IN THE S 194 ENQUIRY

HELD AT THE NATIONAL ASSEMBLY, CAPE TOWN

In respect of the

THE PUBLIC PROTECTOR SOUTH AFRICA

EVIDENCE LEADERS' RESPONSE TO THE PUBLIC PROTECTOR'S APPLICATION FOR THE REMOVAL AND/OR REPLACEMENT OF THE EVIDENCE LEADERS

A. INTRODUCTION

1. It is disquieting that the evidence leaders have now become the subject matter of an enquiry that should be focussed on assessing the fitness to hold office of the Public Protector (PP). Though unorthodox, is in keeping with, however, what appears to be applications which, if successful, would have prevented this Enquiry from either not getting off the ground or not reaching any conclusion. This Committee is now required, once again, to devote time, energy and resources to addressing another application that has nothing to do the achievement of its mandate, i.e., determining whether Adv Mkhwebane has misconducted herself, or been incompetent, as alleged in the Motion.

2. This latest application to remove and/or replace the evidence leaders ('the Removal Application') follow the events below:

    2.1 The prior endeavours to interdict the Committee;
    2.2 Several applications during the course of these proceedings, seeking postponements;
    2.3 The application to recuse the Chair and a member of this Committee;

2.4 Endeavours to delay or stop the continuation of the work of this Committee, in the absence of a court order preventing it from doing so, because of litigation proceedings being pursued by the PP in other fora;

2.5 The alleged limitation imposed by the PP on the mandate of her legal team on 27 October 2022, which led to their walk out from the proceedings on that day whist the proceedings were still underway, and their still unexplained absence on the following day - a scheduled hearing day for the leading of evidence.

3. This was followed by the extraordinary explanation that the publicly viewed walk-out had in fact not been a walk-out, when the legal team returned after it became clear that the Committee was continuing with its proceedings. Manifestly, an application of this nature, if successful, would defer the work of this Committee. It further requires the evidence leaders to divert attention from the core task i.e. preparing evidence for the Committee to consider. More, importantly, on the most basic levels it is an application that does not get out of the starting blocks as a matter of fact and law.

4. The challenge to the credibility of the evidence leaders is simply another attempt to distract the Committee from its objectives and the task at hand.

5. We note that this was indeed the case when, at the request of the legal team of the PP, a public platform was given to two external advocates, who have no personal knowledge of the evidence that has been led before this Enquiry to launch an unsubstantiated and defamatory attack on one of the evidence leaders, including rhetoric and unfounded accusations of racism. Not only was this inflammatory, but it resulted in further diversions from the work of the Committee. The content thereof is not referred to in this very application because it has no bearing on the work of this Committee.

6. Though this Committee is told that the Removal Application embodying an attack on the evidence leaders is under the guise or “squarely based” on the protection of the guaranteed rights of the PP and the South African public at large (para 9), when properly distilled it is apparent that this application uses similar language to that used in the recusal applications, making it plainly obvious that this it is more a recusal application than a removal application. This is quite clear, inter alia, from the contents of paragraphs 48 and 56 of the application. This Committee is not seized with rights of *“the South*

African public at large". The Committee should not buy into rhetoric. Many of the 'facts' complained about do not relate to Adv Mkhwebane, nor to the terms of reference of this Committee.

7. We have no quibble with the imperative that the process must be procedurally fair. Procedural fairness is to be assessed on the actual proceedings before the Committee as a whole. But as will be demonstrated below, this application is not truly about process or procedural rights, nor is this application based on an accurate account of the evidence actually led before the Committee.

8. Unlike with the previous misconceived application or request to the Committee for recusal of the lead evidence leader, the removal of the evidence leaders is not sought by a member of the Committee who, collectively with the Committee, has the power to terminate our services. Instead, our removal is sought by the PP into whose capacity and conduct the Committee is mandated to enquire.

