
**AFFIDAVIT IN THE SECTION 194 INQUIRY INTO THE REMOVAL OF THE
PUBLIC PROTECTOR, ADV B MKHWEBANE**

I, the undersigned,

LIVHUWANI TSHIWALULE

do hereby make oath and say that:

1. I am an admitted advocate currently residing in Gauteng. I am not currently practicing as an advocate.
2. The contents of this affidavit are true and correct and fall within my personal knowledge, unless otherwise stated or clear from the context.
3. I was employed at the Office of the Public Protector ("PPSA") from approximately 2014 until 31 December 2016. I was an investigator in the Private Office of the erstwhile Public Protector ("PP") and, until she vacated office, I worked directly with Adv Madonsela. I also worked with the then Deputy Public Protector ("DPP"), Adv Kevin Malunga ("Adv Malunga").
4. My work entailed doing investigations, rendering advice and assisting in the Private Office prior to the release of reports. I worked on a number of big investigations, including that of State Capture investigation and the investigation involving the CIEX Report.

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5. Not long after Adv Busisiwe Mkhwebane ("*Adv Mkhwebane*" or "*the PP*") assumed office, I was the only person of the staff remaining in the Private Office. The other persons were redeployed to elsewhere in the PPSA. I presumed that I was retained in the Private Office because I had the institutional knowledge in respect of matters that were to be handed over as part of the handover from the erstwhile to the current PP.

6. The system regarding documents management when I was at the PPSA was that every document that was received by Adv Madonsela pertaining to an investigation was entered into a register. Every document that left the Private Office was also recorded in the register. Adv Madonsela's personal assistant would, in turn, register the documents taken to the PP and once she was done with those documents, they were signed out and kept at a registry. There was both a hard copy register with the secretary and, I seem, to recall an electronic copy under the control of Mr Myolisi Zweni.

A. THE CIEX REPORT

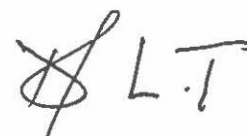
7. The CIEX Report was drafted in the Private Office. Adv Madonsela and I conducted the investigation. I drafted the initial report and obtained her input in relation thereto.

8. Ordinarily a report would be drafted by an investigator in the unit. It would be tabled at a Think Tank meeting which comprised of the senior management in Head Office and provincial representatives, and after it had gone through rigorous debate on all its aspects (facts, law, language, tone used etc.) at

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Think Tank, amendments would be effected if necessary by the Quality Assurance team and Adv Madonsela would then attend to the final determination of the contents of the report and the signature thereof.

9. If Adv Madonsela at any point was unhappy about any aspects of a report, it would be sent back to the investigator to close gaps or to conduct further investigation. I do not recall it ever being so that Adv Madonsela signed a report if she was not satisfied with the contents thereof, nor did I understand Adv Mkhwebane to have done so either, during my time in the PPSA. The last say on any report rests with the PP. When I was there with Adv Madonsela and in the brief period I was there with Adv Mkhwebane, the Think Tank ran in much the same way. I understood that to have been the system in place at the office since the time of Adv Mushwana.
10. On 13 October 2016, I emailed a draft of the provisional report to Adv Madonsela. A copy of the email is attached hereto marked **LT1**. At that stage the report was still very much in draft form, and I indicated to Adv Madonsela that there was still some work to be done on the draft report. A copy of the draft report I submitted to Adv Madonsela is attached marked **LT2**.
11. Adv Madonsela responded to me on 14 October 2016, at 03h25am. A copy of her email response to me is attached marked **LT3**. In addition to the comments made by her in the email, she had also made comments in the draft report itself regarding aspects that still needed to be attended to. A copy of the draft report with her comments is attached marked **LT4**. In addition during

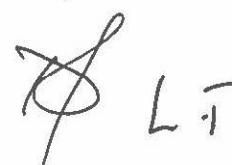
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the course of the morning I was provided with a hard copy version of the report on which there was further handwritten notes.

