

The rules provide that if the motion meets the requirements, the next step would be to establish an independent panel of experts to make a preliminary assessment of the motion. The panel members, who are nominated by political parties and appointed by the Speaker, must be three fit and proper South Africans who, collectively, have the legal and other skills and experience to do this assessment.

I attach a copy of the media statement, marked “TRM 63”.

125. After considering Ms Mazzone’s second notice of motion, together with Annexure A, on 26 February 2020 I decided that it was in order because, in conformity with Rule 129R:

125.1. the motion calls upon the National Assembly to initiate an inquiry in terms of section 194(1) of the Constitution for Adv Mkhwebane’s removal from the office of the Public Protector;

125.2. the motion contains five clearly formulated and substantiated charges relating to actions or conduct by or ascribed to Adv Mkhwebane in person, namely:

125.2.1. the first such charge, set out in Annexure A to the motion, is a charge of misconduct by Adv Mkhwebane in her investigation and report into allegations of the failure by the South African Government to implement the CIEX Report and recover public funds from ABSA Bank (i.e. the CIEX PP Report) and in the litigation challenging that Report;

125.2.2. the second such charge, also set out in Annexure A to the motion, is a charge of misconduct by Adv Mkhwebane in her investigation and report into allegations of maladministration

against the Free State Department of Agriculture in the Vrede Integrated Dairy Project (i.e. the Vrede Dairy Report);

125.2.3. the third such charge, also set out in Annexure A to the motion, is a charge of incompetence ascribed to Adv Mkhwebane based on (a) her investigation and report in the matter that is the subject of the first charge, and her conduct in the ensuing litigation to review that report; (b) her investigation and report in the matter that is the subject of the second charge, and her conduct in the ensuing litigation to review that report; and (c) her investigation and report into allegations of maladministration, abuse of power and improper conduct by the former Executive Officer of the Financial Services Board, Adv. D. P. Tshidi, as well as systemic corporate governance deficiencies at the Financial Services Board (the Public Protector's Report No. 46 of 2018/19), and her conduct in the ensuing litigation to review that report;

125.2.4. the fourth such charge is a charge of misconduct based on Adv Mkhwebane's alleged intimidation, harassment and/or victimisation of staff in the Office of the Public Protector, alternatively her alleged failure to prevent the alleged intimidation, harassment and/or victimisation of staff in the Office of the Public Protector by the erstwhile Chief Executive Officer of that Office, particularised in paragraph 10 of Annexure A to the motion (i.e. the first sub-charge of the fourth charge in that Annexure); and

125.2.5. the fifth such charge is a charge of misconduct and/or incompetence by or ascribed to Adv Mkhwebane particularised in paragraph 11 of Annexure A to the motion (i.e. the second sub-charge of the fourth charge in that Annexure);

125.3. *prima facie* (i.e. on the face of the motion):

125.3.1. the charges of misconduct, if established by the evidence, will constitute misconduct as defined by the NA on 3 December 2019 in and for the purposes of the new Part 4 of Chapter 7 of the Rules of the NA (i.e. the intentional or gross negligent failure by Adv Mkhwebane to meet the standard of behaviour or conduct expected of a holder of public office); and

125.3.2. the charges of incompetence, if established by the evidence, will constitute incompetence as so defined (i.e. as including a demonstrated and sustained lack of knowledge by her to carry out, and of ability to skill by her to perform, her duties effectively and efficiently);

125.4. all the evidence relied upon in support of the motion (i.e. the evidence particularised in paragraphs 2, 5, 8 and 12 of Annexure A to the motion) was attached to the motion; and

125.5. the motion is consistent with the Constitution (especially section 194), the law (it related to functions performed by the PP in terms of the Public Protector Act 23 of 1994, as amended) and the Rules of the NA (especially the New Rules).

126. On 26 February 2020 I therefore caused a memorandum to be circulated to Party Whips and Representatives, indicating that:

126.1. Ms Mazzone had withdrawn her motion of 6 December 2019;

126.2. Ms Mazzone had tabled a new motion on 21 February 2020 requesting the initiation of a process for the removal of the PP in terms of section 194 of the Constitution and the New Rules;

126.3. the new motion was in order;

126.4. Rule 129U obliged me to establish an independent panel to conduct a preliminary enquiry, to establish whether there was *prima facie* evidence to support the charges against the PP in the new motion;

126.5. Rule 129V stipulated who may comprise the panel and that I must appoint the panel after giving political parties in the NA a reasonable opportunity make nominations and after giving due consideration of the all nominees;

126.6. political parties should submit written nominations by 6 March 2020 for that purpose, along with a motivation for the nomination (having regard to the legal or other competencies or experience of the nominee to conduct the assessment under NA Rule 129V).

I attach a copy of the memorandum, marked “**TRM 64**”.

127. On 26 February 2020 I also wrote to the PP:

127.1. informing her of the events on Friday 21 February 2020;

127.2. attaching copies of Ms Mazzone's motion of 6 December 2019, Ms Mazzone's new motion of 21 February 2020 and my memorandum to the political parties represented in the NA of 26 February 2020;

127.3. advising her that I had decided the new motion was in order and had consequently asked the political parties to submit their nominations for appointment to the independent panel by 6 March 2020;

127.4. advising her that after 6 March 2020 I shall establish the independent panel in terms of Rule 129U, appoint its three members in accordance with Rule 129V and appoint one of the panellists as its chairperson in terms of Rule 129W; and

127.5. advising her that, once I had done so, I would immediately refer the motion and the supporting documentation provided by Ms Mazzone to the panel in terms of Rule 129T, advise the panel that it is required by Rule 129X to conduct and finalise its assessment and report relating to the motion within 30 days of its appointment and inform NA and the President of the referral to the panel as required by Rule 129T.

I attach a copy of my letter to the PP (without its annexures), marked "**TRM 65**".

128. In the meantime, on 26 February 2020, my attorneys of record had received a letter from the PP's attorneys. In this letter, a copy of which is attached, marked "**TRM 66**", the PP's attorneys demanded the immediate delivery of my answering affidavit and said, amongst other things, the following:

128.1. *'We have learnt once again from the media for the first time that the 6 December 2019 complaint motion was withdrawn by Ms Natasha Mazonne, who has apparently also submitted a new complaint. We attach a copy of the relevant*

article in today's Business Day newspaper. We also learnt that you are currently in the process of considering the new motion in terms of Rule 129R of the impugned rules, the validity of which is being challenged in court. In other words, nothing has changed except the date of the motion which is under your ongoing consideration and proceeding in terms of the said rules. If the reference to a "material development" [in the State Attorney's letter of 25 February 2020] was to the said amended motion, then it is incorrect since its introduction changes nothing in any material way' (paragraph 5);

128.2. *'What is material is the patently unlawful and unauthorised conduct of the Speaker, apparently in concert with the DA, in unilaterally purporting to withdraw the original motion and accepting the amended motion, midstream and in the middle of ongoing court proceedings' (paragraph 6);*

128.3. *'Given the recent concession by the President that he is potentially conflicted and accordingly disqualified from personal participation in the ongoing process, coupled with the indirect concession by Ms Natasha Mazonne that her original motion, which you approved as being in order, was in fact defective or deficient, it is not clear why your office is still opposing Part A, together with the DA' (paragraph 8);*

128.4. *'We accordingly take this opportunity once more to urge you to suspend the ongoing processing of the amended notice, for the same reasons articulated in our letter to you of 28 January 2020. We ask for an undertaking in that regard by close of business today. We again do so in the spirit of co-operative governance and the need to continue to seek amicable solutions, preferably out of court' (paragraph 9).*

129. Acting on my instructions, on 26 February 2020 my attorneys responded to the PP's attorneys' letter. In their response, a copy of which is attached, marked "TRM 67", my attorneys said the following:

1. *We refer to the above-mentioned matter and to your letter of even date to our client, the Speaker of the National Assembly, which was copied to us.*
2. *We attach a self-explanatory letter of even date from our client to your client, the Public Protector, including the annexures thereto.*
3. *As you will see from our client's letter, the National Assembly process consequent upon the motion tabled by Ms NWA Mazzone MP on 6 December 2019 has been terminated by the withdrawal of that motion on 21 February 2020 and its replacement with a fresh motion requesting the National Assembly to initiate the process to remove your client from the office of the Public Protector.*
4. *Ms Mazzone was entitled to withdraw her motion of 6 December 2019 when she did. Rule 128(1) of the Rules of the National Assembly provides a member who has given notice of a motion may withdraw it at any time before being called upon to move it in the House. By 21 February 2020 Ms Mazzone had not been called upon to move her motion in the House.*
5. *Having withdrawn her motion, Ms Mazzone was entitled to table a fresh motion in terms of Rule 129R, read with Rule 124(6) of the Rules of the National Assembly.*
6. *The fact that your client had instituted the above-mentioned matter was no bar to the withdrawal of the 6 December 2019 motion and the tabling of the 21 February 2020 motion.*

7. *Upon Ms Mazzone having tabled the fresh motion, our client was obliged to consider the new motion and decide whether it is in order (i.e. complies with the formal requirements for motions of this kind set out in Rule 129R). Our client has now duly considered the new motion and decided that it is indeed in order.*
8. *Having reached that decision, our client has consequently re-started the process aimed at the establishment of the independent panel in terms of Rules 129U, 129V and 129W of the Rules of the National Assembly by notifying the political parties represented in the Assembly of Ms Mazzone's withdrawal and replacement of her motion and calling upon them to nominate, afresh, persons for appointment to the panel.*
9. *In the premises, your reference to patently unlawful and unauthorised conduct by our client is incorrect and is denied.*
10. *Moreover, there is no basis either in fact or law for your client's urging that our client undertake to suspend the processing of the new motion. On the contrary, our client is obliged to take the steps now required of her by the Rules of the National Assembly.*
11. *As you will see from the copies of two motions attached to our client's letter, your inference that 'nothing has changed except the date of the motion' is incorrect. The motion of 6 December 2019 materially different from the motion of 21 February 2020, including but not limited to because it includes new charges, substantiates each of charges in far greater detail and relies on additional evidence.*
12. *In the circumstances which have now arisen, your client's current application for the interim interdict pendente lite in Part A of her notice of motion cannot*

continue, at least not based on her founding papers as they currently stand, because it relates to the process started by Ms Mazzone's motion of 6 December 2019 which became moot upon the withdrawal of that motion.