9. This application is brought at a time when the proceedings are still incomplete. Indeed we have considerable reservations as to whether or not it is even competent for the PP to seek our removal primarily based on actual and/or perceived bias, whilst ostensibly stating that it is not a recusal that is sought at all, let alone whether such an application can be brought at this stage of the proceedings. But it remains the task of the Parliamentary legal advisers to the Committee to advise as to whether or not the contents of this application reveal grounds that would sustain a review - which should properly be brought once the entire process is completed and if the PP is ultimately aggrieved by any decision of the National Assembly. This is so given the fact that our courts have rejected adopting a piecemeal approach, where they are asked to tamper with pending proceedings based on *ad hoc* complaints.

10. Even so, as the evidence leaders in this Enquiry, we will abide the decision of this Committee insofar as it concerns the question of our removal and/or replacement as its evidence leaders. Indeed, we have sought to follow all instructions given to us by the Committee to date, or as directed by the Chairperson in terms of time-frames, sitting days and so on.

11. In these submissions we address the three grounds of removal raised in the application for our removal. Before doing so, we further state the following upfront.

11.1. First, we cannot be likened to prosecutors because these are not court room proceedings. This is a process sanctioned in the Constitution, with rules adopted by the Committee. Lawyers call this a *sui generis* process. Trying to equate this process with judicial proceedings is therefore incorrect and misleading and the evidence leaders cannot be equated with prosecutors in a criminal trial. The evidence leaders support the functioning of the Committee: it is the Committee's task to collect and present evidence, and the evidence leaders have been appointed for that purpose, unlike a court, where the Judge and prosecutor are separate, the evidence leaders are, in a sense, a non-decision-making arm of the Committee.

11.2. Second, we hold no decision-making power in this process. We are here to assist the Committee. The Committee has the decision- making power in this process, not the evidence leaders. The attempts to castigate us as evidence leaders is therefore neither here, nor there, because we act on the direction of the Committee and the Chairperson, as the case may be.

11.3. Third, we say that the effect of this would delay the work of this Committee.

11.4. Fourth, we will demonstrate to this Committee that much of what is claimed as fact in this application are in reality false.

11.5. Fifth, as we understand the law of procedural fairness, it depends on an assessment of this process as a whole. We understand that our courts are reluctant to engage in part heard and pending proceedings and have warned repeatedly about “satellite litigation”. While it is not our role to provide legal advice to this Committee (it is the parliamentary lawyers who must do so), we believe that it is not competent in law for individual steps in this Enquiry to be repeatedly attacked by the PP while this process is pending and continuing. Procedural fairness depends on the facts and circumstances of a process and in the context of this Enquiry, an assessment thereof is at the end of the process as a whole, and not piecemeal.

B. REPEATED ATTACKS ON THE EVIDENCE LEADERS

12. The claims in this application are not new.

13. First, the attacks on the evidence leaders started early in the proceedings, with innuendo and intimations that the evidence leaders were biased and off on a frolic of their own, in relation to the evidence being put before the Enquiry. This was simply because of the common-sense approach adopted in the leading of evidence: it is the Motion that serves before the Committee for consideration unfettered by the findings of the report of the Independent Panel. The Committee obtained advice to the effect that this is a Motion of the National Assembly that serves before the Committee, and that it is the veracity of such Motion that the Committee is to determine. This is the basic approach of the Committee, determined by this Committee and it is in line with this approach that the evidence is being led. Whilst the PP's legal team hold a different view, this difference of opinion with the evidence leaders, does not amount to a bias, when evidence is led that do not confirm with their interpretation.

14. Second, soon after witnesses commenced evidence, there was also a suggestion that the evidence leaders either colluded with witnesses, or in the preparation of affidavits, had some ulterior motive of putting evidence before this Committee that was not balanced, or improperly sought to lead through witnesses certain judgments to the Committee with a particular spin. There were suggestions that the evidence leaders were seeking to put only aspects of the judgments before this Committee that reflected the PP in a negative light. This too was soon dispelled when the evidence leaders took the Committee through a number of the judgments and did not do so through witnesses. Timelines of the cases and the judgments were separately prepared and provided to the Committee from time to time. This is also dealt with below when the complaint in relation to the affidavit of Mr Samuel is further considered.

