



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

NATIONAL ASSEMBLY

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Ms T R Modise MP
Speaker of the National Assembly
Parliament of the Republic of South Africa
P.O. Box 15
Cape Town
8000

21 February 2020

Dear Madam Speaker,

WITHDRAWAL OF DRAFT RESOLUTION ON THE REMOVAL OF THE PUBLIC PROTECTOR [20dn01e] SUBMITTED IN TERMS OF RULE 129R

With reference to the above-mentioned matter, I am writing to you in terms of Rule 128(1) of the Rules of the National Assembly in order to formally withdraw the motion submitted in my name on 6 December 2019.

Kindly note that I am submitting a *new* substantive motion in terms of Rule 129R, which is attached along with the necessary supporting documents.

I look forward to your favourable response.

Yours faithfully,

Natasha Mazzone MP
Chief Whip of the Official Opposition
Parliament of RSA



NATIONAL ASSEMBLY NOTICE OF MOTION

Internal Ref Number: 001 - 2020

Date: 21.02.2020

Member: Mrs N W A Mazzone

Motion:

I hereby move on behalf of the Democratic Alliance that the House:

1. Notes that on 3 December 2019, it passed new Rules pertaining to the removal of office-bearers in institutions supporting constitutional democracy, to give effect to section 194 of the Constitution;
2. Further notes that, in terms of section 194(1) of the Constitution, office-bearers may be removed from office only on the ground of misconduct, incapacity or incompetence following a finding of a committee of the National Assembly and the subsequent adoption of a resolution on said removal;
3. Resolves to initiate an inquiry in terms of section 194(1) of the Constitution to remove Adv. Busisiwe Mkhwebane from the office of the Public Protector on the grounds of misconduct and/or incompetence in the *South African Reserve Bank, Vrede Dairy* and other matters, charges of which are set out and substantiated in Annexure A attached hereto.

ANNEXURE A

Charge 1: Misconduct in *South African Reserve Bank* matter

1. Adv. Mkhwebane is guilty of misconduct in that, in her investigation and report into allegations of failure by the South African Government to implement the CIEX Report and recover public funds from ABSA Bank (the Public Protector's Report 8 of 2017/18) and in the litigation challenging that Report, Adv. Mkhwebane committed the following acts, which acts separately or cumulatively constitute an intentional or grossly negligent failure to meet the standards of conduct expected of the holder of the office of the Public Protector:
 - 1.1 Adv. Mkhwebane adopted a dismissive, high-handed, biased and procedurally irrational and unfair approach in the conduct of her investigation, in that she –
 - 1.1.1 met with the Presidency and the State Security Agency secretly, without disclosing the fact and import of such meetings in the Report 8 of 2017/18 and without furnishing any transcripts of the meetings in the rule 53 record filed in the application to review that report;
 - 1.1.2 materially broadened the scope of the investigation in paragraph 4.2.10 of the final report (as compared to the provisional report), without giving notice thereof to any affected person, and without furnishing any explanation therefor;
 - 1.1.3 materially altered the remedial action in the final report (as compared to the provisional report), on the instruction and/or advice of the Presidency and/or the State Security Agency, and without giving notice and an opportunity to comment thereon to the affected persons;

- 1.1.4 failed in her duty to give affected persons (including the Speaker and the South African Reserve Bank, both prominent role players in the affairs of the State) notice and an opportunity for comment on any findings and remedial action she proposed to take, with consequences that were severely damaging not only to the economy but to the reputation of her own office;
- 1.1.5 failed to honour an agreement made with the Reserve Bank to make her final report available to the Reserve Bank five days before its release; and
- 1.1.6 failed to even refer to or discuss the submissions made by the Reserve Bank or any other person in response to the provisional report in the final report.

1.2 In statements made under oath in the litigation:

- 1.2.1.1 Adv. Mkhwebane failed to give a full, frank and honest account of meetings she had with the Presidency and the State Security Agency before she finalised the Report;
- 1.2.1.2 Adv. Mkhwebane misrepresented her reliance on the evidence of economic experts in drawing up the Report; and
- 1.2.1.3 Adv. Mkhwebane provided contradictory, unintelligible and obfuscating accounts of her conduct of the investigation.

2 I attach the following evidence in support of this charge:

2.1 The Public Protector's Report 8 of 2017/18 – **annexure 1A**;

2.2 The judgments in the matters of:

2.2.1 *South African Reserve Bank v Public Protector and Others* (43769/17) [2017] ZAGPPHC 443; [2017] 4 All SA 269 (GP); 2017 (6) SA 198 (GP) (15 August 2017) – **annexure 1B**;

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

2.2.3 *Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 292019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019) – **annexure 1D**;

2.3 The notice of motion and affidavits filed in the matter referred to in paragraph 2.2.1 – **annexure 1E**;

2.4 The notice of motion and affidavits filed in the matter referred to in paragraph 2.2.2 – **annexure 1F**; and

2.5 The notice of motion and affidavits filed in the matter referred to in paragraph 2.2.3 – **annexure 1G**.

3 Due to their bulk, I have not attached all the annexures to the aforesaid affidavits or the complete records filed in the proceedings. However these are public records, and copies thereof will be made available should the need arise.

