member.

[97] **Charge 1**: Misconduct in respect of the South African Reserve Bank (SARB) matter in that the PP committed the acts set out below during her investigation and the litigation challenging the report. The Member contends that these acts, separately and cumulatively, constitute an intentional or grossly negligent failure to meet the standards of conduct expected of the holder of the Office of the Public Protector. The Member contends that the PP adopted a dismissive, high-handed, biased and procedurally irrational and unfair approach in the SARB investigation in that she –

97.1. met with the Presidency and the State Security Agency (SSA) without disclosing the fact and import of such meetings in the report and without furnishing any transcripts of the meetings in the Rule 53 record in respect of the review;

97.2. materially broadened the scope of the investigation in paragraph 4.2.10 of the final report (as compared with the provisional report) without giving notice thereof to any affected person and without furnishing any explanation therefor;

97.3. materially altered the remedial action in the final report on the instruction and/or advice of the Presidency and/or the SSA, without giving notice to the affected persons and an opportunity to comment thereon;

97.4. failed in her duty to give affected persons (including the Speaker and the SARB) notice and an opportunity to comment on any findings

and remedial action she proposed to take with consequences that were severely damaging, not only to the economy, but to the reputation of her own office;

97.5. failed to honour an agreement with the SARB to make her final report available five days before its release and failed to refer to or discuss the submissions made by the SARB or any other person in response to the provisional report in the final report; and

97.6. in her statements made under oath in the litigation regarding the SARB report –

97.6.1. failed to give a full, frank and honest account of the meetings she had with the Presidency and the SSA before she finalised the report;

97.6.2. misrepresented her reliance on the evidence of economic experts in drawing up the report; and

97.6.3. provided contradictory, unintelligible and obfuscating accounts of her conduct of the investigation.

[98] **Charge 2**: Misconduct in respect of the Vrede Dairy matter. More particularly, that the PP committed the actions set out below, which actions separately and cumulatively, constitute an intentional or grossly negligent failure to meet the standards of conduct expected of the holder of the Office of the Public Protector. The actions complained about are that the PP –

98.1. narrowed the scope of the investigation required by the complainants and which had been commenced by Adv Madonsela, without providing any rational or proper explanation therefor;

98.2. failed to investigate, at all, the third complaint submitted by the Democratic Alliance's MP in the Free State Legislature, Dr Roy Jankielsohn (Jankielsohn) on 10 May 2016, without providing any rational or proper explanation;

98.3. took steps which were wholly inadequate, considering the magnitude and importance of the complaints raised, without providing a rational or proper explanation for such failure;

98.4. materially altered the remedial action proposed in the provisional report (prepared by Adv Madonsela) before issuing the final report, without providing any rational or proper explanation therefor; and

98.5. gave directly contradictory explanations under oath for her failure to investigate in the litigation challenging the report.

[99] **Charge 3**: Incompetence in that the PP has demonstrated a sustained lack of knowledge to carry out, and ability or skill to perform, her duties effectively and efficiently. This allegation is made in respect of the SARB Report and the Vrede Dairy Report and extends further to the Report on the chief executive officer (CEO) of the (then) Financial Services Board (FSB), Adv Tshidi. In the supplementary documents, incompetence is also alleged in respect of the Zuma Tax Information Report; and the Government Employees Medical Scheme (GEMS) Report. The charge of incompetence is further particularised as follows:

99.1. In respect of the SARB investigation and report and the ensuing litigation, the PP –

99.1.1. grossly overreached and exceeded the bounds of her authority by directing the Chairperson of the Portfolio Committee on Justice and Correctional Services to

initiate a process to amend section 224 of the Constitution, with a view to altering the primary object of the SARB;

99.1.2. materially broadened the scope of the investigation without giving notice thereof to any affected person and without furnishing any explanation therefor;

99.1.3. materially altered the remedial action in the final report on the instruction and/or advice of the Presidency and/or the SSA and without giving notice and opportunity to the affected persons to comment thereon;

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

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

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

99.1.7. demonstrated irrationality, forensic weakness, incoherence, confusion and misunderstanding of the applicable contractual, constitutional and administrative law principles;

99.1.8. demonstrated that she does not fully understand the constitutional duty to be impartial and to perform her functions without fear, favour or prejudice; and

99.1.9. demonstrated her failure to appreciate the Public Protector's heightened duty towards the court as a public litigant.

99.2. In respect of the Vrede Dairy investigation and report and ensuing litigation, the PP –

99.2.1. demonstrated a failure to conduct a lawful and meaningful investigation, and a failure to grant appropriate remedial action;

99.2.2. demonstrated a failure to appreciate her legal duty to come to the aid of the vulnerable and marginalised members of society, in this instance, the intended beneficiaries of the Vrede Dairy project;

99.2.3. demonstrated a failure to appreciate that her investigation was wholly inadequate and grossly negligent and/or a failure to appreciate her constitutional duty to conduct a lawful and meaningful investigation;

99.2.4. demonstrated legal ineptitude in her inability to comprehend and accept the inappropriateness of her proposed remedial action in the report;

99.2.5. demonstrated irrationality, forensic weakness, incoherence, confusion and misunderstanding of constitutional and administrative law principles; and

99.2.6. demonstrated her failure to appreciate the Public Protector's heightened duty towards the court as a public litigant.

99.3. In respect of Tshidi (Report 46 of 2018/19), the Member alleges that the PP declined to defend the lawfulness of her findings and remedial action and that she failed to give any proper explanation for findings and remedial action and thereby –

99.3.1. demonstrated irrationality, forensic weakness and misunderstanding and/or misappropriation of legal principles; and

99.3.2. demonstrated a failure to appreciate the public protector's heightened duty towards the court as a public litigant.

[100] **Charge 4**: Misconduct and / or incompetence in respect of certain other actions and reports, namely:

100.1. Intimidation, harassment or victimisation of staff (7 names are listed) by the PP herself and/or at her behest by the former CEO, Mr Vussy Mahlangu (Mahlangu). Also, that she failed, intentionally or in a grossly negligent manner, to manage the internal capacity and resources of management staff, investigators and outreach officers in the Office of the Public Protector effectively and efficiently.

100.2. Failing, intentionally or in a grossly negligent manner, to conduct her investigations and / or make her decisions in a manner that ensures the independent and impartial conduct of investigations. [This allegation is made in respect all the investigations falling under Charges 1, 2 and 3 and extends to the CR17 Report; Gordhan / Pillay Rogue Unit Report; the Zuma Tax Report; and the GEMS Report].

100.3. Failing, intentionally or in a grossly negligent manner, to prevent fruitless and wasteful and/or unauthorised public expenditure in legal costs.

100.4. Failing, intentionally or in a grossly negligent manner, to conduct her investigations and/or make her decisions in a manner that ensures the independent and impartial conduct of investigations.

100.5. Avoiding, the making of findings against or direct remedial action at certain public officials, while deliberately seeking to reach conclusions of unlawful conduct and imposing far-reaching disciplinary measures and remedial action in respect of other officials (even where such conclusions and/or measures and/or remedial action manifestly had no basis in law or in fact).

[101] There is overlap in that, to a certain extent, the same materials were submitted by the Member in support of more than one charge. Charges 3 and 4 are in fact sought to be substantiated by the same materials as Charges 1 and 2 (more materials were simply added in respect of Charges 3 and 4).

(iv) The Panel's Approach

[102] In order to avoid repetition, we commence the assessment by focusing separately on the various reports and actions which are the subject matter of the charges. We then revert to the question of whether the evidence regarding these actions and reports substantiate the charges.

[103] In all but one instance (Charge 4, the allegations of Mr Sphelo Samuel (Samuel)), the Member contends that the evidence of the charges can be found in judgments or court papers. Insofar as reliance is placed on the judgments of courts, we record that:

103.1. We are alive to the fact that courts dealt with the conduct of the PP in a different context, mostly whether the PP's reports are reviewable. The question before us is different. It is whether there is *prima facie* evidence that the PP has committed misconduct or is incompetent. But this does not mean that the factual findings of the courts cannot be relied upon, to the extent relevant, as *prima facie* evidence of misconduct or incompetence. For example, a patently incorrect interpretation of a statute may constitute an error of law, but it may also constitute *prima facie* evidence of incompetence. In the circumstances, the findings of the courts in respect of the PP's conduct have been taken into account, as detailed below.

103.2. We took into account that there is a fundamental difference between judgments which are the subject of some or other appeals processes; and final judgments, such as those of the Constitutional Court or the SCA and Divisions of the High Court where there is no longer a possibility of an appeal. The PP could have disputed the relevance or materiality of the findings in either, but in the case of the former the possibility of the judgment being overturned on appeal had to be factored in as well. In this regard, we would have been greatly assisted had the PP furnished us with her grounds of appeal; or the heads of argument or even recordings of the appeal hearings. This was not done, which then necessitated us making an assessment only on the materials before us. What then follows is an assessment based on the information made available to the Panel, starting with the SARB/ABSA Lifeboat Report.

(v) SARB / ABSA Lifeboat Report

[104] This report of the PP (the SARB Report) concerned a loan amounting in total to some R3.2 billion made by the SARB between the years 1985 and 1991 to

an entity called Bankorp. This financial assistance has become known as the "lifeboat".

[105] An agency called CIEX investigated the circumstances of the loan in 1997 and concluded in its report that there had been wrongdoings therein. The finding was later used (in 2010) by a Adv Paul Hoffman SC (Adv Hoffman) to lay a complaint to Adv Madonsela about the failure to recover the losses of the fiscus in respect of the loan from Bankorp's successor, ABSA Bank.

[106] Adv Madonsela initiated an investigation, which was incomplete at the time her term came to an end. The PP took over the investigation which culminated in her issuing the final SARB report on 19 June 2017. In the final report, the PP made adverse findings against numerous persons including the SARB.

[107] The SARB as well as the Minister of Finance / National Treasury (NT) and ABSA took the PP on review.

[108] We now turn to deal with the evidence which emerges from the affidavits filed in these reviews as well as the findings of the courts.

[109] It will be remembered that in the charges submitted by the Member, set out above, allegations of incompetence are premised on the PP having exceeded the bounds of her authority in directing the amendment of the Constitution; unlawfully broadening the scope of the investigation without *audi* to those who were affected; unlawfully and materially altered the remedial action in the final report on the instruction or advice of the Presidency and/or SSA without *audi* to those affected; unlawfully failed to have regard to third parties' evidence in her final report; demonstrating irrationality, weak forensic skills weak, misunderstanding of the applicable constitutional and administrative principles as well as a failure to appreciate her heightened constitutional duties.

[110] SARB had responded to the PP's provisional report 12 of 2016/2017, raising issues regarding the PP's scope of investigation, incorrect factual findings, lack of jurisdiction and the inappropriateness of her proposed remedial action. ABSA did the same.

[111] Following the said adverse findings and prior to the institution of the review application(s), a number of things happened. We mention a few that bear relevance:

111.1. First, the report that was impugned on review resulted from a complaint from Adv Hoffman. Subsequent to the publication of the final report, Adv Hofmann was interviewed by Mr Stephen Grootes of Radio 702 on 20 June 2017.[81] This was after the media briefing on 19 June 2017, in which the PP announced her findings, and before the latter was furnished with the final report. Adv Hoffmann was asked, *inter alia*, whether he had asked the PP for a remedy that would change the mandate of the SARB, i.e. the amendment of the Constitution in relation to the SARB's mandate. Adv Hoffman answered:

> "[N]o. Certainly not and I do not believe that it is anywhere near the scope of her constitutional mandate . . . She is on a frolic of her own, it has nothing to do with the complaint and I am sure the Reserve Bank will successfully knock that particular finding of the [PP] on its head."[82]

111.2. Secondly, on the same day the PP was interviewed on radio by Mr Eusebius McKaiser (McKaiser).[83] She was asked several questions, including whether she did not go beyond what she was allowed to do. The PP was specifically asked to indicate the legal basis for making the "recommendation" to amend the Constitution. In her response she appeared to evade to answer this

[81] See transcript at Record p. 405ff.
[82] See transcript at Record at p. 406.
[83] See transcript at Record p. 407ff.

straightforward question. McKaiser repeated the same question and the PP appeared to simply stonewall him. For the third time, the same question was asked in this fashion:

> "[So] I still do not understand what part of the PPA or which particular clause of the [Constitution] justifies telling the Executive and Legislature how they need to expand the role of an institution that falls outside your part of the state apparatus."[84]

111.3. In answer, the PP could only refer to section 182 of the Constitution.[85]

111.4. We pause to mention that this section does not empower the PP to direct constitutional amendments.

[112] In its papers, the SARB contended that the PP had no powers to amend the Constitution and review the SARB's core functions of jurisdiction; that the remedial action was not the product of procedural fairness, that the PP acted irrationally and that her remedial actions breached the separation of power principle.

[113] The Speaker and the Chairperson, both cited as second and third respondents, respectively, by the SARB, supported the review application. The Speaker filed an affidavit on their behalf. ABSA, through its CEO, also filed papers.

[114] The Speaker and Chairperson basically said that the PP operates under the Constitution and not above it and that she had no powers to order or even propose a constitutional amendment to the SARB's primary function. They relied on section 43 (dealing with the legislative authority); section 44 (the NA's authority); section 55 (powers of the NA); section 2(d) (foundational values) and section 74 (regarding Bills amending the Constitution). They

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[84] Record at p. 410.
[85] Record at p. 410.

contended that the PP's remedial action trenches on Parliament's exclusive domain and the separation of powers principle.

[115] ABSA also sought an order reviewing the PP's remedial action and in particular the parts relating to the alleged failure to recover misappropriated funds. ABSA raised several grounds, including material errors of fact; that it did not benefit from the "gift"; that the PP relied on third party statements without verifying the correctness thereof; that the remedial action flows from erroneous facts and procedural references. In respect of the latter it was contended that the PP relied on the CIEX report, that made adverse findings against ABSA without affording it *audi*.

[116] The Minister of Finance also sought to review the report on the basis of irrationality; breach of the Constitution, arbitrariness, capricious and procedural unfairness.