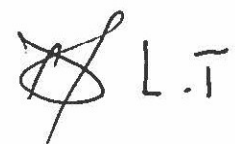
12. Also, later on in the morning of 14 October 2016, I received an email from Mr Chris Moraitis of Werksmans Attorneys, the attorneys of record for the South African Reserve Bank (SARB). A copy of the email is attached marked LT5. As can be seen from the email, he was in essence enquiring about the release of the provisional report into the SARB / CIEX investigation.
13. I responded to Mr Moraitis on the same day by means of the email which also appears on LT5. I assured him that once the provisional report was signed by the PP, SARB would be provided with a copy of it.
14. In October 2016, a few days after the PP was appointed, I was informed by her professional assistant that the PP would like a briefing on the reports that were finalised but not yet released by her predecessor Adv Madonsela.
15. The reports were on a memory stick. I went to her office to meet with her and she asked that I download the reports and save them onto her laptop. The CIEX draft report was part of the reports. It was during this period that she indicated that the CIEX report needed to be finalised urgently as there was pressure from society that this be done. I explained to Adv Mkhwebane when we were discussing the provisional CIEX report, that Adv Madonsela had wanted changes which I had effected to the draft, and therefore I was providing the report to Adv Mkhwebane with those changes incorporated.

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16. Sometime in November 2016 I had another discussion with the PP when I was dropping the boxes of evidence in the CIEX matter in her office. During our discussion I asked her if she had finished reading the draft report and she responded that she needed more time.
17. I recall handing over to the PP two boxes of documentary evidence to her. The evidence leaders advised that they were provided with a box that had come out of the strongroom attached to the Private Office. They sent me a picture of this box. I confirmed that to the best of my recollection that was the box and that there was another smaller one which I seem to recall contained the records of the interviews – the transcribed documents. But I cannot remember anything specifically therein. I just remember that the documentation could not all fit into one box.
18. Whilst I do not recall all of the documentation that I handed over to Adv Mkhwebane, I do recall that some of it were transcribed interviews with various people. They were contained in the two boxes I have alluded to above. At the time interviews in the PPSA were recorded and were transcribed as that was the prevailing practice. There was a private company that did the transcriptions for the PPSA based in Pretoria East. I do not actually recall their name, but we had long meetings and so we used an external service provider to do the transcriptions. We were then provided with both an electronic version as well as a hard copy. The hard copies would go into the evidence file and the electronic copy would be kept on the IT system.


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19. Whatever evidence I had that had been collected for the CIEX investigation during the period under Adv Madonsela I handed over to Adv Mkhwebane when I was requested to do so. When I left the PPSA my laptop was returned to the office.
20. I recall that thereafter we had a number of meetings to discuss the investigation and the report. She indicated to me that she would go through the evidence and the report given that she was now in possession of the boxes that had all the records, which I had delivered to her.
21. I received the draft report back from her on the memory stick with some changes.
22. On 25 November 2016, we received correspondence from Mr Chris Van der Walt of the SARB. It was a letter from the SARB to Adv Mkhwebane, a copy of which is attached marked **LT6**. The SARB was once again enquiring about the release of the provisional report, with reference to an agreement it said had been made by Adv Madonsela at a meeting held on 2 September 2013, wherein she undertook to afford the SARB ten days to comment on the provisional report and then only to release the finalised report after 5 days' notice to the SARB. I forwarded the SARB's correspondence to the PP, who requested me to draft a response for her signature (**LT7**).
23. On 25 November 2016, I obtained alternative employment from the PPSA with my current employer - the Office of the Ombudsman. I advised the PP of this opportunity by email on 25 November 2016, a copy of which email is attached marked **LT8**. Her response appears on the same annexure. She was

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concerned that all cases handled by me be monitored and that handover reports be finalised before I left.

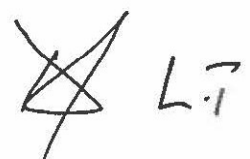
24. On the same day – 25 November 2016 – I drafted the response to the SARB for the PP's consideration, as requested by her (LT9). A copy of the covering email to her is attached marked **LT9A**.
25. On 7 December 2016, I received an email from the PP requesting me to do some further research on other country's Reserve Banks, and some 'indications on state control'. A copy of this request is attached marked **LT10**.
26. On 20 December 2016, I emailed the finalised provisional report to the private office. I sent the email to Ms Linda Molelekoa who was the PP's Chief of Staff, as well as to Mr Tebogo Kekana who had taken over from me as the investigator in the matter. A copy of this email correspondence is attached marked **LT11**. The finalised report is attached marked **LT12**.
27. On 21 December 2016, the PP signed the provisional report as well as the covering letter accompanying the provisional report in terms of section 7(9). I sent both signed documents to the SARB, the Presidency and other implicated parties. A copy of the letter to the SARB is attached hereto marked **LT13**. I am told that the provisional report signed by the PP on 21 December 2016, which accompanied the covering letter to the SARB, and was also sent to other implicated parties, already forms part of the record that is before this committee.