13. *We are accordingly instructed to enquire, as we hereby do:*

13.1. *whether, having considered Ms Mazzone's new motion, your client will be persisting with the above-mentioned matter; and*

13.2. *if so, whether your client intends amending her notice of motion and/or supplementing her founding papers.*

14. *We are further instructed to request, as we hereby do, that should the answers to both the questions in the preceding paragraph be in the affirmative, you:*

14.1. *propose, for consideration by our client, the other respondents who have given notice of their intention to participate and all persons who have sought admission as amici curiae, a timetable for the further conduct of the above-mentioned matter, including:*

14.1.1. *a proposed date for the amendment of your client's notice of motion and the supplementation of her founding papers;*

14.1.2. *proposed dates for the delivery by the respondents of notices indicating their attitude to the amended relief and of their answering papers, if any;*

14.1.3. *a proposed date for the delivery of your client's replying papers, if any;*

14.1.4. *proposed dates for the delivery of heads of argument; and*

14.1.5. *a proposed hearing date (which of necessity must be a date later than 17 March 2020); and*

- 14.2. *advise the Judge President of the Western Cape Division of the High Court, in writing, of the facts that your client intends amending her notice of motion and/or supplementing her founding papers and has made a proposal to the persons participating in the matter regarding the exchange of papers and proposed hearing date, and that the parties' legal representatives will seek leave to approach him in chambers once they have concluded their discussions about the further conduct of the matter.*
15. *We are further instructed to request, as we hereby do, whether, should the answer to the question in paragraph 13.1 above be in the negative, your client intends instituting fresh proceedings and, if so, when she is aiming to do so, whether such proceedings will include an application for an interim interdict pendente lite and the proposed (first) hearing date of any such fresh proceedings.*
16. *Our instructions are that if, having considered Ms Mazzone's new motion of 21 February 2020, your client decides to seek an urgent interim interdict in relation to the new Parliamentary process started by the new motion, whether by amending her existing notice of motion and supplementing her existing founding papers or by instituting fresh proceedings, our client will consider the grounds for the new interdict set out in your client's papers and decide whether or not she will oppose the granting of the new interdict. If our opposes, she will set out the relevant facts and explain the basis for her opposition in her answering court papers.*

17. *In the circumstances, your client's demand that our client immediately deliver answering papers to your client's application as it currently stands is unjustified and is refused.*
18. *Finally, in circumstances which have arisen, your client's allegations that our client has been dilatory and your client has been prejudiced thereby, are incorrect and are denied; and, further, should your client seek to persist with her application in its present form on her self-selected date of 17 March 2020, our client will draw the contents of this correspondence to the attention of the Court and request that your client's application be dismissed with punitive costs on the ground that such persistence will entail the incurrence of fruitless and wasteful expenditure of public funds.*
19. *We trust that your client will be guided accordingly.'*
130. On 27 February 2020 my attorneys received a response from the PP's attorneys, a copy of which is attached, marked "**TRM 68**". As is apparent, this letter, amongst other things:
- 130.1. contained five new allegations of unlawful conduct by me in the period following the withdrawal on 21 February 2020 by Ms Mazzone of the motion she had tabled on 6 December 2019 and its replacement on 21 February 2020 with a fresh motion requesting the NA to initiate the process to remove Adv Mkhwebane from the office of the Public Protector;
- 130.2. requested me to deal with those allegations in her answering affidavit; and
- 130.3. again urged me to suspend the processing of the new motion.

131. On 27 February 2020 the DA, which is opposing the relief sought by Adv Mkhwebane, delivered its answering affidavits in relation to the urgent relief sought by her in Part A of her notice of motion.
132. On 28 February 2020, acting on my instructions, my attorneys of record addressed a response to the PP's attorneys' letter of 27 February 2020. In my attorneys' letter, a copy of which is attached, marked "**TRM 69**", my attorneys, amongst other things:
- 132.1. denied that I had acted unlawfully in relation to the process to remove Adv Mkhwebane from the office of the Public Protector initiated by Ms Mazzone;
- 132.2. stated that I remain of the view that there is no basis either in fact or law for Adv Mkhwebane's urging that the Speaker undertake to suspend the processing of the new motion. On the contrary, section 194 of the Constitution and the Rules of the National Assembly together require that the process started by Ms Mazzone's motion of 21 February 2020 continue;
- 132.3. pointed out that on Wednesday 26 February 2020, acting on the instructions of the Speaker, my attorneys had invited Adv Mkhwebane to amend the urgent relief she is seeking in Part A of her notice of motion and to supplement her founding papers, so as to deal with the withdrawal and replacement of Ms Mazzone's motion on 21 February and with my decision on 26 February 2020 that the fresh motion is in order (i.e. complies with the formal requirements for motions of this kind set out in National Assembly Rule 129R);
- 132.4. pointed out that it is not permissible for any litigant, let alone one who has been invited to file supplementary founding papers dealing with new developments

which have a material impact on the relief she is seeking and particularly the grounds on which she is doing so, to make new allegations concerning those developments in correspondence directed to one of the respondents alone (i.e. directed to me alone) and then to rely, at the hearing, on those new allegations in support of the relief claimed, as the PP is evidently now seeking to do;

132.5. pointed out that if, in support of her application for the urgent relief, Adv Mkhwebane indeed intends relying on the new allegations of unlawfulness made in her attorneys' letter of 27 February 2020, she must do so in a supplementary founding affidavit;

132.6. invited Adv Mkhwebane to deliver a supplementary founding affidavit, together with a proposed timetable governing her application for the urgent relief including proposed dates for the delivery of the answering affidavits by me and the other respondents who may oppose and a proposed new hearing date (a date later than Adv Mkhwebane's self-selected date of 17 March 2020 because of the need for parties to file answering and replying papers and heads of argument before the hearing);

132.7. warned Adv Mkhwebane that if she did not deliver a supplementary founding affidavit, at the hearing she would be confined to the factual allegations set out in her founding papers, which because they were filed before 21 February 2020 relate to the process to remove her from the office of the Public Protector started by Ms Mazzone's motion of 6 December 2019, whereas that process was terminated on 21 February 2020 by the withdrawal of that motion and its replacement by a fresh and materially different motion; and

132.8. again warned Adv Mkhwebane that should she persist with her application for urgent relief in its present form on 17 March 2020 (i.e. without supplementing her founding papers to deal with the commencement of a fresh process to remove her from office), I will request that the application be dismissed with punitive costs on the ground that her persistence will entail the incurrence of fruitless and wasteful expenditure of public funds.

133. On 2 March 2020 my attorneys received a response to their letter of 28 February 2020 from the PP's attorneys, a copy of which is attached, marked "TRM 70". This letter made it clear the PP would not be supplementing her founding papers and would be *'dealing with the so-called new developments in her replying affidavit'*.

THE PROCEDURE FOR THE REMOVAL OF SOMEONE FROM THE OFFICE OF PUBLIC PROTECTOR

134. The procedure for the removal of a person from the office of Public Protector is governed by section 194 of the Constitution ("**section 194**") and by the new Part 4 of Chapter 7 of the Rules of the NA, adopted on 3 December 2019, pertaining to the removal from office of the Public Protector, the Auditor-General or a member of a Commission established by Chapter 9 of the Constitution (i.e. the New Rules). (In what follows, unless otherwise stated, all references to rules are to the NA Rules as amended by the New Rules.)

135. If the process runs its full course, it comprises seventeen steps.

136. The first step is the submission by a member of the NA of a notice of a substantive motion in terms of NA Rule 129(6) requesting the NA to initiate proceedings for an enquiry by it to remove the incumbent from the office of Public Protector in terms of

section 194 (“**the motion**”) (see Rule 129R(1), read with the definition of ‘*section 194 enquiry*’ in the New Rules).

137. The motion must be limited to a clearly formulated and substantiated charge relating to an action performed by or conduct ascribed to the incumbent which, if established by the evidence, shows the incumbent committed misconduct (i.e. the intentional or grossly negligent failure to meet the standard of behaviour or conduct expected of a person appointed in terms of Chapter 9 of the Constitution), is incapacitated (i.e. as including a permanent or temporary condition that impairs the incumbent’s ability to perform her work, and any legal impediment to employment) or is incompetent (i.e. as including a demonstrated and sustained lack of knowledge to carry out, and of ability to skill to perform, her duties effectively and efficiently) (see paras (a) and (b) of the proviso to Rule 129R(1), read with the definitions of ‘*misconduct*’, ‘*holder of a public office*’, ‘*incapacity*’ and ‘*incompetence*’ in the New Rules and with Rule 129R(2)).
138. The motion must be consistent with the Constitution, the law and the Rules, in particular the New Rules (see para (d) of the proviso to Rule 129R(1)).
139. All evidence relied upon in support of the motion must be attached to it (see para (c) of the proviso to Rule 129R(1)).
140. The second step is an assessment by the Speaker of whether or not the motion is in order, i.e. compliant with the criteria set out in Rule 129R. The Speaker may consult with the member to ensure the motion is compliant (see Rule 129S, read with the opening words of Rule 129T (‘*When the motion is in order*’)).
141. The third step is the giving by the Speaker to political parties represented in the NA (“**the political parties**”) of a reasonable opportunity to put forward nominees for

consideration for appointment to the independent panel to conduct the preliminary assessment into the motion described in Rule 129X (“**the panel**” and “**the preliminary assessment**”) (see Rule 129V(2)).