[117] The various review applications were consolidated. The PP elected not to respond to the contents of the affidavits filed paragraph by paragraph. Relying on her powers in terms of the Constitution (section 182) and the PPA (section 7) and certain the Constitutional Court judgments, she maintained that she acted within the scope of her powers, even to the extent that she recommended to Parliament to consider a review of the constitutional mandate of SARB. This part of the review was nevertheless conceded.

[118] SARB contended that the PP's answering affidavit displayed a fundamental lack of understanding of the monetary system and role of the Central Bank. It was contended that it was an abuse of power for the PP to assume that she could act in an area and direct fundamental change to it, while displaying a lack of the basic understanding of the underlying principles. SARB said it was not good enough for the PP to concede the merits without explaining her conduct, and offering a retraction and apology. Merely conceding perpetuated the damage.

[119] Much of the above allegations in the pleadings remain unchallenged and they must accordingly be accepted as correct. This is so because, despite having been afforded the opportunity to deal with these allegations, the PP failed to do so.

[120] Against this background, we now turn to deal with the judgments regarding the SARB Report.

[121] Three judgments dealing with these review proceedings were referred to us by the Member.

[122] The first judgment is Annexure 1B,[86] which is the judgment of Murphy J in Case No 43769/17, dated 15 August 2017.[87] This was an urgent application which only concerned the remedial action in para 7.2 of the SARB Report. It was concerned with that part of the remedial action directed at the Chairperson of the Portfolio Committee requiring him to initiate a process for the amendment of section 224 of the Constitution – to change the primary object of the SARB. The (limited) review succeeded. No punitive or personal costs order was made against the PP. Relevant are the following parts:

122.1. Para 5: This concerns the PP's remedial action to amend the primary object of the SARB (section 224 of the Constitution) to include the objective of "[e]nsuring that the socio-economic wellbeing of the citizens are protected". In a relatively short affidavit, the PP conceded that the power to amend the Constitution is exercised at the discretion of Parliament and not "[u]nder dictation by any other body" and that her remedial action "[t]renches on the powers of Parliament".[88] In her own words, she accordingly accepted

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[86] Record at p. 71ff.
[87] *South African Reserve Bank v Public Protector and Others* (43769/17) [2017] ZAGPPHC 443; [2017] 4 All SA 269 (GP); 2017 (6) SA 198 (GP) (15 August 2017).
[88] Record at p. 615, PP's AA at para 34.

illegality, the subset of the rule of law. The consequences of her conduct were serious. The release of the SARB Report resulted in the rand instantly depreciating by 2.05% and R1.3 billion of government bonds were also sold by non-resident investors.[89]

122.2. Para 12: The PP made no mention that the lifeboat had been the subject of two judicial investigations, both concluding that recovery of the lifeboat funds was not feasible.

122.3. Para 33: There are two patent inaccuracies in the report, namely the description that it was common cause that the lifeboat belong to the people of South Africa in the form of public funds and that it was not in dispute that the failure to recover the lifeboat amounted to a loss by the public.

122.4. Para 37: The remedial action taken by the PP would have left the currency unprotected. The reason for this is that it would remove the primary object of the SARB, which is to protect the value of the currency, without allocating this function to anyone else.

122.5. Para 39: There was no complaint about the primary object of the SARB. This makes it all the more difficult to understand why the PP elected to address this issue.

122.6. Para 40: The remedial action to amend the primary object of the SARB has nothing to do with the improper conduct found by the PP, i.e. that the government and the SARB failed to recover money from Absa.

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[89] See, also, para 19 of the judgment where the Court finds that, before its publication, the PP had been warned by the SARB that the errors in the report were likely to bring instability to the financial markets. This part of the remedial action further resulted from a broadening of the scope of the investigation, which was done without notice to affected persons. The PP's reasoning is described as superficial and erroneous. See para 31 of the judgment.

122.7. Para 43: The PP's remedial action "[t]renches unconstitutionally and irrationally on Parliament's exclusive authority". The PP does not have the power to prescribe to Parliament how to exercise its discretionary legislative powers. She has no power to order an amendment of the Constitution."

122.8. Para 50: The PP's amendment to the Constitution would take the SARB's core function away. In order to achieve the object of promoting balanced and sustainable growth, the SARB would have to have control over an array of additional policy variables such as industrial policy, fiscal subsidies and taxation powers.

122.9. Para 55: [T]he PP's contention that the remedial action was merely a recommendation was "disingenuous" as the language in which the remedial action is formulated is peremptory.

122.10. Para 58: The PP failed to honour an agreement with the SARB to make her final report available to the SARB five days before its release.

122.11. Para 59: The PP's explanation and begrudging concession of unconstitutionality offer no defence to the charges of illegality, irrationality and procedural unfairness. The PP seems impervious to the criticism and disinclined to address it. The PP "... [r]isks the charge of hypocrisy and incompetence if she does not hold herself to an equal higher standard than that to which she holds the subject to her writ. A dismissive and procedurally unfair approach by the PP to important matters placed before her by prominent role players in the affairs of the state will tarnish her reputation and damage the legitimacy of the office. She would do well to reflect more deeply on her conduct of this investigation and the criticism of her by the Governor of the Reserve Bank and the Speaker of Parliament."

[123] The second judgment is Annexure 1C[90], which is the Full Court judgment of Pretorius J (with Mngqibisa – Thusi J *et* Fourie J concurring) in Case No: 48123/17; 52883/17; and 46255/17, dated 16 February 2018.[91] This judgment deals with three review applications: one brought by SARB in respect of the parts of the SARB Report not dealt with in the judgment of Murphy J; and two more brought by the Minister of Finance / National Treasury (NT) and ABSA. The applications succeeded with punitive and personal costs ordered against the PP. The following are relevant:

123.1. Para 32: Prior to finalising it, the Public Protector had interviews/meetings with an official from the SSA and a certain Mr Stephen Mitford Goodson, an economist. However, the Public Protector did not disclose that she had also met with officials from the Presidency and representatives of an organisation known as Black First Land First (BFLF).

123.2. Para 56: The investigation is not under attack, but the conclusion, findings and remedial actions are. [This relates to an *in limine* point of the PP, namely that the review is delayed as the investigation commenced in 2012].

123.3. Para 69: The PP does not have to power to instruct the SIU as to how to deal with the matter she brings to its notice, i.e. she cannot direct the SIU to approach the President.

123.4. Para 87: The PP never informed ABSA that she was contemplating ordering the SIU to reinvestigate the lifeboat saga. This violated ABSA's right to procedural fairness and is also an indication of one-sided conduct by the PP.

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[90] Record at p. 113ff.

[91] *Absa Bank Limited and Others v Public Protector and Others* (48123/2017; 52883/2017; 46255/2017) [2018] ZAGPPHC 2; [2018] 2 All SA 1 (GP) (16 February 2018).

123.5. Para 88: The PP also failed to alert ABSA to a meeting she had with the SSA.

123.6. Para 94: The PP's report does not mention any meeting with the Presidency. However, in her answering affidavit, she mentioned a meeting of 25 April 2017. It later turned out that there was a further meeting with the Presidency which took place on 7 June 2017.[92]

123.7. Para 95: The court states that "[t]he reason that the PP gives for affording the Presidency and the SSA the opportunity to consult with her, after she had decided to change the focus and remedial action of her investigation substantially without affording the revering parties similar opportunity is disingenuous".

123.8. Para 101: The PP did not disclose in her report that she had meetings with the Presidency on 25 April 2017 and again on 7 June 2017. It was only in her answering affidavit that she admitted to the meeting of 25 April 2017, but she was totally silent on the second meeting which took place on 7 June 2017. She gave no explanation in this regard when she had the opportunity to do so. Having regard to all these considerations, a reasonable, objective and informed person, taking into account all these facts, would reasonably have an apprehension that the PP would not have brought an impartial mind to bear on the issues before her. It accordingly concluded that it has been proven that the Public Protector is reasonably suspected of bias.

123.9. Para 102: There is Constitutional Court authority to the effect that affected parties cannot make meaningful representations when

[92] See, in this regard also para 116, where the Court states that the question remains (regarding the PP's failure to mention the meetings) why the PP had acted in such a secretive manner and why she does not give an explanation for doing so.

they do not know what factors will weigh against them in a decision to be taken. In this instance, they were not informed at all before the final Report was published.

123.10. Para 127: The PP does not fully understand her duty to be impartial and to perform her functions without fear, favour or prejudice. She failed to disclose in her report that she had a meeting with the Presidency on 25 April 2017 and again on 7 June 2017. It was only in her answering affidavit that she admitted the meeting on 25 April 2017, but she was totally silent on the second meeting which took place on 7 June 2017. She failed to realise the importance of explaining her actions in this regard, more particularly the last meeting she had with the Presidency. This last meeting is also veiled in obscurity if one takes into account that no transcripts or any minutes thereof have been made available.

123.11. Para 107: The PP attempted to justify her findings *ex post* facto in the answering affidavit, in respect of the advice she obtained from economic experts. Her averment that she had received advice from economic experts whilst compiling the report is "doubtful". The reason for this is that the expert's report was only obtained after the SARB Report had been issued.

123.12. Para 116: The PP contends that she had no malice or sinister purpose when meeting with the Presidency and the State Security Agency without alerting ABSA and the SARB that she had done so. The question remains unanswered as to why she had acted in such a secretive manner and she does not give an explanation for doing so.

123.13. Para 117: [I]t is possible that the PP had not fully taken the court into her confidence when deposing to paragraph 2 of the answering affidavit, where she set out: "[W]here I make averments relating to economics I do so on the basis of advice received from economic experts during the investigation of the complaint referred to below, which advice I accept as correct". Dr Mokoka's report was obtained after the final report had been issued and the applications for review had been served. The second meeting with the Presidency was not divulged in the Report.

123.14. Para 120: The PP did not conduct herself in a manner which should be expected from a person occupying the office of the Public Protector. The SARB's submissions in this regard are warranted. She did not have regard thereto that her office requires her to be objective, honest and to deal with matters according to the law and that a higher standard is expected from her. She failed to explain her actions adequately.

[124] The Full Court refused leave to appeal.[93] The PP then sought (and was granted) leave to appeal directly to the Constitutional Court against the personal and punitive costs order only.

[125] The judgment of the Constitutional Court (Annexure 1D),[94] was handed down on 22 July 2019. Khampepe *et* Theron JJ wrote for the majority with Mogoeng CJ *et* Goliath AJ dissenting.[95] Apart from the issue of costs, the Constitutional Court judgment deals with the Full Court ruling on the declaratory order sought by the SARB that the PP abused her office.

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[93] Record at p. 186ff.
[94] Record at p. 190ff
[95] *Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019).

[126] Ultimately, the personal and punitive costs order made by the Full Court was upheld by the majority of the Constitutional Court and the application for the declaratory relief was dismissed.

[127] The relevant parts of the minority judgment of Mogoeng CJ are the following (our underlining):

127.1. Para 64: The minority was severely critical of the PP's legal findings. At para 64 they stated that: "[T]he Public Protector got the law completely wrong by acting as if it was open to her to direct Parliament to amend the Constitution and even in a specific way." The minority goes on to say at para 65 that "[T]he Public Protector's remedial action was a known or predictable non-starter in legal circles". It is then suggested that the remedial action was so ill-advised that it posed no real threat to the SARB.

127.2. Para 81: The minority was also severely critical of the PP's response to the allegation that she *ex post facto* introduced the economic expert report, saying at para 81: "[I]t is true that the Public Protector failed to give answers that could convincingly put to rest questions around some of these points of criticism. She fumbled around in a way that is somewhat concerning. It baffles me that she was unable to explain herself even with the benefit of legal representation."

[128] The relevant parts of the majority judgment of Khampepe *et* Theron JJ are the following (our underlining):

128.1. Para 162: The court has no reason to interfere with the finding of the High Court that the PP forfeited her immunity (against personal liability) because she acted in bad faith.

128.2. Para 205: The Public Protector's persistent contradictions, however, cannot simply be explained away on the basis of innocent mistakes. This is not a credible explanation. The Public Protector's conduct in the High Court warranted a *de bonis propriis* (personal) costs order against her because she acted in bad faith and in a grossly unreasonable manner.

128.3. Para 170: The Full Court did not conflate the principles of bias and *audi alteram partem*. Both findings were made against the PP.

128.4. Para 181: The PP's explanation of the meeting with the SSA "[i]s not only woefully late but also unintelligible".

128.5. Para 183 that "[i]t is disturbing that there is no explanation from the Public Protector as to why none of her meetings with the Presidency were disclosed in the final report." [See, also, para 194]: "[I]t follows that the [Full] Court did not misdirect itself in finding that the Public Protector failed to either fully or genuinely disclose her meetings with the Presidency." [See, also, para 195]: "[T]his conduct clearly falls foul of her obligation as a public litigant to be candid with the court and violates the standards expected of a Public Protector in light of her institutional competence." [And at para 201]: "[T]hus, despite three successive explanations for the 7 June 2017 meeting with the Presidency, the Public Protector still has not come clean and frankly explained why the meeting was held."

128.6. Para 186: "[T]he record that was produced by the PP was thrown together, with no discernible order or index, and excluded important documents. The Public Protector is wrong when she claims that she "[f]iled the entire record". She did not. She omitted pertinent documents from the record, some of which were only put up for the

first time as annexures to her answering affidavit in the High Court and others, which were disclosed for the first time in this court."

128.7. Para 187]: "[T]he Public Protector's failure to include these documents in the record, or to account for this failure, stands in stark contrast to her heightened obligation as a public official to assist the reviewing court."

128.8. At para 207: "[T]he Public Protector's entire model of investigation was flawed. She was not honest about her engagement during the investigation."

128.9. Para 214: The PP's affidavit in the Full Court proceedings was "[m]isleading because it conveyed that the economic analysis that underpinned the report was based on expert economic advice, which it was not."