15. Indeed, this narrative of skewed evidence in the affidavits of witnesses became difficult to sustain after the evidence of Mr Mahlangu and, for obvious reasons, was entirely

unsustainable after the evidence of Mr Tebele.[1] Hence after having repeatedly made this suggestion, unsuccessfully even so in relation to Mr Samuel, after the evidence of Mr Tebele, there was a respite from accusations of this nature.

16. In relation to:[2]

16.1. Mr Kekana it was inferred during cross-examination that the subpoena issued calling him to give evidence at the Enquiry was simulated and that the evidence leaders had in some way connived with Mr Kekana by asking him for a consultation. It was then suggested that Mr Kekana gave a note to the evidence leaders which was then deliberately concealed from the Committee. This was not the case as the evidence leaders did not have this note, nor was the subpoena 'simulated'.

16.2. With Mr Mahlangu it was suggested that the evidence leaders sought to mislead and corner the witness. This was firmly dispelled by the witness who took ownership of his affidavit, as was also the case with other witnesses.[3] The exchange was as follows:

"ADV SHABALALA: So, if you say you were assisted by the evidence leaders to compile your affidavit, in what way did they assist you?

MR MAHLANGU: Basically, they interview, they ask questions and then from your responses they document the information that you provide to them.

ADV SHABALALA: So, they … the document was drafted by the evidence leaders?

MR MAHLANGU: Yes, they … remember, they interview and then they take a statement which they contextualize and then confirm with you if this, to your recollection, what you have provided to them and then yes.

ADV SHABALALA: But you can own up to this affidavit?

MR MAHLANGU: Yes."

[1] The EFF lodged a complaint about a WhatsApp brought to Mr Tebele's attention shortly before evidence. The evidence leaders' response thereto is before this Committee and is not included as a basis for this ostensible application for removal.
[2] Given the reliance on the evidence of Samuels and Thejane.
[3] It is noted that in Removal application that whilst reference is made in para 44 to the affidavits of four witnesses, in the absence of any identification of the who the other two witnesses are, the evidence leaders are not in a position to deal with the bald and unsubstantiated averment.

17. Third, this was then followed with unjust accusations that the evidence leaders had colluded with the chairperson. These accusations were made without basis in law or fact. Indeed the accusation was made without any of the elements of collusion having been stated, let alone proven, and in circumstances where no tangible evidence of collusion has ever been put before this Committee.

18. To the extent that some sort of reliance was placed on a letter from the chairperson, which expressly refers to information attributed to the evidence leaders, such is misconceived as collusion for reasons already explained to this Committee. The evidence leaders' factual account was not disputed.[4]

19. Though this attack is directed at the chairperson, acts of collusion require there to be another party to such collusion, and so it is also levelled (albeit indirectly) at the evidence leaders, particularly when it is then followed by an unsubstantiated accusation that *"this was not happening for the first or even the last time"*. Of course the lack of detail of the latter statement is perfectly understandable as one would find it hard to conjure up something that never took place. We have no doubt that were the attack on the chairperson based on collusion to be sustained, following thereon would be an attack on the evidence leaders premised on the same collusion for reasons already indicated.

C. THE FRAMEWORK WITHIN WHICH THE EVIDENCE LEADERS EXERCISE THEIR FUNCTIONS

20. Fundamentally the task of the evidence leaders is to put evidence before members of the Committee who have the constitutional task to attend to the Motion. The evidence is directed to Members of the Committee who would have diligently engaged with the evidence since day one. By now members would be steeped in what is required from the Motion and have been afforded an opportunity in relation to every witness to ask questions from witnesses in this process.

[4] We note that the accusation of collusion as couched in its initial terms is persisted with in the review application before the WCHC, without any evidence to refute the explanation provided by the evidence leaders that was put before the Committee as to how information known to the evidence leaders came to be made known to the chairperson and was reflected in his letter.