142. The fourth step is the establishment by the Speaker of the panel, the appointment by the Speaker of the members of the panel and the appointment by the Speaker of one of the panellists as its chairperson. The panel must be independent. It must consist of three fit and proper South African citizens, which may include a judge, and who collectively possess the necessary legal and other competencies and experience to conduct the preliminary assessment. If the Speaker appoints a judge to the panel, that must be done in consultation with the Chief Justice. When appointing the members of the panel, the Speaker must give due consideration to all persons nominated by the political parties (see Rules 129U, 129V, 129W and 129X(1)(a)).
143. The fifth step is the referral by the Speaker to the panel of the motion and any supporting documentation provided by the member. Without delay after the referral to the panel, the Speaker must inform the NA and the President of the referral (see Rule 129T).
144. The sixth step is the conduct of the preliminary assessment by the panel. The task of the panel to is to assess whether there is *prima facie* evidence to show that the incumbent has committed the misconduct, or is incompetent or incapacitated, for the reasons alleged in the motion. When performing its task the panel must apply the Constitution, the law and the Rules impartially and without fear, favour or prejudice (see Rule 129X(1)(a) and (b)).
145. The panel may determine its own working arrangements, subject to the following: (a) a *quorum* comprises the chairperson and one of the panellists; (b) in its sole discretion the panel may afford any member of the NA an opportunity to place written or recorded

information before it within a specified timeframe; (c) the panel must, without delay, provide the incumbent with copies of all information available to the panel relating to the assessment; (d) the panel must provide the incumbent with a reasonable opportunity to respond, in writing, to all relevant allegations against her; (e) the panel must not hold oral hearings, i.e. it must limit its assessment to the written and recorded information placed before it; and (f) within 30 days of its appointment the panel must complete the assessment and its report thereon, which must include any recommendations and its reasons for such recommendations and any minority view of any panellist (see Rules 129X(1)(c) and (2) and 129Y).

146. The panel's recommendations may include whether the NA should refer the matter to a committee of the NA to consider motions initiated in terms of section 194 ("**the section 194 committee**") and if that is done whether or not the incumbent should be suspended by the President from the office of Public Protector (see Rules 129X(1)(c)(v), 129Z(2) and (3) and 129AA, read with section 194(1)(b) and (3)(a)).
147. The seventh step is the scheduling by the Speaker of a meeting of the NA to consider the report and recommendations by the panel. This must be done with due urgency, given the programme of the NA (see Rule 129Z(1)).
148. The eighth step is the taking of a decision by the NA of a decision as to whether or not an enquiry by it to remove the incumbent from the office of Public Protector in terms of section 194 should be proceeded with. If the NA resolves that such an enquiry should be proceeded with, it must refer the matter for a formal enquiry to the section 194 committee (see Rule 129Z(2)).
149. The NA may also resolve to recommend to the President that the incumbent be suspended by the President from the office of Public Protector pending the outcome of

the formal enquiry (see Rule 129Z(3) s.v. '*any action or decision emanating from the recommendations*', read with section 194(3)(a)).

150. The ninth step is the Speaker must inform the President of the action or decision by the NA emanating from the recommendations by the panel (see Rule 129Z(3)).
151. The tenth step is the determination by the Speaker of the number of members of the section 194 committee (if that has not already been done) and the allocation of seats on the committee to the political parties in accordance with Rule 154, i.e. each party is entitled to at least one representative on the committee and the political parties are entitled to be represented on the committee in substantially the same proportion as the proportion in which they are represented in the NA except where the number of members of the committee does not allow for all political parties to be represented (see Rule 129AB(1)).
152. The eleventh step is the appointment by the political parties of their members of the section 194 committee (see Rule 129AB(2), read with Rule 155).
153. The twelfth step is the appointment by the committee of one of its members as chairperson (see Rule 129AC).
154. The thirteenth step is the conduct by the section 194 committee of an enquiry aimed at establishing the veracity of the charges against the incumbent in the motion. For the purpose of performing its functions, the committee has all the powers applicable to parliamentary committees as provided for in the Constitution, applicable law and the Rule, subject to the following: (a) the committee must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe; (b) the committee must afford the incumbent the right to be heard in her own defence

and to be assisted by a legal practitioner or other expert of her choice, provided that the legal practitioner or other expert may not participate in the committee; (c) a question before the committee is decided when a majority of the members is present and there is agreement among the majority of members present; (d) the committee must make a finding as to whether or not the incumbent has committed the misconduct, or is incompetent or incapacitated, for the reasons alleged in the motion; and (e) the committee must set out in a report its findings and recommendations, the reasons therefor and all views expressed in the committee including minority views (see Rules 129AD, 129AE and 129AF (introductory portion), read with Rule 162(2) and section 194(1)(b)).

155. At any stage after the start of the proceedings of the section 194 committee, the President may suspend the incumbent from the office of Public Protector (see section 194(3)(a)).
156. The fourteenth step is the scheduling by the Speaker of a meeting of the NA to consider and debate the report and recommendations by the section 194 committee. This must be done with due urgency, given the programme of the NA (see Rule 129AF(1)).
157. The fifteenth step is the consideration and debate by the NA of the report and recommendations by the section 194 committee. If the report recommends that the incumbent be removed from the office of Public Protector, the question must be put to the NA directly for a vote in terms of the Rules. If at least two thirds of the members of the NA vote in favour, the resolution is adopted; otherwise, it fails (see Rule 129AF(2), read with section 194(1)(c) and (2)(a)).

158. The sixteenth step, which must be taken only if the NA adopts the resolution, is the NA (presumably through the Speaker) must convey its decision to the President (see Rule 129AF(2)).
159. The seventeen and final step is the removal by the President of the incumbent from the office of Public Protector, something which may be done only if the NA has adopted the resolution and which must be done in that eventuality (section 194(3)(b), read with Rule 129AF(2)).
160. As is apparent, the main functions of the Speaker in this process are confined to matters of a formal nature, namely:
- 160.1. consulting the member who gave the impeachment motion to ensure it is compliant with the criteria set out in rule 129R (Rule 129S);
 - 160.2. appointing the independent panel after giving due consideration to the nominees put forward by the political parties represented in the NA (Rule 129V(3));
 - 160.3. referring the motion to the panel and informing the NA and the President of the referral (Rule 129T);
 - 160.4. scheduling a sitting of the NA sitting to consider the report and recommendations of the panel (Rule 129Z(1));
 - 160.5. informing the President of any action or decision by the NA emanating from the recommendations of the panel (Rule 129Z(3));
 - 160.6. if the NA resolves that a section 194 enquiry be proceeded with, determining, subject to Rule 154, the number of members of the section 194 committee (Rule 129AB(1));

160.7. scheduling a meeting of the NA to consider and debate the report and recommendations by the section 194 committee (Rule 129AF(1)); and

160.8. if the NA resolves that the incumbent be removed from the office of Public Protector, conveying that decision to the President (Rule 129AF(2)).

THE TEN GROUNDS ON WHICH THE RELIEF IN PART A OF THE NOTICE OF MOTION IS SOUGHT

The first ground: the *audi alteram partem* rule and procedural irrationality

161. This ground is set out in paragraphs 97 to 106 of the founding affidavit.

162. Before dealing with the specific allegations Adv Mkhwebane makes in support of this complaint, I point out that the New Rules provide her with two opportunities to answer the charges against:

162.1. the first opportunity is when the independent panel is conducting the preliminary assessment of whether there is *prima facie* evidence to show that she committed the misconduct with which she has been charged by Ms Mazzone or is incompetent for the reasons alleged by Ms Mazzone – see Rules 129X(1)(c)(ii) and (iii), which provide the panel must without delay provide her with copies of all information available to it relating to the assessment and provide her with a reasonable opportunity to respond, in writing, to all relevant allegations against her; and

162.2. the second opportunity, which will arise if, after considering the report of the independent panel the NA decides that a section 194 enquiry be proceeded with, is when the section 194 committee proceeds with the enquiry to establish the

veracity of the charges – see Rule 129AD(3), which provides that the committee must afford her the right to be heard in her own defence and to be assisted by a legal practitioner or other expert of her choice, provided that the legal practitioner or other expert may not participate in the committee.

163. I submit that these provisions provide the PP with fair opportunities to answer the charges against her.
164. Adv Mkhwebane alleges the New Rules deny her the benefit of the *audi alteram partem* rule because they do not make any provision for her to be notified by the Speaker of a complaint in the form of a motion that has been lodged against her. For two reasons, I dispute this allegation. First, although the New Rules do not provide for the Speaker to notify the PP of a motion to initiate proceedings for a section 194(1) enquiry, nothing in the New Rules prohibits the Speaker from doing so should she consider it appropriate in the circumstances arising in a particular case – as indeed I did on 26 February 2020 when I sent to Adv Mkhwebane copies of both Ms Mazzone’s original motion of 6 December 2020 and her new motion of 21 February 2020. Second, as explained, Rule 129X(1)(c)(ii) requires that the independent panel, once established, must without delay provide Adv Mkhwebane with copies of all information available to it relating to the assessment. That information will include the motion and the evidence attached to it.
165. Adv Mkhwebane alleges the function performed by the NA under section 194 of the Constitution is quasi-judicial. Although I have reservations about the label ‘quasi-judicial’, it is clear that section 194 of the Constitution requires, as a pre-requisite for the removal of the PP from office, an investigation by a committee of the NA into whether one or more grounds for the impeachment of the PP exists, including a fair

hearing to allow her to respond to charges, and a finding by the committee that such a ground does indeed exist. My reservations arise from the fact that such a finding by the section 194 committee is necessary but not sufficient for the removal of the PP from office. What section 194 also requires is a resolution of the NA adopted with a supporting vote of at least two thirds of its members. When voting on such a resolution the members of the NA, who are the representatives of the political parties elected by the people of this country in a general election, must assess whether, having regard to the report and findings of the committee and any other facts and circumstances they consider relevant, resort must be had to the ultimate accountability-ensuring mechanism of impeachment. That assessment is political rather than judicial in nature.

166. Adv Mkhwebane alleges the right of access to justice in section 34 of the Constitution applies to the NA process under section 194 of the Constitution. For two related reasons, I dispute this allegation. First, an impeachment motion does not raise a legal dispute, i.e. one that can be resolved solely by the application of law. Second, the ultimate decision-making body, the NA, is not a court or an independent and impartial tribunal or forum. Although the impeachment process is governed by section 194 of the Constitution and the New Rules, as just explained the outcome – or resolution – of the process is determined by an exercise of political judgment made by a body comprising the representatives of the political parties elected by the people in a general election.