128.10. At para 217: "[T]he Public Protector either failed entirely to deal with the allegations that she was irresponsible and lacking in openness and transparency, or, when she did address them, offered contradictory or unclear explanations. She gave no explanation as to why there were no transcripts of the meetings with the Presidency and the State Security Agency and why the vulnerability of the SARB was discussed with the State Security Agency. No explanation was provided for the meeting with the Presidency on 7 June 2017. Instead, another meeting with the Presidency, held on 25 April 2017, was disclosed for the first time by the Public Protector in her answering affidavit in Full Court proceedings."

128.11. At para 237: "[R]egard must be had to the higher standard of conduct expected from public officials, and the number of falsehoods that have been put forward by the Public Protector in the

course of the litigation. This conduct included the numerous 'misstatements', like misrepresenting, under oath, her reliance on evidence of economic experts in drawing up the report, failing to provide a complete record, ordered and indexed, so that the contents thereof could be determined, failing to disclose material meetings and then obfuscating the reasons for them and the reasons why they had not been previously disclosed, and generally failing to provide the court with a frank and candid account of her conduct in preparing the report."

[129] In her written response to this Panel, the PP contends that:

129.1. She had already provided explanations under oath and that no useful purpose would be achieved by repeating them.[96]

129.2. Her reports speak for themselves, except to the extent qualified or further clarified by her in the pleadings.[97]

129.3. The charges in paragraph 1.1 of Annexure A to the motion relate to an overall allegation that she denied various parties their right to *audi alteram partem*. Such findings are made on a daily basis by the courts in respect of other office bearers and it has never been suggested that they should be impeached for this reason.[98]

129.4. The charges in paragraph 1.2 of Annexure A to the motion relate to the failure to give full disclosure, misrepresentations and contradictory evidence, which are commonplace criticisms levelled by the courts against litigants and not a basis for impeachment.[99]

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[96] PP's representations at p. 31, para 103.
[97] PP's representations at p. 31, para 103.
[98] PP's representations at p. 32, para 108.
[99] PP's representations at p. 34, para 115.

129.5. Regarding the allegation of bias, the Constitutional Court did not put the issue higher than a perception of bias.[100]

129.6. The Office of the Public Protector is comparable to that of a judge. The remedy for being wrong is invalidity or reversal and not removal from office.[101]

129.7. The views of the minority of the Constitutional Court in the SARB matter may be taken into account and may prevail in the context of a section 194 enquiry.[102]

129.8. The majority judgment is influenced by judicial norms and standards such as the *Plascon-Evans* rule and the court of appeal [presumably the Constitutional Court] cannot intervene with the lower court merely because it was wrong but only when a misdirection was alleged and proved.[103] These considerations have no place in a legislative process. The call for a *holus bolus* transplantation of court judgments in the section 194 enquiry must be rejected.[104]

129.9. In respect of the allegation of incompetence, apart from regurgitation of the words of judges and the duplication of charges and evidence, no *prima facie* evidence of incompetence as envisaged in section 194 of the Constitution, is provided.[105]

[130] This response from the PP does not come close to casting doubt on the findings in the three judgments analysed above. We say this for the following reasons:

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[100] PP's representations at p. 32, para 106.
[101] PP's representations at p. 33, paras 110, 112.
[102] PP's representations at p. 33, para 113.
[103] PP's representations at p. 34, para 114.
[104] PP's representations at p. 34, para 114.
[105] PP's representations at p. 35, para 120.

130.1. It is of no assistance to say that the PP has provided explanations under oath and that no purpose would be served by repeating them. The reality is that, despite those explanations, the courts made very serious findings against her. Whilst the Panel is not bound by those findings, we can hardly deviate from them without further and better explanations from the PP so as to tilt the scales in her favour. Such explanations have not been forthcoming. We hold the view that without any answer and explanation the averments stand. This means that they should be accepted as correct.

130.2. It is simply not correct that the findings made against the PP are of the ordinary variety that are made on a daily basis against litigants by the courts. Both the minority and the majority of the judges of the Constitutional Court made clear how high the threshold is for awarding personal and punitive costs against a public official. That threshold was met because the PP's conduct fell so far short of what was required of a person in her position. The details of how the PP fell short are set out, in detail, in the various judgments, as quoted above. In any event, the PP seems to be oblivious of the special nature of the Office of the Public Protector. She cannot simply compare herself with ordinary public officials.

130.3. It may well be that the courts in the SARB matter only made a finding of a perception of bias. However, that is in and of itself a serious finding, especially when made against the Office of the Public Protector.

130.4. The contention of the PP that the minority view of the Constitutional Court may be taken into account is hardly deserving of a response. As we have described above, even the minority was severely critical of the PP's legal findings and conduct.

130.5. The PP contends that appeal [she probably means review] is the remedy if she makes a mistake. But this misses the point. In the proceedings before us the question is not whether the PP is wrong, but whether she committed misconduct or is incompetent. Removal, and not appeal or review, is the remedy for misconduct or sustained incompetence.

130.6. The fact that the findings against the PP were made in motion proceedings counts in her favour and not against her. In such proceedings, the courts favour the version of a respondent [as the PP was in the review proceedings].[106] Despite this, very serious findings were made against her.

130.7. We fail to see why the Member could not substantiate the charges by referring to the findings made in the various judgments, particularly the judgment of the Constitutional Court regarding the SARB Report. It was for the PP to deal with those findings rather than to accuse the Member of regurgitating the words of the judges.

[131] In our view, the findings in all three judgments but particularly those of the majority of the Constitutional Court regarding the SARB investigation, report and ensuing litigation must be the focus of our assessment on whether the PP committed misconduct or is incompetent. Although the Constitutional Court judgment merely considered the issue of personal and punitive costs, the spotlight was placed on the degree to which the PP deviated from the standard of conduct expected from a person in her position. The Constitutional Court judgment is accordingly of particular relevance.

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[106] Simply put and generally speaking, in a court process brought by way of motion, i.e. on papers only, it is well-established that where there is a dispute of fact, the version of the respondent must prevail.

[132] Having regard then to the evidence we find that there is *prima facie* evidence of incompetence (whether the instances add up to "sustained" incompetence is discussed further below) for at least following reasons:

132.1. It is a basic principle of law that parties must wait for outcomes of a process before rushing to court to review the exercise of public power. By taking the point that the review was unreasonably delayed the PP appears be oblivious to this basic legal principle.

132.2. The PP lacked the knowledge that she cannot order Parliament to amend the Constitution. No satisfactory explanation is given as to why she did not know this. This appears to be a flagrant breach of the principle of separation of powers.

132.3. When contemplating to grant such radical remedial action, with such drastic consequences, anyone with skill and ability would have obtained independent legal advice and would have tested the proposition with the SARB itself. The PP did not do so.

132.4. Anyone in the position of Public Protector should know that one cannot materially alter the scope of an investigation (by including an "investigation" regarding mandate of the SARB) without affording *audi* to parties affected thereby. The difficulty is that although the final report differed substantially from the preliminary report the affected persons were not heard in relation to the remedial action. This impacts on the constitutional procedural fairness rights, legality and constitutes a failure to comply with section 7(9) of the PPA itself.[107] As remarked by the Full Court at para 99, the right to be heard is integral to the constitutional scheme.[108] *Prima facie* the

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[107] *EFF v Speaker, NA* 2016 (3) SA 580 (CC) at para 60; *South African Broadcasting Corporation Soc. Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) at para 38.

[108] The Constitutional Court relied on *Joseph & Others v City of Johannesburg* (CC) 2010 (4) SA 55 (CC) at para [42] that "[s]uch participation a safeguard that not only signals respect for the dignity and worth of the

evidence shows that the PP was oblivious to the fact that safeguarding the rights of those implicated would enhance the legitimacy of her decision. That is simply common sense.

132.5. It is apparent from the judgments that the PP acted *ultra vires* her powers and indeed contrary to her constitutional and legislative powers in sections 181, 182 of the Constitution and section 7 of the PPA.

132.6. Finally, anyone in the position of Public Protector would have ensured that the Rule 53 record contains all of the relevant documents in respect of the review. The fact that such documents were not included and only revealed when the answering affidavit was compiled shows a lack of ability or skill to perform her duties effectively and efficiently.

[133] We find *prima facie* evidence of misconduct in the sense of an intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office for the following reasons:

133.1. The failure to reveal in her report (and to an extent in subsequent affidavits in the litigation) all meetings with the SSA and President.

133.2. The misrepresentation in her affidavit that the relevant parts of the SARB Report were compiled based on the advice of an expert in economics.

133.3. The failure to honour an agreement with the SARB to make her final report available to the SARB five days before its release.

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participants but is also likely to improve the quality and rationality of the administrative decision-making, and to enhance its legitimacy."

[134] In order to avoid repetition, we relate our findings to the charges of the Member in Annexure A to this report.

(vi) Vrede Dairy Project

[135] On 8 February 2018, the PP released a report titled "[A]llegations of maladministration against the Free State Department of Agriculture – Vrede Integrated Dairy Project" (the Vrede Dairy Report).

[136] The Vrede Dairy Report concerned an intervention commenced in 2012 by the Free State Department of Agriculture aimed at revitalising the agricultural sector. It was intended to uplift the Vrede community, through creating sustainable job opportunities. However, very serious irregularities, also possibly corruption, arose from the management of the Vrede Dairy by an entity called Estina (Pty) Ltd (Estina).

[137] Following investigations by NT and the investigative journalists of amaBhungane, Jankielsohn MP, representing the DA in the Free State provincial legislature lodged a series of complaints with the PP concerning the project. These complaints were lodged between 2013 and 2016.

[138] Adv Madonsela published a provisional report on the project in November 2014. The investigation was taken over by the current PP, who published her final report on 8 February 2018. The Vrede Dairy Report was accordingly the culmination of more than four years of investigation by the PP and Adv Madonsela.

[139] The PP was taken on review in respect of the Vrede Dairy Report by the DA and the Council for the Advancement of the South African Constitution (CASAC).

[140] Before dealing with the judgments in the matter we deal with certain aspects of the evidence as it emerges from the affidavits filed in the review.

[141] The charges of the Member relating to the Vrede Dairy Project are, *inter alia*, that the PP failed to conduct a lawful and meaningful investigation and to grant appropriate remedial action; that she failed to appreciate her legal duty to come to the aid of the vulnerable and marginalised members of society – e.g. the intended beneficiaries of the project; and that her conduct demonstrates a misunderstanding of the Constitution and administrative principles as well as to appreciate her heightened duty towards the courts.

[142] The DA's main contention was that the PP's investigation was inadequate and ineffective and that one of the complaints was not investigated at all.[109] In the review application by the DA, the party also sought a declaratory order that the PP acted unlawfully and in violation of her constitutional mandate entrenched in section 182 of the Constitution.

[143] Mr James Selfe (Selfe), who deposed to affidavits on behalf of the DA emphasised the PP's failure to investigate the most serious allegations of corruption, money laundering and theft by the Gupta family and their associates in the Free State government.

[144] The third complaint, in particular, implicated the Premier and Mr Zwane, the then MEC for Agriculture. It was not, according to the DA, investigated at all.

[145] The Vrede Report investigation has a long history. It is not necessary to give detail of what happened prior to the litigation. Suffice to mention that the investigation was started by Adv Madonsela, who also issued a provisional report proposing certain remedial action. The current PP proceeded with the

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[109] Dr Jankielsohn submitted three complaints to the PP relating to the Vrede Dairy Project, namely on 12 September 2018, 28 March 2019 and 10 May 2018.

investigation and produced the final report, which was the subject of the review proceedings.

[146] Evident from the PP's report is that the remedial actions and findings of the provisional report by Adv Madonsela were removed.

[147] In the litigation, the PP filed a notice to abide but also an answering affidavit. In her answering affidavit, she contended that the PPA confers on her a very wide discretion, including an opt-out option, i.e. not to investigate even complaints that fall within her jurisdiction. The PP contended that her exercise of the opt-out option should not give rise to accusations of bad faith and incompetence.[110]

[148] The PP denied allegations of failing to conduct proper and effective investigations; or to appreciate the nature and importance of her constitutional function; of bad faith; abuse of powers, acting for an ulterior motive; and of being compromised and incompetent in her functions.[111]

[149] She explained that the so-called *prima facie* evidence of fraud, theft and money laundering was investigated by the Hawks; that arrests were made and preservation orders were obtained.[112]

[150] The PPP also said that she is not compelled, on the basis of media publications, to investigate allegations on own initiative, especially given the lack of capacity and financial resources that her office was experiencing.[113]

[151] The PP averred that the media publications implicating the Premier emerged after the investigation had been completed and the provisional report prepared by her predecessor. The PP averred that the conduct investigated by her

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[110] Record at p. 1587, AA at para 7.
[111] Record at p. 1631-3, AA at para 91.
[112] Record at p. 1632, AA at para 91.4.
[113] Record at p. 1633, AA at para 91.5.

predecessor, and subsequently carried forward by her, "[h]ad nothing to do with the Premier and the MEC".[114]

[152] Subsequently, however the PP did not refute the allegations in Selfe's affidavit implicating the Premier and MEC Zwane. In the face of the Treasury report findings, she denied that the Premier and the MEC were involved or implicated in the matter under investigation.

[153] In the replying affidavit, Selfe characterises the denials by the PP as not plausible or acceptable. Whilst DA, noted that the claims against the Premier and the MEC were made in media articles either before her tenure or after the provisional report had been prepared, this provided no justification for the PP's failures to investigate. These aspects were covered by Jankielsohn's third complaint.

[154] It is a matter of public record that the PP released another report on the Vrede Dairy project on 21 December 2020. However, the PP did not place this report before us nor does she claim that the fresh report cures some or all of the criticism levelled at her report which was set aside by the High Court. In the circumstances we are unable to take the new report into account in our assessment of her conduct. In any event, we are precluded by the NA rules from doing so.

[155] We now turn to deal with the judgments of the court regarding the Vrede Dairy Report.

[156] In the original annexures to the Member's motion, there were three High Court judgments relating to these review proceedings (annexures 2D, 2E and 2F). These are all judgments by Tolmay J handed down during 2019. The first deals with the merits, the second deals with costs and the third deals with leave to appeal. The outcome was as follows: (i) the Vrede Dairy Report was

[114] Record at p. 1637, AA at para 95.4.

reviewed and set aside; (ii) personal and punitive costs were awarded against the PP (7.5% of the total costs); and (iii) the applications for leave to appeal was refused, with costs.