21. Evidence leaders are appointed by the Committee and we accept, as was the case with the misguided recusal application, that the evidence leaders perform their tasks at the behest of the Committee. There is simply no room for any "frolic" as the evidence leaders do the bidding of the Committee. But, more importantly, these are not criminal proceedings. It is not a criminal trial of the PP and it is obviously not a process during which the evidence leaders are, or even should be, placed on trial before this Committee.

22. The evidence leaders are not prosecutors in an adversarial process and comparisons with prosecutors are not apposite. This is a constitutionally sanctioned process of enquiry of an entirely different nature from criminal trials. We have not descended into the arena of the Committee as would be the case perhaps with a prosecutor in a criminal trial.

23. Had we as evidence leaders been adversarial in our delivery of the evidence, this would have been very obvious to the Committee a long time ago. We would not have sought to correct members where there was an error in relation to evidence in circumstances where such evidence would reflect negatively on the PP or have said to witnesses we interviewed that our job is to put evidence before the Committee – whether implicating or exculpatory – with reference to the Motion. We would not have led the evidence of witnesses who clearly have no quibble with the PP, as we have done, or ensured that where witnesses have praised the PP that this is put before the Committee. We would not have taken the trouble to distinguish the judgments and legal challenges attributed to reports prepared by the PP's predecessor and carve out the legal fees attributable to those cases or which are attributable to labour cases.

24. We also did not lurch into action to protect witnesses when they were, in our professional view, being abused in cross examination as we would have done in an adversarial process, nor did we put up contrary views on legal principles put up by the PP's legal team with which as legal practitioners we fundamentally disagreed, be it the concept of double jeopardy, the application and interpretation of the Protected Disclosures Act or even the submission that members of the Committee would be in contempt of a non-existent court order were they not to recuse the Chair or a member and proceedings continued, when an intention to bring a review application was made known. In an adversarial process, the "prosecutor" would have objected to the PP having, on many

occasions inserted an ear piece in her ear when being addressed by, or was herself addressing the Committee,[5] even as this was suggestive of her being prompted from elsewhere. The reality of the non-adversarial stance adopted by the evidence leaders since inception of these proceedings has recently been demonstrated by the chairperson himself, when he requested that the evidence leaders be more robustly involved in these proceedings. Otherwise, we do as we are required to do by this Committee.

25. We raise this because on the one hand we are not prosecutors and have performed our mandate on the understanding that we are not in a court room. Yet in the application, there is seemingly a suggestion that we are to be measured against a standard expected of prosecutors and for the procedures that apply in a court of law to be of application. The very nature of this Enquiry does not lend itself to that approach and we disagree with this mischaracterisation.

26. The Committee may accept or reject the evidence (or part thereof) of any witness. In espousing the constitutional values of openness, transparency and accountability, the Committee meetings are open and members of the public and the media may watch the proceedings, and the media report on them. Members of the public may have a view of the proceedings and of the witnesses who appear, and there has been a diversity of views in relation to these proceedings. With such openness comes inevitable opinions, criticism, analysis and even condemnation.

27. As evidence leaders we have not engaged in the public space. Our tasks also cannot be guided by views expressed there, and no member of the public or organisation is entitled to interfere with the work of the Committee or impose their view/s on what the Committee deems necessary to have regard to, what evidence it seeks to place before it and how to assess the evidence before it. Because ultimately it is up to the members of the Committee to assess the evidence placed before it.

28. Whilst there is a public presence to these proceedings, the evidence leaders are not tasked to lead evidence playing to a public gallery or to style evidence to garner public favour or to gear such for media attention. It is precisely because the Committee is not

[5] We have been informed that this had been mentioned on numerous occasions in the social media platform.

influenced by outside interference with its work that the Committee has not responded to complaints from civil organisations as to the manner in which the PP's legal has conducted cross-examination and the seeming lack of protection afforded to witnesses during cross-examination.

