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

I, the undersigned,

SPHELO HAMILTON SAMUEL

do hereby make oath and say that:

A. INTRODUCTION

1. I am an adult residing in Mangaung.
2. The facts in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are to the best of my belief both true and correct. Where I make averments not directly within my knowledge, I do so on the basis of information made available to me (to which I have referred herein) and I have no reason to doubt the authenticity thereof.
3. This affidavit should be read in conjunction with my affidavit filed with the Speaker of the National Assembly on 11 February 2020 ("**Initial Affidavit**").
4. After I filed my Initial Affidavit, I was suspended from the Office of the Public Protector ("**OPP**") and subject to disciplinary action. My work laptop was



confiscated and I was unable to access my OPP email account or electronic records.

5. Some of the information referred to in this affidavit includes email correspondence and attached documentation, provided by the Committee's evidence leaders, which information they obtained from my email records downloaded from the OPP's computer servers.
6. The evidence leaders have not been able to trace all of my email and other records. Nor were they able to obtain my laptop from the OPP's IT Department, despite making such a request prior to this affidavit being finalised. Accordingly, in some instances, I have been unable to annex the relevant documentary records to this affidavit. Nevertheless, I have set out the relevant facts to the best of my recollection.
7. It must be borne in mind that a considerable time has lapsed since the events in question. Also, I have had a number of health challenges and my memory of some detail is not as good as I would like it to have been.
8. The Commission for Conciliation, Mediation and Arbitration ("CCMA") has recently ordered that I should be reinstated to my position at the OPP. However, I have not yet been able to access all of my electronic records. Given the lapse of time since I was suspended, I do not know whether the records on my work laptop will be intact and accessible – they may have been edited, deleted, cleaned up or re-allocated to someone else. In the event that I am able to access

SAS

such records and they contain relevant information, I may have to provide the Committee with a further supplementary affidavit.

9. In some instances, it is necessary in this affidavit for me to rely on hearsay evidence. I respectfully submit that such evidence should be considered because—

- 9.1. these are not judicial proceedings and the formal rules of evidence do not apply as they would in a court of law;
- 9.2. these are parliamentary proceedings that are not concerned with civil or criminal liability;
- 9.3. the evidence flows from my many years of experience in the OPP;
- 9.4. the evidence is tendered for the critically important reason of ensuring constitutional accountability;
- 9.5. my evidence may be tested and rebutted through, among other things, subpoenaing any individual upon whose credibility the probative value of my evidence depends;
- 9.6. the evidence is tendered in order to provide the Committee with as complete a picture as possible of the state of affairs in the OPP; and
- 9.7. the evidence is tendered, in part, because many persons with relevant information may well be reluctant to participate in these proceedings, or fearful for their job security. It may be that the Committee does not

conclude that Adv Mkhwebane is incompetent or has misconducted herself, or that the National Assembly decides not to remove her from office, or that her suspension is lifted while the Committee's proceedings are ongoing. These possibilities present obstacles to witnesses coming forward, especially those in the OPP's employ at Head Office, who have witnessed what occurred to me and others for crossing the PP. In my view, these are sufficient reasons why any employee would be hesitant of giving evidence to the Committee.

B. INTRODUCTION

10. On 11 February 2020 I lodged the Initial Affidavit regarding the affairs of the OPP and the conduct of the current incumbent, Adv Busisiwe Mkhwebane (also referred to as "the PP").
11. As it appears that some of the grounds of alleged misconduct and/or incompetence against the PP appear to flow from my Initial Affidavit, I deemed it necessary, especially in light of this Committee's rules, to amplify the contents thereof. Hence this supplementary affidavit (as foreshadowed in paragraph 6.2 of the Initial Affidavit), in order to further assist the Committee to discharge its function.

C. PERSONAL EXPERIENCE

12. My functions as a senior investigator in the OPP's Head Office (from 2000 – 2009) included: receiving and investigating complaints; engaging with interested parties and witnesses; recommending how complaints should be addressed;



and, in appropriate cases, preparing draft reports setting out the OPP's findings and recommendations. I was also responsible for supervising and mentoring the junior investigators who reported to me.

13. As indicated in my Initial Affidavit, I have served as the Provincial Representative of the OPP in two different provinces: first Limpopo and then the Free State.
14. The OPP has offices in each of South Africa's nine provinces. Each provincial office is headed by a "Provincial Representative". The Provincial Representatives, and various Senior Managers, Chief Investigators and Executive Managers, constitute the OPP's senior management, along with the Public Protector and her Deputy.
15. As Provincial Representative, my overall purpose is to manage investigations, outreach, education and communication in the Free State Province, through the Provincial Office (located in Bloemfontein) and the Regional Office (located in Phuthaditjhaba). My responsibilities include –
 - 15.1. representing the OPP in the Province, leading the Provincial Office to ensure that it complies with its constitutional and statutory mandate, and providing strategic direction;
 - 15.2. managing the provincial outreach, education and communication programmes;
 - 15.3. managing the operations of the Provincial Office (with 17 employees) and the Regional Office (with four employees), which includes



administrative functions, facilities, finance, human resources and disciplinary matters, investigations, outreach activities, the preparation of reports and supply chain management;

15.4. guiding and supervising investigations, monitoring workload and the assessment of complaints;

15.5. ensuring quality control in all provincial functions;

15.6. supervising and conducting more complex investigations;

15.7. attending quarterly management gatherings, which would entail –

15.7.1. (before their abolition) Think Tank sessions, chaired by the Public Protector, at which the OPP's senior managers would engage in the quality-assurance processes described in my Initial Affidavit;

15.7.2. management meetings, chaired by the Chief Executive Officer ("CEO"), which included scrutinising financial records and management reports, and reporting to the OPP's management team on the state of affairs in the province; and

15.7.3. participating in the Provincial Forum, where Provincial Representatives would engage with Executive Managers on issues pertaining to their provincial offices; and

- 15.8. formulating the Provincial Office's budget for each year, and requesting funds from the Head Office to discharge provincial functions.
16. As discussed in my Initial Affidavit, Adv Mkhwebane abolished the Think Tank. I am not too sure about when this occurred.
17. As Provincial Representative, I report to one of the two Executive Managers in the Head Office responsible for the Provincial Offices. The Executive Managers, in turn, report to the Chief Operations Officer ("COO").
18. Although the Provincial Offices are responsible for investigations in their respective areas of jurisdiction, there are also other investigative units located at the OPP Head Office. One such unit is the Good Governance and Integrity ("GGI") unit, which deals with investigations into politicians, complex and time-consuming matters, and complaints that would generally result in the production of a formal report. Another such unit is Administrative Justice and Service Delivery, which deals with day-to-day complaints about bureaucratic maladministration and prejudicial conduct. These units do not operate with exclusive jurisdiction: the fact that something might fall within GGI's mandate does not exclude it from being investigated by a Provincial Office. Thus, for example, even though the whole investigation was politically sensitive, the Public Protector at the time – Adv Madonsela – allowed the Free State Provincial Office to take the lead on the investigation, both to ease the burden on GGI, and because we were equally equipped and better placed (in terms of proximity) to conduct the investigation.



D. THE OPP'S INVESTIGATION PROCESSES GENERALLY

19. The OPP's standard processes for dealing with complaints include the following:
 - 19.1. receiving a complaint (although the OPP is also able to initiate investigations of its own accord in terms of the Public Protector Act, No 23 of 1994 ("the PP Act"), without first receiving a complaint);
 - 19.2. determining whether the complaint has sufficient merit (in order to justify expending limited resources on it) and, if so, how it should be treated;
 - 19.3. conducting an investigation, which would entail, among other things, engaging with the complainant, engaging with the relevant organs of state implicated in the complaint, and calling for and scrutinising documentation;
 - 19.4. preparing a first draft of the report, or a recommendation for mediation, or whichever document would support the appropriate resolution of the complaint (prepared by the investigator appointed to handle the matter);
 - 19.5. scrutiny of the report by a senior investigator, Provincial Representative and other members of senior management; and
 - 19.6. consideration and sign-off by the Public Protector (if warranted in the circumstances).
20. Although the OPP's reports attract much public attention, the overwhelming majority of the cases we finalise do not result in formal investigation reports. This

is because a significant number of the matters are resolved through alternative dispute-resolution mechanisms, where we bring the conflicting parties together, mediate, negotiate or conciliate, and emerge with a settlement agreement, or engage with government functionaries to release bureaucratic blockages or find administrative solutions.

21. ~~Relying on alternative dispute-resolution processes can be time consuming.~~ However, it may be more fruitful than the formal report route because, in the case of a formal report, remedial action is imposed and therefore may be resisted or may not occur readily. I am not aware of the statistics as to the success rate of compliance with remedial actions set out in formal reports.

II. ~~SUBMITTING THE INITIAL AFFIDAVIT~~

22. On 11 February 2020 I wrote to the Speaker of the National Assembly, attaching my Initial Affidavit. Because the Public Protector accounts to the National Assembly, I considered it appropriate for that institution to consider my complaints and initiate the necessary investigations. I did so out of extreme concern for what I regarded as a decline within the OPP and what I saw as ~~unhealthy working conditions to which the PP subjected the staff. This was, in my view, starting down to the Provincial Office and was not a healthy~~ environment.
23. I only took this step out of utmost concern and because, given that it was a concern relating to the head of the institution who correctly enjoyed protected security of tenure, there were no other avenues open. I also regarded raising my



concerns within the OPP as a fruitless exercise given that the conduct of the PP was the very cause of my concerns. In desperation, after receiving no speedy response from the Speaker, I did in March 2020 raise concerns internally.

24. As mentioned in my Initial Affidavit, one of my concerns was the reckless litigation into which the PP was dragging the OPP, the costs thereof, and the extent to which those costs jeopardised other activities and programmes of the OPP. I elaborate on these below.

(i) Reckless litigation

25. At the regular OPP management meetings, we would receive reports from the Legal Services department, addressing the litigation in which the OPP was involved. These reports indicated to me that the OPP was getting progressively more litigious, and fuelled my concerns about reckless litigation: i.e. poorly considered litigation that did little to enhance the efficacy, prestige or jurisprudence of the office, and seemed only to result in costs orders, heavy criticism and bad publicity.

26. By way of example, the reckless litigation to which I am referring includes the following:

- 26.1. **The litigation in respect of Report No. 8 of 2017/2018**, which dealt with the CIEX Report and the historical dealings between the South African Reserve Bank ("SARB") and ABSA Bank and its predecessors.