[157] Also before us, are the orders of the SCA[115] and CC[116] dismissing, with costs, applications for leave to appeal against the judgments of Tolmay J to those courts. The judgments of Tolmay J are accordingly the final word on the reviews instituted by the DA and CASAC of the Vrede Dairy Report.

[158] We start with annexure 2D,[117] i.e. the judgment on the merits handed down by Tolmay J on 20 May 2019.[118] Relevant are the following statements and findings:

158.1. Para 49: The steps taken by the PP seem wholly inadequate, considering the magnitude and importance of the complaints raised.

158.2. Para 60: The court quizzed on what basis the PP found that compliance with the legal requirements for concluding a public-private partnership (PPP) was not required for the Estina agreement, stating "[o]n what basis she could justifiably come to such a conclusion is unclear. It points either to ineptitude or gross negligence in the execution of her duties."

158.3. Para 67: "[O]ne would have expected the PP to have engaged in an examination of the true, inherent nature of the agreement entered into between the Department and Estina. The PP did not enquire any further into the nature of the irregularities committed, or

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[115] Record at p. 3248.
[116] Record at p. 3249.
[117] Record at p. 1389.
[118] *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* (11311/2018; 13394/2018) [2019] ZAGPPHC 132; [2019] 3 All SA 127 (GP); 2019 (7) BCLR 882 (GP) (20 May 2019).

whether the agreement and execution thereof resulted in misappropriation of public funds. This is inexplicable seen in the broader context of her duties and powers."

158.4. Para 75: "[t]he findings of irregular expenditure in the provisional report [authored by Adv Madonsela] were omitted from the final report. In the light of all the facts, this omission by the PP is inexplicable. One may justifiably ask whether this was done for some ulterior purpose. Unfortunately no explanation was given by the PP for these changes."

158.5. Para 79: "[I]t seems that the PP chose to simply ignore the information supplied to her and then blamed financial constraints for her failure to execute this simple task [of ascertaining the market value of cattle]."

158.6. Para 94: "[I]nterviewing and taking statements from the implicated officials and interviewing the journalist who had reported on the project, seems to me to be quite simple and could not have resulted in huge expenditure, the PP's failures to undertake these simple and cost effective measures are to put it lightly, of serious concern, as it may point to a concerning incomprehension of the nature and extent of her obligation towards the people of this country and her obligations in terms of the Constitution and the PP Act."

158.7. Para 113: "[T]he PP, in order to justify her stance pertaining to the remedial action in respect of the HOD, stated that the Executive Authority (i.e. the MEC) has no power to discipline a provincial HOD. She contended that, only the Premier has that power in terms of the Public Service Act. However, this legal conclusion is obviously incorrect."

158.8. Para 116: "[t]he PP afforded the Premier, the discretion to determine who the "implicated officials" were as already stated. … To put people who are implicated in wrongdoing in a position to investigate that very same wrongdoing, is absurd and goes against every known principle of law and logic."

158.9. Para 129: "[I]t is crucial to note that these remedies were removed from the provisional Report before the PP was even aware of any parallel investigations, which immediately causes one to doubt the truthfulness of this explanation [i.e. that the remedial action got overtaken by events]. The aforesaid is clear, because they had already been removed from the Report when the section 7(9) notices were sent to the Premier and Mr Thabethe, among others, on 7 June 2017."

158.10. Para 140: "[I]t is accordingly clear that the PP's contention in this regards (sic) is incorrect" [referring to a finding that the Auditor-General does not have the power to do forensic or due diligence investigations].

158.11. Para 45: "[T]he PP committed yet another error of law, when she assumed that she lacked such a power [i.e. to instruct the SIU / AG to conduct an investigation]. The evidence suggested, that she was aware that she possessed the power, but elected nevertheless to exclude the remedial action."[119]

158.12. Para 148: "[T]he PP should rise above any political agenda real or perceived and should look objectively at the complaints lodged, irrespective of where it may emanate from, and whatever the political objectives may be. Anyone, including any political party,

[119] The High Court calls this a "[p]rofound mistake of law" at para 156.

should feel confident that the PP will investigate any legitimate complaint properly and objectively."

[159] Turning to annexure 2E,[120] i.e. the judgment on the costs handed down on 15 August 2019,[121] the following are relevant (our underlining):

159.1. Para 25: "[T]he PP's conduct was far worse, and more lamentable, that that set out the SARB matter. The PP turned a blind eye and did not consult with the intended beneficiaries of the Estina Project. Her conduct during the entire investigation constitutes gross negligence."

159.2. Para 29: "[T]he PP made use of two sets of counsel [one set for the Democratic Alliance review and another one for the CASAC review even though they both challenge the same Report] and this shows a total disregard for the taxpayers, who will have to foot the bill."

[160] Finally, there is annexure 2F,[122] which is the dismissal of the Public Protector's application for leave to appeal by the High Court,[123] handed down on 13 December 2019. This short judgment does not add anything to what is stated above.

[161] As stated above, the SCA and the Constitutional Court dismissed, with costs, applications for leave to appeal to those courts.

[162] In her written response to this Panel, in respect of the Vrede Dairy matter, the PP contends that:

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[120] Record at p. 1456.
[121] *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* (11311/2018; 13394/2018) 2019 JDR 1582 (GP) (15 August 2019).
[122] Record at p. 1473
[123] *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* (11311/2018; 13394/2018) (13 December 2019).

162.1. She had already provided explanations under oath and that no useful purpose would be achieved by repeating them.[124]

162.2. Her reports speak for themselves, except to the extent qualified or further clarified by her in the pleadings.[125]

162.3. The consequence of the PP being wrong is to have a report set aside on review, not impeachment.[126]

162.4. The charges relate to the failure to give full disclosure, misrepresentations and contradictory evidence, which are commonplace criticisms level by the courts against litigants and no basis for impeachment.[127]

162.5. In respect of the allegations of incompetence, the PP contends that, apart from regurgitation of the words of judges and the duplication of charges and evidence, no *prima facie* evidence of incompetence as envisaged in section 194 of the Constitution, is provided.[128]

[163] It is apparent that the PP's response regarding the Vrede Dairy Report is very similar to her response to the SARB Report. We reiterate what we said about her response: it simply does not cast doubt on the serious findings made against her. Moreover, the findings made against her are not ordinary, run of the mill findings, as the PP suggests. The findings are serious.

[164] Having regard then to the evidence we find that there is *prima facie* evidence of incompetence[129] for the following reasons:

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[124] PP's representations at p. 31, para 103.
[125] PP's representations at p. 31, para 103.
[126] PP's representations at p. 35, para 118.
[127] PP's representations at p. 35, para 119.
[128] PP's representations at p. 35, para 120.
[129] Whether the instances add up to "sustained" incompetence is discussed further below.

164.1. Lack of knowledge that the public protector may order investigations to be conducted by the SIU and AG.

164.2. Lack of appreciation that, in law, a member of a provincial executive council is entitled to discipline the head of a department.

164.3. Failure to interview the intended beneficiaries, implicated officials and the journalist who had reported on the project.

164.4. Failure to obtain the market value of the goods and services procured and failure to take into account the information submitted by the DA to her regarding same.

[165] We find *prima facie* evidence of misconduct in the sense of an intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office as required by the Constitution in the following respects:

165.1. Failure to investigate the irregularities and misappropriation of funds which resulted from the Estina agreement in contravention of the empowering legislation (the PPA).

165.2. Removal of findings made in the provisional report, from the final report, without proper explanation.

165.3. Affording the Premier, who was implicated in wrongdoing, the discretion to determine who the wrongdoers (officials) were.

165.4. Failure to investigate the third complaint that was lodged on 10 May 2016 by Dr Jankielsohn.

165.5. Removing the remedial action in the provisional report which referred the matter for further investigation by the SIU and the AG.

[166] We relate our findings to the charges of the Member in Annexure A to this report.

(vii) Financial Sector Conduct Authority (FSCA) and Tshidi

[167] This component of the charges concerns Report 46 of 2018/19, which was an investigation into Allegations of Maladministration, Abuse of Power and Improper Conduct by the Former CEO of the (then) FSB, Adv DP Tshidi (Tshidi), as well as Systemic Corporate Governance Deficiencies at the FSB. We refer to the report, which was issued on 28 March 2019, as the "FSCA Report".

[168] The Member submitted as Annexures 3A and 3B to the original motion, the PP's Report as well as the papers in the matter between the successor to the FSB, the FSCA and the PP, Case No GNHC 39589/19. The FSCA was the first applicant and Tshidi was the second applicant in this matter.

[169] The FSCA Report contained findings that (i) Tshidi acted improperly in the nomination of a certain Mr Anthony Louis Mostert (Mostert) as a curator to manage certain pension funds; (ii) that Tshidi failed to manage a conflict of interest between Mostert's role as curator and the appointment of his law firm to litigate on behalf of the pension funds; and that (iii) Tshidi had misled a Minister when briefing him to reply to Parliamentary questions concerning Mostert's curatorships.[130]

[170] As part of the supplementary documents, the Member submitted, as Annexure 12, the judgment and order of the High Court in the above matter, namely *Financial Sector Conduct Authority and Another v Public Protector*, Case No. 39589/19 (Gauteng Division, Pretoria). This is a judgment of Janse Van Nieuwenhuizen J delivered on 9 October 2020. What happened was that:

[130] Record at pp. 1983 – 1987

170.1. The PP conceded the review.

170.2. Evident from the pleading, there was, however, a dispute as to whether the matter ought to be remitted to the PP and, related to that issue, whether the PP ever had jurisdiction to investigate the complaint. In her answering affidavit, the PP suggested that the declaration of constitutional invalidity for lack of jurisdiction brought an end to the complaint.[131] In this regard, the PP's position is difficult to understand. The law is clear. The PP was legally not precluded from investigating the same complaint in the future using her broad powers in terms of the PPA. This begs the question why then did the PP believe that the declaration to review and set aside the report for lack of jurisdiction rang the end of the complaint and investigation?

170.3. Ultimately, the court reviewed and set the Report aside and declared it constitutionally invalid constitutionally invalid "[f]or lack of jurisdiction".[132] This suggests that the matter was not remitted. The judgment however records that the PP is not precluded from reinvestigating the same matter in future.[133]

170.4. The review in the Tshidi matter was brought under the constitutional principle of legality, the subset of the rule of law. Whilst a challenge was launched against the remedial action in paras 7.1 and 7.3, no challenge was launched in respect of remedial action in para 7.2, in which the Conduct Authority (CA)) was directed to develop and adopt a Policy to regulate the process for nominating curators. This means that remedial action in 7.2 passed muster and the PP succeeded in this regard.

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[131] Record at p. 2076, AA at para 14.
[132] Record at p. 4003, para 31.
[133] Record at p. 4001, para 21.

[171] In her written response to this Panel, PP contends, in respect of the FSCA matter, that:

171.1. The alleged incompetence is solely hinged upon the fact that the PP, upon obtaining legal advice, filed a notice to abide.[134]

171.2. She did so because she wanted to expand on her report, due to her having obtained subsequent relevant information, and information which had been wrongly concealed by one of the investigators.[135] She had obtained legal advice from Adv Smith SC (the advice is annexed to her written representations).

171.3. Litigants file notices to abide frequently and that that in itself cannot, without more, constitute *prima facie* evidence of incompetence.[136] In other words, no adverse inference can be drawn from the mere act of abiding.[137] Inferences can only be drawn from proven facts, and here the only proven fact is the filing of the notice to abide.[138]

[172] There is one aspect relating to the PP's representations which must be corrected at the outset: the PP did not abide the outcome of the review but she proposed that a consent order be taken reviewing and setting aside the FCSA Report and that the matter be remitted to her.[139] In other words, the PP accepted that the FCSA Report had to be reviewed and set aside.[140] The basis on which this concession was made, is however not clear. We revert to this aspect further below.

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[134] PP's representations at p. 36, para 123.
[135] PP's representations at p. 36, para 123.
[136] PP's representations at p. 36, para 123.
[137] PP's representations at p. 36, para 125.
[138] PP's representations at p. 37, para 126.
[139] Record at p. 2074, para 7.
[140] Record at p. 2076, para 13.

[173] Important, for present purposes, are the following allegations made in the court papers by FSCA and Tshidi against the PP:

173.1. The PP made no attempt to deal with the very serious allegations levelled against her in the founding papers.[141] Public office-bearers have a particular responsibility to answer meaningfully when their official conduct and decisions are impugned, and to account for the exercise of their public power.[142] The PP failed to meet this responsibility.

173.2. The PP failed to give any reasoned justification for her findings.[143]

173.3. The PP failed to address or discuss the credibility of the various sources of information she considered and their reliability. The PP failed to assess the probabilities of their evidence been true. This was necessary because the PP was faced with mutually destructive versions.[144]

173.4. It appeared that the PP was "[g]oing through the motions of meeting with [Tshidi and others] and had already decided, for whatever reason, to uphold the allegations"."[145] The PP also failed to deal with the allegation that she was not concerned to establish the truth of the allegations but was blatantly biased against Tshidi and the FSB and did not have an open mind in assessing the allegation.[146]

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[141] Record at p. 2093, para 4.
[142] Record at p. 2094, para 7.
[143] Record at p. 2095, para 8.
[144] Record at p. 2095, para 8.
[145] Record at p.2008 para 38 also quoted at p. 2096
[146] Record at p.2008 para 38 also quoted at p. 2096

173.5. The PP failed to disclose the identity of the true complainant (a Mr Simon Nash) as source of the allegations and alleged evidence against Tshidi and others.[147]

173.6. The PP failed to disclose the fact of her meeting with the EFF and Mr Nash's attorney of record.[148]

173.7. The PP failed to disclose that extensive submissions were received from Mr Nash's advocate, Adv De Bruyn, and which submissions were relied upon by her office in compiling the FSCA Report.[149]

173.8. The PP failed to obtain responses to the submissions from Mr Nash's lawyers. She selectively collated the evidence in support of the complaint.[150]

173.9. The PP disregarded the documents filed by Tshidi and others and the evidence of third parties that supported them.[151]

173.10. In her answering affidavit the PP made bald, unsubstantiated and general denials leaving many serious allegations against her unanswered, indicating a flawed and ineffectual approach on her part.[152] Office bearers have the responsibility to answer allegations and account when their official conduct and decisions are impugned.