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28. As I recall, when Adv Madonsela left office, the CIEX investigation was completed and the drafting of the CIEX Report was substantially done. She had satisfied herself as to what to say in this report and I was provided with a draft on which her handwritten changes were made with an instruction to finalise it for her signature on her last day. However, in the flurry of the last day's activities, the provisional report could not be released as a finalised version could not be signed because there were still things on the report that I needed to attend to.
29. It is so that when findings were made against people as contemplated in section 7(9) of the Public Protector Act 23 of 1994 (*"the PP Act"*),¹ the provisional (or preliminary) reports were provided to those persons pursuant to section 7(9), to give them an opportunity to respond to findings and remedial actions intended to be made in relation to them. They had to give an undertaking not to disclose such provisional reports. However, it often happened that provisional reports released to affected parties would be leaked and so, during a Think Tank meeting in about November 2016, the resolution was taken that only extracts of the preliminary report would be furnished to implicated parties (the sections that were pertained to them), as part of the

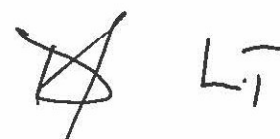
¹ Section 7(9)(a) provides:

- (a) *If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any way that may be expedient under the circumstances.*
- (b) (i) *If such implication forms part of the evidence submitted to the Public Protector during an appearance in terms of the provisions of subsection (4) such person shall be afforded an opportunity to be heard in connection therewith by way of giving evidence.*
- (ii) *Such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before the Public Protector in terms of this section."*

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section 7(9) notice, and not the entire report. In effect, and in order to avoid such leaks, it was decided that instead of furnishing the entire report to an implicated party, we would extract from the provisional report the exact evidence and proposed findings and remedial action against that particular part and provide them with to implicated parties as the section 7(9) notice.

30. This resolution did not apply to reports and/or section 7(9) notices that were already in the Private Office, of which the CIEX report was one. This is apparent from the email from the PP, a copy of which is attached marked **LT14**.
31. When it came to the CIEX matter, I was specifically told by Adv Mkhwebane to provide the report to implicated parties when the section 7(9) notices went out. In fact, Adv Mkhwebane signed the preliminary report for that very reason prior to its distribution to the implicated parties.
32. I recall sending the provisional report to several officials at the Presidency, the Governor of the Reserve Bank, the Minister of Finance and ABSA Bank. The evidence leaders advised me that Adv Hoffman indicated that he was not provided with the preliminary report and that he indicated that it was given to him by journalists. I recall the issue being brought up as well in the meeting I had with PPSA officials in February 2017, to which I refer below. I did not send the provisional report to him because he was not an implicated party in the provisional report, as envisaged in section 7(9) of the Act.
33. I am told that Adv Hoffman engaged in communication with Adv Mkhwebane after he became aware that the preliminary report was in the public domain,

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and that this communication occurred in January 2017 after I had left the PPSA. It was my responsibility to furnish the provisional report to the parties envisaged under section 7(9) of the PP Act. I reiterate that the only reason that I did not furnish Adv Hoffman with the provisional report was because he was not an implicated person in terms of section 7(9).

(i) Prescription

34. I was asked by the evidence leaders whether I have any recollection in respect of the issue of how prescription was dealt with in the CIEC investigation.

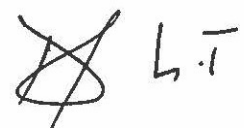
35. On the issue of prescription, Adv Madonsela was clear that any monetary claim had prescribed and that remedial action could not include any recovery of funds. I was not entirely convinced that that was necessarily the end of the remedial action with respect to the recovery of funds and so I prepared two versions of the provisional report for her consideration: (1) One which said that the money is owed to the government, albeit the claim has prescribed, and that the implicated parties should consider paying it back. (2) A second version saying that the money is recoverable and must be paid back with interest. I preferred the second version of the provisional report, which would then place the onus on the implicated parties to say any debt owed was no longer recoverable as it had prescribed.