SH

- 26.1.1. The SARB, the National Treasury and ABSA Bank all instituted judicial-review applications to challenge the OPP's report. The PP caused the OPP to oppose most of the applications in the face of what were (and should obviously have been understood as) insurmountable grounds of review that would have made the outcome inevitable.
- 26.1.2. The High Court (case numbers 48123/2017; 52883/2017; 46255/2017, handed down on 16 February 2018) found that the PP made "*disingenuous*" arguments (paras 44 and 95); acted inconsistently with the Constitution and her empowering statute (para 70); failed to observe the requirements of fairness during the investigation process (para 87); and could reasonably be suspected of having been biased in the investigation (paras 101 and 103). The remedial action in the reports was therefore reviewed and set aside.
- 26.1.3. The High Court concluded that, during the litigation, the PP did not conduct herself in a manner befitting the Public Protector, and called into question her objectivity, honesty and the fullness of her disclosures (para 120). It found that the PP "*does not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice*" (para 127).

SAS

- 26.1.4. Because of the manner in which the PP conducted the litigation, the OPP was subject to a substantial costs order: it had to pay ABSA's legal costs in full, including the costs of three counsel, on the punitive attorney-client scale; and it had to pay 85% of SARB's legal costs, including the costs of three counsel, on the punitive attorney-client scale.
- 26.1.5. But this was not enough. The PP then caused the OPP to appeal to the Constitutional Court (Case No. CCT 107/18; judgment handed down on 22 July 2019), solely with reference to the costs against her personally and without what appeared to be any regard as to whether the costs of doing so may even exceed the costs which she was ordered to pay personally.
- 26.1.6. This was especially so as the appeal was then prosecuted by a new legal team. In the High Court, the OPP had been represented by Motsoeneng-Bill Attorneys Incorporated and five counsel: P Kennedy SC, P Khoza, T Manchu, M Manala and T Marige. In the Constitutional Court, this team was replaced in its entirety: the new attorneys were Ohoodie, Thompson & Haysom Inc and the new counsel were V Ngalwana SC and F Karachi. This substitution of the entire legal team for purposes of the appeal would have significantly increased the costs of the process, as each of

8/5

the new lawyers would have had to acquaint themselves with all of the material on record.

26.1.7. The PP should account for whether the change in attorneys and counsel was as a result of advice given as to prospects of success on appeal.

26.1.8. Not unexpectedly, the appeal was unsuccessful. Among other things, the majority of the Constitutional Court concluded that: there was no basis for interfering with the High Court's finding that the PP had acted in bad faith (para 162); the PP had failed to provide explanations that were clearly called for (para 180); the explanations that the PP did provide were "woefully late [and] unintelligible" (para 181); the PP failed to discharge her "*heightened obligation as a public official to assist the reviewing court*" (para 187; see also para 195) and offered contradictory evidence (para 203).

26.1.9. Ultimately, the Constitutional Court determined that the PP, in failing to disclose her interactions with the Presidency and the State Security Agency while preparing the report, "*acted in bad faith and in a grossly unreasonable manner*" (paras 205 – 206). "*This type of conduct falls far short of the high standards required of her office*" (para 207).

845

26.1.10. Although there was no order as to costs in the Constitutional Court, the OPP still had to foot the bill for its own (new) legal team.

26.2. **The litigation in respect of Report No. 31 of 2017/2018**, which dealt with the *Vrede Dairy Project*. The report was released on 8 February 2018 and subsequently challenged by the Democratic Alliance (“DA”), a political party, and the Council for the Advancement of the South African Constitution (“CASAC”), a non-governmental organisation. Judgment was handed down by the High Court (under case numbers 11311/2018 and 13394/2018) on 20 May 2019.

26.2.1. Despite initially stating to abide the applications, the PP later directed the DPP to oppose them in full. Three counsel were briefed to represent the OPP in one application, and two counsel in the other. This in itself was inexplicable, given the limited resources of the OPP and the obvious overlap in issues that would have made it appropriate, cost-effective and even desirable to have one legal team deal with both applications.

26.2.2. Again, not unexpectedly, the High Court declared the report invalid and set it aside (para 159), and issued a declaration that the PP had failed to discharge her duties under section 182 of the Constitution (para 160).

- 26.2.3. The High Court concluded that the PP had dramatically and unduly narrowed the scope of the investigation, and so ignored relevant information (para 43). She acted irrationally, took inadequate steps, failed to exercise her constitutional and statutory powers to conduct the investigation and failed to execute her constitutional duty to conduct a proper investigation (paras 47 – 49, 67 – 72 and 84).
- 26.2.4. The PP's legal conclusions pointed "*either to ineptitude or gross negligence in the execution of her duties*" (para 60). Provisional findings were inexplicably omitted from the final report, which could lead to concerns about the PP acting for ulterior purposes (para 75).
- 26.2.5. The High Court found that the PP's claims that resource constraints prevented her from investigating various aspects of the matter were "*unsustainable*" (para 79).
- 26.2.6. The High Court concluded that it was "*especially inappropriate and irrational*" for the PP to have removed the specific recommendation that the Head of Department be disciplined (para 116). It also criticised the PP's failure to deal with, among other things, the Premier and the relevant Member of the Executive Council (para 121).

26.3. In a separate judgment regarding the Vrede report (handed down only on 15 August 2019 because the Court was awaiting the abovementioned Constitutional Court judgment in the CIEX matter), the High Court concluded that the PP should be personally liable for 7.5% of the applicants' costs on a punitive scale; and the OPP should be liable for 85% of the applicants' costs (including the costs of two counsel), also on a punitive scale. The costs orders were imposed because:

26.3.1. The PP's "*failures and dereliction of duty ... are manifold... her conduct in this matter is far worse, and more lamentable, than that set out in the [SARB] matter ... In this instance her dereliction of her duty impacted on the rights of the poor and vulnerable in society, the very people, for whom her office was essentially created*" (para 25).

26.3.2. The PP's failure to conduct a proper investigation and to propose appropriate remedial action constituted "*gross negligence*" (para 25). She "*tried to defend the indefensible and should have realized that her defences were hopelessly without merit*" (para 26). "*Her inability to comprehend and accept the inappropriateness of her proposed remedial action constitutes ineptitude*" (para 27).

26.3.3. "*What was also of great concern and a factor that this Court took into consideration, when considering the appropriate*

848

costs order, is that the Public Protector made use of two different sets of counsel. These appointments must have caused an enormous escalation of legal costs for her office. ... One set, of any of her very competent legal teams, could easily have dealt with both matters... This decision by the Public Protector unfortunately shows a total disregard for the taxpayers, who will have to foot the bill and files in the face of her complaint about how financial constraints limited her ability to properly investigate the complaints" (para 29).

- 26.4. The PP sought to appeal the High Court's decisions on three separate occasions: she first sought leave to appeal from the High Court; then from the Supreme Court of Appeal; then from the Constitutional Court. In each case, the application was dismissed.
- 26.5. **The litigation regarding Report No. 46 of 2018/2019**, which dealt with complaints in respect of the Financial Sector Conduct Authority ("FSCA"). The PP persisted with the litigation in December 2019, even after conceding that the report in question should be set aside. The High Court (Case No. 30586/2019, judgment handed down on 6 October 2020) concluded that "the insistence of all the parties to proceed on an opposed basis is perplexing and only resulted in unnecessary costs being incurred" (para 24).
- 26.6. Why it was not contemplated that there be no opposition, and that the OPP need simply file a basic explanatory affidavit, is inexplicable.

26.7. The litigation regarding Report No. 37 of 2019/2020, which dealt with statements that President Ramaphosa made to the National Assembly regarding political donations for his campaign to be elected as President of the African National Congress, the ruling political party. The report concluded that the President had misled Parliament, had failed to disclose political donations and could be suspected of money laundering. The President, the Speaker of the National Assembly and the National Director of Public Prosecutions (“NDPP”) took the report on review. The PP caused the OPP to oppose the application. The High Court handed down judgment on 10 March 2020 under Case No. 55578/2019, concluding as follows:

26.7.1. The PP’s analysis of the evidence and her understanding of the law she was required to consider was “fundamentally flawed” and fell “far short” of what was required (paras 54 and 63 – 65). Her finding was “totally irrational” (para 65).

26.7.2. The PP made a finding on money laundering by applying a statute that does not deal with money laundering (para 136), and made various findings that were “inexplicable”, “unfathomable”, “reckless” and unsupported by any evidence (paras 137 – 139, 145 – 148, 153):

“The conclusion is inescapable that in dealing with this issue [Adv Mkhwebane] completely failed to properly analyse and understand the facts and evidence at her disposal. She also showed a complete lack of basic knowledge of the law and its application. She clearly

did not acquaint herself with the relevant law that actually defines and establishes the offence of money laundering before making serious unsubstantiated findings of money laundering against a duly elected Head of State. Had she been diligent she would not have arrived at the conclusion she did."

- 26.7.3. The PP "*did not act with an open mind, and so breached one of the cardinal requirements of her position*" (para 74). Her findings were "*unsustainable*", because they lacked a proper legal or factual foundation (para 132).
- 26.7.4. The PP imposed remedial action that was "*ineffective*", "*inappropriate*" and "*an unlawful interference with the Speaker's constitutional role*" (para 169). It was also an undue intrusion on the National Prosecuting Authority, which has guaranteed prosecutorial independence (para 178).
- 26.7.5. The report had to be set aside as unlawful (para 111). There was "*no question*" that the OPP had to pay the costs of the President, the Speaker and the NDPP, and that it had to do so on a punitive scale as a result of the PP's breach of various legal prescripts during the investigative and reporting process (paras 158 – 212).
- 26.8. Again, lessons were not learnt from the previous litigation failures: the High Court's decision was once again taken on appeal and the appeal was again dismissed by the Constitutional Court.

S/HS

27. The abovementioned judgments are all matters of public record. I understand that copies will be made available to the Committee.
28. There have since been other judgments in which the courts have made similar findings both about the manner in which the PP has conducted investigations and produced reports, and the manner in which she has litigated. My summary above does not purport to be comprehensive, only indicative of those cases which concerned me at the time, especially given the adverse media coverage that reflected so poorly on the reputation of the OPP.
29. The irregularities that resulted in the various reports being set aside and the various costs orders being imposed were not minor or innocent. Instead, they were serious, substantial and culpable, in many instances resulting in scathing criticism of the PP and, by association, the OPP. The litigation, in many instances, constituted attempts to defend the indefensible. One did not need external legal advice or counsel's opinion to appreciate this.
30. Furthermore, the OPP was not merely prejudiced by the other litigants' legal bills it was required to pay (often on punitive scales), but also by the fact that on several occasions the PP retained multiple legal teams for the same or essentially the same case, leading to further unnecessary legal costs.
31. In addition, the manner in which the PP conducted the litigation was itself the subject of serious censure. She did so in circumstances where, prior to her incumbency, the prevailing practice was for the OPP not to spend money on litigation unless it was confident that the report in question could be defended,

and it was satisfied that the OPP's participation would bolster the jurisprudence regarding the office and its powers and functions. These requirements were cast aside by the PP.