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[147] Record at p. 2097, para 9.
[148] Record at p. 2097, para 31.3.
[149] Record at p. 2097, para 31.4
[150] Record at p. 2097, para 32.
[151] Record at p. 2098, para 33.
[152] This kind conduct is view in a serious light by our courts. See *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 13.

[174] We find that there is *prima facie* evidence of incompetence[153] for the following reasons –

174.1. She provided no reasoned justification for her findings;

174.2. She failed to address or discuss the credibility of the various sources of information she considered, their reliability or the probabilities of them being true when faced with mutually destructive versions;

174.3. She did not afford Tshidi and others an opportunity to respond to the submissions of Mr Nash's lawyers;

174.4. She disregarded the documents filed by Tshidi and others and she failed to consider evidence of third parties that supported them. There is indeed evidence of selective collation of evidence and answering of allegations against her.[154]

[175] Additionally, the evidence of *prima facie* incompetence is bolstered by the further evidence in the Tshidi matter where the applicants stated, categorically, that they would not want the PP to investigate the complaint because they lost confidence in her. Their reasons for holding this view included the PP's alleged failures to rebut serious allegations such as perceived bias, bad faith, dishonest; for her unreasoned findings, selective evidence, ignoring or disregarding third party exculpatory evidence and committing errors of law and fact but still failing to own up her shortcomings.[155]

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[153] Whether the instances add up to "sustained" incompetence is discussed further below.
[154] *Public Protector v SA Reserve Bank* 2019 (6) SA 253 (CC) at para 152: "[T]he Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court."
[155] Record at p. 2103, para 19.

[176] We find *prima facie* evidence of misconduct in the nature of an intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office in the following respects:

176.1. The PP failed to deal with the allegation that she was going through the motions and had already made up her mind to uphold the allegations against Tshidi and others.

176.2. The PP failed to disclose that fact of her meetings with the EFF; Mr Nash's attorney of record; and the extensive submissions received from Mr Nash's advocate, Adv De Bruyn.

[177] We relate our findings to the charges of the Member in Annexure A to this report.

(viii) Samuel

[178] This component of the charges concerns a letter dated 11 February 2020, from Mr SH Samuel (Samuel), the provincial representative of the PP, to the Speaker of the NA requesting an investigation into the conduct of the PP on various grounds. An affidavit, also dated 11 February 2020, is attached to the letter. The affidavit sets out the evidence to which we refer below.

[179] It appears that there are no court proceedings pending regarding Samuel's letter and affidavit.

[180] The overarching theme of Samuel's affidavit is that the PP is responsible for creating very unhealthy working conditions; and unleashing a tyranny with a view to destroy the Office.

[181] In her written response to this Panel, in respect of Samuel's affidavit, the PP contends that:

181.1. The allegation of a mismanagement of resources has no merit. It has been widely reported that the office of the current PP has for the first time in 26 years obtained a clean audit.[156]

181.2. The origin of the affidavit of Samuel is unclear and the PP has not been given an opportunity to deal therewith.[157]

181.3. The affidavit is an *ex post facto* contrivance meant to overcome the objection against retrospectivity.[158] The affidavit was signed on 11 February but refers to events of 8 February 2020, which shows that it was hastily drafted, either overnight or within a day or two.[159]

181.4. The allegations are nothing short of the irrelevant ramblings of a disgruntled employee who has been convicted of the crime of assaulting a member of the public.[160]

181.5. In referring to complaints by other employees without confirmatory affidavits, the allegations constitute inadmissible hearsay.[161]

181.6. Even if true, the allegations cannot constitute *prima facie* proof of impeachable misconduct or incompetence as envisaged in section 194 of the Constitution.[162]

181.7. The Speaker did not refer the complaint to the portfolio committee on justice and it is reasonable to assume or infer that the Speaker must have decided not to take any action due to the frivolity of the

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[156] PP's representations at p. 39, para 132.
[157] PP's representations at p. 39, para 134.
[158] PP's representations at p. 39, para 135.
[159] PP's representations at p. 39, para 135.
[160] PP's representations at p. 40, para 136.
[161] PP's representations at p. 40, para 136.
[162] PP's representations at p. 40, para 137.

complaint. The complaint of Samuels cannot be converted into a section 194 motion. Samuels is not a member. His remedies lie in the internal processes of the Office of the Public Protector and the courts.[163]

181.8. Samuels [the PP refers to Baloyi, but, read in context, it appears to be a reference to Samuels] has since been dismissed in December 2020 following an independent disciplinary process. It remains to be seen whether he will elect to exercise his rights in terms of the applicable labour legislation.[164]

[182] We do not believe that section 194 of the Constitution or the NA rules exclude misconduct or incompetence in the context of labour relations from being considered. We do, however, accept that the allegations by Samuel are mostly too vague and general to rise to the level of *prima facie* evidence of misconduct or incompetence against the PP. For instance, there could be any number of reasons for the excessive amounts spent on legal fees or for the lack of vehicles for investigators and outreach officers. We have also not taken into account hearsay allegations. This Panel does not, however, believe that the evidence by Samuel can be disregarded in its entirety as contended for by the PP. More particularly:

182.1. We have already stated that the principle against retrospectivity is not applicable in the present instance.

182.2. We also fail to see why the affidavit of Samuel is a contrivance to overcome the objection against retrospectivity.

182.3. Further, the fact that Samuel may have been a disgruntled employee who has apparently been dismissed from his position by

[163] PP's representations at p. 40, para 139.
[164] PP's representations at p. 41, para 140.

an independent entity does not mean that he may not submit relevant evidence to a member who may use such evidence when laying a charge in terms of the NA rules. On the information before us, Samuel's motive for submitting evidence, even if it is one of seeking revenge, cannot lead to the exclusion of relevant evidence. Nor can the fact that Samuel was later dismissed be of relevance, particularly given that a record of the proceedings has not been provided to us.

182.4. In our view nothing can be made of the fact that the Speaker did not refer Samuel's letter to the portfolio committee on justice.

[183] Having had regard to the allegations, we find *prima facie* evidence of misconduct in only one respect. Samuel mentions that after the query by the portfolio committee on justice and correctional services (through which the PP accounts to Parliament) the PP undertook to reinvestigate the project with specific focus on the role of politicians in the scheme and to interview the beneficiaries.[165] Samuel then alleges that the investigation was swept under the carpet despite some of the findings in respect of Messrs Magashule and Zwane being made in staff reports submitted to her (the PP). The same Mr Zwane is said to have supported the PP by attending her 50th birthday party that she had hosted.[166]

[184] These serious allegations remain unanswered. In the circumstances, we find *prima facie* evidence of misconduct in the nature of an intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office in the following respects:

184.1. The PP failed to investigate despite an undertaking to do so.

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[165] Record at p. 2144, Samuel Affidavit at para 4.4.

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

184.2. Instead, she allegedly swept the investigation under the carpet.

184.3. This may constitute prejudice in favour of a particular cause; being one-sided or biased in her role as PP. Selective investigation would undermine the constitutional democracy. That would diminish the public's confidence in the Office of the Public Protector.

184.4. The PP may also be said to have failed or refused and/or deliberately ignored to perform her functions.[167]

[185] We relate our findings to the charges of the Member in Annexure A to this report.

(ix) Baloyi

[186] This component of the charges concerns a labour law dispute, this time between Baloyi, the former Chief Operating Officer (COO), on the one hand, and the Office of the Public Protector, on the other. Baloyi instituted proceedings in the High Court over an allegedly unlawful termination of a fixed-term contract of employment.

[187] Annexure 5 to the original complaint consists of the papers filed in the matter of *Baloyi v Officer of The Public Prosecutor and Others* (84053/19) [2019] ZAGPPHC 993 (12 December 2019). The proceedings resulted in a judgment of Teffo J, who found that the High Court did not have jurisdiction to decide the matter. The judgment of Teffo J is not amongst the materials provided to us.

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[167] In *EFF v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 52 it is stated that the PP is: "[o]ne of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs and for the betterment of good governance." A failure to investigate does not accord with this sentiment.

[188] The matter then went on appeal to the Constitutional Court. Annexure 13, which forms part of the supplementary papers submitted by the Member, is the judgment and order of the Constitutional Court per Theron J in *Louishah Basani Baloyi v Public Protector and Others Baloyi v Public Protector and Others* (CCT03/20) [2020] ZACC 27, handed down on 4 December 2020. This judgment deals with an appeal against the judgment of Teffo J in *Baloyi v Office of the Public Prosecutor* [2019] ZAGPPHC 993 (12 December 2019).

[189] The Constitutional Court judgment essentially deals with the issue of whether the High Court had jurisdiction. The High Court's finding that it did not have jurisdiction was overruled by the Constitutional Court. The latter did not deal with the merits of the application brought by Baloyi and remitted same to the High Court. The remittal order was only granted on 4 December 2020 and hence the matter would not have been heard let alone decided by the High Court.

[190] As stated above, Baloyi is the former COO of the Office of the Public Protector. It appears from the Constitutional Court judgment that Baloyi raised various allegations against the PP, including that –

190.1. her employment was terminated because Ms Mkhwebane and Mahlangu wanted to "[g]et rid of" her after she raised concerns about their "[u]nlawful and deeply concerning" conduct (para 35);

190.2. that the termination was made in bad faith for the ulterior purpose of furthering nefarious political objectives (para 49); and

190.3. that the PP allegedly flouted her constitutional duties (para 49).

[191] In her written response to this Panel, in respect of the Baloyi matter, the PP contends that:

191.1. It is not clear whether direct or vicarious liability is relied upon. She questions the basis on which either can be imposed.

191.2. The PP does not get involved in operational issues such as disciplinary action as that is the sole preserve of the CEO as the accounting officer.[168]

191.3. No dates, places, amounts, names of individuals are provided.[169]

191.4. The Baloyi matter cannot constitute *prima facie* evidence as the matter is *sub judicae* and as yet unresolved.[170] In this context, the PP refers to the decision of the Constitutional Court reversing the High Court's judgment that it did not have jurisdiction.[171]

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

192.1. there is no role for Mahlangu in respect of the merits of investigations and that his interference with the investigations was thus unlawful;[172] and

192.2. Mahlangu informed her that he would "[g]et [her]".[173]

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

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[168] PP's representations at p. 38, para 128.1.
[169] PP's representations at p. 38, para 128.2/130.
[170] PP's representations at p. 41, para 141.
[171] PP's representations at p. 41, para 141.
[172] Record at p. 2164, para 20.
[173] Record at p. 2165, para 24.

[194] In the founding affidavit, Baloyi however describes what she calls "[u]nconstitutional behaviour of the Public Protector and the CEO in a number of high-profile complaints".[174] These are the following:

194.1. The Nkwinti investigation:[175] This concerns the alleged unlawful acquisition of the Bekendvlei Farm by the then Department of Rural Development and Land Reform (DRDLR). The complainant to the PP alleged that the then Minister of the Department, Mr Gugile Nkwinti violated the Executive Members' Ethics Act in relation to the purchase of the property. At the time Mahlangu was the Deputy Director-General (DD-G) of the DRDLR. Mahlangu was charged with misconduct for his involvement in the purchase of the Bekendvlei Farm. He was found guilty on six of the eight charges and dismissed as DD-G on 13 June 2016. Thereafter Mahlangu was appointed CEO of the Office of the Public Protector. Baloyi alleges that Mahlangu improperly sought to interfere with the Nkwinti investigation and that the PP was aware of his interference and did nothing to stop it. Baloyi further contends that the PP did not want to grant an extension of the time for Nkwinti to respond because the report needed to be released before the expiry of Mahlangu's one-year contract as CEO.

194.2. Bosasa and the Rogue Unit:[176] Baloyi alleges that in an interview conducted by the PP at which she was present, Bosasa's Mr Gavin Watson (Watson), told the PP that he donated not only to the CR17 campaign, but also to the NDZ campaign,[177] yet the PP refused to investigate the allegation about donations to the NDZ campaign. Baloyi also alleges that the investigation into CR17 was conducted

[174] Record at p. 2167, para 39.
[175] Record at p. 2167, para 40ff.
[176] Record at p. 2171, para 57ff.
[177] This was the campaign for the election of Dr Nkosazane Dlamini-Zuma as the President of the African National Congress. The CR17 campaign was for the election of Mr Cyril Ramaphosa as the President of the ANC.

by external people and not in terms of the ordinary process, which was most unusual. Baloyi further alleges that these reports were prioritised.

194.3. McBride:[178] Baloyi alleges that the ordinary process for preparing this report was not followed. Instead of a draft being sent to the provincial representative for a review, it was sent directly to the PP. It is further alleged that the report was rushed and that the report blamed McBride for issues outside of his control in that he was the Executive Director of the Independent Police Investigative Directorate (IPID) and not responsible for every administrative issue.

194.4. PRASA:[179] This concerns a report by Adv Madonsela into unlawful procurement processes at the Passenger Rail Agency of South Africa (PRASA). Part of the remedial action in the report required the PP to investigate all companies that had been illegally appointed. One of those companies was called "Prodigy". Prodigy however approached Mahlangu and laid a complaint against PRASA for failing to pay it. Baloyi alleges that Mahlangu pressured the staff to consider this complaint. This is mentioned as another example of where Mahlangu improperly sought to interfere in the conduct of an investigation.

[195] The bulk of the allegations again concern Mahlangu and not the PP. This is certainly the case in respect of the Nkwinti and PRASA investigations.

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

[178] Record at p. 2174, para 71ff.
[179] Record at p. 2176, para 78ff.