167. Adv Mkhwebane alleges the NA acts as the employer of the PP and, consequently, it was incumbent on the NA to consult with her and the other Chapter 9 institutions of its intention to make the New Rules. I dispute that the PP is employed by the NA. The PP is a state institution to strengthen constitutional democracy in our country created

by the Chapter 9 of the Constitution. The incumbent PP is accordingly the holder of a constitutional office. The facts that (a) the PP is appointed (by the President) on the recommendation of the NA in terms of section 193(4) and (5) of the Constitution, (b) is accountable to the NA and must report on her activities and the performance of her functions to the NA at least once a year in terms of section 181(5) of the Constitution and (c) must be removed from office (by the President) upon the adoption by the NA of the resolution calling her removal envisaged by section 194 of the Constitution, do not mean the NA (or the President) is her employer. Section 181(2) of the Constitution makes it clear the PP is independent, and subject only to the Constitution and the law.

168. Adv Mkhwebane alleges my refusal to furnish her with a copy of the complaint was procedurally irrational. There are several difficulties with this allegation. First, on 26 February 2020 I furnished her with copies of both Ms Mazzone's first motion of 6 December 2019 and her new motion of 21 February 2020. Second, the reasons I did not initially furnish her with the then existent complaint (i.e. Ms Mazzone's first motion of 6 December 2019) were I had to consider whether it was in order (i.e. complied with the requirements of Rule 129R) and, having done so, I set in train the process for the appointment of the independent panel and I knew that, once appointed, the panel would be obliged to provide her with a copy of the motion without delay in terms of Rule 129X(1)(c)(ii). I deny that my approach was procedurally irrational. On the contrary, it was part of a procedurally rational scheme which, had it run its course (i.e. not been terminated on 21 February 2020), would have included Adv Mkhwebane being given a copy of Ms Mazzone's first motion at an appropriate juncture.
169. Finally in this regard, I should mention the reasons why I decided on 26 February 2020 to provide Adv Mkhwebane with copies of both Ms Mazzone's motions were to enable

her to take an informed decision as to whether or not she wished to carry on with the present application and if so to supplement her founding papers; and, given the length and relative complexity of Annexure A to Ms Mazzone's motion of 21 February 2020, to give her a longer period of time to prepare her response to the charges against her than would be the case if she received a copy of the motion from the independent panel (which must complete its work within 30 days of its appointment).

170. Adv Mkhwebane alleges she was entitled to be involved in the process which culminated in my decision that Ms Mazzone's motion was in order (i.e. complied with the requirements of Rule 129R). I dispute this allegation because that process did not involve an assessment of the strength of the charges against her – a task to be performed by the independent panel and, if appointed, the section 194 committee. As appears from the reasons for my decision in relation to Ms Mazzone's new motion of 21 February 2020 set out in paragraph 125 above, my decision involved an assessment of the motion against the form and content requirements of Rule 129R and a consideration of whether it is consistent with the Constitution, the law and the Rules of the Assembly. During the panel proceedings the PP will have the opportunity to respond in writing to all the relevant allegations against her, and during the committee proceedings (if the NA resolves that a section 194 enquiry be proceeded with) she will be afforded the right to be heard in her own defence. On either or both of those occasions she is at liberty to assert and seek to establish that the motion is non-compliant either because it does not meet the form and content requirements of Rule 129R or because it is inconsistent with the Constitution, the law or the Rules of the NA.
171. Adv Mkhwebane apparently alleges that the requirement in Rule 129S means the Speaker must evaluate the evidence attached to the motion. If that is indeed what she

alleges, I disagree. As explained in paragraph 125.3 above, the task I had to perform under Rule 129S was to determine whether, *prima facie* (i.e. on the face of the motion), the charges of misconduct, if established by the evidence, will constitute misconduct as defined by the NA on 3 December 2019 in and for the purposes of the New Rules (i.e. the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of public office) and the charges of incompetence, if established by the evidence, will constitute incompetence as so defined (i.e. as including a demonstrated and sustained lack of: (a) knowledge by her, and (b) ability or skill to perform or to carry out, her duties effectively and efficiently). By contrast, as explained in paragraph 144 above, the task of the independent panel is to assess whether there is *prima facie* evidence to show that the incumbent has committed the misconduct, or is incompetent or incapacitated, for the reasons alleged in the motion (see Rule 129X(1)(b)).

172. Adv Mkhwebane alleges the New Rules are unlawful and offend against the *audi* principle because Rule 129X(1)(c)(iv) precludes the independent panel from hearing oral evidence. I dispute this allegation. The panel performs screening and advisory functions. Written evidence and submissions are sufficient for the proper performance of those functions. Also, the panel must act expeditiously. Hearing oral evidence, especially in a case like the present where there are several, detailed charges, will make it hard or perhaps even impossible to complete its task within 30 days of its appointment, as it is required to do. Hence, there must be no oral hearings. If, after considering the panel's report, the NA decides that a section 194 enquiry be proceeded with, the section 194 committee will conduct an oral hearing which may include oral evidence if that is what procedural fairness requires. Rule 129AD(2) requires that the committee conduct the enquiry in a procedurally fair manner.

The second ground: deviations from established procedure

173. This ground is set out in paragraphs 107 to 109 of the founding affidavit.
174. Adv Mkhwebane alleges the New Rules ‘*flout*’ four ‘*standard practices*’ or ‘*acceptable norms*’ for impeachment processes, namely (a) the right to be informed of the charges and its details at the earliest available opportunity in the process, (b) the right to refute the existence of the requisite grounds at an early stage and at the point of the first determination of a *prima facie* case to answer, (c) the right to reasons and (d) the option to be allowed full legal representation.
175. I dispute that these alleged standard practices or norms (for which no evidence has been given) are requirements for the validity of the New Rules. The real requirement, imposed by the Constitution, is their legality, including their rationality, viewed in the context of section 194 of the Constitution and the Rules of the NA as a whole. I submit the New Rules comply with that requirement.
176. In any event, the New Rules do provide for the PP to be informed of the charges without delay after the appointment of the independent panel and afford her the right to refute the existence of the requisite grounds at the point of the first determination of a *prima facie* case to answer (i.e. while the panel is considering the matter). (As regards Adv Mkhwebane’s allegation in this section that she was entitled to be involved in the process which culminated in my decision that Ms Mazzone’s motion of 6 December 2019 was in order, I refer to paragraph 170 above.)
177. I deny the PP has or should have a right to reasons for any of the following: (a) a decision of the Speaker that an impeachment motion is in order; (b) a resolution by the NA that a section 194 enquiry be proceeded with; (c) a resolution by the NA to

recommend to the President that the PP be suspended pending the outcome of the formal enquiry; (d) a decision by the section 194 committee that the PP has committed the misconduct or is incompetent or incapacitated for the reasons alleged in the motion; and (e) and a resolution by the NA that the PP be removed from office.

178. None of these decisions or resolutions is administrative action subject to the Promotion of Administrative Action Act 3 of 2000 (“PAJA”). There is no requirement in the Constitution, in any other law or in the Rules of the NA that reasons be given for these decisions or resolutions. Nor does procedural rationality or any other constitutional rule or principle applicable to the impeachment process require the giving of reasons.
179. I further deny that the PP has or should have a right to full legal representation, if by that is meant the right to have a legal representative speak on her behalf during the enquiry by the section 194 committee. When section 181(5) of the Constitution provides that the PP is accountable to the NA, it means that she is accountable personally. Section 194 of the Constitution, which as stated is the ultimate accountability-ensuring mechanism, similarly requires that she answer the charges against her personally.
180. I repeat paragraph 178 above in relation to this allegation, *mutatis mutandis*.
181. Finally in this regard, it also bears mentioning that the PP (like the Auditor-General and the commissioners of the Chapter 9 commissions) is no hapless accused. To be appointed to the office of the PP, section 1A(3) of the Public Protector Act 23 of 1994 requires that a person must be someone 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.

The third ground: the right to legal representation

182. This ground is set out in paragraphs 110 to 113 of the founding affidavit.
183. Adv Mkhwebane alleges that the New Rules are unfair because they do not grant a full or effective right to legal representation. I dispute this allegation for the reasons given in paragraphs 179 to 181 above.
184. Adv Mkhwebane also alleges Rule 129AD(3) is vague because it is not clear whether it excludes the participation of the legal practitioner during the leading of evidence, cross-examination of witnesses and the like, or whether it only excludes the participation of the legal practitioner in the deliberations of the section 194 committee. I deny the rule is vague for the reasons given, or at all. On the contrary, it is straightforward and clear. The PP may be assisted by a legal practitioner, but the legal practitioner may not participate in the section 194 committee in any of the ways mentioned by Adv Mkhwebane.

The fourth ground: unlawful and premature referral

185. This ground is set out in paragraphs 114 to 119 of the founding affidavit.

186. Adv Mkhwebane appears to allege that Rule 129X(1)(c)(i) is inconsistent with the Constitution because it confers on the independent panel a discretion whether or not to permit a member of the NA to place relevant information before it, instead of obliging the panel to accept any such information. If that is indeed her allegation, I dispute the alleged unconstitutionality. There is no requirement in the Constitution obliging a screening body like the panel to receive additional information (as opposed to permitting it to do so if that is what rationality requires).
187. Adv Mkhwebane alleges that when the Speaker determines that a motion is compliant and in order, as contemplated by Rules 129S and 129T, she must ‘*determine that there is prima facie evidence of intention in the form of dolus*’ and a ‘*winnable case*’. In this regard Adv Mkhwebane further alleges that in making that determination, the Speaker’s position is comparable to that of a prosecutor. I dispute these allegations for the reasons given in paragraph 171 above and also because, in any event, intention in the form of *dolus* is not an essential requirement for impeachment contained in section 194(1)(a) of the Constitution or in the relevant definitions in the New Rules (i.e. the definitions of ‘*incompetence*’ and especially ‘*misconduct*’, which also encompasses gross negligence).