32. I regarded this as a reckless approach to litigation that had no positive outcomes for the OPP. It could well be that others do not share my views and that a justification for litigating these cases could be contrived. I am simply making the point – borne out by several judgments – that the approach adopted was catastrophic for the OPP's budget, image and reputation, with a knock-on effect that there would be a loss of confidence in the work of the OPP.

(ii) Soaring legal costs

33. The cost of the above litigation is evident from various extracts from the OPP's Annual Report and, in particular, the detail from the Annual Financial Statements set out therein:

33.1. I annex extracts from the OPP's Annual Report and Annual Financial Statements for the 2016/2017 financial year, marked "SS1".

33.2. I annex extracts from the OPP's Annual Report and Annual Financial Statements for the 2017/2018 financial year, marked "SS2".

33.3. I annex extracts from the OPP's Annual Report and Annual Financial Statements for the 2018/2019 financial year, marked "SS3".

SHE

34. I do not profess to have financial expertise. However, from my many years in OPP management and as an investigator, it is obvious that the OPP's spending on legal costs increased significantly between 2017 to 2019.
35. In my Initial Affidavit I said that the amount of R10,000,000 budgeted for legal fees in 2019/2020 was a "record high amount". On closer scrutiny of the abovementioned financial records, it is clear that I had underestimated the extent to which legal expenditure had ballooned.
36. Resources were being diverted away from the OPP's core function – investigating improper or prejudicial conduct in public affairs and offering ordinary citizens meaningful remedies – in order to engage in what was, in my view, reckless litigation whose unsuccessful outcomes were entirely foreseeable.
37. I explained in my Initial Affidavit that things were due to get significantly worse in the 2019/2020 financial year, as the OPP was on track to spend approximately R27,000,000 on legal fees. In fact, it seems that the eventual outcome was more dire than anticipated. During the 2019/2020 financial year, the OPP's expenditure on legal and other professional fees increased from R17,189,915 during the previous year to R47,208,433 (see annexure "B54"). That is an astonishing increase of almost 175%. I have little doubt that most of the increase was attributable to the OPP's expenditure on legal fees under the direction of the PP.
38. At the regular management meetings, we would receive reports on various aspects of the OPP's affairs, including financial reports. From the numbers

875

presented in these reports, it became clear to me that the OPP was spending increasing amounts of its limited budget on legal fees.

39. The "*main core*" of the OPP's business is not defending reports in judicial-review proceedings. It is addressing complaints of maladministration and improper and ~~prejudicial conduct, and providing ordinary members of the public with effective relief, without the delay, expense and formality of litigation.~~
40. The OPP has always functioned in the context of substantial budgetary constraints. The lion's share of the annual budgetary allocation goes to staff costs, leaving a relatively small portion for other operational costs.
41. ~~As more money is spent on legal fees it has a debilitating effect on the OPP's ability to fund its other programmes. I detail some of the adverse effects of the distorted funding regime below.~~
42. I should clarify that, although I controlled the Free State office as the Provincial Representative, finances were centrally administered. Thus, each year, I would submit a proposed provincial budget to the OPP's head office and would then ~~receive an approved provincial budget based on the funds that Parliament allocated. However, those funds would not be transferred into the provincial office's bank account on an annual basis. Instead, provincial expenditure required a financial requisition to be submitted to and approved by the OPP head office. For example, even if the Free State office had an approved travel budget, I still needed to apply to the head office for the approved funds in order to incur travel expenditure.~~

SHS

43. I am also aware that the PP has claimed, in public, that the OPP's finances – including its legal expenditure – is not her area of responsibility, but the CEO's. However, there can be no doubt that the litigation strategy that has resulted in the OPP's repeated legal losses and overwhelming legal costs is entirely attributable to the PP. She makes the ultimate decisions in the OPP.
44. As the litigation consumed more and more of the budget, it became more and more frequent that my applications to receive transfer of approved funds were being declined by Head Office on the basis that there were "no more funds". In my view, they were declined because the funds had been diverted to legal fees.
45. I became increasingly concerned about the OPP's expenditure on legal fees. I raised these concerns on multiple occasions in the management meetings: I wanted details about the expenditure, as well as explanations for why we were departing from the practice of only defending reports in the clearest of cases. I feared that the litigation expenses would exhaust our budget, and that there were no cogent reasons for why the OPP was involving itself as it was in numerous litigious disputes.
46. On 9 March 2000, I wrote to the OPP's Acting CEO – Ms Yvonne Luscombe – to raise the issue of the OPP's expenditure on legal fees and request documentation setting out the details thereof. I also wanted to know what was informing the OPP's decisions on engaging in litigation, given that those decisions were not in accordance with previous practice (which had generally been not to oppose judicial-review applications), entailed overspending, were not aimed at improving the jurisprudence regarding the office and were making other

SAS

OPP programmes suffer. A copy of my correspondence is annexed, marked "SS5".

47. As set out below, instead of responding to my queries, the PP had me suspended and disciplined two days later.

(48) Prejudice to other OPP programmes... outreach clinics

48. One important aspect of the OPP's work – at least prior to Adv Mkhwebane's appointment as Public Protector – was the holding of outreach clinics. During those clinics, OPP staff would go out into communities to interact with individuals, advise communities of the services that the OPP could offer, take down specific complaints, assist with completing forms and offer advice to aggrieved persons.

49. The outreach clinics were an important way of ensuring that communities – even those in far-flung, disconnected or rural areas – could use the services of the OPP to ensure accountability in the public administration. Because provincial offices are often headquartered in capital or large cities, achieving accessibility required expanding our footprint through initiatives such as the outreach clinics.

50. This was appreciated by the PP when she first started at the OPP during the 2016/2017 financial year. As can be seen from her first Annual Report (annexure SS1), when the PP came into office she recorded that she was –

"in the early stages of the launch of my blueprint document, Vision 2023: Taking the Services of the Public Protector to the Grassroots. Vision 2023 seeks to ensure that we dedicate more of our time and resources to our services being filtered to communities living on the margins of society. It is my belief that they, too, deserve a taste of the fruits of freedom and

87/15

democracy... we intend to achieve this by broadening access to our services, especially to rural and impoverished communities.” [my emphasis].

51. In that same report the PP noted that “[a]s many as 803 community outreach clinics were held countrywide” and acknowledged that “[t]hese contributed to the total figure of 9,563 new complaints received during the period under review.”

52. In addition, in respect of “Access”, the Annual Report recorded the following:

“The institution’s goal is to reach as many people as possible through its outreach activities. We reached many communities through our 803 clinics that were conducted during the period under review. Furthermore, the impact of the outreach activities such as media house visits, numerous newspaper articles written about the office and interviews resulted in South Africans being made aware of the existence of the office, the work it does and the type of assistance they can obtain. While millions of people were reached through outreach activities, the objective going forward is to focus more on bringing these services to people living in villages and townships.”

53. In the 2017/2018 Annual Report (annexure SS2), the PP recorded that –

“For my office to make a meaningful contribution towards its shared responsibility of strengthening constitutional democracy, our services must be accessible to all. The successes I refer to above could therefore not have been possible without our efforts to enhance access to our services. In the intervening period, 815 outreach clinics were held to take our services to far-flung communities. With only 19 offices countrywide, these clinics make up for our limitations where our footprint is concerned.”

54. Unfortunately, the commitment to making the OPP accessible and readily available to communities across the country changed significantly, and for the worse, in the 2018/2019 financial year. The PP’s foreword to the Annual Report for that year (annexure SS3) records the following:

SH

"Other targets included conducting 208 community outreach clinics and 36 radio slots also by financial year end. Clinics are mass meetings were presentations on the Public Protector's mandate are made in vernacular to remote communities. Complaints are also lodged during such outings. Slots, on the other hand, involve call-in programmes on SABC and community radio, where the message about this institution is spread. These two targets relate to the enhancements of public access to the services of this office." [my emphasis].

55. Thus, despite having acknowledged their usefulness and importance, the outreach-clinic targets were reduced to almost one quarter of what they had been: from more than 800 during the financial year to a target of just over 200.
56. By reducing the target so substantially, it became much easier to meet, and therefore much easier to show above-target compliance for audit purposes, at significantly less cost than would previously have been the case. This begs the question as to what happened to the funds that had previously been used to do significantly more outreach to the ordinary people in South Africa, in circumstances where the overall OPP budget was not reduced.
57. The 2018/2019 foreword recorded that the OPP actually "*exceeded our community outreach clinics by 69, holding 277 when we had planned to conduct only 208.*" This was, frankly, disingenuous given the huge decrease from the 815 clinics held in the previous year, which decrease had a substantial impact on the OPP's ability to make services available and accessible to members of the public.
58. The substantial cutting back of the outreach clinics was deeply felt in the Free State office. Though I cannot speak for the other Provincial Offices, it would be unlikely that they would not have had similar experiences. Under section 182(4) of the Constitution, the OPP "*must be accessible to all persons and*

SAS

communities'. The outreach activities were critical in achieving this constitutional imperative, and cutting them back so significantly jeopardised our ability to achieve this mandate.

59. The PP favoured substituting outreach clinics with radio engagements, and required outreach to be measured by the number of radio slots procured for the OPP and the number of associated listeners. However, interacting via the radio did not offer the same level of access as direct and personal engagements, as it did not allow ordinary citizens to speak with OPP staff, submit complaints and documentation, and obtain advice to the same extent as happened at outreach clinics.

59.1. Outreach officers were required to do the radio engagements. However, while those sorts of engagements may have helped to publicise the OPP, they did not allow ordinary citizens to submit documents and complaints, and obtain advice or assistance in completing forms, especially given limited education in certain areas.

- 59.2. In many communities, citizens cannot easily access the internet or the post office after hearing a radio engagement. That made it difficult to submit complaints and substantiating evidence. During outreach clinics, this sort of documentation could far more easily be handed over to the OPP, and they could be assisted in the completion thereof.