36. I thought one could be hopeful in that if the implicated parties did not raise the issue of prescription themselves, then the remedial action that would find its way into the final report could result in the fiscus being able to recover some funds. Whilst I agreed with Adv Madonsela's interpretation of the legal

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position, I thought she could test the waters and not make a decision in the provisional report as to whether or not the debt had prescribed. Adv Madonsela was firm that it had prescribed and she did not want the latter approach.

37. In our meetings and discussions about the CIEX matter, Adv Mkhwebane was determined that it was important to look at the recovery of the money and it was her position that found expression in the preliminary report that went out in December.
38. As the preliminary report was not final, I did inform Adv Mkhwebane that there was no real impact in taking a chance with the approach that Adv Madonsela had rejected. So I gave Adv Mkhwebane both of the options that I considered.
39. As stated previously, when Adv Madonsela left, I think she regarded the investigation to have been substantially completed and all that was required was a section 7(9) notice in that over a considerable period of time we had interviewed just about everybody that was relevant to the matter. Adv Madonsela at no stage suggested to me that we needed to engage the services of an economist and whilst I was there, I have no knowledge of Adv Mkhwebane having done so either.
40. I recall that generally when experts were appointed to assist in an investigation there was a procurement process in place in order to obtain such an expert. This process would involve writing a report to be sent to the CEO and CFO to confirm that there were funds available and that such expert was on the database of experts. Further, that Supply Chain Management ("SCM") would

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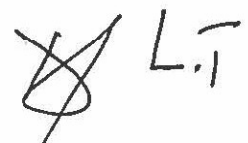
then need to request quotations and would revert with a recommendation of a particular expert. The Private Office's role would be to prepare a report for approval by the CEO taking into account the availability of budget/funds. Adv Madonsela was not really involved in that process and usually it was the CEO who made the appointments. I am not aware of any experts that Adv Mkhwebane appointed during the period that I was in the Private Office with her, from October until the end of December 2016.

41. I recall that when I briefed Adv Mkhwebane she was of the view that I was not considering the benefits that went to ABSA Bank. She specifically gave an example of African Bank and how the Reserve Bank helped it. My understanding is that she had not had an opportunity to go through all the information at that stage and I attributed her views to the fact that she was not as yet conversant with all the documentation relevant to the matter.

(ii) The meeting with PPSA officials

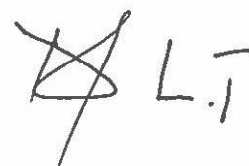
42. After I had left the PPSA on 31 December 2016, the preliminary report was in the public domain. The media was talking about it. Adv Mkhwebane wrote to my new employer requesting an opportunity to meet with me.

43. I had a meeting with Adv Mkhwebane in January or February 2017. I was supposed to meet with Adv Mkhwebane in Pretoria, but when I arrived, I was told she was in Cape Town, in Parliament. We then had a virtual meeting with her, linked up at the PPSA's boardroom. Present with me physically were senior investigators Adv Isaac Matlawe and Mr Kekana, as well as Ms Linda Molelekoa who was then the Chief of Staff for Adv Mkhwebane. Adv

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Mkhwebane linked up via Skype from Cape Town. Her connection was poor and she was in the meeting for only a short time before we lost her. The meeting nevertheless continued in her absence. Mr Kekana indicated to me that he had been asked to take over the investigation and as he was not that familiar with the matter, he asked whether I would avail myself to discuss the matter with him, on that day and on future occasions. I agreed.

44. It was indicated that the meeting had been requested because there were aspects that required clarification. I was asked how it came about that the preliminary report was released when a resolution had been taken in the November Think Tank that whole reports would not be released any longer for the purposes of section 7(9). I reminded the meeting of the ambit of that resolution, and that the CIEX report was not one of the reports to which it applied. Adv Mkhwebane also enquired about audio recordings of interviews conducted during the investigation conducted with Adv Mkhwebane.
45. There were some questions directed to me by the senior investigators regarding the contents of the provisional report released by the PP. I could not assist them much on this score, as there were changes effected to the preliminary report that was issued, which changes were made without my involvement, and I had no idea where they had come from. Adv Mkhwebane had final say over the report and did not provide me with any explanation as to her changes. So, in respect of those I was not helpful to the officials. I can confirm that the preliminary report that was eventually issued and signed by Adv Mkhwebane, to the best of my recollection, did in material respects differ

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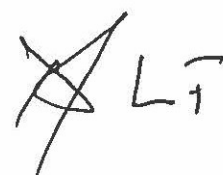
from the last report left behind by Adv Madonsela, and which I had provided to Adv Mkhwebane.