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

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

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

(x) CR17 Campaign

[199] The origin of this component of the charges was a so-called "follow-up" parliamentary question put to President Ramaphosa in the National Assembly by the then leader of the DA, Mr Mmusi Maimane (Maimane) on 6 November 2018. The question was put after Maimane had asked the President a question about VBS Bank. Maimane alleged that a payment of R500 000.00 was made into an account of the President's son by Watson, who was the then chief executive officer of an entity called African Global Operations, formerly Bosasa.

[200] Even though the follow-up question was unrelated to the original question, and hence impermissible under the NA rules, the President elected to answer the question on the spot. The President said that the payment was related to work his son had undertaken for the company in question.

[201] Approximately a week later, the President wrote to the Speaker advising that he had provided incorrect information in response to Maimane's question. He explained that the payment had in fact been made to the CR17 campaign. The

CR17 campaign was an initiative to support the President during the run-up to the 2017 internal ANC elections.

[202] These events gave rise to two complaints to the PP.[180] One was from Maimane, and the second was from Mr Floyd Shivambu (Shivambu), a member of the EFF. The PP investigated both complaints. Ultimately, she released her "[R]eport on an investigation into a violation of the Executives Ethics Code through an improper relationship between the President and African Global Operations (AGO), formerly known as Bosasa Report 37 of 2019/2020" (the CR17 Report) on 19 July 2019. The PP made serious findings against the President in the Report and she adopted remedial action[181]directed at the Speaker, the National Director of Public Prosecutions (the NDPP) and the National Commissioner of Police.

[203] On 31 July 2019, the President instituted review proceedings aimed at setting aside the CR17 Report. Annexure 6 to the original motion consists of the papers in the matter of *President of the Republic of South Africa v Public Protector & Others* GNHC Case No: 55578/19. Annexure 9, which forms part of the supplementary documents is the judgment by Mlambo JP; Matojane J and Keightley J, dated 10 March 2020.[182]

[204] Before turning to the judgment of the Full Court in respect of the review, we deal briefly with the contentions made by the President in the founding papers in support of the relief sought in the review applications and the PP's responses.

[205] The President's contentions included that the PP had no authority to investigate the CR17 campaign; that there was no factual or legal basis for the

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[180] The PP received a third complaint. However, because it came from a member of the public and not a Member of the NA, she did not proceed to investigate it.

[181] The PP *inter alia* directed the Speaker to refer the violation by President Ramaphosa to the Joint Committee of Parliament and to demand publication of all donations received by him. The NDPP was directed to conduct further investigations into the *prima facie* evidence of money laundering.

[182] *President of the Republic of South Africa and Another v Public Protector and Others* (55578/2019) [2020] ZAGPPHC 9; 2020 (5) BCLR 513 (GP); [2020] 2 All SA 865 (GP) (10 March 2020).

PP's finding that he was duty bound to disclose the CR19 donations. The President further contended that the prohibition in the Executive Ethics' Code (the Code) is against wilful misleading of Parliament but not against any inadvertent or inaccurate statement made in Parliament; and that the first finding is completely irrational and contradicted by direct evidence. Regarding *audi*, the President contended that he was not given copies of the notice of the complaint and that he was denied an opportunity to question Watson despite the fact that Watson was available to be interviewed. The President averred that the PP insisted that questions must be sent to Watson instead of facilitating an oral questioning. Finally, the President alleged that there was no proper and meaningful investigation in the matter at all and that the PP failed to apply her mind to the evidence that was before her to contradict the false claims that he misled Parliament.

[206] The PP seems to agree that the request was made to question Watson and that the latter was available. She does not deny that she insisted on the written questions being sent to Watson instead of him being orally questioned.

[207] We now turn to deal with the judgment of the Full Court.

[208] The judgment concerns Part B of the application instituted by the President. Part A of the application was directed at suspending the operation of the remedial action contained in the CR17 Report pending the finalisation of the review proceedings. That application succeeded by agreement.

[209] Relevant in the judgment of the Full Court are the following:

209.1. Para 49: As stated above, in the National Assembly, the President answered that an amount of R500 000 was paid to his son by Bosasa for consulting work. This answer was later corrected by the President. In fact the money was paid to the CR17 campaign without the President's knowledge. The Full Court held that the

problem with the PP's Report is that she introduced [a foreign] element of "inadvertent" misleading of Parliament into the Executives' Ethics Code and then relied on it. In reality, the Code only prohibits the deliberate, wilful or intentional misleading of Parliament. The Full Court held that the (incorrect) answer given by the President could "[b]y no stretch of law, logics or even ethics" amount to wilful or deliberate misleading of Parliament [see para 53].

209.2. Para 65: the Full Court held that the PP doubted the bona fides of the President and that this "[d]isplays a deep-seated inability, or refusal, to process facts before her in a logical and fair-minded manner". The Full Court further held that this is difficult to reconcile with the PP's constitutional obligations. The Full Court found [at paras 74 and 75] that the PP did not "[a]ct with an open mind" and that she breached "[o]ne of the cardinal requirements of her position".

209.3. Paras 104 – 105: the Full Court held that the contribution to the CR17 fell "[s]quarely within the private domain" and that the PP does not appear to have "[f]ully appreciated the distinction between her powers and her jurisdictional competence in the approach she took".

209.4. Paras 120 – 121: the Full Court held that the PP has not identified any evidence or facts to substantiate her conclusion that [the President] received direct personal sponsorship (or benefitted personally) through the contribution made to his campaign.

209.5. Para 139: this relates to the finding made by the PP that there was *prima facie* evidence against the President of money laundering as defined under the Prevention and Combating of Corrupt Activities

Act 12 of 2004 (PRECCA). The Full Court found that the PP had no evidence even remotely suggesting that money laundering was at play and that, in any event, PRECCA has nothing to do with money laundering [that is dealt with in the Prevent of Organised Crime Act 121 of 1998 (POCA]. The Full Court went on to hold, on this aspect, at para 146, that the PP "[c]ompletely failed to properly analyse and understand the facts and evidence at her disposal" and "[s]howed a complete lack of basic knowledge of the law and its application". It is further stated by the Full Court at para 153, on the money-laundering issue, that the PP displayed anything but an open mind and she made serious findings based on unfounded assumptions and that "[h]er findings were not only irrational but indeed reckless."

209.6. Para 173: the Full Court held that it was remarkable that the PP went as far as to engage on the issue of whether an answer given in the National Assembly may be clarified as this was not raised in the complaints [of Maimane and Shivambu].

209.7. Para 189: the Full Court held that the PP displayed a clear failure to grasp the meaning of the concept of prosecutorial independence. The PPA and National Prosecuting Authority Act 32 of 1998 (the NPA Act) are clear in that she cannot direct the NDPP to investigate any criminal offences and how to go about doing so.

209.8. As to the justification for a personal costs order –

209.8.1. paras 205 – 206, the Full Court held that the PP acted recklessly in respect of the finding on money laundering; and that what makes its worse is that despite being requested to give the President an opportunity to respond, she refused to do so and

"[f]ailed to show appreciation for an elementary principle of due process"; and

209.8.2. paras 207 – 208 regarding the Executive Ethics Code, that the PP showed a flawed conceptual grasp of the issue with which she was dealing. Her reasoning was muddled and difficult to understand.

[210] In her written response to this Panel, the PP contends as follows regarding CR17:

210.1. The evidence bears no logical relevance whatsoever to the charges referred to in charge 4.[183]

210.2. The appeal was heard in the Constitutional Court in November 2020 and the judgment is reserved. This should have been disclosed by the Member.[184] The matter is *sub judicae*.[185]

210.3. It will be the first time that the Constitutional Court will decide whether parties are entitled to additional *audi* in respect of remedial action other than the opportunity given to them in terms of section 7(9) of the PPA.

[211] The mere fact that an appeal is pending does not preclude this Panel from considering the PP's conduct based on the report placed before us and the remarks of the Full Court pertaining to her conduct.

[212] We are in any event not in a position to assess the PP's prospects of success in the Constitutional Court as she did not provide the Panel with the application for leave to appeal, or the heads of argument filed in the matter, or a recording

[183] PP's representations at p. 42, para 143.
[184] PP's representations at p. 45, para 159.
[185] PP's representations at p. 42, para 144.

of the hearing. From the PP's response, we are not able to distil the grounds of appeal. For instance, it seems to be suggested by the PP that the issue of whether the President was entitled to separate *audi* on the remedial action, is a novel issue. Why this is so, is not explained. The principle is that procedural fairness depends on the circumstances and, in this context, *audi* may well have been required given the drastic nature of the remedial action taken against the President by the PP.

[213] Even though we have not been provided with the PP's appeal grounds, we have assessed the findings made by the Full Court against the record of the papers filed in the matter. We have satisfied ourselves that the findings of the Full Court constitute, at the very least, *prima facie* evidence of incompetence and misconduct, in the manner described below.

[214] We find that there is *prima facie* evidence of incompetence[186] in respect of the CR17 Report for the following reasons:

214.1. The PP's patently incorrect interpretation and application of the Executive Ethics Code. She was patently wrong in that the Code does not make provision for inadvertent misleading of Parliament.

214.2. The PP's confusion between PRECCA and POCA and her assumption that money laundering was dealt in the former.

214.3. The PP's finding that President personally benefitted, without basis.

214.4. The fact that the PP refused *audi* to the President on the remedial action, when she was requested to do so and hence failed to show appreciation for elementary principles of due process.

[186] Whether the instances add up to "sustained" incompetence is discussed further below.

214.5. The PP's failure to appreciate that she cannot direct the NDPP regarding prosecutions to be instituted.

[215] We find *prima facie* evidence of misconduct in the sense of an intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office in respect of the CR17 Report for the following reasons:

215.1. The findings against the President on the issue of money laundering.

215.2. The PP's doubting of the *bona fides* of the President without reason and her failure to have an open mind on the issues to be determined.

[216] We relate our findings to the charges of the Member in Annexure A to this report.

(xi) Gordhan / Pillay Rogue Unit

[217] On 5 July 2019, the PP released a report "[O]n an Investigation into Allegations of Violation of the Executive Ethics Code by Mr Pravin Gordhan, MP as well as allegations of Maladministration, Corruption and Improper Conduct by the South African Revenue Services" (the Rogue Unit Report). Apart from the adverse findings made against Minister Pravin Gordhan (Gordhan), the Rogue Unit Report also implicates Mr Visvanathan Pillay (Pillay) and Mr George Nkgakane Vigil Magashula (Magashula), who were both former employees at SARS. The main finding in the Rogue Unit Report is that an intelligence gathering unit was unlawfully established within SARS. In her remedial action, the PP, *inter alia*, directed the President to take [and complete] appropriate disciplinary action against Gordhan for infractions of

the Constitution and the Executive Ethics Code within 30 days, and to report thereon to her.

[218] The Rogue Unit Report is not to be confused with an earlier report of the PP, released on 24 May 2019, which deals with allegations of maladministration and impropriety against Gordhan in respect of his approval of the early retirement from SARS of Pillay. We refer to this report as "the Pillay Report". The PP found that Pillay was not entitled to early retirement with full pension benefits, and that Gordhan did not have the necessary authority to approve Pillay's pension benefits.

[219] Gordhan took both the Rogue Unit Report and the Pillay Report on review. The PP however insisted that the remedial action, i.e. the disciplinary proceedings against Gordhan, be implemented even whilst the review proceedings in respect of both reports were pending.

[220] Gordhan then instituted separate applications for urgent interim relief in respect of the two reports, essentially aimed at suspending the reports pending the determination of the reviews.

[221] Both applications for interim relief succeeded. Part of Annexure 7, submitted by the Member is the judgment of Potterill J in *Gordhan v Public Protector and Others* (48521/19) [2019] ZAGPPHC 311; [2019] 3 All SA 743 (GP) (29 July 2019). Potterill J granted interim relief in respect of the Rogue Unit Report. The judgment or on interim relief in respect of the Pillay Report is not before us.[187]

[222] The EFF and the PP, in her official as well as her personal capacity, applied for leave to appeal directly to the Constitutional Court against the judgment of Potterill J. Annexure 7 to the Member's motion contains the court papers in

[187] We know it was granted because this much is recorded in *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (8) BCLR 916 (CC) at para 12.

these applications, i.e. *Public Protector v Gordhan & Others*, Constitutional Court Case No. 232/19 and *Economic Freedom Fighters v Gordhan,* Constitutional Court Case No. 233/19. The Constitutional Court judgment on interim relief, per Khampepe ADCJ in *The Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* (CCT 232/19; CCT 233/19) [2020] ZACC 10; 2020 (8) BCLR 916 (CC) (29 May 2020) is not amongst the materials provided to us. The appeal was dismissed but the personal costs order made against the PP was set aside.

[223] The review papers regarding the Pillay Report and the judgment, which was handed down on 17 December 2020 and which is available on Saflii,[188] have also not been placed before us. Suffice it to say that the Pillay Report was set aside by a Full Court consisting of Kubushi, Twala *et* (Norman) Davis JJ.

[224] This leaves the review papers and the judgment in the review of the Rogue Unit Report. These materials have been placed before us. Annexure 14B, which is part of the supplementary documents submitted to us by the Member, contains the review papers, running to some 5 109 pages. The judgment in the matter *Gordhan v Public Protector and Others* (48521/19) [2020] ZAGPPHC 743 (7 December 2020) per Baqwa, Windell *et* Basson JJ, is Annexure 14A.

[225] Gordhan sought the relief to set aside the PP's report broadly on the bases of (i) breach of her constitutional duty to be independent and exercise her powers and perform her functions without fear, favour or prejudice; (ii) that she was dishonest or reckless when making the findings in the report. More specifically, Gordhan referred to a multitude of errors of law and fact, including the allegation that the PP disregarded relevant and took into account irrelevant considerations. The PP is also accused of incorrectly interpreting

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[188] *Gordhan and Others v Public Protector and Others* (36099/2098) [2020] ZAGPPHC 777 (17 December 2020).

section 209 of the Constitution because the section does not deal with the establishment of a covert information gathering unit at all

[226] Pillay repeated most of the contentions of Gordhan.