60. The 2018/2019 Annual Report sought to justify eradicating the majority of the outreach clinics as a cost-cutting exercise:

SAS

"PPSA implemented various cost containment measures from 2017 in an effort to reduce actual spending on non-essential expenditure items like travel and subsistence, accommodation, catering, advertising and outreach programmes. This resulted in PPSA reducing actual expenditure significantly from R9.5 million in 2016/17 to approximately R3.5 million in 2018/19." [my emphasis].

61. Again, this begs the question as to whether the saving of R6,000,000 had simply been absorbed in litigation costs and, if so, what benefit was derived given the poor outcomes thereof?
62. Moreover, the OPP's outreach clinics should by no means be described "*non-essential expenditure items*" or likened to catering costs. They are, in fact, an essential mechanism through which members of the public are able to ensure scrutiny and accountability in the public administration.
63. The total recorded reduction from cutting down these various items (as evident from the above extract) was R6,000,000. Over the same period (i.e. from 2016/2017 to 2018/2019), the OPP's expenditure on legal fees increased from R6,446,036 to approximately R14,000,000 (as per the annexures referred to above). The increased legal spend thus significantly outstripped the entirety of the cost saving accrued by decreasing the number of outreach clinics and other ostensibly "*non-essential*" items (which I am by no means agreeing all constituted "*non-essential*" expenses). This perverse approach displays the worrying distortion away from the OPP's constitutional mandate.
64. In my view, given the ballooning legal costs, there were no options available to the PP other than to "*rob Peter to pay Paul*", or else there would be no funds to

SAB

litigata. This was demonstrably to the detriment of one of the core functions of the OPP: reaching the most marginalised in South Africa.

(iv) Prejudice to other OPP activities: investigations and administration

65. In much the same way as our outreach activities suffered under the PP, so too did our core ability to conduct investigations.

66. As mentioned above, even though the Free State Office – like all other provincial offices of the OPP – had an approved budget, individual instances of expenditure still had to be requisitioned and approved by Head Office. By the time Mr Vussy Mahlangu became CEO, our funding requests for items such as travel would routinely be denied, even though our allocations had not yet been spent. In other words, even though there was an approved travel budget, we were not permitted to utilise the funds allocated for travel purposes, because they had already been spent elsewhere. They were not spent by, or ever transferred to, the Provincial Office.

67. At one point Mr Mahlangu issued a circular to the OPP, stating that travel expenditure would not be approved because there was no money for it, even if travel funds had been approved in the budget.

68. Initially, the Head Office Supply Chain Unit leased several vehicles and allocated them to the Free State office, to allow the latter to undertake its various activities. The Head Office then cancelled / did not renew that lease, and purchased vehicles for the provincial office instead. By 2020, we had two such

SHP

vehicles. However, they were later effectively grounded because Head Office refused to authorise expenditure associated with travel, including fuel.

68.1. Outreach officers and investigators were required to use OPP vehicles to conduct their work. However, when those vehicles were grounded, the officers and investigators saw their ability to discharge their functions significantly impaired.

68.2. Senior managers were permitted to use their own vehicles for OPP purposes. However, I was the only senior manager in our office who could do so. Even then, the travel expenditure I was permitted (e.g. allowances for fuel to travel across the province) was limited. For example, I could only visit the Regional Office once a quarter. My ability, for example, to undertake monitoring visits and file inspections was significantly curtailed.

69. As far as I am aware, other provincial offices were subject to similar restrictions.

70. We were therefore unable to travel from our offices to conduct investigations in the areas where the complaints originated / where relevant witnesses were situated, and were reduced to undertaking desktop investigations and conducting our enquiries through correspondence. This greatly hampered our ability to investigate complaints of maladministration and wrongdoing in public affairs and also significantly slowed down our ability to deal with matters. Moreover, the quality of investigations is hampered when limited to a desktop investigation.

BAC

71. This all happened in the context where the OPP's budgetary allocation from Parliament was not decreasing: revenues for the office increased from year to year. So these cuts clearly had to come about with a reprioritisation of funding flows that was internal to the OPP, rather than one that was imposed from outside. In other words, programmes, expenditure and activities were cut because the PP decided that the funds should be spent elsewhere, not because Parliament refused to continue making the necessary funds available.

72. I queried this constant denial of funds by the Head Office and raised it at a management meeting, as it made no sense to me that the funds would be refused when our budget had not been exhausted. However, I never received an explanation of where the funds had been channelled to. During the management meeting the CEO would say that the matter should be taken up with him outside of the meeting. When I would do so, he would inform me that the funding decision had been taken by the OPP's Executive Committee, and that that was the end of the matter.

(v) Prejudice to other OPP activities: producing reports

73. As mentioned in my initial Affidavit, one of the OPP's previous quality-assurance processes was the Think Tank. One of the great benefits of the Think Tank was that it would ensure that all reports were informed by legal and investigative expertise and experience from numerous sources. Think Tank scrutiny was rigorous, and added significant value to each report.



74. The Think Tank would consider not only questions of law and whether the factual conclusions in a particular report were supported by the evidence collated, but also questions of procedure and legal compliance, such as whether the requirements of procedural fairness and the Public Protector Act had been properly observed. The Think Tank would therefore regularly consider notices dispatched in terms of section 7(8) of the Public Protector Act.
75. Another benefit was that the Think Tank allowed genuine, face-to-face engagement between those responsible for preparing a particular report, and those conducting the scrutiny exercise. This would allow ventilation and expression of concerns from all sides, and a proper understanding of issues going forward. Under Adv Madonsela, when the Think Tank was convened we would simultaneously be provided with all the material which formed the subject of the process and would be afforded sufficient time to consider it.
76. Initially, Adv Mkhwebane retained the Think Tank, which continued to operate much as it had previously, and included the participation of her Deputy. One change I recall her making is that, when a draft report was circulated beforehand, she would require particular individuals to focus on specific sections of the report. This allowed each portion of the reports considered to be subject to particularised scrutiny, which was a positive development from a quality-assurance perspective.
77. At the time the PP did away with the Think Tank, OPP staff in the Free State office asked me why we, as management, could allow such a thing to happen. I explained to them that it was not a decision taken by the management collective,

but a decision imposed on the organisation by the PP, which was her prerogative.

They remained dissatisfied that such a useful and important quality-assurance tool had been done away with.

78. As far as I recall, the PP justified the abolition of the Think Tank as a cost-saving measure. That is not to suggest that there was any broad consultation with the DPP's senior management on the abolition: we were simply informed. However, my recollection is that, when justification was offered, it was contended that the Think Tank had been too costly because it involved many senior personnel travelling from across the country to Gauteng and having to be accommodated for several days.
79. To my knowledge, the PP did not replace the Think Tank with a similar quality-assurance structure that made use of the senior management structure in its entirety. Instead, she relied on a small secretariat within her private office, reporting directly to her, to quality assure reports. This quality-assurance secretariat comprised Mr Tebogo Kekana (a senior investigator), Adv Isaac Matlawe (another senior investigator) and one or two other individuals. There may also have been interns who assisted. The quality-assurance secretariat was much smaller, and had much less collective experience, than the Think Tank. I do not know what the Deputy Public Protector's involvement in this was, if any, or if any other persons were involved in this process.
80. I should point out that the quality assurance secretariat was not an innovation that the PP introduced. It had been operational under the previous incumbent, to support the Think Tank by coordinating reports and providing supplementary

8/15

quality-assurance services between Think Tank sessions. Around the time that Adv Madonsela's term came to an end, some of its members – such as Ms Belinda Moses and Ms Janine Hicks – also left the OPP.

81. I have heard that there is now a structure within the OPP called the Task Team. I have never been involved in the Task Team and I do not know who participates in its meetings, how frequently it sits or what its functions are. On my understanding, it is a Head Office initiative that does not include Provincial Managers.
82. The PP also required the then Senior Manager: Legal Services, Mr Nemasisi, to quality assure reports. However, that was an overwhelming task for one person, especially if it involved scrutinising the evidence collated.
83. The PP also insisted that investigators had to quality assure their own work: when they submitted reports for her consideration, those reports had to be accompanied by certificates verifying that the investigators and managers involved thus far were satisfied regarding the evidence and law presented in the draft report.
84. I accept that it was her prerogative, as the Public Protector, to adopt different decision-making and quality-assurance processes. However, it remained her constitutional obligation to ensure the integrity of the OPP's investigating and report-producing processes. Whatever systematic changes were to be implemented, they had to be focused – as the Supreme Court of Appeal told us more than a decade ago in the Mail & Guardian case – on addressing allegations

875

of malfeasance, actively discovering the truth and inspiring confidence in the public that the OPP has discovered the truth.

85. The manner in which Adv Mkhwebane did away with the Think Tank did not achieve these objectives. This is evident from the scathing judicial remarks in respect of the various OPP reports that did not have the benefit of Think Tank scrutiny. It is so that, even while the Think Tank was in place, not all reports went through it. The report into the CRED matter is one such example. As set out above, judgments criticised the OPP for elementary mistakes of law, ignoring relevant evidence and failing to observe the basics of procedural fairness. I am of the view that these sorts of errors would have been picked up in a Think Tank process, properly convened and afforded sufficient time to consider reports.
86. Around the same time as the Think Tank was abolished, the OPP's regular management meetings were no longer held in-person. Instead, they were held virtually (even before the rest of the world became familiar with online platforms such as Zoom and Microsoft Teams) and chaired by the CEO. Because these meetings were held virtually, it was no longer necessary for senior management to converge on the Head Office in Pretoria for the management meetings.
87. The virtual platforms worked well for hosting the management meetings. In my view, there is no reason why the virtual platforms could not also have been used to host Think Tank sessions. At the very least, the OPP should have attempted to hold the sessions virtually, which would have allowed the important quality-assurance function to be retained without the associated travelling and accommodation costs.

88. I should also mention that, while Adv Madonsela was Public Protector, she secured lots of training for OPP staff: from judges (who would provide training on how to prepare reports that can withstand legal scrutiny), through courses and through seminars that she or other experienced staff members would provide. She also arranged for ombudsman offices in other jurisdictions (such as Canada) to share their experiences and perspectives on how to best go about our work. This assisted in the quality of our investigations and reports.
89. Since Adv Mkhwebane became Public Protector, these training initiatives have ground to a halt, at least in the Free State office. I understand that Parliament previously expressed concern about the OPP utilising sponsorships to attend training courses, and such funding was discontinued. However, Adv Mkhwebane even discontinued the in-house training sessions and free training courses we used to attend.
90. This lack of training has had a particularly serious impact in the light of the OPP's high staff turnover and loss of institutional knowledge through the flight or purging of senior personnel.