29. It is also from the Committee that instructions or requests have been made for evidence to be put up in a particular form or subject and it is with this evidence that Members of the Committee have immersed themselves. What is being lost in all the noise is that it is not what is in the public arena, with its piecemeal consumption of bites of the evidence as presented in the media and on various social platforms, is not what constitute the evidence before this Committee. Even though the public is watching it is not to the public that evidence is being directed, but to the Committee. It also cannot be laid at the door of the evidence leaders if reporters on the various media platforms are perceived as having inadequately or improperly reported on the evidence in the context of the overall evidence before the Enquiry; if they get it wrong or drew conclusions that were not alleged or are not borne out by the evidence led in its entirety. Complaints about what is not accurately appearing in the media lie with the Press Ombudsman and not with this Committee. But members of the Committee who have diligently listened to the evidence presented and considered the documents provided would obviously not make such errors.

30. Under section 129AD the function of the Committee is to establish the veracity of the charges and report to the Assembly thereof. Paragraph 3 of the Terms of reference points out that the:

"The objective of the Enquiry is to:

(a) assess the charges contained in the motion in order to determine whether the PP is incompetent and/or has misconducted herself;

(b) report to the NA on its findings and recommendations."

31. The utilisation of external evidence leaders is to assist the Committee in ensuring that evidence is put before it for purposes of achieving this objective, and in doing so, there has been no contravention of Rule 129AD(2).

32. Clause 9 confirms that the role of the evidence leaders is to support the Committee under the direction of the Chairperson.[6] Also, clause 4 of the Terms of reference provides as follows:

> *"The Enquiry is a constitutional process to establish, on the basis of evidence presented, whether the PP is incompetent and/or has misconducted herself.*
>
> *It is neither a judicial or quasi-judicial process, nor is it an adversarial process.*
>
> *The Enquiry in (sic) an inquisitorial process, informed by Parliament's constitutional oversight mandate, and the principle of fairness shall be paramount to the manner in which the Committee conducts the Enquiry."*

D. CONDUCT ALLEGED TO BE UNFAIR

33. The allegation is one of misconduct. It is premised on three grounds that are dealt with below.

E. FIRST GROUND: ALLEGED MISCONDUCT

34. The allegation is one of misconduct. This relates to the evidence of Neels van der Merwe. The evidence leaders are accountable to the Committee, and not to the social media platforms. There was no need to give advocated and attorneys notice and in any event that does not impede any of the PP's procedural rights.

35. In respect of this ground for the removal of the evidence leaders, it is to be remembered that when the costs of litigation incurred by the PP's office inclusive of the costs of advocates and attorneys were put before the Committee, it was on the instructions of this Committee that this was done. This also directly aligns with the Motion, which requires the Committee to investigate expenditure on legal fees.

36. Further to be noted was that it was represented that a major contributor to litigation costs was the new attitude of the people under investigation caused or rather encouraged by the EFF Nkandla judgment which made remedial action binding. The costs of litigation

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[6] **Clause 9 states:**
An external Evidence Leader, other experts as may be determined by the Committee and a dedicated team of officials, including committee secretaries and assistants, a researcher, content adviser and legal advisers, will support the Committee under the direction of the Chairperson.

incurred by the PPSA are certainly central to the issues before this Committee as apparent even in the cross-examination of Mr Sithole. It went as follows:

"Adv Mpofu: Then the sixth proposition that we're going to argue is that this Public Protector, when there was this escalation, even though it was predicted even by Adv Madonsela, went out of her way to introduce austerity measures in order to control the legal spend. Correct?

Mr Sithole: Correct.
Adv Mpofu: Those austerity measures – we won't go through that because you testified about them the last time – but they included an almost blanket withdrawal of matters, except those that had set downs. Correct?
Mr Sithole: Correct.
Adv Mpofu: And that strategy we can safely say was implemented admirably, in that, as you say, those cases that were not withdrawn which were exceptions to the rule, actually the Public Protector won those cases, except for one example, I think, out of four. Correct?
Mr Sithole: Correct.
Adv Mpofu: You identified those cases last time so I will save time by not going back to that. Those austerity measures obviously made a huge positive impact not only on the legal budget, but on the financial performance of the entity as a whole. Correct?
Mr Sithole: Correct."