[227] We now turn to the with the Full Court judgment. Relevant aspects of this Full Court judgment are the following (our underlining):

227.1. Paras 38, 43 and 46: the PP is criticised for not corresponding directly to Gordhan but releasing responses and notices to him *via* media statements. See, also, para 264.

227.2. Paras 60 and 61: the PP is criticized for launching into a scathing, unwarranted and personal attack on the integrity of Potterill J. The Full Court states: "[T]o claim that Potterill J "[d]eliberately omitted the words 'inadvertently mislead'" from the actual Code, is simply astonishing. Besides being a Public Protector, Adv Mkhwebane is officer of this court [and] owes it a duty to treat the court with the necessary decorum. She not only committed an error of law regarding the Code but was also contemptuous of the court and Judge Potterill personally. What makes this reprehensible conduct worse is that the remarks by Adv Mkhwebane were made under oath, when she ought to have known about the falsity thereof. This clearly held the possibility of misleading this court. This is conduct unbecoming of an advocate and officer of this court. She owes Judge Potterill an apology. The Registrar of this Division is requested to send a copy of this judgment to the Legal Practice Council for consideration."

227.3. Para 64: The PP's evidence that Gordhan wilfully contravened the Code is incorrect and irrational.

227.4. Para 95: The PP inexplicably ignored the report of the Nugent Commission. The PP similarly ignored the apology and retraction of the adoption of the Sikhakhane's Panel's finding by the SARS Advisory Board, headed by retired Judge Frank Kroon.

227.5. Para 99: The PP, during a public interview, referred to the unit as the "rogue unit" and as a "monster"; and the PP expressed her desire to "[d]efeat the monster". The Full Court held that these comments, unfortunately, do little to allay the applicant's allegation that the PP is biased or at least that she is reasonably perceived to be biased.

227.6. Para 101: The Full Court held that, insofar as the PP has placed any reliance on a contravention of section 3(1) of the National Strategic Intelligence Act 33 of 1994 (NSI Act) in arriving at a finding that the unit was unlawfully established, her conclusions are clearly wrong in law and therefore irrational and unlawful. See, also para 104, where the Full Court rejects the PP's interpretation of section 209 of the Constitution as well.

227.7. Para 111: The Full Court held that the KPMG report is flawed in fact and in law, and that its findings and conclusions have been formally withdrawn, and that "[a]ny reliance by the Public Protector on the KPMG report was, under the circumstances, irrational and ill-placed."

227.8. Para 113: The PP is criticised for her reliance on the report of the Office of the Inspector General of Intelligence Report (the OIGI Report), dated 31 October 2014, for the following reasons:

227.8.1. The PP relies on the OIGI Report despite explicitly stating that she has not seen the report.

227.8.2. The PP relies on the OIGI Report because she has it "[o]n good authority" that certain findings were made therein.

227.8.3. However, during argument (see paras 119 – 120), the PP's Counsel "[c]onceded that, despite the explicit statement in the Report that she has not had sight of the OIGI report in preparing the Report, she had in fact had the OIGI report in her possession when she drafted the Report. The Public Protector now claims that she subsequently received the OIGI report from an anonymous source who left it at her offices. This turn of events is disturbing to say the least and it is difficult to label the Public Protector's conduct in this regard as anything else but dishonest."

227.9. Paras 125 – 126: Dealing with the procedural fairness (or lack thereof) of the PP's conduct, the Full Court held that, to "[a]dd insult to injury", the PP, during her investigation, never provided the OIGI report to Gordhan or Pillay for them to respond thereto and probably the "[m]ost egregious" is the PP's failure to consider the extensive body of evidence that Pillay provided to her.

227.10. Para 182: In respect of procedural unfairness: "[B]y dismissing Mr Pillay and his evidence out of hand, the Public Protector breached her oath of office in the most fundamental way. She discarded the only evidence that served before her under oath, that of Mr Pillay, and instead uncritically adopted, under the guise of conducting her own investigation, the unattributed and anonymous complaint that was delivered to the office of the Public Protector by Mr Manyike on 21 February 2012…". The Full Court added

that the PP did not investigate the origin of the complaint or the veracity of the allegations made in the complaint."

227.11. Para 183: Still on procedural unfairness, the Full Court held that: "[W]ith total disregard to any semblance of a fair investigation the Public Protector did not deem it necessary to interview Mr Peega, Mr Manyike or Ms Modiane to satisfy herself that there was any merit in the allegations contained in the complaint".

227.12. Para 195: On the issue of bias: "[T]his [describing the evidence given by Pillay as merely his 'views'], evidences the most egregious failure of the Public Protector to understand and honour the most basic requirements of the office she occupies. It is plain that the Public Protector has approached this investigation with an unwavering commitment to her own preconceived views and biases. The manner in which the Public Protector had, and continued, to simply ignore Mr Pillay's evidence, clearly demonstrates her manifest bias."

227.13. Paras 197 – 210: Under the heading "[t]he equipment issue", the PP is criticised for turning no evidence (in respect of unlawful purchase of equipment) into evidence. It appears that the PP inferred from her finding that the unit was unlawfully conceived that it must have purchased spying equipment unlawfully. At para 204 this reasoning is described as "astonishing" by the Full Court. The Full Court is also highly critical of the PP's failure to interview members of the so-called rogue unit. The conclusion is that the investigation was fatally flawed and incompetent. The findings she made in light of the evidence available to her was "[i]llogical and clearly fallacious".

227.14. Paras 211 – 219: Under the heading "[t]he employment issue", the PP's approach is described as fallacious (ignoring evidence) and indicative of the mind-set with which she approached the investigation.

227.15. Paras 220 – 226: Under the heading "[t]he interception issue", it is found that the PP ignored evidence and that she "[p]ostulated herself as a judge, receiving and dismissing evidence at a whim, and then closed her mind to the actual facts available to her to consider".

227.16. Paras 227 – 236: Under the heading "[t]he qualification issue", it is found that, for no apparent reason, evidence was disregarded (para 233) by the PP; and that she was disingenuous (para 235) and that (at para 236): "[A]ccordingly, at the time of the Report, the Public Protector well knew that Mr Pillay has a matric certificate. Her conclusion in the Report that Mr Pillay does not hold even that basic qualification, notwithstanding the fact that on 25 March 2019 she accepted that this was a matter of public record and was within her knowledge, is astounding."

227.17. Paras 237 – 243: Under the heading "[t]he Magashula application", it is concluded as follows by the Full Court (at para 243): "[A]n allegation of perjury is of a very serious nature. It infringes upon Mr Magashula's constitutional rights and subjects him to criminal investigations by the highest authorities. No foundation for such a finding was laid in the Report and was not warranted by either the facts or the law. There is no indication in the Report or otherwise that Mr Magashula took part in any mal-administration or illegal activities within SARS during his tenure of office with that institution. Thus, there is no factual foundation for the Public Protector to even refer this issue to the SAPS and the

NDPP for remedial action. Her finding in this regard is illogical, unfounded and irrational."

227.18. Paras 251 – 252: Regarding the PP's remedial action, it is found that the PP intruded improperly on the competence and responsibility of the NPA and police and that the remedial action to implement the OIGI report was "astounding".

227.19. Paras 280, 282: Regarding bias, the Full Court held as follows,[at Para 280]: "[W]e have already referred to Mr Pillay's submissions in the Pillay application that the Public Protector's persistent reliance on fundamentally flawed and discredited reports; her failure to deal with the evidence produced by Mr Pillay and Mr Van Loggerenberg; as well as the scorn and dismissiveness with which she rejected the evidence of Mr Pillay, shows a clear pattern of bias. This perception is compounded by the fact that the Public Protector made no attempt to afford both Minister Gordhan and Mr Pillay an opportunity to make submissions before adverse findings were made against them." And at para 289: "[W]hat we have considered as indicative of bias is the general manner in which the Public Protector conducted herself in conducting the investigation and her interaction with the individuals subject to her investigation that indicates bias on her part." [The Full Court then lists nine examples of conduct which justifies the inference of bias].

227.20. Para 296: Under the heading "conclusion", the Full Court states: "[T]he Report fails at every point. We are satisfied that the Report is the product of a wholly irrational process, bereft of any sound legal or factual basis. It cannot stand and must be set aside. Had the Public Protector undertaken a fair and credible investigation and considered the extensive body of evidence in an open-minded

manner, the report may have been an opportunity to confirm the facts and the truth thereof. Instead, she allowed her important office to be used to try and resuscitate a long-dead fake news propaganda fiction."

227.21. Paras 297 – 304: In dealing with costs, the Full Court reiterates that there was a lack of impartiality and states at para 303: "[T]he fact that the Public Protector displayed dishonesty in respect of the OIGI report is, on its own, deserving of censure by this court in the form of a personal costs order against her.

[228] In her written response to this Panel, the PP contends as follows regarding the Rogue Unit report:

228.1. The evidence bears no relevance whatsoever to the charge referred to in charge 4.[189]

228.2. The matter operates in favour of the PP as the Constitutional Court unanimously reversed the punitive cost order made by the High Court against the PP.[190] This should have been disclosed by the Member.[191] [This relates to the costs order made by the High Court in the application for interim relief].

228.3. An application for leave to appeal to the SCA has been lodged against the Full Court judgment.[192] It cannot be relied upon based on remarks of the court of first instance.[193]

[229] As with the CR17 Report, we do not believe that the mere fact that an application for leave to appeal is pending precludes us from considering the

[189] PP's representations at p. 42, para 146.
[190] PP's representations at p. 42, para 147.
[191] PP's representations at p. 43, para 148.
[192] PP's representations at p. 44, para 149.
[193] PP's representations at p. 47, para 163.

matter, including the findings of the Full Court in respect of the PP's conduct. We have not been provided with the record of the application for leave to appeal.

[230] Other than the general statement that the evidence does not relate to the charge, the PP has not challenged the numerous and detailed findings made against her in the Full Court judgment.

[231] As with CR17, we have nevertheless assessed the findings made by the Full Court against the record of the papers filed in the matter. Once again, we have satisfied ourselves that the findings of the Full Court constitute, at the very least, *prima facie* evidence of incompetence and misconduct, in the manner described below.

[232] We find that there is *prima facie* evidence of incompetence[194] in respect of the CR17 Report for the following reasons:

232.1. Releasing responses and notices to Gordhan via media channels and not to him or his legal representatives.

232.2. Contrary to what the Constitution and the PPA require, the PP failed to provide the OIGI Report to Gordhan for his response.

232.3. Failing to take into account the evidence provided by Pillay. Again, as contended for in another – the Tshidi matter, the PP was selective on her collation of evidence.

232.4. Failing to interview Mr Peega, Mr Manyike or Ms Modiane; and failure to interview members of the so-called rogue unit. This failure was in contravention of the PPA itself.

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[194] Whether the instances add up to "sustained" incompetence is discussed further below.

232.5. Inferring, for no good reason, that a unit [allegedly] unlawfully established would procure equipment unlawfully. The unlawful, unsubstantiated and unexplained inference was prejudicial to those against whom the findings were made.

232.6. Making a finding about Pillay's lack of qualification which was irrational in light of the materials before her. There was no factual basis for such finding.

232.7. Making an allegation of perjury against Magashula without any proper foundation therefor.

232.8. Unlawfully intruding on the competence and responsibility of the NPA and police in respect of her remedial action, by:

232.8.1. Directing the NDPP to expedite the then pending criminal trial against Mr Pillay and other former SARS officials;

232.8.2. Directing the Commissioner to investigate, within 60 days, "criminal conduct" of Gordhan, Pillay and officials involved in the unit.

[233] We find *prima facie* evidence of misconduct in the nature of an intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office, in respect of the CR17 Report for the following reasons:

233.1. The nine aspects justifying the finding of bias against Gordhan and Pillay listed in para 290 of the Full Court judgment, which are, in summary:

233.1.1. The investigation and the Report fell outside of the jurisdiction of the PP as it related to events dating back to 2009/2010. No exceptional circumstances have been presented by the PP justifying the investigation after an extraordinary lapse of time. The PP's predecessor had already, in 2014, received a complaint about the alleged unlawful establishment of the unit. She elected not to investigate the complaint. The PP nonetheless proceeded with the investigation.

233.1.2. The manner in which the PP interacted with Gordhan during the investigation and in releasing the Report: Not only did the Public Protector elect not to engage with Gordhan's attorneys on record, the section 7(9) notice was publicly posted on YouTube before giving any notice to him and his attorneys. Similarly, the Rogue Unit Report was presented to the media without any prior notice to Gordhan or his legal representatives.

233.1.3. The reliance on the discredited KPMG report despite it having been disavowed, and the Sikhakhane report despite it having been widely discredited. The PP also failed to engage with the findings made in the Nugent report.

233.1.4. The alleged dishonesty of the Public Protector with regard to the OIGI report and her insistence on ordering the Minister of State Security to implement, in totality, a report that she has, according to the Rogue Unit Report itself, never seen.

233.1.5. The PP's pandering to the rogue-unit narrative and her public reference to the unit as the "rogue unit" and as a "monster" and her stated desire to "[d]efeat the monster" display a profound bias towards Gordhan and Pillay. The evidence displays *prima facie* evidence of uneven-handed investigation consequently demonstrating lack of impartiality contrary to the Constitution and the law.

233.1.6. The PP's complete disregard of the Sunday Times apology and the Kroon apology.

233.1.7. The PP's scurrilous allegations that Gordhan deliberately misled Parliament.

233.1.8. The PP's unwarranted and slanderous attack on Potterill J.

233.1.9. The PP's relentless pandering to the untruths of Pillay's qualification.

[234] The above is cumulatively the basis on which the finding of actual bias against Gordhan and Pillay was made by the Full Court. Cumulatively, the findings would also constitute *prima facie* evidence of misconduct.

[235] The finding of dishonesty regarding the OIGI report, and the unwarranted and slanderous attack on Judge Potterill, constitute, in our view, separate and self-standing evidence of misconduct by an officer of court who is ethically obliged to maintain and foster "[a] high standard of professional ethics." This is in breach of the constitutional principles in section 195(1).