F. UNHEALTHY WORKPLACE

91. I was a member of the Public Servants Association ("PSA"), which was the only union among OPP staff and representative of the majority of staff members. In the feedback sessions from PSA shop stewards, it was clearly communicated to us that OPP employees were unhappy with the working environment that the PP

SAK

had introduced. The same information was relayed to us at the OPP bargaining forum, at which I represented the provincial offices.

(i) General atmosphere in the office and working environment

92. Most of the senior managers in the OPP had the impression that the PP had undisclosed information about each of us, and would use it against us. She would, for example, from time to time make pointed and unpleasant comments that expressly or impliedly referred to one or more of us in meetings with OPP staff. Aside from being embarrassing and uncomfortable, this had the effect of undermining us in front of our colleagues and subordinates.

93. For example, at what I think was a strategic planning session during 2017, the PP made opening remarks during which she went to town on what she claimed to know about various persons present. In my regard she expressly referenced the Limpopo altercation; in respect of Mr Ndou she spoke about the allegations of misconduct against him; and she raised various other aspects about others present. When we took a break from the session, we expressed our shock to each other, at how openly the PP sought to embarrass and intimidate us.

94. I knew (as did everyone else) that the PP had a background in the State Security Agency, which made me suspicious that she could have had access to personal and confidential information about anyone from conversations with others who had similar concerns. The information she disclosed at the meeting described in the preceding paragraph, for example, was not the sort of information that would have been included in a handover memorandum prepared by Adv Madonsela.

875

95. My impression was that the PP wanted to undermine the hard work done by the OPP before her incumbency, and that to do so she was intent on getting rid of individuals with institutional memory. During the PP's tenure there has been a high departure rate of senior staffers. This was because of the unpleasant working environment, and the lack of trust in the workplace.

96. It was also apparent to me that the PP was not concerned with adverse publicity or reputational harm, because she incurred that time and again, yet persisted with similar acts and the same course of conduct. This is evident from, for example, her persistent adoption of losing litigation strategies in the cases referred to above.

97. The PP introduced weekly reporting structures, which required Provincial Representatives to account to the relevant Executive Manager regarding the status of various investigations and compliance with reporting deadlines.

97.1. On Mondays, there would be weekly meetings at Head Office, at which Executive and some Senior Managers would meet with the PP to discuss some investigations and reports.

97.2. In order to ensure that Executive Managers were adequately briefed and prepared for their Head Office meetings, we (in the provincial offices) had to have our own prior weekly meetings regarding the investigations and reports in question. The outcomes of those meetings would then be fed through to the Executive Managers, who would account to the PP.

98. In principle, it is sensible to have regular reporting to executive management, to ensure progress and efficiency within the office.
99. In practice, however, the manner in which this reporting system was implemented rendered it a tool of terror and intimidation. The PP would insist on deadlines that were impossible to meet, and would not allow those deadlines to be missed even when there were good investigation-related reasons for the delays (such as a particular organ of state's failure to provide information timely).
100. She would also insist that people who did not meet their deadlines be subject to disciplinary action: Executive Managers had instructions to issue "audi letters" (i.e. letters asking the recipient why he or she should not be disciplined) in respect of missed deadlines. I never received such an audi letter myself; this was because my Executive Manager, Mr Nkomo, refused to pass on the pressure that he received from the OPP leadership to the Provincial Representatives that reported to him.
101. Much of the pressure would flow through the CEO at the time, Mr Vussy Mahlangu. He would issue threats of disciplinary action to staff members who questioned the PP's decisions (although he never threatened).
102. Adu Mkhwebane would determine deadlines for investigation outcomes and reports without reference to the investigating team's constraints or the investigators in question. However, because staffers understood the PP's aversion to granting extensions even if legitimately requested, and feared disciplinary action, they would often submit substandard work (e.g. reports based

on incomplete investigations) because they simply were not allowed sufficient time to discharge their functions. While this approach may have allowed an increase in the number of reports produced, it significantly impaired the quality of those reports and, more importantly, the OPP's ability to discharge its core mandate of determining the truth about complaints of maladministration and prescribing appropriate remedial action.

103. The PP therefore sought to enforce her impossible deadlines with the constant threat of disciplinary action. Among other things, that resulted in an overworked and demoralised staff complement, constantly fearing for their jobs.
104. I should make it clear that I never accepted substandard work or pushed work through in order to meet arbitrary deadlines. Hence I often did not comply with what were, in my view, unreasonable deadlines. Fortunately, however, my Executive Manager – Mr Ndou – sufficiently respected the integrity of my work that he did not subject me to workplace discipline when I missed a deadline for legitimate, investigation-related reasons.
105. While there can be no dispute that attempting to address the OPP's backlog is an important objective, that should not come at the cost of the quality of our work: investigators should not be required to compromise the integrity of their investigations just so that numbers and statistics can be made to sound attractive. The OPP does not deliver on its mandate if it clears a high number of cases, but does so in such a shoddy fashion that complaints are not properly investigated and the appropriate remedial action not properly determined, and

hance would lead to non-compliance with such remedial action if it is not properly thought through.

106. The PP would also insist on being provided with information on very short notice.

106.1. For example, when she was due to have a meeting with a particular member of the National Executive, she would want a report on all of the cases dealing with that member's department. The Executive Managers would often be given a day or a few hours' notice, even if a substantial amount of information needed to be collated and/or summarised.

106.2. Sometimes, upon arriving at the office at 08h00, we would discover an email that had been sent overnight, stipulating that the PP required certain information "by 08h00 tomorrow morning". Thus, when we switched on our computers at the start of the workday, we would be surprised to find that we were already under pressure and behind on our deadlines. Often, more time would be required to provide reliable and cogent information, but we would receive pushback against any requests for more time.

106.3. Furthermore, the information requested would often be information that we had already reported – we would be required to report repeatedly on the same information, in an *ad hoc* fashion, as and when it suited the PP, to the detriment of our other work.

SMS

106.4. In addition, these information requests would be presented while we were engaged with our other work. These interruptions had an adverse effect on our productivity.

107. Below I set out some details about how various individuals were unfairly targeted by the PP. This conduct not only affected the named individuals, but had an insidious effect on the OPP as a whole, as the remaining staff members saw the consequences of remaining robust and independent, or failing to toe the line, through observing what happened to colleagues who did not do so.

(ii) Reginald Ndou

108. Mr Ndou was an Executive Manager for Provincial Investigations. When the PP took office, Mr Ndou had been serving the OPP for many years. He had a great deal of institutional knowledge and was respected by most staff members.

109. During 2017 allegations of misconduct were laid against Mr Ndou. He was suspended and an external law firm (Strauss Daly) was appointed, at significant expense, to investigate the allegations. The law firm concluded its investigation and submitted a report, which absolved Mr Ndou of wrongdoing. Mr Ndou returned to work.

110. More than a year after Mr Ndou's return to work, he resigned from the OPP. During the last week of his notice period he was inexplicably charged with misconduct in respect of the 2017 allegations, despite the fact that the Strauss Daly report had exonerated him, and further despite the OPP having allowed him to return to work and continue functioning in the workplace for more than a year.

111. I was Mr Ndou's employee representative in the disciplinary proceedings. Ultimately, the disciplinary hearing never took place: Mr Ndou's resignation took effect before it could commence.

112. It was clear from inception that the disciplinary hearing would not be completed while Mr Ndou was still an employee, and therefore could not serve any legitimate function for the OPP. I could only conclude that the PP wanted to have these unresolved allegations of misconduct on his record, casting a shadow over his future prospects.

(iii) Ponatshego Mogaladi

113. Ms Mogaladi started at the OPP as a senior investigator and was promoted through the ranks to become an Executive Manager.

114. Ms Mogaladi was responsible for an investigation into the FSCA, following a complaint laid by the Economic Freedom Fighters, a political party ("EFF"). The investigation led to a report that was challenged in judicial-review proceedings and ultimately set aside by the High Court (discussed above). The OPP did not seek to defend the validity of the report.

115. The PP alleged, inter alia, that Ms Mogaladi had set her up for failure because Ms Mogaladi had failed to consider information that was supplied to the OPP when conducting the investigation. The PP directed that Ms Mogaladi should face disciplinary charges for her alleged misconduct.

SAS

116. I am informed by the evidence leaders that Ms Mogaledi has indicated that she is prepared to make a statement and as such I will leave the details hereof for her to apprise the Committee herself.

117. I will say, however, that ultimately the PP is the one responsible for the OPP's investigations and reports. As the constitutional office-bearer and signatory, she should have determined whether additional information had been submitted in response to the section 7(5) notices, and whether that information had been taken into account, instead of seeking to blame her subordinates, who were endeavouring to do their best under onerous circumstances and trying deadlines.

(iv) Lesedi Sekele

118. Like Ms Mogaledi, Ms Sekele has been in the OPP's employ for many years, having risen from being a senior investigator to a senior manager and chief investigator. Again the evidence leaders have indicated that she had agreed to provide a statement and as such do not deal with the details herein.

(v) Abongile Madiba

119. Mr Madiba was a Chief Investigator in the ODI Unit who has now passed away. Like Ms Mogaledi and Ms Sekele, he was involved in the FSCA investigation and was charged with misconduct when the report was set aside. He was very ill while the disciplinary proceedings were ongoing; he had had a stroke.

SMS

120. Mr Madiba was a strict, robust and assertive person. My impression was that the PP did not like these characteristics, particularly because they would lead to him vocally opposing her during Think Tank meetings.
121. Mr Madiba was responsible for the investigation into wrongdoing in respect of the funeral of former President Nelson Mandela. The PP wanted the report to be released urgently. However, Mr Madiba insisted that more time was required to conduct the investigation properly. In particular, he needed to engage with reluctant witnesses, and therefore prepared a subpoena for the PP to sign. However, she refused to sign the subpoena and insisted that the report be finalised. When the report was issued, it had not properly been finalised and the investigation was not thorough or complete.
122. As discussed below, I had a similar experience with the PP in respect of the Vrede investigation.

(vi) Other individuals

123. As mentioned in my Initial Affidavit, other individuals targeted and purged by the PP were Basani Baloyi, Isaac Molloa and Tebogo Kekana. Mr Kekana has deposited a self-explanatory affidavit that has been in the public domain for some time.
124. Another individual who was targeted was Mr Bonginkosi Dhlamini, who served as Chief of Staff to Adv Madonsela during her tenure as Public Protector. Adv Mkhwebane's determination to get rid of Mr Dhlamini led to more adverse media coverage for the DPP.