37. It is not just personal costs orders and whether this in fact borne out by what the PPSA actually spent the funds on, when we deal with the issue of legal fees versus legal costs.

38. Further the PP represented to this Committee in writing that:

*"the total figure of **R 48 million** spent over a period of **5 to 6 years** is portrayed as current expenditure. The Evidence Leaders have also stated that Seanego Attorneys was paid R49 million which is false. **The correct figure is below R40 million**, of which only about R10 million (less VAT) over a period of 5 years was earned by Seanego Attorneys and the balance was paid out to a number of senior and junior advocates handling the relevant briefs and depending on the size and duration thereof."*

39. With reference to the aforegoing representation, it is evidence from the schedule provided by the PPSA that:

39.1 First, at the time (July) that it was presented it had indeed been so that the PPSA had paid to Seanego Inc. an amount of R ***49,477,573.79***[7] **-** meaning that the figure is not false as indicated to this committee.

39.2 Second, by that time it was not payments over a period of five years but the first payment was effected on 25 July 2018 and the last 15 July 2022 – almost exactly 4 years nad not the five years represented.

39.3 Third, that of this amount (inclusive of VAT and disbursements) (excluding the fees of junior and senior counsel, and the disclosed fees of Mr Ngobeni) approximately **R 17, 443, 623.28** of the **R 55 444 105, 79** was payment to Seanego Inc – and not R10 million (less VAT).

#	Posting Date	C/D (LC)	#	Posting Date	C/D (LC)
2	7/25/2018	(206,413.43)	53	2/29/2020	(559,283.84)
4	9/20/2018	(205,166.44)	54	2/29/2020	(574,783.13)
6	12/20/2018	(20,352.13)	57	3/31/2020	(153,616.79)
7	12/20/2018	(153,331.70)	58	3/31/2020	(140,212.88)
9	3/29/2019	(91,444.86)	59	4/1/2020	(778,096.02)
11	4/26/2019	(117,967.34)	60	4/1/2020	(314,794.00)
13	6/3/2019	(90,450.00)	61	4/1/2020	(1,258,037.98)
14	6/6/2019	(279,513.38)	62	4/1/2020	(2,588,925.00)
16	7/3/2019	(111,714.75)	63	4/1/2020	(890,070.92)
17	7/3/2019	(165,512.60)	67	4/8/2020	(225,112.74)
20	8/31/2019	(833,230.18)	70	4/30/2020	(388,310.73)
21	8/31/2019	(181,362.45)	71	4/30/2020	(108,919.85)
22	9/26/2019	(136,922.65)	72	5/31/2020	(382,427.85)
24	9/30/2019	(106,894.80)	74	6/30/2020	(401,072.85)
25	9/30/2019	(329,311.33)	75	6/30/2020	(414,167.90)
26	9/30/2019	(213,943.76)	76	6/30/2020	(86,247.13)
29	10/31/2019	(79,927.55)	77	6/30/2020	(192,442.15)
30	10/31/2019	(475,715.81)	81	8/31/2020	(356,945.68)
31	10/31/2019	(255,606.28)	83	8/31/2020	(378,616.70)

[7] With the inclusion of invoices not yet paid then payments would be **R 55 444 105, 79.**