The fifth ground: the rule against retrospectivity

188. This ground is set out in paragraphs 120 to 121 of the founding affidavit.
189. Adv Mkhwebane alleges that the New Rules do not apply to conduct by the PP before 3 December 2019 (i.e. the date when the NA adopted the New Rules), as that would be a violation of the rule or presumption against retrospectivity. Adv Mkhwebane consequently alleges that insofar as the charges in Ms Mazzone’s motion relate to events before that date, it is not ‘in order’ and consequently is not a valid foundation

for an impeachment process in relation to her. I dispute these allegations for the following reasons. First, with the exception of criminal trials (as to which, see section 35(3)(l) of the Constitution), there is no rule against retrospectivity in our law. There is a presumption, but it can be rebutted. Second, it would be absurd to interpret the New Rules as applying only to events after their adoption. Not only would that leave a *lacuna* (i.e. the NA could not validly impeach a Chapter 9 officer or commission member for anything done or not done before 3 December 2019, no matter how serious), but the New Rules mainly regulate the procedure to be followed for impeachment processes in terms of section 194 of the Constitution, a provision which has been in operation since the commencement of the Constitution on 4 February 1997 (a date long before Adv Mkhwebane's appointment to the office of the PP). Third, insofar as the New Rules regulate matters of substance (i.e. define '*incapacity*', '*incompetence*' and '*misconduct*') they impose higher thresholds for impeachment than the ordinary meaning of those words would otherwise impose, alternatively they do not impose lower thresholds. Consequently, in this respect, the retrospective operation of the New Rules inures to the benefit or at least not to the detriment of the PP. The reasons underlying the presumption against retrospectivity are thus not engaged.

The sixth ground: recusal and the right to be protected against conflicts of interest

190. This ground is set out in paragraphs 122 to 130 of the founding affidavit.

191. Although Adv Mkhwebane's allegations in these paragraphs are rather hard to follow, I understand them to be the following:

191.1. the office of the PP is currently dealing with a number of complaints involving allegations of serious impropriety or wrongdoing by members of the national

Cabinet who are members of the NA, by conducting investigations into the complaints and by preparing reports on the investigations;

191.2. some national Cabinet members including the incumbent President are currently involved in acrimonious litigation against Adv Mkhwebane involving reports containing findings of wrongdoing by them;

191.3. I have acted unlawfully in a range of respects alleged elsewhere in her affidavit (and which I deal with from paragraph 200 below);

191.4. there are members of the NA '*who by association are implicated in the unlawful conduct of the Speaker*' (paragraph 124 of the founding affidavit) – I identify and deal with her allegations against the members in question from paragraph 210 below;

191.5. '*the Speaker and Deputy Speaker have unnecessarily decided to take sides in the dispute between the President and the Public Protector [i.e. in the litigation about the BOSASA report referred to in paragraph 115 above] by siding with the President against the Public Protector, instead of maintaining their independence*' (paragraph 125 of the founding affidavit);

191.6. all of these persons are '*indisputably conflicted in relation to the question posed in the [impeachment] motion*' (paragraph 126 of the founding affidavit); and

191.7. the new rules are irrational because they '*fail to make provision for filtering malicious and/or dishonest "complaints" by conflicted compromised individuals or any other abuse-of-process manoeuvres*' (paragraph 129 of the founding affidavit).

192. It is convenient to deal, first, with the last of these allegations by Adv Mkhwebane. I deny this allegation because it fails to account for the three filtering mechanisms in the New Rules described in paragraphs 137 to 140, 143 and 148 above.
193. Subject to what I say below, particularly in the section of this affidavit (starting at paragraph 199 below) about Rule 30 and the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members ("**the Ethics Code**") (which is referred to in Rule 30 and is a schedule to the Joint Rules of the NA and the National Council of Provinces, I accept the correctness of the allegations by Adv Mkhwebane summarised in paragraphs 191.1 and 191.2 above.
194. I also accept that both procedural fairness (the standard made applicable by Rule 124AD (2) to the conduct of the enquiry by the section 194 committee) and procedural rationality (a standard for the validity of all exercises of public power) require that the members of the section 194 committee should not have or be reasonably perceived to have a personal interest in the outcome of the proceedings of the committee. In this regard it is important to bear in mind that the function of the committee is to make a finding as to whether or not the PP has misconducted herself or is incompetent on the grounds set out in the charges. In instances where the facts are in dispute, this will entail both fact-finding and determining whether the facts, as found, show misconduct, incapacity or incompetence. In instances where the facts are common cause, the function of the committee will solely be to determine whether the facts show misconduct, incapacity or incompetence.
195. If the NA resolves that a section 194 enquiry be proceeded with in relation to Ms Mazzone's complaint, it is most unlikely that political parties in the NA with members in the national Cabinet will appoint any of those members to the committee.

The reason is that national Cabinet members have never in the last five consecutive Parliaments been appointed to serve on NA committees.

196. However, for three related reasons, I do not accept that such national Cabinet members may not participate or vote in the proceedings of the NA which will ensue if the section 194 committee finds that Adv Mkhwebane did indeed misconduct herself in one or more of the ways alleged by Ms Mazzone or that she is indeed incompetent for one of more of the reasons alleged by Ms Mazzone.
197. The first reason is that if the committee makes such a finding, the NA as a whole must decide whether or not to remove her from office. A supporting vote of at least two thirds of the members of the NA is required for her removal. It would be inimical to the proper functioning of the impeachment mechanism and to our system of party-political representative democracy, if national Cabinet members (most if not all of whom would be members of the majority party) were to be precluded from participating or voting in the proceedings of the NA simply because they know or have reason to suspect Adv Mkhwebane is investigating complaints involving allegations against them of serious impropriety or serious wrongdoing or because they are involved in litigation against Adv Mkhwebane involving reports containing findings of wrongdoing by them. It is necessarily implicit in section 194(2)(a) of the Constitution, the provision which requires that, to be adopted, a resolution calling for the PP's removal from office must be supported by at least two thirds of the members of the NA, that all the members of the NA are entitled to vote.
198. The second reason is voting on such a motion entails an exercise of political judgment, more specifically whether the misconduct, incapacity or incompetence as found by the committee are so serious that removal from office – the ultimate accountability

mechanism provided by Chapter 9 – is warranted. This means that when voting on such a motion, all members of the NA must put the public interest ahead of their personal interests.

199. The third reason is the obligation just mentioned is underscored and enforced by Parliament, by means of Rule 30 of the NA Rules and the Ethics Code, a copy of which is attached, marked “**TRM 71**”. Rule 30 provides that if a member has a personal interest or a private financial or business interest in any matter before a forum of the Assembly of which he or she is a member, he or she must at the commencement of engagement on the matter by the forum immediately declare that interest in accordance with the code of conduct contained in the schedule to the Joint Rules and comply with the other provisions of the code. The code in question is the Ethics Code.
200. In line with the oath or solemn affirmation to be taken by all members of Parliament before they may perform their functions as such (see item 4 of Schedule 2 to the Constitution), the Ethics Code outlines the minimum ethical standards of behaviour that South Africans expect of public representatives, including upholding propriety, integrity and ethical values in their conduct. It specifically provides that all members of the NA must *‘take decisions solely in terms of public interest and without regard to personal financial or other material benefits for themselves, their immediate family, their business partners, or their friends’* (clause 2.4.1), must *‘declare private interests relating to public duties and resolve any conflict arising in a way that protects public interest’* (clause 2.4.5) and must *‘discharge their obligations, in terms of the Constitution, to Parliament and the public at large, by placing the public interest above their own interests’* (clause 4.1.4). A member of the NA breaches the Ethics Code when he or she, amongst other things, *‘contravenes or fails to comply with the*

requirements of the provisions for disclosing interests' (clause 10.1.1.1) or contravenes clause 4.1 (clause 10.1.1.1.3). The Joint Committee on Ethics and Members' Interests as established by the Joint Rules of Parliament may consider complaints of alleged breaches of these provisions of the Ethics Code (clause 10.2.2.1) or acting on its own may consider any breach or alleged breach of the Code (clause 10.2.2.3). If the Committee finds on the balance of probabilities that a member has breached a provision of the Ethics Code (clause 10.7.6.1), then, depending on the provision breached, the Committee may impose certain sanctions including a reprimand in the NA or a fine of up to 30 days' salary (clause 10.7.7.1) or recommend to the NA any greater sanction it deems appropriate, in which event the NA shall decide on the appropriate sanction to be imposed (clause 10.7.7.2).

201. Turning to Adv Mkhwebane's allegations of unlawful action on my part, elsewhere in her affidavit I have been able to discern eight pertinent allegations.
202. First, Adv Mkhwebane alleges that on about 29 May 2019 I '*unlawfully and unjustifiably entertained*' a request by the DA for her removal from the office of PP, although I did not process the request when she pointed out that unless there were rules governing the process it would be unconstitutional (paragraph 50 of the founding affidavit). I deny the allegation that I unlawfully and unjustifiably '*entertained*' Mr Steenhuisen's third request. The relevant facts are set out in paragraphs 66 to 73 and 79 above. In short, on 10 July 2019 I referred the request to the Portfolio Committee for consideration, and on 27 August 2019 the Portfolio Committee reported that the adoption by the NA of rules governing the section 194 process was necessary and requested that I refer the matter to the Rules Committee, which I duly did.

203. Second, Adv Mkhwebane complains that I have not reprimanded the DA's former and current Chief Whips, Mr Steenhuisen and Ms Mazzone, for unconstitutionally attacking her (paragraph 68 of the founding affidavit). I deny that Mr Steenhuisen and Ms Mazzone attacked her unconstitutionally. What they did was make substantiated requests for the initiation of the impeachment process against her, something which is envisaged and permitted by section 194 of the Constitution and, more latterly, in Ms Mazzone's case, regulated by the New Rules. NA members are within their rights to propose a motion alleging that Adv Mkhwebane has misconducted herself or is incompetent and asking that the NA resolve that she be removed from office in terms of s 194 of the Constitution. None of their motions was frivolous or an abuse of that right.
204. Third, Adv Mkhwebane complains that I did not provide her with a copy of Ms Mazzone's motion of 6 December 2019 and consequently violated '*the right to fairness and justice*' (paragraph 97 of the founding affidavit), '*the requirements of procedural rationality*' (paragraph 100 thereof) and '*the right to be informed of the charge and the details at the earliest available opportunity in the process*' (paragraph 107.1 thereof). I have dealt with these allegations in paragraphs 168, 169 and 176 above.
205. Fourth, Adv Mkhwebane complains that when I decided I was satisfied Ms Mazzone's motion of 6 December 2019 was compliant with the criteria for such a motion set out in the new rules, I confined my assessment to '*the form requirements in the rules*', whereas the proviso to Rule 129R(1) required that I assess the substance of the motion to determine whether, *prima facie*, it showed a ground for impeachment (i.e. whether it

shows a ‘*winnable case*’) (paragraphs 82 and 119 of the founding affidavit). I have dealt with this complaint in paragraphs 171 and 187 above.