(vii) Security clearances

125. Several people – including the former Deputy Public Protector, Mr Kevin Malunga, and Mr Kaposi – were targeted because they lacked security clearance in accordance with the Minimum Information Security Standards (MISS). On my understanding, the MISS is the South African government's policy on information security, and regulates such things as "top secret" security clearances.
126. I can confirm that, in my two decades at the OPP, I have never had to handle Top Secret or other classified information. In my view, a security clearance is simply not required to undertake most of the functions of the OPP.
127. If one does the exercise of determining who in the OPP has had top-secret clearance, for what periods and for what purpose, I would not be surprised if many senior managers and other staff did not have top-secret clearance at all times, which makes a mockery of the requirement. Moreover, it has never been precisely clear as to whether there has been any classification of documents at all indicating what is sensitive.
128. I can also confirm that the security clearance applications are often not finalised: while applications are submitted, they are often not received in a timely fashion. Nevertheless, work in the OPP carries on without any impediment as there is a general confidentiality requirement.

SAS

129. In my view, the lack of security clearances was held against people not because it rendered them unable to discharge their OPP functions, but because it provided a reason to have them removed from positions or excluded.

G. THE VREDE DAIRY INVESTIGATION

130. The Vrede investigation began with Adv Madonsela, and was one of the investigations pending when her term was completed. The investigation was concluded, and the report published in 2018, under Adv Mkhwebane.

131. I transferred to the OPP's Free State office, as Provincial Representative, in April 2015. At that time, the Vrede investigation was ongoing. It had been managed by the previous Provincial Representative, Ms Griesel, and now fell under my supervision. The investigator assigned to the matter was Adv Erika Cilliers, who was assisted by others, including Mr Sisa Mkhweni.

132. Previous drafts of the report had been presented to and discussed by the Think Tank (on which I sat as Provincial Representative for Limpopo), so I was aware of the investigation. When I assumed responsibility for the Free State province, there was a draft of the Vrede report dated November 2014, which had been prepared by Adv Cilliers. That draft had, as far as I recall, been scrutinised by the Think Tank, and sent back to the provincial investigation team for further revision and investigation. Furthermore, Adv Madonsela had informed me that she considered the draft and the evidence, but was concerned that insufficient attention had been paid to the role of politicians.

EHS

133. As far as I can recall, during 2016 Adv Cilliers prepared a further draft of the Vrede report. Adv Madonsela was still not satisfied with the adequacy of the draft, and so referred it to me as the head of the Provincial Office conducting the investigation. The concerns raised in respect of the draft report necessitated further investigations, which were still underway by the time the PP took office in October 2016.

134. At 09h13 on 14 November 2016, Adv Cilliers sent me an email, a copy of which is annexed, marked "SS6".

134.1. The email is addressed to "SHS", which is me: Sphelo Hamilton Samuel. It has "*THINK TANK REPORT*" in the subject line.

134.2. The email included a draft of the Vrede report, which was dated November 2014. A copy of extracts from the draft is annexed, marked "SS7". It will be noted that the draft refers to the report as emanating from Adv Mkhwebane as the Public Protector (she had assumed office a month before Adv Cilliers' email).

134.3. This draft report is the same "Provisional Report" that was filed by Adv Mkhwebane during the subsequent judicial-review proceedings. It contains the same findings and the same remedial action. However, the version filed by Adv Mkhwebane reflected "Adv T N Madonsela" at the end of the document.

134.4. This change may give the impression that Adv Madonsela had signed off on the "Provisional Report" dated November 2014. However, that is



not the case and such an impression would be false. The draft dated November 2014 failed to address Adv Madonsela's concerns, and had been referred to me for further investigation. It had never been adopted by Adv Madonsela (whether as a "*Provisional Report*" for circulation or otherwise) and was very much a work in progress. When Adv Madonsela left office, no report had been signed off or finally approved by her.

135. Shortly after Adv Cilliers emailed the draft to me, I enquired whether section 7(9) letters had been sent to the Head Office's Quality Assurance Unit. Adv Cilliers indicated that they had been sent through on numerous occasions, most recently in November 2015. I indicated that the PP had requested that the section 7(9) letters be resent to her, together with the draft report, because Adv Matlawe claimed that he had never received the drafts. At 11:15 Adv Cilliers sent me the drafts. A copy of our correspondence is annexed hereto, marked "SS8".

136. I immediately sent the drafts on to Adv Matlawe. More than three months later, on 24 February 2017, Adv Matlawe sent the drafts on to Adv Mkhwebane. He noted that –

136.1. he was sending the documents on because the "State investigation had been "*raised by Minister Zwane yesterday*" (I assume this was a reference to Mr Mosebenzi Zwane, formerly the Free State's Member of the Executive Council for Agriculture and Rural Development ("MEC") and later national Minister of Mineral Resources);

- 136.2. the Provisional Report had not been finalised under Adv Madonseia because she was dissatisfied with the work that the Free State Provincial Office had done; and
- 136.3. the draft correspondence to implicated parties needed to be re-formatted.
137. I do not know if this was the first time that he sent the documents through to the PP, or whether, in light of the matter having been raised the previous day, the documents were being sent again.
138. A copy of Adv Matlawe's correspondence is annexed, marked "SS9".
139. In mid-March 2017 (almost a month before the Vreda site inspection) the PP came to the Free State province to host a stakeholder consultative engagement – sometimes termed a "roadshow" – where she met with various OPP stakeholders (including members of the public and politicians) over a period of two days.
- 139.1. As part of this stakeholder engagement, the PP was due to meet various members of the Free State Provincial Legislature. I met with her the day before, to brief her and assist with her itinerary. At that meeting I conveyed the Premier's request to meet with the PP before she attended the Legislature for the stakeholder engagement. The request had been conveyed to me by officials from the Premier's office (even though my own previous requests to meet with the Premier when

SMB

I transferred to the Free State had not received the courtesy of a response).

139.2. Initially, the PP was unwilling to accede to the request. I accepted her position and proceeded with the briefing. During the course thereof, the PP accepted a telephone call. When the call ended, she announced that she had changed her mind and would meet with the Premier on the following day, with me and the OPP CEO. I do not know the identity of the caller.

139.3. On the following day, the CEO and I met the PP outside the Premier's office in Bloemfontein. The CEO and I went to the Premier's waiting room, and the PP entered the Premier's office alone. When she later emerged from that office, she went straight to her car and the CEO and I were not called into the Premier's office. Instead, the Premier came to the waiting room, introduced himself to the CEO, ignored me and then left.

139.4. I can only speculate that the PP and the Premier likely discussed the Vrede investigation. Based on the abovementioned email correspondence, she had already engaged in such discussions with Minister Zwane during February 2017, and was in possession of the draft Vrede report. Furthermore, at the time that the PP took office as Public Protector (in October 2016), the Vrede investigation was topical and brought to her attention. In addition, shortly after this meeting with the Premier, Adv Mkhwebane told us she had given undertakings that



13

the final report would be ready by the end of April 2017; in this regard I annex email correspondence, marked "SS10". However, I have no personal knowledge of their discussion as I was not permitted in the room.

- 139.5. If the Vrede investigation was discussed, it would have been unusual for the discussion not to have taken place in a properly minuted and recorded meeting, so that the records could be placed with other evidence to be taken into account.
- 139.6. I was surprised that I had been required to attend the meeting but was then excluded from any engagement with the Premier. I do not know whether my exclusion was at the behest of the Premier or the PP. As the Provincial Representative, and the head of the OPP in the Free State, I expected to be part of any discussions with the Premier regarding the OPP Provincial Office.
140. On 27 March 2017, Adv Matlawe sent the drafts on to Mr Sello Mothupi (from the Provincial Investigations Unit at Head Office), copying me, and asking for the section 7(2) correspondence to be reformatted (see annexure 538 referred to in para 138 above).
141. Adv Matlawe's correspondence of 27 March 2017 attached another draft of the Provisional Report (still with "November 2014" in the header). This was materially the same as the draft sent as had been sent through by Adv Cilliers at 09h13 on 14 November 2016, save that it recorded –

- 141.1. the Public Protector as being "*T N Madonsela*" instead of "*Busisiwe Mkhwebane*"; and
- 141.2. that the Public Protector had been assisted by "*Erika Cilliers and Tshiamo Mocum*" rather than the "*Free State Provincial Office*".
142. An extract of the draft circulated by Adv Madonsela is annexed, marked "SS11". I do not know who made the abovementioned changes to the draft, or when or why they were made. As set out above, the draft report marked "*November 2014*" did not reflect the changes that Adv Madonsela had wanted implemented i.e. a proper consideration of the role of the politicians.
143. On 30 March 2017 I sent the reformatted section 7(3) correspondence to Adv Madonsela, together with a revised version of the draft report ("*The March 2017 Report*"). A copy of my email correspondence is annexed, marked "SS12".
144. The March 2017 Report changed the name of the Public Protector from Adv Madonsela to Adv Mkhwebane and incorporated numerous changes to the structure of the report; Adv Mkhwebane had introduced many changes to the manner in which reports should be structured and formatted. I annex a copy of extracts from this version, marked "SS13". I sent the report through because Adv Mkhwebane was insistent about receiving a copy of the draft as soon as possible. However, in my view, various issues still needed to be considered and canvassed in the document before the report could be finalised.

876

145. I was aware that the concerns raised by Adv Madonsele had still not been addressed in the Vrede investigation. I took various steps to address those concerns:

145.1. I considered information from the legislature's Hansard, as well as some public speeches.

145.2. I considered evidence from officials employed in the provincial Department of Agriculture. They did not want to meet personally, but were willing to provide information.

145.3. I reconsidered all of the evidence that had been collected by Adv Cilliers.

145.4. I sought permission (discussed below) to subpoena the politicians that I believed could provide information. As Provincial Representative, I had the authority to subpoena officials. However, in respect of political office-bearers, subpoenas had to be approved and issued by the Public Protector herself.

146. A site inspection of the Vrede farm was conducted on 10 April 2007. Both Adv Mkhwebane and I were in attendance (together with my team from the Provincial Office, including Adv Cilliers and Mr Mlonyeni, and officials from Head Office). Because the politicians had not participated in our investigation, I wanted to subpoena them to provide information, and made a request to the PP accordingly. However, she refused to allow such a subpoena. In fact, the PP

SAB

expressly said to me that she did not want the Vrede report to have any findings against, or remedial actions in respect of, politicians.