32	10/31/2019	(65,130.73)	84	9/30/2020	(3,068,418.76)
33	11/28/2019	(302,904.36)	85	9/30/2020	(922,985.63)
36	11/30/2019	(1,550,730.35)	87	10/20/2020	(2,963,008.95)
40	12/31/2019	(344,476.26)	89	12/2/2020	(341,550.00)
41	12/31/2019	(1,132,269.28)	90	12/2/2020	(640,769.70)
42	12/31/2019	(932,574.36)	91	12/2/2020	(872,000.00)
43	12/31/2019	(302,668.10)	92	12/2/2020	(392,446.73)
44	12/31/2019	(181,860.53)	95	12/2/2020	(152,271.92)
45	12/31/2019	(998,765.71)	97	12/23/2020	(135,760.38)
46	12/31/2019	(1,521,134.83)	98	12/23/2020	(470,580.00)
47	12/31/2019	(813,825.52)	100	100	(240,000.00)
48	12/31/2019	(248,400.00)	101	1/28/2021	(182,686.03)
50	1/31/2020	(633,249.11)	102	1/28/2021	(117,685.25)
52	2/29/2020	(1,194,217.50)	103	1/28/2021	(386,400.00)
105	2/3/2021	(333,500.00)	116	4/7/2021	(20,813.00)
107	3/4/2021	(360,424.53)	117	4/7/2021	(35,923.16)
#	**Posting Date**	**C/D (LC)**	**#**	**Posting Date**	**C/D (LC)**
108	3/4/2021	(448,500.00)	122	5/27/2021	(11,000.00)
109	3/4/2021	(273,000.00)	124	6/11/2021	(67,300.00)
110	3/4/2021	(354,325.51)	126	9/7/2021	(140,400.00)
111	3/4/2021	(33,379.05)	127	9/7/2021	(261,175.00)
113	3/31/2021	354,325.51	128	9/7/2021	(225,720.00)
114	4/1/2021	(73,478.76)	130	9/16/2021	(253,968.84)
115	4/7/2021	(77,352.99)	131	9/20/2021	(58,711.44)
116	4/7/2021	(20,813.00)	133	10/28/2021	(993,600.00)
117	4/7/2021	(35,923.16)	134	10/28/2021	(893,780.00)
122	5/27/2021	(11,000.00)	137	10/28/2021	(400,200.00)
124	6/11/2021	(67,300.00)	141	11/3/2021	(976,540.05)
126	9/7/2021	(140,400.00)	142	11/3/2021	(333,500.00)
127	9/7/2021	(261,175.00)	143	11/3/2021	(449,827.08)
128	9/7/2021	(225,720.00)	144	11/3/2021	(55,561.43)
130	9/16/2021	(253,968.84)	145	11/3/2021	(186,300.00)
131	9/20/2021	(58,711.44)	147	11/11/2021	(258,199.23)
133	10/28/2021	(993,600.00)	148	11/11/2021	(327,667.52)

134	10/28/2021	(893,780.00)	150	12/21/2021	(151,754.28)
137	10/28/2021	(400,200.00)	151	12/21/2021	(336,785.75)
141	11/3/2021	(976,540.05)	152	12/21/2021	(1,842,300.00)
105	2/3/2021	(333,500.00)	154	1/17/2022	(167,430.34)
107	3/4/2021	(360,424.53)	156	3/3/2022	(190,849.98)
108	3/4/2021	(448,500.00)	158	3/31/2022	(685,875.96)
109	3/4/2021	(273,000.00)	160	4/29/2022	(126,800.95)
110	3/4/2021	(354,325.51)	161	4/29/2022	(29,132.92)
111	3/4/2021	(33,379.05)	162	4/29/2022	(2,839,333.01)
113	3/31/2021	354,325.51	163	4/29/2022	(164,406.30)
114	4/1/2021	(73,478.76)	165	6/17/2022	(37,446.65)
115	4/7/2021	(77,352.99)	167	7/6/2022	(5,047,534.84)
			168	7/15/2022	(918,997.16)
		(55,444,105.79)			
		49,477,573.79			
		(5,966,532.00)			
		(5,047,534.84)			
		(918,997.16)			

(5,966,532.00)

40. At the outset the evidence leaders note that the PP concedes at para 6 of the application that the allegations of professional misconduct do not fall within the scope of the Committee. This is a significant concession.

41. The complaint that is before the Committee is an allegation that the conduct of the evidence leaders has adversely effected the procedural rights of the PP in the Rules, PAJA and the Constitution, and not the public at large or legal practitioners who have indicated that they are aggrieved.