206. Fifth, Adv Mkhwebane complains that I did not allow her to participate in the process leading to my decision that the motion, *prima facie*, showed a ground for impeachment. She alleges that in so doing I breached her ‘*right to refute the existence of the requisite grounds at an early stage and at the point of the first determination of a prima facie case to answer*’ (paragraph 107.2 of the founding affidavit). I have dealt with this complaint in paragraph 170 above.

207. Sixth, Adv Mkhwebane complains that on 24 January 2020 (25 January 2020, in fact) I publicly announced my decision to proceed with the impeachment process without first informing her of my decision, and in so doing violated her rights and the office of the PP (paragraph 154 of the founding affidavit). I deny that in making the public announcement I violated any of Adv Mkhwebane’s rights or the protections of her office (especially in sections 181(3) and (4) of the Constitution). I submit my announcement that I had decided that Ms Mazzone’s motion of 6 December 2019 was in order and had consequently called upon the political parties represented in the NA to submit their nominees for appointment to the independent panel, did not infringe Adv Mkhwebane’s rights or the protections of her office. The main reasons I made a public announcement at that juncture were (a) the commencement of the process aimed at the establishment of the independent panel was the first public step by the NA in relation to a matter of public concern, (b) the sending of my memorandum to the political parties meant it was bound to receive some publicity and (c) I wanted to ensure that the media was able to report accurately on what was happening.

208. Seventh, Adv Mkhwebane complains that I have refused or failed to give reasons for my decision to proceed with the impeachment process announced on 25 January 2020 (paragraphs 86 and 158). Adv Mkhwebane is right that I did not acceded to her attorneys' demand on 28 January 2020 that I give written reasons for my decision that Ms Mazzone's motion of 6 December 2019 was in order. I have dealt with this in paragraphs 177 and 178 above. In any event, this issue is moot as Ms Mazzone has withdrawn her motion of 6 December 2019 and in this affidavit I have given reasons for my decision that Ms Mazzone's new motion of 21 February 2020 is in order (see paragraph 125 above).
209. Eighth, Adv Mkhwebane alleges that the '*attitude of the Speaker and the approval of the motion and her failure to inform me about her decision to approve the motion lodged by the DA, all points to the narrative that the Speaker is acting with an ulterior motive*' (paragraph 155). I emphatically deny that I have been acting with an ulterior motive. The objective facts and the reasons for my actions and decisions, set out in in detail in this affidavit, speak for themselves. I trust that in her replying papers Adv Mkhwebane will withdraw this unfortunate allegation. Should she however persist with it, I shall ask this Honourable Court, as a mark of its displeasure, to make a punitive costs order against Adv Mkhwebane in her personal capacity.
210. Turning to the members of the NA who Adv Mkhwebane alleges '*by association are implicated in the unlawful conduct of the Speaker*', it appears from the remainder of Adv Mkhwebane's affidavit the members in question are (a) Mr Steenhuisen, (b) Ms Mazzone and (c) the members of the NA who on 6 March 2018 at a meeting of the Portfolio Committee on Justice and Correctional Services (annexure PPFA3 pp 95-

112) *'publicly pronounced and passed judgment on the very issues which reportedly form the subject of the [current] complaint by the DA'* (annexure PPFA9 para 3 p 155).

211. As regards Adv Mkhwebane's complaints about Mr Steenhuisen and Ms Mazzone, I refer to paragraph 203 above.
212. Turning to the members of the NA who participated in the meeting of the Portfolio Committee on 6 March 2018, I refer, firstly, to what I have said in paragraphs 37 to 42 above about this meeting and about annexure "PPFA 3" to the founding affidavit (i.e. the report of the PMG on the meeting). I emphasise that statements ascribed to the Portfolio Committee as a whole by the PP in her founding affidavit (especially in paragraphs 31 to 35) come from the PMG's meeting summary (which inaccurate in so ascribing the statements), not from its meeting report (which contains an accurate account of what the individual members of the Portfolio Committee actually said). What the latter reveals is a robust engagement between certain members of the Portfolio Committee and Adv Mkhwebane about the Vrede Dairy Report, and about the CIEX PP Report and the litigation in the High Court about it. Members of the Portfolio Committee are within their rights to engage robustly with Adv Mkhwebane about her conduct especially in her capacity as the PP. She is accountable to the NA (s 181(5) of the Constitution), the Portfolio Committee is charged with exercising oversight over the performance of her function and members of the committee have freedom of speech in it (s 58(1)(a) of the Constitution). Indeed, as regards the robust nature of the some of their comments, it is unexceptional that members of the NA, at times, express strong views of matters of public concern. I submit it would be inimical to the proper functioning of the NA if members who have previously had robust engagements with the incumbent PP, in the discharge of their constitutional power and duty to hold her to

account, were, on that account, precluded from participating in later proceedings concerning the PP under section 194.

213. Turning to Adv Mkhwebane's allegation that I and the Deputy Speaker have unnecessarily decided to take sides in the dispute between the President and her in the litigation about the BOSASA report referred to in paragraph 115 above, by siding with the President against her, instead of maintaining our independence (paragraph 125 of her founding affidavit), I deny that we took sides unnecessarily. I applied to intervene as a co-applicant in that matter because, in my estimation, certain of the remedial action and monitoring measures (namely, those contained in paragraphs 8.1.1, 8.1.2, 8.1.3, 9.1, 9.2 and 9.3 of the report) amounted to impermissible prescriptions to the NA about the manner in which it exercises oversight over the executive, were incompatible with the Ethics Code (which does not apply to the President) and the Executive Ethics Code, infringed the doctrine of separation of powers and impermissibly extended to subjecting the NA to monitoring by the PP. In this regard I attach, marked "TRM 72", a copy of my counsel's written submissions to the High Court. I submit my intervention was quite proper, aimed as it was at upholding the integrity and constitutional autonomy of Parliament. Finally in this regard, I should mention that the Deputy Speaker made the founding affidavit in support of my application for judicial review of those elements of the PP's report, because I was unavailable to do so. I made the replying affidavit. If requested, copies of these affidavits will be made available to this Honourable Court and the other parties.

214. Consequently, subject to paragraphs 193 and 195 above, I dispute Adv Mkhwebane's assertion that all of the persons she has named or referred to in her affidavit are indisputably conflicted in relation to the question posed in the impeachment motion.

The seventh ground: the right to decisional and institutional independence

215. This ground is set out in paragraphs 131 to 135 of the founding affidavit.

216. Although Adv Mkhwebane's line of reasoning in this paragraph is somewhat hard to follow, I understand her to argue that she should not be liable to be impeached on account of things done in the course of investigations or things said in her reports because that would infringe the constitutional independence of the institution of the PP guaranteed by section 181(2) of the Constitution. I submit the fallacy in this argument is demonstrated by the following: (a) the findings of the majority of the Constitutional Court in *PP v SARB (CC)* quoted in paragraph 76 above include findings in relation to things done by Adv Mkhwebane in the course of her investigation into the CIEX matter and things said by her in the resulting CIEX PP Report; (b) the findings of the High Court in *DA v PP II* quoted in paragraph 78 above include findings in relation to things done and not done by Adv Mkhwebane in the course of her investigation into the Vrede Dairy matter; and (c) if, following a section 194 enquiry and a consideration of the evidence the section 194 committee reaches same or similar conclusions, the result will probably be a finding by the section 194 committee, in terms of section 194(1)(b) of the Constitution, that Adv Mkhwebane misconducted herself or is incompetent within the meaning of the those terms as defined in the New Rules. I submit it would be absurd and incompatible with the purpose or function of section 194 of the Constitution as the ultimate accountability mechanism provided by Chapter 9, if the incumbent PP's actions or omissions in the course of her investigations, or things said by her in her reports, if found by a section 194 committee, following a reasonable and procedurally fair enquiry in terms of the New Rules, to be misconduct by the PP or to reveal

incompetence on the part of the PP, are impermissible bases for a decision by the NA that she be removed from office.

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

217. This ground is set out in paragraphs 136 to 145 of the founding affidavit.

218. Adv Mkhwebane's first allegation under this heading is that the inclusion by the NA of '*intentional*' and '*gross*' in the definition of '*misconduct*' in the New Rules, as well as of '*demonstrated*' and '*sustained*' in the definition of '*incompetence*' in the New Rules, impermissibly raise the thresholds for impeachment in section 194(1) of the Constitution. I dispute the allegation that the NA's definitions of these terms is inconsistent with the constitutional. I submit that, as with the grounds for the impeachment of the President in section 89(1) of the Constitution, the drafters of the Constitution left the details relating to these grounds to the NA to spell out in rules regulating the impeachment process. I further submit the determination of those details, which the NA did by way of its definitions of '*misconduct*' and '*incompetence*' (and '*incapacity*') in the New Rules, falls within the exclusive jurisdiction of the NA. It follows that those details cannot validly be challenged in legal proceedings on the ground now sought to be advanced.

219. Adv Mkhwebane's second allegation under this heading is to the effect that, in determining whether she has committed impeachable conduct, the NA cannot rely the findings of judges in litigation concerning her (i.e. the NA must decide for itself whether she has misconducted herself or is incompetent). I agree. I however point out that the charges in the DA's motion of 21 February 2020, which is the operative motion, invite the NA to make the relevant findings for itself. The fact that the DA has attached the judgments of certain courts as evidence in support of those charges, does not detract

from this. What this means in practical terms is, if the NA resolves that a section 194 enquiry be proceeded with, the members of the section 194 committee may and probably will derive guidance from the judges' reasoning, and they may ask the witnesses (including the PP) questions based on the judges' reasoning (including whether they admit or dispute facts found by the judges and on which the charges are now based). However, at the end of the enquiry the members will have to decide for themselves whether or not any or all of the charges misconduct or incompetence have been established.