147. Although I was of the view that the subpoenas were necessary, the PP had made herself clear on the issue. Accordingly, as far as I can recall, I did not persist with my requests or submit draft subpoenas to her for consideration.

148. Notwithstanding the PP's admonition, and notwithstanding her refusal to authorise subpoenas, it was apparent to me that the evidence unearthed during the investigation justified both findings and remedial action in respect of certain politicians.

149. Adv Cilliers prepared a further draft of the report ("the April 2017 Report") which contained findings against Ace Magashule (the Premier of the Free State) and Mcebisi Ezame (the MEC).

149.1. A copy of the cover email is annexed, marked "SS14".

149.2. A copy of the April 2017 Report is annexed, marked "SS15".

150. As is evident from the April 2017 Report, the evidence showed the following:

150.1. The Estina agreement was not concluded in accordance with the binding procurement framework, which constituted maladministration and a contravention of section 217 of the Constitution. The rules regarding public-private partnerships – which were applicable – were not followed.

SAS

- 150.2. Among other things, the prices paid for equipment, cows and infrastructure was considerably higher than market value.
- 150.3. The accounting officer was guilty of gross irregularity, maladministration, abuse of power and improper conduct, as well as responsible for irregular expenditure. Among other things, he should not have paid over more than R140 million to Estina after the Accountant General's report, which raised significant concerns about the transaction. Furthermore, he had failed to put in place financial-control and risk-management measures in respect of the project. In addition, there were no invoices or receipts to substantiate the expenditure claimed.
- 150.4. The failure by the Premier and the MEC to institute disciplinary action against the senior officials responsible for the unlawful agreement, in accordance with the Accountant-General's recommendations, constituted maladministration on their part.
- 150.5. The allegations that environmental legislation had been breached were not substantiated.
151. The findings and proposed remedial action reflected these conclusions.

Adv Cilliers' cover email to me explained the following:

"We have finished the report and are starting the Sec 7(9) letters. We are making findings of maladministration against Premier and MEC therefore three notices and one discretionary notice for the SIU. We took out remedial action for [the Auditor-General] as [the Auditor-General Free

SAS

Statej is already busy with audit of the project. Sisa and I met him and his team on Friday."

152. The April 2017 Report was circulated, both within the Free State Office and to Head Office. In addition, draft section-7(9) correspondence was sent on, as was the "Certificate of Compliance" in respect of the investigation. A copy of the email correspondence in respect of the draft notices and certificate is annexed, marked "SSM". The email was sent to, among others, Mr Sello Mofhupi, Ms Phisoalo Sebopelo and Mr Reginald Ndou, all of the Provincial Investigations Unit in the OPP Head Office. A copy of the April 2017 Report was sent via separate correspondence, of which I have not been able to locate a copy.
153. The section 7(9) correspondence (to dispatch to parties implicated in our findings) went through various iterations, and was quality assured by Mr Ndou's team as well as Adv Matlawe (in Adv Mkhwebane's private office).
154. On 19 May 2017 Adv Matlawe provided the PP with drafts of the section 7(9) correspondence, and requested her "further guidance on the way forward". On 22 May 2017 Adv Matlawe sent further versions of the section 7(9) correspondence back to Adv Cilliers, copying, among others, me and Adv Mkhwebane. A copy of Adv Matlawe's correspondence is annexed, marked "SSM".
155. Adv Matlawe sent the final versions of the section 7(9) correspondence to Adv Mkhwebane and other members of her team on 7 June 2017. This correspondence, like the draft April 2017 report and the previous versions of the letters, confirmed inter alia the DPP's provisional conclusions that the "failure by

GHS

the Premier and the MEC to institute disciplinary action amounts to maladministration".

155.1. A copy of Adv Matlawe's correspondence in this regard is annexed, marked "SS18".

155.2. A copy of one of the final drafts, as an example, is attached, marked "SS18".

156. A copy of the section 7(9) correspondence signed and issued by the PP (dated 7 June 2017) is annexed, marked "SS20".

157. The section 7(9) correspondence was issued on the basis of the April 2017 Report.

157.1. The evidence leaders have provided me with a copy of the index to the rule-53 record that the PP filed when the Vrede report was taken on review. A copy thereof is annexed, marked "SS21".

157.2. I was never asked to assist in the preparation of that record, to ensure that all relevant documentation was included. Neither, to my knowledge, was anyone from the Free State Office.

157.3. I note that the only draft of the Vrede report recorded in the index is the one dated "November 2014", supposedly under the hand of Adv Madonsela. As explained above, the draft dated "November 2014" was never accepted or adopted by Adv Madonsela (as a "Provisional

Report or otherwise). Furthermore, the versions of that draft that I sent on to Head Office (both in November 2016 and then in March 2017) recorded the Public Protector as Adv Mkhwebane. I do not know who changed the name to "*Adv Madonsela*".

157.A. It is not apparent to me why the draft dated "November 2014" would have been included in the record, but not the other drafts discussed in this affidavit. Particularly, in my view, the April 2017 Report should have been included, because that is the draft on the basis of which the section 7(9) notices were issued.

157.5. I note that the index does not include much of the email correspondence relating to the Vrede investigation that is discussed in this affidavit.

158. On 14 June 2017, the Premier responded to the section 7(9) correspondence by noting that certain paragraphs that were supposed to be put to him had not been sent to his office. The PP then sent the following email to myself, Adv Matlawe and Adv Cilliers (among others):

"Can I have an explanation as to why I was requested to sign the section 7(9) which omitted issues the Premier and MEC should respond on? I took it we sending the section 7(9) for their information on the findings against the HODP"

ACOS deal with this and facilitate preparation of response to the Premier."

159. A copy of the PP's email is annexed, marked "**SS22**". As far as I can recall, the Premier was later provided with all of the information necessary for him to submit a section 7(9) response.



160. I note that all of the versions of the section 7(9) correspondence that Adv Mkhwebane had considered – including the final version that she signed and sent off – were not merely sent to the Premier and MEC for information about findings against the Head of Department, but also because additional findings were proposed to be made against the Premier and the MEC, as set out in the April 2017 Report.
161. On 14 July 2017 Premier Magashule responded to the section 7(9) notice. The MEC and the Accounting Officer also submitted responses around that time. As far as I can recall, these responses were submitted to Adv Mkhwebane and the OPP Head Office.
162. At this stage, the investigation was still ongoing. While the OPP's provisional conclusions were as set out in the April 2017 Report, the section 7(9) submissions could have unearthed additional evidence or further avenues for exploration. The OPP was duty-bound to remain open to wherever the evidence led.
163. I also recall that, at some point during 2017 – I cannot remember precisely when – Head Office required the Free State Office to hand over its investigation file in its entirety. This was unlike other cases, where Head Office would simply require copies of the evidence.
164. From July 2017 until September 2017, I was on extended leave from the office due to health afflictions. Although I was copied on email correspondence during this period, I did not participate in any investigations or OPP matters. During that

time, Adv Cilliers, assisted by Mr Mlonyeni, took the lead in providing whatever assistance Head Office required in respect of the Vrede investigation.

165. Because I remained copied on emails, and because the evidence leaders have been able to provide me with some of my email records, I am now able to reconstruct at least some of what happened during my absence from that workplace. I set this out in the paragraphs that follow.
166. On 8 August 2017, Adv Cilliers prepared a further draft of the Vrede report. Although the report was circulated in August 2017, it has "July 2017" in the header, and I shall therefore refer to it as "**the July 2017 Report**". As far as I can recall, I did not assist in preparing this report, as I was on leave.
167. On 11 August 2017, Mr Mlonyeni sent the July 2017 Report on to Ms Phelelo Sebopelo, a Senior Investigator in the Provincial Investigations Unit at Head Office, who shortly thereafter sent it on to Messrs Matlawe, Kekana and Sithole in the PP's office.
168. A copy of the email correspondence between the abovementioned parties is annexed, marked "SS21". I was not copied on the correspondence to Ms Sebopelo or the correspondence to Head Office, presumably because I was on leave.
169. I annex, marked "**SS24**", a copy of the July 2017 Report. In a departure from the conclusions and content of the April 2017 Report, the draft now omitted any findings of maladministration or wrongdoing on the part of Premier Magashule or

the MEC. I do not know why these findings were omitted. Even now, I do not agree with these omissions.

170. The July 2017 Report, like the April 2017 Report, concluded that –

170.1. ~~the Accounting Officer was guilty of improper conduct, gross negligence, abuse of power, gross irregularity and maladministration;~~

170.2. the rules regarding public-private partnerships – which were applicable – were not followed;

170.3. the prices for goods and services had been inflated; and

170.4. ~~the allegations that environmental legislation had been breached were not substantiated~~

171. On 21 August 2017 Adv Cilliers sent a further draft of the report on to Mr Mothupi, noting that it reflected the “*Corrections made per TT and discussed with team this morning.*”

171.1. ~~A copy of the correspondence is annexed, marked “25”.~~

171.2. ~~A copy of an extract from the revised draft is also annexed, marked “25~~
26”. Once again, as far as I can recall, I did not assist in preparing this report as I was on leave.

172. Even though the draft refers to “*September 2017*” in the header, it was circulated in August 2017 and I shall therefore refer to it as “**the August 2017 Report**”.

Like the July 2017 Report, the August 2017 Report omitted the findings of maladministration against Premier Magashule and the MEC, but retained the findings mentioned in paragraph 170 above.

173. I annex minutes of the Provincial Office's Dashboard meeting held on 30 August 2017, marked "SS27". These minutes reflect that, at that date, I was still on leave from the office. However, in respect of the Vrede investigation, the minutes record "*Final Report submitted*" and that the office was awaiting feedback from Head Office (referred to as "*PII*" i.e. the Provincial Investigations and Integration Unit at Head Office, led by Mr Ndou).

174. On 4 September 2017 Mr Ndou submitted the draft report to Mr Nemasisi, the Senior Manager: Legal Services. On 6 September 2017 Mr Nemasisi sent the draft back to Mr Ndou, incorporating his comments and changes. On 7 September 2017 Adv Cilliers revised the draft to incorporate Mr Nemasisi's changes and prepared "**the September 2017 Report**". A copy of extracts from that report is annexed, marked "**SS28**".

174.1. Mr Nemasisi's comments noted that "*[i]f Treasury issued a report on this, with recommendation, maybe we can ensure enforcement of such recommendations in the form of the remedial action, only if the report has not been complied with*".