Charge 2: Misconduct in the *Vrede Dairy* matter

4 Adv. Mkhwebane is guilty of misconduct in that, in her investigation and report into allegations of maladministration against the Free State Department of Agriculture in the Vrede Integrated Dairy Project (the Public Protector's Report No. 31 of 2017/18), Adv. Mkhwebane committed the following acts, which acts separately or cumulatively constitute an intentional or grossly negligent failure to meet the standards of conduct expected of the holder of the office of the Public Protector:

- 4.1 Adv. Mkhwebane narrowed the scope of the investigation required by the complaints, and as commenced by her predecessor, Adv. Madonsela without providing any rational or proper explanation therefor;
- 4.2 Adv. Mkhwebane failed to investigate, at all, the third complaint submitted by the Democratic Alliance's MP in the Free State Legislature, Dr Jankielsohn on 10 May 2016, without providing any rational or proper explanation for such failure;
- 4.3 the steps taken by Adv. Mkhwebane in the conduct of the investigation, were wholly inadequate considering the magnitude and importance of the complaints raised, and no rational or proper explanation has been provided for such failure;
- 4.4 Adv. Mkhwebane materially altered the remedial action proposed in the provisional report (prepared by her predecessor, Adv. Madonsela) before issuing the final report, without providing any rational or proper explanation therefor; and
- 4.5 in statements made under oath in the litigation challenging the Public Protector's Report 31 of 2017/18, Adv. Mkhwebane gave directly contradictory explanations for her failure to investigate.

5 I attach the following evidence in support of this charge:

- 5.1 The Public Protector's Report 31 of 2017/18 – **annexure 2A**;
- 5.2 The provisional report (prepared by Adv. Madonsela) in the Public Protector's investigation into the Vrede Dairy Project – **annexure 2B**;
- 5.3 The National Treasury Report on the Vrede Dairy Project, as produced in the rule 53 record and referred to in the Public Protector's Report 31 of 2017/18 – **annexure 2C**;
- 5.4 The following judgments:

5.4.1 *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* (11311/2018; 13394/2018) [2019] ZAGPPHC 132; [2019] 3 All SA 127 (GP); 2019 (7) BCLR 882 (GP) (20 May 2019) (judgment on the merits) – **annexure 2D**;

5.4.2 *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* (11311/2018; 13394/2018) 2019 JDR 1582 (GP) (15 August 2019) (judgment on costs) – **annexure 2E**;

5.4.3 Judgment dismissing the Public Protector's application for leave to appeal in *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* (11311/2018; 13394/2018) (13 December 2019) – **annexure 2F**; and

5.5 The notices of motion and affidavits filed in the matters referred to in paragraph 5.4.1 – **annexure 2G**.

6 Due to their bulk, I have not attached all the annexures to the aforesaid affidavits or the complete record filed in the proceedings. However, these are public records, and copies thereof will be made available should the need arise.

Charge 3: Incompetence

7 Adv. Mkhwebane is guilty of incompetence in that she has a demonstrated and sustained lack of knowledge to carry out, and ability or skill to perform, her duties effectively and efficiently. Adv. Mkhwebane's incompetence is evidenced in the following conduct:

7.1 her investigation and report in the matter that is the subject of charge 1, and the ensuing litigation to review that report, in that Adv. Mkhwebane:

- 7.1.1 grossly overreached and exceeded the bounds of her authority, and unlawfully trespassed on Parliament's exclusive authority as well as the national executive's authority to determine socio-economic policy, by directing the Chairperson of the Portfolio Committee on Justice and Correctional Services to initiate a process to amend section 224 of the Constitution, with a view to altering the primary object of the Reserve Bank – which unlawfulness Adv. Mkhwebane conceded on review in *South African Reserve Bank v Public Protector and Others* (43769/17) [2017] ZAGPPHC 443; [2017] 4 All SA 269 (GP); 2017 (6) SA 198 (GP) (15 August 2017);
- 7.1.2 materially broadened the scope of the investigation in paragraph 4.2.10 of the final report (as compared to the provisional report), without giving notice thereof to any affected person, and without furnishing any explanation therefor;
- 7.1.3 materially altered the remedial action in the final report (as compared to the provisional report), on the instruction and/or advice of the Presidency and/or the State Security Agency, and without giving notice and an opportunity to comment thereon to the affected persons;
- 7.1.4 failed in her duty to give affected persons (including prominent role players in the affairs of the State) notice and an opportunity for comment on any findings and remedial action she proposed to take, with consequences that were severely damaging not only to the economy but to the reputation of her own office;
- 7.1.5 failed to honour an agreement made with the Reserve Bank to make her final report available to the Reserve Bank five days before its release;