220. Adv Mkhwebane's third allegation under this heading is that the New Rules were adopted without any appreciation of the intention of the drafters of the Constitution to differentiate between the requirements for the impeachment of the President in section 89 of the Constitution and the requirements for the impeachment of the holder of an office in a Chapter 9 institution in section 194. I deny this allegation. As appears from the description of the process of formulation of the New Rules in paragraphs 80 to 92 above, the members of the Rules Committee and particularly the Subcommittee gave careful consideration to a set of rules that would 'fit' and regulate the impeachment process outlined in section 194 of the Constitution.

The ninth ground: one size fits all

221. This ground is set out in paragraphs 146 to 149 of the founding affidavit.
222. Adv Mkhwebane criticises the New Rules for failing to distinguish between, on the one hand, the PP and the Auditor-General (whose removal is dependent on a resolution supported by at least two thirds of the members of the NA) and, on the other hand, members of the commissions established by Chapter 9 (whose removal can be effected by a resolution supported by a majority of the members of the NA). Although she is

right in saying the New Rules do not make that distinction, I submit that is not a valid basis for criticism let alone for a contention – which, I assume, she intended to make – that the New Rules are invalid on that account. The reason is the difference on which she relies is the only difference between the two classes of Chapter 9 office bearers which emerges from section 194 of the Constitution. The voting requirements are catered for in that section, and consequently needed no elaboration in the New Rules (compare Rule 129AF(2)). What had to be regulated further, however, by means of the New Rules, were (a) the details of what would constitute incapacity, incompetence and misconduct, and (b) the process, from start to finish, of proceedings aimed at such office bearers' removal from office in terms of section 194. In the parts of section 194 relevant to those matters no distinction is drawn between the PP and the Auditor-General, on the one hand, and the members of the Chapter 9 commissions, on the other hand. The New Rules, which similarly draw no such distinction, are thus rationally related to section 194.

The tenth ground: separation of powers

223. This ground is set out in paragraphs 146 (second) to 151 of the founding affidavit.

224. Adv Mkhwebane's first allegation under this ground is based on the misconception that Ms Mazzone's complaint is '*largely and seemingly based on opinions of the courts in their criticisms of [her] reports*' (paragraph 146). I have dealt with this issue in paragraph 219 above.

225. Adv Mkhwebane's second allegation under this ground is that the provision made in Rule 129V for a judge to be appointed to the independent panel, in consultation with the Chief Justice, violates the principle of the separation of powers between the judiciary and the legislature. I deny this allegation. Our model of the separation of

powers is not one that requires a complete or total separation. It permits the performance of some non-judicial functions by the judiciary, especially if they are closely connected with the core function of the judiciary. I submit the NA may validly enlist the aid of a member of the judiciary to participate in the non-adjudicatory screening function entrusted to the panel. The performance of the panel's function, focussed as it is on a determination whether there is *prima facie* evidence to show that the holder of a Chapter 9 office, committed misconduct, is incapacitated or is incompetent, is compatible with the office of a judge and will not be harmful to the institution or central mission of the judiciary. More specifically, the performance of the panel's function calls for qualities and skills required for the performance of judicial functions, including independence, the weighing up of information and the forming of an opinion based on information. In other words, it is a function closely connected with the core function of the judiciary.

THE INTERIM INTERDICT *PENDENTE LITE*

General

226. In paragraph 2 of Part A of her notice of motion Adv Mkhwebane seeks an order interdicting and prohibiting me from taking any further steps in the implementation of the processes envisaged in section 194 of the Constitution and conducted in terms of the New Rules, pending the final outcome of the relief she seeks in Part B of the her notice of motion (the main such relief being an order declaring the New Rules to be unlawful, unconstitutional, invalid, null and void).
227. The provisions of section 194 of the Constitution and the New Rules are part of a constitutional scheme that gives effect to one of the NA's primary constitutional responsibilities, namely the responsibility maintain oversight of all organs of state

(section 55(2)(b)(ii) of the Constitution) and to ensure the PP (an organ of state) is and remains accountable to the NA (compare section 181(5) of the Constitution). As stated earlier, proceedings for the impeachment of the PP are the ultimate mechanism for ensuring the accountability of the PP to the NA.

228. I submit that proceedings like the present in which a litigant seeks interim interdictory relief that would impinge on the functions of Parliament were it to be granted, call out for judicial circumspection.

229. Such relief, especially where, as here, it is sought well ahead of the final adjudication of the litigant's case on the merits (i.e. the challenge to the New Rules in Part B of the notice of motion, which is not yet ripe for hearing), may be granted only in the clearest of cases and after a careful consideration of the harm to the separation of powers between the legislature and the judiciary that will ensue if it is granted.

230. I submit that nothing short of a very compelling case on the merits, or where bad faith or corruption or fraud is proved (none of which have been proved in the present matter, as distinct from being alleged without any legitimate factual basis for doing so), will justify the exceptional remedy of staying a section 194 process before it has started in earnest. That is because the incumbent of a Chapter 9 office does not have a general right to pre-emptive protection against the operation of section 194 of the Constitution and the New Rules according to their tenor. More specifically, in this case, Adv Mkhwebane does not have a general right to prevent the NA from exercising its responsibility to undertake a section 194 process in accordance with the New Rules when, as has now happened, a member has lodged a substantive motion calling upon it to do so.

231. I further submit that, in addition to a very compelling case on the merits:

231.1. Adv Mkhwebane will have to show that she reasonably apprehends that she will suffer irreparable and imminent harm if interim interdict is not granted and she is ultimately successful with her Part B challenge to the New Rules; and

231.2. if Adv Mkhwebane overcomes that hurdle, she will also have to show that the imminent and irreparable harm she will suffer outweighs the serious prejudice to the separation of powers and to the public interest in the timely conclusion of the section 194 process that will ensue if the interim interdict she seeks is granted.

232. For the reasons which follow I submit Adv Mkhwebane has not satisfied any of the requirements for the granting of the extraordinary remedy she is seeking.

***Prima facie* right**

233. This issue is dealt with in paragraphs 155 to 165 of the founding affidavit.

234. For the reasons set out in paragraphs 161 to 225 above, none of the ten grounds on which Adv Mkhwebane seeks the relief in Part A of her notice of motion is compelling.

235. I submit the absence of a compelling case on any of her ten grounds of challenge is fatal to Adv Mkhwebane's claim for the interim interdict *pendente lite* in Part A of her notice of motion.

Irreparable harm

236. This issue is dealt with in paragraphs 166 to 175 of the founding affidavit and in the ensuing (but wrongly numbered) paragraphs 138 to 148 thereof.

237. Adv Mkhwebane has not pointed to any effects or consequences which cannot be reversed or undone if the section 194 process continues while her challenge to the New Rules is pending.
238. Aside from the possibility of her suspension by a person with a conflict of interest (i.e. the President), which can be discounted because he has accepted that he has a conflict of interest and consequently will delegate his powers under section 194(3)(a) of the Constitution to another member of the national Cabinet who does not have a conflict should the need to exercise such powers arise, Adv Mkhwebane seemingly confines her case on this issue to the destabilisation of the office of the PP that the section 194 process will cause (see the (second) paragraphs 138 and 139 of her founding affidavit) and '*the nuisance value of the alleged motion*' (see the (first) paragraph 175 of her founding affidavit).
239. The section 194 process is in its early stages. I have taken the third of the seventeen steps in the process described in paragraphs 135 to 159 above. I have yet to establish the independent panel. The significance of this is there is ample time for the parties to exchange papers in relation to the Part B relief and for this Honourable Court to hear and determine that relief, before the section 194 process runs its full course, assuming that were to happen, or perhaps even before any enquiry before a section 194 committee which the NA may order will commence. I undertake to co-operate with Adv Mkhwebane and the other parties and *amici curiae* participating in this matter to ensure that the her application for the Part B relief is ripe for hearing during early May this year, at the latest. If that is done and this Honourable Court can accommodate this matter in early May, any need which may exist for an interim interdict pending the

determination of the Part B relief by this Court (the existence of which is disputed) will fall away.

240. Moreover, even if the section 194 process continues while the Part B relief is pending in this Honourable Court (i.e. it cannot be heard in early May as I have suggested):

240.1. there is the possibility of the NA, after considering the report and recommendations of the independent panel, resolving that a section 194 enquiry not be proceeded with;

240.2. if such an enquiry does ensue, there is also the possibility of the section 194 committee deciding, at the end of the enquiry, that none of the charges levelled against Adv Mkhwebane by Ms Mazzone has been established, i.e. that Adv Mkhwebane has not misconducted herself and is not incompetent for the reasons given by Ms Mazzone; and

240.3. if the section 194 committee decides Adv Mkhwebane has misconducted herself and/or is incompetent for the reasons given by Ms Mazzone, there is the possibility of less than two thirds of the members of the NA supporting the resolution for Adv Mkhwebane's removal from office. In this regard I note that Adv Mkhwebane's case is that it is very unlikely she will be removed (see (the first) paragraph 175 of her founding affidavit).

241. Finally in this regard, I submit that even if, while the Part B relief is pending in this Honourable Court the section 194 process runs its course and the NA adopts a resolution for her removal from office by the requisite majority and consequently she is so removed by the President, then, if she is ultimately successful in obtaining the Part B relief and the grounds on which she succeeds require that her removal from office be

reversed, there would be nothing precluding her from seeking and being granted an order to that effect.

242. I submit the absence of any showing by Adv Mkhwebane of irreparable harm, too, is fatal to her claim for the interim interdict *pendente lite* in Part A of her notice of motion.