174.2. Adv Cilliers' comments noted that the remedial action requiring the Premier to ensure the implementation of the findings and recommendations by the Accountant-General should be removed.

CAS

- 174.3. Otherwise, the findings of the September 2017 Report are largely the same as those reflected in the July 2017 Report (summarised in paragraph 170 above).
175. Once again, as far as I can recall, I did not assist in preparing this report.
176. On the following day, Mr Ndou submitted the draft to the PP. On 11 September 2017, the PP sent the draft back to Messrs Ndou and Nhembezi, asking them to “*verify whether indeed this response capture [sic] the issues we raised with the Premier*”, and further requested Mr Ndou to address correspondence to the Premier regarding outstanding documentation. Mr Ndou then sent the email correspondence on to me. A copy of this email correspondence is annexed, marked “SS29”.
177. To my mind, the April 2017 Report had not gone far enough. In my view, the politicians’ wrongdoing had not been limited to failing to take disciplinary action. Rather, they were thoroughly implicated in the transactions because they had taken ownership of the project in public. I was satisfied that there was no way that the Accounting Officer could have been acting alone; instead, he must have been acting under political direction from the Premier and the MEC. Accordingly, I concluded that those political office-bearers were culpable in the Accounting Officer’s maladministration, negligence and misconduct.
178. During the course of 2017 I prepared a revised report reflecting my conclusions (referred to above) that Messrs Magashule and Zwane should be held liable not only for failing to discipline the Accounting Officer, but because they had overall

responsibility for the project, the manner in which it had been implemented and the extent to which it had failed the beneficiaries ("the Revised Report"). I submitted it to Head Office – specifically to Mr Ndou, as far as I recall.

179. I was aware that the Revised Report flew in the face of the PP's desire not to make findings in respect of political office-bearers. However, in my view, those desires could not be accommodated in the light of the evidence that had been discovered (even without the politicians having been subpoenaed).
180. Unfortunately, I have been unable to locate a copy of the Revised Report or the associated email correspondence.
181. After September 2017 I was not included in the aspects of the Vrede investigation that were still ongoing.
182. The PP finalised and published the Vrede report on 8 February 2018. I am advised that a copy of the finalised report is before the Committee. The PP ultimately changed both the April 2017 Report and the Revised Report, to remove the adverse findings against the politicians. She did not discuss these changes with me. I remain of the view that those adverse findings were justified, and should have been included in the final report.
183. The PP also departed from our earlier conclusions that the prices for goods and services had been inflated.

SATS

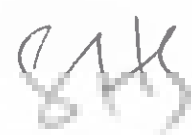
183.1. The complaint had alleged that the processing equipment, cows, construction and administration services had been procured at inflated prices.

183.2. The Department had indicated that it had spent: R6,212,000 on cows; R2,600,000 on the security gate and guardhouse; and R30,050,000 on a milking parlour.

183.3. We had concluded that the prices of the milking equipment, cows and gate and guardhouse had been considerably higher than prevailing market prices.

183.3.1. This was based on independent evidence obtained during the course of the investigation i.e. information provided by the SA Holstein Breeders' Association (as set out in the various versions of the draft, including the iterations from April – September 2017). Based on this information, for example, only R3,374,000 should have been spent on the cows and only R7,200,000 on the milking parlour.

183.3.2. Furthermore, our own inspection of the simple infrastructure comprising the security gate and guardhouse (a rudimentary structure) revealed that the structure should not cost more than R50,000.



- 183.4. While there was not sufficient evidence to find that all of the items alleged by the complainant were overcharged, there was sufficient reliable evidence to make findings in respect of the above items.
- 183.5. The PP ultimately concluded that a finding could not be made "*due to the fact that there was no procurement process followed and the Public Protector could not test the markets to determine market value of goods and services procured without the necessary documents which proof the actual price for the goods and services procured*".
- 183.6. However, this completely ignored the independent information acquired from the Breeders' Association, which rendered it unnecessary for the OPP to take further steps to test the market. *I do not know why this information was ignored.*
- 183.7. Furthermore, determining the value of the security gate and guardhouse did not require specialist input: it was basic construction of a rudimentary structure. The April 2017 Report included the following pictures of the infrastructure:

S/S



183.8. Even if we had not undertaken a site visit, these photographs would have indicated the simplicity of the structures in question. There is no reasonable way in which those structures could have cost PC2,600,000. To suggest otherwise would, frankly, be disingenuous.

S/H

- 183.9. These photographs were also included in the July 2017 Report, August 2017 Report, the September 2017 Report and the Revised Report. I note that these photographs were removed from the final report that the PP issued. I do not know when or why they were removed, given how clearly they showed the gross overcharging in respect of the security gate and guardhouse.
184. The Final Report also states that there was an inability to investigate certain issues "*due to capacity and financial constraints*". I was never of the view that the investigation was particularly inflicted by such constraints and neither, to my knowledge, were any other investigators from the Provincial Office.
185. In some instances, we consulted experts, but this was done for free. For example, during March 2013 and April 2017 we consulted the SA Holstein Breeders' Association for assistance in determining certain values. This information was incorporated into the April 2017 Report (and the various other versions of the report discussed above).
186. Generally, an external forensic investigator was not required. We were able to scrutinise the financial records sufficiently. I was never informed by the PP that additional external forensic expertise was required.
187. The Final Report records that the "*beneficiaries who were intended to benefit from the project*" could not be investigated "*due to lack of information*".
- 187.1. We had a list of 78 named beneficiaries, which included copies of the identity documents of 63 persons. Those persons could have been



Pi

traced with reasonable ease, which would not have necessitated external or significant additional resources. Numerous investigators were working on the Vrede case, and had been doing so over a number of years; any one or more of them could have attended to the tasks of tracing and interviewing the beneficiaries. This would not have been unduly onerous in the light of the resources dedicated to the investigation, if the PP regarded it necessary that they be consulted.

187.2. For example, while we were making arrangements for the PP's site visit in April 2017, Adv Cilliers suggested that a delegation of the beneficiaries should be invited to the visit, to provide their input and perspective. However, the PP's office responded that there was "No need to invite the complainant and delegation beneficiaries." I am in this regard an email from Ephraim Kabinda (the PP's personal assistant) to Adv Cilliers, dated 29 March 2017, marked "SS30".

187.3. I recall being informed that, prior to my arrival as the Provincial Representative in the Free State Office, the provincial investigators had spoken with a representative or representatives of the beneficiaries. I recently confirmed this with Adv Cilliers, who indicated that my predecessor had met with the beneficiaries' lead representative. That individual was subsequently killed.

187.4. I am aware that the High Court criticised the OPP's failure to "investigate who the true [intended] beneficiaries of the Vrede Dairy project were". However, in my view, given the nature of the complaint,

F

this was not an essential component of the investigation. At its core, the complaint was about procurement irregularities and price inflation. Those features required detailed consideration of the conduct of the government and commercial actors, but did not necessitate greater engagement with the intended beneficiaries: it was obvious that they had not received the intended benefits.

187.5. Thus, while there were not resource constraints in respect of conducting further investigations into the intended beneficiaries (who could, as suggested by Adv Cilliers, have been invited to the site inspection), at the time of conducting the investigation I did not think that this aspect required further consideration in order to address the complaint.

188. After the Vrede report was set aside by the High Court on 20 May 2019, the PP undertook to the National Assembly that she would re-investigate the matter. That re-investigation was not done by the Free State office, but by the Head Office. A new report was issued in 2020, a copy of which is in the public domain.

H. MY PERSONAL CIRCUMSTANCES SINCE SUBMITTING THE INITIAL AFFIDAVIT

189. At the time I submitted the Initial Affidavit, I was the Provincial Representative of the OPP in Free State. As I anticipated, my submission had severe professional consequences for me.



F3

190. As set out above, on 9 March 2020 I wrote to the Acting CEO to once again raise the issue of the OPP's expenditure on legal fees and request documentation setting out the details thereof (see annexure SS5).
191. On 10 March 2020, I wrote to the PP and requested that she resign the office of Public Protector given, among other things, a recent judgment in which the presiding officer had been scolding about her conduct (referred to in paragraph 26.7 above). A copy of this correspondence is annexed, marked "SS 31".
192. On 11 March 2020 the OPP, at the direction of the PP, preferred various disciplinary charges against me. One of the charges dealt with the Limpopo assault that is described in the Initial Affidavit. The other charges were related to my conduct in submitting the Initial Affidavit to the Speaker of the National Assembly and answering media questions about that affidavit. I was also charged with inciting fellow employees to come forward with complaints.
193. This was the first instance of disciplinary action against me in almost 20 years of employment at the OPP.
194. I was suspended from the workplace pending the outcome of my disciplinary hearing. Although I could not attend five of the six days of my hearing (due to Covid-19 exposure), it went ahead in my absence. I was found guilty and the Chairperson recommended that I be dismissed. The PP ultimately terminated my employment at the OPP at the end of December 2020.




195. I challenged my termination by referring an unfair dismissal dispute to the CCMA. After a lengthy delay I was vindicated: on 4 July 2022 the CCMA exonerated me, ordered that I be reinstated to my position as Provincial Representative and directed of the OPP to pay me approximately R1 500 000. A copy of the decision is annexed, marked "SS32". Among other things, the PP was cautioned against attempting to exercise thought control in respect of OPP employees through restricting free expression. The award characterised the case against me on some of the charges as "hopeless" and something that could not constitute misconduct "by any stretch of the imagination". The Commissioner concluded that the "disciplinary action... is a clear demonstration of anger. Anger at the applicant's request to [the Speaker of the National Assembly] of 11 February 2007".
196. As mentioned in my Initial Affidavit, a civil claim for R300 000 was launched as a result of the Limpopo altercation. To my knowledge, that matter is pending.
197. At present, the leave to appeal in respect of my criminal conviction as mentioned in my Initial Affidavit is still pending.

L. CONCLUSION


198. The PP has been disastrous for the effectiveness and prestige of the OPP, and for the members of the public that the office is supposed to serve. Her decisions have repeatedly compromised and undermined the OPP's ability to deliver on its constitutional mandate and it was for that reason that I took the steps I did at

S-110
TS

great personal cost to myself. I regard it as my responsibility as an officer of the court to participate in the Committee process.


SPHELO HAMILTON SAMUEL

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 at 14-11 PM 1982 on this 23 day of JULY 1982, in accordance with Government Notice No R1258 dated 21 July 1972, as amended by Government Notice No R1548 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.

2228010-7
CS7,
 KIE KAWLO TSI
COMMISSIONER OF OATHS