- 7.1.6 failed to even refer to or discuss the submissions made by the Reserve Bank or any other person in response to the provisional report in the Public Protector's final report; and
 - 7.1.7 demonstrated irrationality, forensic weakness, incoherence, confusion and misunderstanding of the applicable contractual, constitutional and administrative law principles;
 - 7.1.8 demonstrated that she does not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice; and
 - 7.1.9 demonstrated her failure to appreciate the Public Protector's heightened duty towards the court as a public litigant.
- 7.2 in her investigation and report in the matter that is the subject of charge 2, and the ensuing litigation to review that report, in that Adv. Mkhwebane:
- 7.2.1 demonstrated a failure to conduct a lawful and meaningful investigation, and a failure to grant appropriate remedial action;
 - 7.2.2 demonstrated a failure to appreciate her legal duty to come to the aid of the vulnerable and marginalised members of society, in this instance, the intended beneficiaries of the Vrede Dairy project;
 - 7.2.3 demonstrated a failure to appreciate that her investigation was wholly inadequate and grossly negligent and/or a failure to appreciate her constitutional duty to conduct a lawful and meaningful investigation (as she sought to defend her failure to investigate in the litigation challenging the Report);

- 7.2.4 demonstrated legal ineptitude in her inability to comprehend and accept the inappropriateness of her proposed remedial action in the Report;
 - 7.2.5 demonstrated irrationality, forensic weakness, incoherence, confusion and misunderstanding of constitutional and administrative law principles; and
 - 7.2.6 demonstrated her failure to appreciate the Public Protector's heightened duty towards the court as a public litigant.
- 7.3 in litigation pending in the High Court, Adv. Mkhwebane has declined to defend the lawfulness of her findings and remedial action in the Public Protector's Report 46 of 2018/19 ('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'), and has failed to give any proper explanation for such findings and remedial action, and has thereby –
- 7.3.1 conceded that irrationality, forensic weakness and misunderstanding and/or misapplication of legal principles is demonstrated in such report; and
 - 7.3.2 demonstrated a failure to appreciate the Public Protector's heightened duty towards the court as a public litigant.

8 In support of charge 3, I rely on:

- 8.1 the evidence submitted in support of charges 1 to 2;
- 8.2 the Public Protector's Report 46 of 2018/19 – **annexure 3A**; and
- 8.3 the notice of motion and affidavits filed by the applicants and the Public Protector in the matter of *Financial Sector Conduct Authority and*

Another v Public Protector, case no. 39589/19 (Gauteng Division, Pretoria) – **annexure 3B**.

- 9 Due to their bulk, I have not attached all the annexures and the complete record filed in the *Financial Sector Conduct Authority v Public Protector* matter. However, these are public records, and copies thereof will be made available should the need arise.

Charge 4: Misconduct and/or incompetence

- 10 Adv. Mkhwebane is guilty of misconduct in that Adv. Mkhwebane has intimidated, harrassed and/or victimised staff, alternatively has failed to protect staff in the office of the Public Protector from intimidation, harrassment and/or victimisation by the erstwhile CEO of the Office of the Public Protector, Mr Vussy Mahlangu, in particular the following staff members who have been threatened with or had disciplinary action taken against them unlawfully and on trumped-up charges:

10.1 Provincial Representative of the Public Protector: Free State, Mr Sphelo Samuel;

10.2 Chief Investigator, Mr Abongile Madiba;

10.3 Chief Investigator, Ms Lesedi Sekele;

10.4 Executive Manager, Ms Pona Mogaladi;

10.5 Chief Operations Officer, Ms Basani Baloyi;

10.6 Senior Investigator, Mr Teboho Kekana; and

10.7 Senior Investigator, Adv Isaac Matlawe.

- 11 Adv. Mkhwebane has committed misconduct by and/or demonstrated incompetence in the performance of her duties by:

- 11.1 failing intentionally or in a grossly negligent manner to manage the internal capacity and resources of management staff, investigators and outreach officers in the Office of the Public Protector effectively and efficiently;
 - 11.2 failing intentionally or in a grossly negligent manner to prevent fruitless and wasteful and/or unauthorized public expenditure in legal costs;
 - 11.3 failing intentionally or in a grossly negligent manner to conduct her investigations and/or make her decisions in a manner that ensures the independent and impartial conduct of investigations; and/or
 - 11.4 by deliberately seeking to avoid making findings against or directing remedial action in respect of certain public officials, while deliberately seeking to reach conclusions of unlawful conduct and impose far-reaching disciplinary measures and remedial action in respect of other officials (even where such conclusions and/or measures and/or remedial action manifestly had no basis in law or in fact).
- 12 In support of charge 4, I rely on:
- 12.1 the evidence submitted in support of charges 1, 2 and 3;
 - 12.2 the affidavit of Mr Sphelo Samuel, the Provincial Representative of the Public Protector: Free State, which was addressed to the Speaker on 11 February 2020 – **annexure 4**;
 - 12.3 The notice of motion and affidavits filed in the matter of *Louisah Basani Baloyi v Public Protector and Others*, case no. 84053/19 (High Court, Gauteng Division, Pretoria) – **annexure 5**;
 - 12.4 The court papers in the matter of *President of the Republic of South Africa v Public Protector and Others*, Gauteng Division of the High Court, Pretoria, case number 55578/19 – **annexure 6**; and

12.5 The court papers in *Public Protector v Gordhan and Others* Constitutional Court case number 232/19 and *Economic Freedom Fighters v Gordhan*, Constitutional Court case number 233/19 – **annexure 7.**