No alternative remedy

243. This issue is dealt with in (the second set of) paragraphs 149 to 156 of the founding affidavit.

244. I submit if, as Adv Mkhwebane evidently believes, Ms Mazzone's charges against her lack any substance, Adv Mkhwebane has the obvious alternative remedies of participating in the section 194 process and (a) persuading the NA (via her submissions to the independent panel and its report to the NA on the preliminary assessment process) that there is no *prima facie* evidence to show that she has committed the misconduct or is incompetent or (b) persuading the section 194 committee to make a finding that the charges against her lack veracity.

245. I further submit, for the reasons given in paragraph 241 above, that even if the section 194 process runs its course, the outcome is unfavourable to Adv Mkhwebane and she later succeeds with her Part B relief on grounds which require that her removal from office be reversed, she may seek and being granted an order to that effect.

246. I submit the availability of these alternative remedies is a further reason why Adv Mkhwebane's claim for the interim interdict *pendente lite* in Part A of her notice of motion should be refused.

Balance of convenience

247. This issue is dealt with in (the second set of) paragraphs 157 to 164 and 166 to 170 of the founding affidavit.
248. I submit that even if Adv Mkhwebane will suffer the imminent and irreparable harm on which she relies, it will be far outweighed by the serious prejudice to the separation of powers and to the public interest in the timeous conclusion of the section 194 process that will ensue if the interim interdict she seeks is granted.
249. I submit the factors relevant to the separation of powers harm and the harm to the public interest include that the allegations of misconduct levelled against Adv Mkhwebane are serious and some of them are concordant with findings by the majority of our highest court in a matter (i.e. *PP v SARB (CC)* quoted in paragraph 76 above) in which there is no possibility of any further appeal.
250. For these reasons too, I submit, Adv Mkhwebane's claim for the interim interdict *pendente lite* in Part A of her notice of motion should be refused.

THE CONFLICT-OF-INTEREST RELATED RELIEF

251. In paragraphs 3 and 4 of Part A of her notice of motion, in the alternative to the interim interdict *pendente lite* sought in paragraph 2 thereof, Adv Mkhwebane seeks orders:
- ‘3. *Interdicting those respondents, and/or their members, who have a conflict of interest from voting and/or participating in any way in the processes carried out in terms of section 194 of the Constitution;*
4. *Directing the conflicted persons referred to in Prayer 3 to declare such interests to the Speaker of the National Assembly’.*

252. Although framed as prayers for interim relief, I submit they are prayers for final relief in the form of a prohibitory interdict (prayer 3) and a mandatory interdict (prayer 4). If granted, they will govern the section 194 process going forward without any opportunity for their reconsideration in Part B or in any other proceedings.
253. For the reasons given in paragraphs 190 to 214 above, I submit Adv Mkhwebane has not established the clear right required for the granting of either of these orders, and, consequently they should be refused.
254. Moreover, Adv Mkhwebane's allegations are speculative, depending as they do on the possible future participation in the section 194 process of NA members who she alleges are conflicted. She however has not shown the requisite reasonable apprehension of an infringement of the right on which she relies. Indeed, the process may well unfold in a way which provides no basis whatsoever for a conflict-of-interest complaint. For this reason too, the final interdicts she seeks should be refused.
255. Finally, if the section 194 process runs its course and the outcome is unfavourable to Adv Mkhwebane, and she believes the process was tainted by conflicts of interest on the part of members of the NA who participated in it and has evidence supporting her belief, she may seek to achieve her reinstatement in office by means of proceedings for judicial review. Although, for the reasons given in paragraphs 190 to 214 above, I make no concession about the merits of any proceedings, the fact is she has an alternative remedy. For this further reason, the relief sought in paragraphs 3 and 4 of Part A of her notice of motion should be refused.

THE CLAIM FOR REASONS FOR THE SPEAKER'S DECISION

256. In paragraph 5 of Part A of her notice of motion, also in the alternative to the interim interdict *pendente lite* sought in paragraph 2 thereof, Adv Mkhwebane seeks a final order:

‘5. *Directing the Speaker to furnish the applicant with requested reasons for the approval decision made / announced on 24 January 2020*’.

257. I submit this issue became moot when, on 21 February 2020, Ms Mazzone withdrew her motion of 6 December 2019, to which my decision of 24 January 2020 related. Upon such withdrawal, the section 194 process in relation to Ms Mazzone’s motion of 6 December 2019 came to an end.

258. Alternatively, and in any event, for the reasons given in paragraphs 177 and 178 above, I deny Adv Mkhwebane has a right to reasons for my decision that Ms Mazzone’s motion of 6 December 2019 was in order.

259. Finally, as regards the reasons for my decision that Ms Mazzone’s new motion of 21 February 2020 is in order, these are given in paragraph 125 above.

COSTS

260. I reserve my right to seek a punitive costs order against Adv Mkhwebane personally should she:

260.1. persist with the scurrilous allegation, traversed in paragraph 209 above, that I have been acting with an ulterior motive;

- 260.2. persist with seeking relief in relation to Ms Mazzone's motion of 6 December 2019 and/or my actions in relation thereto, the section 194 process in relation thereto having been terminated upon its withdrawal on 21 February 2020; and
- 260.3. in her replying papers (i.e. without filing a supplementary founding affidavit), seek to make out a new case based on Ms Mazzone's lodging of her new motion on 21 February 2020 and/or my actions in relation to that motion.

AD-SERIATIM

261. Ad paragraphs 34, 35 and 42 of Adv Mkhwebane's founding affidavit:

- 261.1. In these paragraphs Adv Mkhwebane alleges the members of the Portfolio Committee who engaged with her at the committee's meeting on 8 March 2018 about the CIEX PP Report and investigation and the Vrede Dairy report and investigation, infringed the *sub judice* rule (i.e. NA Rule 89 which provides that no member may reflect on the merits of any matter on which a decision in a court of law is pending) because at the time there was pending litigation about both reports and investigations. She also alleges the subsequent letter from the Chairperson of the Portfolio Committee, Dr Motshekga, dated 21 June 2018 (annexure "PPFA4"), inviting her to respond to Mr Steenhuisen's complaint of 16 February 2018 (annexure "PPFA6") evinces disrespect for the judiciary and infringes sections 165 and 166 of the Constitution.
- 261.2. I dispute these allegations. The members were exercising the right and duty of the Portfolio Committee to exercise oversight over the performance of her functions, pursuant to sections 55(2)(b)(ii) and 181(5) of the Constitution. The *sub judice* rule and sections 165 and 166 of the Constitution do not preclude the

members of NA from performing their oversight functions, or for that matter from initiating or participating in impeachment processes.

262. Ad paragraph 43 thereof:

In this paragraph Adv Mkhwebane makes the unsubstantiated and scurrilous allegation that, when inviting her to respond to Mr Steenhuisen's complaint of 16 February 2018, the Portfolio Committee did not refer to the finding of the Supreme Court of Appeal in *Minister of Home Affairs and Another v Public Protector* 2018 (3) SA 380 (SCA) (i.e. that decisions of the Public Protector were not administrative action and so not subject to review under the Promotion of Administrative Justice Act 3 of 2000, but they could be reviewed under the principle of legality), '*presumably for political expediency and to curry favour with their political principals, who are the subjects of Public Protector investigations for alleged impropriety*'. As confirmed by Dr Motshekga in his affidavit, this allegation is devoid of any truth. When writing to Adv Mkhwebane on 21 June 2018 Dr Motshekga did not consider the legal basis on which the PP's decisions can be brought under judicial review.

263. Ad paragraphs 43 and 44 thereof:

When on 21 June 2018 Dr Motshekga wrote to Adv Mkhwebane asking for her response to the allegations in Mr Steenhuisen's letter of 16 February 2018, it had taken no decision on those allegations. This is clear from paragraphs 50 to 53 above.

264. Ad paragraph 48 thereof:

The allegations in this paragraph are incompatible with the outcome of the process in the Portfolio Committee regarding Mr Steenhuisen's letter of 16 February 2018, namely

it did not support his request to expedite the process aimed at her removal in terms of section 194 of the Constitution. I refer to paragraphs 56 to 60 above.

265. Ad paragraphs 64 to 66 thereof:

The allegations in these paragraphs to the effect that the New Rules are in fact rules proposed by the DA, that the differing views of the other political parties were not taken into account and that I failed to act impartially in relation to the process leading to the adoption of the New Rules, are devoid of any truth. I refer to paragraphs 80 to 93 above.

CONDONATION

266. At the hearing of this application, I shall apply for condonation for the late filing of my answering papers. The course of events since the launching of this application on 4 February 2020 are set out in paragraphs 106 to 133 above, which shows why I was not able to comply with the timetable unilaterally fixed by Adv Mkhwebane in her notice of motion. I have not delayed wilfully or negligently. On the contrary, I have dealt as expeditiously as possible with this matter as it has unfolded since 4 February 2020 and have delivered this affidavit as soon as practically possible after it became clear on 2 March 2020 that Adv Mkhwebane would not be supplementing her founding papers to address the material new developments on and after 21 February 2020. I submit that, in the circumstances, my papers have been delivered sufficiently far in advance of the date unilaterally selected by Adv Mkhwebane for the hearing of this matter to cause her no legally cognisable prejudice. I hope that the date of delivery of my answering papers will not inconvenience this Honourable Court, but if it does I sincerely apologise therefor. Finally in this regard, in all the circumstances I submit

that it is in the interests of justice that the late delivery of my answering papers be condoned.

CONCLUSION AND PRAYER

267. In the premises, I pray that Adv Mkhwebane's application for the relief sought in Part A of her notice of motion be refused with costs, including the costs of two counsel.

I have read this affidavit and understand its contents.

I have no objection to taking the prescribed oath.

I consider the oath to be binding on my conscience.

I swear the contents of this affidavit are true, so help me God.



THANDI RUTH MODISE

I certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, that she has no objection to taking the prescribed oath and that she considers it to be binding on her conscience. I further confirm that this affidavit was duly sworn to before me and the deponent signed it in my presence at Cape Town on 3 March 2020.

SIGNATURE: 

FULL NAMES: Maule Vitima Jere

COMMISSIONER OF OATHS, REPUBLIC OF SOUTH AFRICA

EX OFFICIO: (eg: South African Police Service)

Advocate of the High Court of South Africa

RANK: _____

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