46. During this meeting the senior investigators also asked and wanted some understanding of who I had sent the provisional report to, and I explained that, as was usually the case, I had sent it to the implicated parties for the purposes of section 7(9). I recall this included the Reserve Bank, ABSA Bank, the President and the Minister of Finance. I was asked specifically whether I had sent it to Adv Hoffman to which I responded that I had not.
47. Subsequent to my having left the employ of the PPSA, SAPS officials visited me at my new employers' offices to inform me that they were investigating a case of a leaked preliminary report. I was advised that Adv Mkhwebane had opened a case about the leakage of the report and that my name was mentioned when the complaint was made. For the sake of completeness, I confirm that I had nothing to do with the preliminary report being leaked. I was questioned. I responded. To the best of my recollection this could have been in March or April 2017.
48. I also received correspondence from the National Prosecuting Authority where they asked me some questions to which I responded. I prepared an affidavit which I provided to the National Prosecuting Authority ("NPA"). I no longer have this affidavit in my possession. But after that no one was in contact with me again. I do recall reading the final report when it was issued in June 2017 as I was interested in it. I was not approached for comment on the final report other than by media houses to whom I declined to comment.

49. At some point members of the South Africa Police Service arrived at my home and told me that they were conducting an investigation into the leaking of the CIEX provisional report, and that my name was mentioned by Adv Mkhwebane when she laid the complaint. They asked if they could conduct a search in my home for relevant documents. However, they did not have a search warrant and accordingly I refused to permit them to search my home without it. I have not heard of the investigation or its outcome since.
50. I was asked by the Evidence Leaders if I had been asked to assist with the Rule 53 record when court proceedings ensued. I was not asked for any input into the Rule 53 record compiled for Court in the subsequent litigation. As I had provided all the documentation in my possession to Adv Mkhwebane, I did not regard this as strange.
51. I do recall that the leak of the report occurred prior to 31 December in that I received a call from a journalist saying that she had seen my name on the report, requesting comment. I declined to comment.
52. I confirm that I had several meetings with Adv Mkhwebane before the preliminary report was signed. I am not aware of any meetings with third parties occurring prior to the release of the preliminary report. If any meetings had occurred – which I doubt – I was not privy to any such meetings.

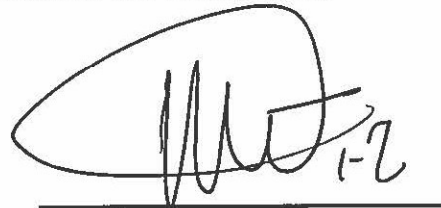
B. THE VREDE DAIRY REPORT

53. The evidence leaders enquired what my recollection was in respect of the Vrede Dairy Report. As far as I was aware the investigation was done at

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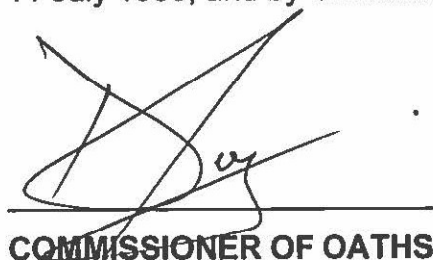
provincial level and at some point, it may well have gone to the Think Tank. I do not remember the specifics. I do recall that there was unhappiness about the investigation, and it was referred back in order that the province closes off certain gaps. That was in early 2016 – it could have been March or April.

54. Adv Madonsela wanted a number of pending investigations to be completed before her term ended in October 2016 and she pressed for this to be done. But as investigations took time there was only so much that could be done before her term ended. The Vrede report was one of those reports, because the investigation had not yet been completed to her satisfaction.



LIVHUWANI TSHIVALULE

I certify that the above signature is the true signature of the deponent and that he has acknowledged that he knows and understands the contents of this affidavit which affidavit was signed and sworn to before me in my presence at AKASIA, PRETORIA on this 31st day of **JULY 2022**, in accordance with Government Notice No R1258 dated 21 July 1972, as amended by Government Notice No R1648 dated 19 August 1977, as further amended by Government Notice No R1428 dated 11 July 1980, and by Government Notice No R774 of 23 April 1982.



COMMISSIONER OF OATHS

Ex officio: Advocate of the High Court of South Africa

Full Name: DEIDRE ELIZABETH GOUWEN

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