[236] We relate our findings to the charges of the Member in Annexure A to this report.

(xii) Zuma tax records

[237] This component has its origins in a court application brought by the Commissioner for the South African Revenue Service (the Commissioner) for a declaratory order that SARS is permitted and required under the proviso of "just cause" contained in section 11(3) of the PPA read with section 69(1) of the Tax Administration Act 28 of 2011 (TAA) to withhold taxpayer information and that the PP's subpoena powers do not extend to the taxpayers' information.

[238] The dispute was accordingly whether SARS or its officials are by law permitted and required under the TAA to withhold confidential taxpayer information, or whether the PP's subpoena power is superior.

[239] Annexure 10A, which forms part of the supplementary documents submitted by the Member, is the judgment of the NGHC, per Mabuse J, in the matter of *Commissioner of the South African Revenue Service v Public Protector and Others* (84074/19) [2020] ZAGPPHC 33; [2020] 2 All SA 427 (GP); 2020 (4) SA 133 (GP) (23 March 2020). Annexure 10B, submitted by the Member, is the papers filed in that matter.

[240] The High Court made a series of scathing findings against the PP.

[241] In her responses, the PP points out that this judgment was reversed by the Constitutional Court in respect of the personal cost order. The judgment of the Constitutional Court in the matter of *Public Protector v Commissioner for the South African Revenue Service and Others* (CCT63/20) [2020] ZACC 28 (15 December 2020), per Madlanga J, was provided to us by the PP. In the

judgment, the personal costs orders and the serious adverse findings against the PP were overturned.

[242] The PP further refers to various comments made by the Constitutional Court in the course of its judgment.

[243] In our view, it is not necessary to go into the details as far as this component of the charges is concerned. Read as a whole, the Constitutional Court's judgment exonerates the PP, certainly from charges of incompetence and misconduct.

(xiii) GEMS

[244] This component of the charges concerns a dispute about whether a certain Mr Ngwato ought to have been recognised as a beneficiary of GEMS after the death of a woman he claimed he married by way of an unregistered customary marriage. GEMS took the view that Mr Ngwato did not qualify for the benefit in terms of the GEMS' rules. Mr Ngwato eventually laid a complaint with the PP. The matter ended up in court because of a dispute as to whether the PP has the power to investigate this kind of complaint.

[245] The High Court found in favour of the PP, but the judgment was overturned on appeal by the SCA. Annexure 11A is the judgment and order of the SCA in *Government Employees Medical Scheme and Others v The Public Protector of the Republic of South Africa and Others* [2020] ZASCA 111, delivered on 29 September 2020,[195] per Ponnan J. Annexure 11B is the appeal record in the matter.

[246] The SCA held that the PP did not have the power to investigate the complaint; and that the PP should in any event not have done so as Mr Ngwato failed to

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[195] *Government Employees Medical Scheme and Others v Public Protector of the Republic of South Africa and Others* (1000/19) [2020] ZASCA 111; [2020] 4 All SA 629 (SCA) (29 September 2020).

exhaust an internal remedy. The following *dicta* of the SCA judgment are relevant (our underlining):

246.1. Para 35: Regarding the contention that the PP continued with her investigation even after the dispute had become moot: "[I]t is manifest that the Public Protector's stubborn and irrational insistence on continuing with her investigation could hold no benefit for the public at large, or for that matter even Mr Ngwato himself. In other words, it is not aimed at, nor is there any need to protect the public against the conduct which informed the complaint."

246.2. Para 43: Regarding the insistence by the PP that there must be compliance with subpoenas whilst a court application about jurisdiction was pending): "[I]nsisting on compliance with the subpoenas whilst the question of her jurisdiction remained to be determined by the high court, leaves one with the impression that the subpoenas were intended to cow the appellants into submission" and "[T]here is much to be said for the appellants' argument that for so long as the jurisdiction of the Public Protector remained to be settled by the court in the main application, the coercive subpoena power was invoked in bad faith or with an ulterior purpose or in a manner that abuses the power to subpoena. But, it is perhaps not necessary to go that far."

246.3. Paras 50 – 51: "[F]inally, as I have already pointed out, not only did the Public Protector misconceive her powers, but in many respects her approach is regrettable". "[F]rom the outset, GEMS evidently entertained grave concern as to the jurisdiction of the Public Protector to investigate Mr Ngwato's complaint. Instead of seeking to assuage those concerns, the repeated refrain on the part of the officials in the office of the Public Protector was to

> regurgitate provisions of the PPA and to insist on compliance on pain of criminal sanction. They thus eschewed reason for coercion. That strikes one as the very antithesis of an office designed to resolve conflict between the citizenry of this country and those who control the levers of power. It ill-behoves officials to perceive GEMS' challenge to jurisdiction as undermining the office of the Public Protector or its constitutional powers. Nor, was it fair to suggest that GEMS sought to immunise itself from the scrutiny of the Public Protector."

[247] The PP in her response did not deal with the GEMS investigation or the judgment of the SCA.

[248] We find that there is *prima facie* evidence of incompetence,[196] because the PP pursued the matter even though it became moot, and even though the investigation could no longer benefit the public and was indeed a waste of public resources.

[249] We find *prima facie* evidence of misconduct in the sense of an intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office in respect of the GEMS investigation because the PP insisted on compliance with the subpoena and thereby bullying the targets of the investigation, despite the court challenge having already been instituted. Here too, there was an alleged breach of section 195(1) of the Constitution.

[250] We relate our findings to the charges of the Member in Annexure A to this report.

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[196] Whether the instances add up to "sustained" incompetence is discussed further below.

E. CONCLUSION ON FINDINGS

[251] This part of our report should be read with the detailed findings set out above.

(i) Incompetence

[252] In respect of the charge of incompetence, an assessment of the cumulative effect of the various findings is necessary in order to determine whether they amount to *prima facie* evidence of a demonstrated and sustained lack of knowledge to carry out; and ability or skill to perform the duties of the PP effectively and efficiently. In other words, an individual instance of incompetence may well not be enough to meet the threshold set in section 194 of the Constitution read with the NA rules but the cumulative effect may do so.

[253] In assessing the cumulative effect, we had regard to the following:

253.1. As is clear from the table below, the incidents of incompetence stretched over a period of at least three years, commencing in 2017 and ending, in the materials before us, in 2019. This, in our view, amounts to "sustained" incompetence.

Name of report	**Date**
SARB Report	19 June 2017
Vrede Dairy Report	8 February 2018
FSCA Report	28 March 2019
CR17 Report	19 July 2019
Rogue Unit Report	5 July 2019
Relevant part of GEMS Investigation	2017 - 2018

253.2. The courts have used epithets such a "patently wrong" in respect of some of the mistakes made, indicating a very high degree of incompetence.

253.3. The mistakes cover a wide range of areas and are not restricted to highly specialised legal fields.

[254] In summary, in respect of the charge of incompetence, the Panel finds that there is substantial information that constitutes *prima facie* evidence of incompetence. There are a number of examples of such incompetence, the most glaring of which is the *prima facie* evidence demonstrating that the PP grossly overreached and exceeded the bounds of her powers in terms of the Constitution and the PPA by unconstitutionally trenching on Parliament's exclusive authority when she directed Parliament to initiate a process to amend the Constitution. In addition, there are repeated errors of the same kind, such as the incorrect interpretation of the law and other patent legal errors; failure to take relevant information into account; failure to provide *audi* to affected persons; incorrect factual analysis; sustained lack of knowledge to carry out her duties; and/or ability or skill to perform the duties of the PP effectively and efficiently. This suggests an inability to learn from mistakes by adopting a more careful approach. If assessed cumulatively, these instances meet the threshold of *prima facie* evidence of sustained incompetence.

(ii) Misconduct

[255] In respect of misconduct, each individual instance may well on its own rise to *prima facie* evidence of intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office, but that threshold is certainly met when the instances are assessed in conjunction with one or more others.

[256] In summary, in respect of the charge of misconduct, the Panel finds that there is sufficient information that constitutes *prima facie* evidence of misconduct.

[257] This relates, amongst others, in the SARB Report to the PP's failure to reveal that she had meetings with the President and the SSA; and the failure to honour an agreement with the SARB thereby displaying non-compliance with the high standard of professional ethics as required in terms of section 195(1)(a) of the Constitution.

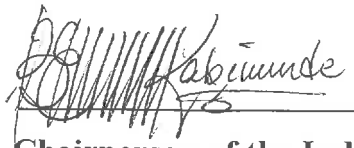
[258] Turning to another example, namely the Vrede Dairy Report, the PP, amongst other things, altered the final report and gave the Premier, who was implicated, the discretion to determine who the wrongdoers were; the PP removed the referral to the SIU and the AG from the final report and provided an untruthful explanation to the review court as to why this was done; and the PP failed to investigate the third complaint in breach of her constitutional and statutory duties and functions in section 182 of the Constitution and section 7 of the PPA.

[259] Additionally, the PP patently made a wrong finding on money laundering in the CR17 matter and doubted the bona fides of the President without reason. [In our view this information regarding the conduct of the PP, also constitutes *prima facie* evidence of incompetence].

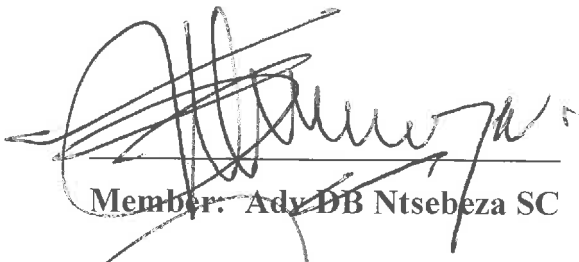
F. RECOMMENDATIONS

[260] In the circumstances, and for the reasons contained in this report, we recommend that the charges of incompetence, be referred to a committee of the Assembly as provided for in the NA rules.

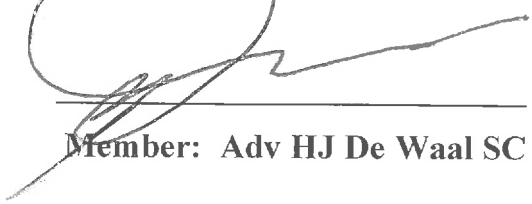
[261] In the circumstances, and for the reasons contained in this report, we recommend that the charges of misconduct be referred to a committee of the Assembly as provided for in the NA rules.



Chairperson of the Independent Panel: Justice BE Nkabinde



Member: Adv DB Ntsebeza SC



Member: Adv HJ De Waal SC

24 February 2021

G. ANNEXURE A: FINDINGS IN RELATION TO CHARGES

[262] As related to the charges, the preliminary assessment of the Panel as per NA rule 129X(1)(b) and (c)(v), are that there is *prima facie* evidence of incompetence in respect of the following charges:

262.1. Charge 7.1.1 (SARB): PP cannot direct the initiation of a process to amend the Constitution and lack of ability and skill in that she should have at least taken external advice or test the proposition with the SARB itself.

262.2. Charge 7.1.2 (SARB): Broadening the scope of an investigation without affording *audi* to parties affected thereby.

262.3. Charge 7.1.7 (SARB): incompetence regarding compilation of Rule 53 record.

262.4. Charge 7.2.1 (Vrede): Lack of knowledge; that the PP may order investigations to be conducted by the SIU and AG; that a member of a provincial executive council could discipline the head of a department; and lack of skill and ability in that she failed to interview relevant persons and take relevant information into account; and she has failed to obtain the market value of the goods and services procured.

262.5. Charge 7.3.1 (Tshidi): No reasoned justification for her findings; failed to properly deal with conflicting versions; failure to give proper *audi*; disregarded documents and evidence.

262.6. Charge 11.4 (CR17): incorrect interpretation and application of the Executive Ethics Code: wrong conclusion on jurisdiction; confusion between PRECCA and POCA and assumption that

money laundering is dealt with in the latter; finding that President personally benefitted, without any basis; no *audi* to the President on the remedial action; failure to appreciate that she cannot direct the NDPP regarding prosecutions to be instituted.

262.7. Charges 11.3 and 11.4 (Rogue Unit): releasing responses and notices via media channels; wrong interpretation of section 3(1) of the NSI Act and section 290 of the Constitution; failure to provide the OIGI Report for comment to Gordhan; failure to take into account the evidence provided by Pillay; failure to interview relevant witnesses; drawing unsustainable inferences; making irrational factual findings in light of information before her; making far-reaching allegation of perjury without factual basis; improperly intruding on the competence and responsibility of the NPA and police with remedial action.

262.8. Charges 11.1 and 11.2 (GEMS): pursuing a moot matter.

[263] As related to the charges, the preliminary assessment of the Panel as per NA rule 129X(1)(b) and (c)(v), is that there is *prima facie* evidence of misconduct in respect of the following charges:

263.1. Charge 1.1 (SARB): failure to reveal in her report and subsequent affidavits the fact that she held meetings with the SSA and President.

263.2. Charge 1.2.1.2 (SARB): misrepresentation that the relevant parts of the SARB Report were compiled based on the advice of an expert in economics.

263.3. Charge 1.1.5 (SARB): failure to honour an agreement with the SARB.

263.4. Charge 4.1, 4.3 and 4.4 (Vrede): failure to investigate the irregularities and misappropriation of funds and removal of findings without reason.

263.5. Charge 4.2 (Vrede): failure to investigate the third complaint.

263.6. Charge 4.4 (Vrede): alter remedial action by giving the Premier who was implicated in wrongdoing the discretion to determine who the implicated officials were; remove referral to SIU and the AG.

263.7. Charge 11.3 and 11.4 (Tshidi): going through the motions, having made up the mind; failure to disclose meetings and submissions received.

263.8. Charge 11.3 (Samuel): sweeping investigations under the carpet; having the person she is investigating at her birthday party.

263.9. Charge 11.3 and 11.4 (CR17): Patently wrong finding on money laundering; doubting of the *bona fides* of the President without reason.

263.10. Charge 11.3 and 11.4 (Rogue Unit): The nine aspects set out above justifying the finding of bias against Gordhan; dishonesty regarding the OIGI report, and the unwarranted and slanderous attack on Judge Potterill.