42. To that end, on the assumption that an application of this nature can be competently brought at this stage of the Enquiry, this Committee must then look at the conduct of the evidence leaders and whether it has in anyway impacted on the right of the PP to a fair and reasonable procedure.

43. We thus do not intend to address any allegations of professional misconduct in the application[8] and our rights are strictly reserved in relation thereto. The veracity of these allegations and whether the conduct is unprofessional falls to be determined by the relevant professional body if and when a complaint is so referred and after a proper consideration of the evidence. It is self-evident that the consternation of third parties concerned is unrelated to the procedural rights of the PP. It is further noted that whilst the vitriolic attack by Adv Sikhakhane SC and Ngalwana SC based on racism were solely directed at the lead evidence leader, this application is directed at both evidence leaders. Indeed, it will be recalled that the lead evidence leader noted immediately at the end of the speech by the third-party advocates, which contained unjustified allegations of naked racism, that her rights were reserved. She did not want to waste the Committee's time by responding to matters which were irrelevant to the terms of reference of this Committee.

44. The documents attributed to PABASA and the Johannesburg Society of Advocates were not filed with the Secretary or put before the Committee.[9]

45. We reiterate that for purposes of this application this submission is restricted to the alleged impact on the procedural rights of the PP.

The conduct complained of

46. The conduct that forms the basis of this complaint is that the evidence leaders caused the names and fees of "various black counsel and attorneys" who do work for the office of PPSA to be displayed during the Enquiry.

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[8] In this regard and for purposes of the Enquiry we do not respond to and reserve our rights to do so if and when called upon by our professional body. These include and refer to para 24 – save for the suggestion that we were misleading the committee. Para 26 – The allegation that the evidence leaders conduct sparked confusion and mayhem in the country and legal fraternity. And the allegations that the screenshot predictably went viral "to the detriment of the family members of the concerned advocates and attorneys. The persons involved were also exposed to criminality and other forms of harassment and insults". Inter alia, the whole of paras, 26, 32 to 40 and the statements by Adv Sikhakhane SC and Ngalwana SC, the Pan African Bar Association and the Johannesburg Society of Advocates. These are all concerned with the impact of the evidence on the attorneys and advocates concerned and fall squarely in the category of allegations described by the PP as not falling within the scope of the Committee.

[9] To the contrary, hereto, as we will demonstrate later, we have been flooded with expressions of support and offers of assistance by members of the legal profession.

47. This is criticised because it was done:

47.1 Whilst knowing that the proceedings were being aired in public.

47.2 Without notice to the advocates and attorneys concerned or consulting them.

47.3 Without context of:

47.3.1 The period over which the fees were earned;

47.3.2 the number of matters that each advocate was briefed on;

47.3.3 the complexity of the matters;

47.3.4 the volume of the work to be done;

47.3.5 the applicable tax deductions and other associated expenses.

47.4 Despite the fact that PP's counsel had objected to it as irrelevant (an objection which was not upheld by this very Committee).

47.5 Did so again after Advs Sikhakhane and Ngalwana SC came to tell the Committee that they were offended and hurt by the evidence.

48. There is also a complaint that this evidence was led through the senior manager legal services and not Mr Sithole who had been the person who had signed off on a vast number of the legal invoices. In addition, some of the amounts flighted were incorrect, though this is referred to it did not appear to be the cause of the complaint.

49. There are numerous factual inaccuracies in the application. We will point them out as we go through the correct sequence of events. We will base our summary on the transcripts and produce screenshots of the proceedings on Youtube relied on in the application. All of these show that the factual basis for the PP's complaint now is demonstrably incorrect.

The request of the committee

50. On 8 September 2022, during the evidence of Mr Sithole, the presentation started with a summary of the judgements and orders schedule. Thereafter dealing with expenditure during the period from the financial year of 2016/17 to the end of 2022, it was indicated that an amount of R158 000 976 was spent on professional and consulting fees, of which R146 998 047 had been spent on legal fees. A screenshot of the spreadsheet flighted at the time is attached as **"1"**. With the inclusion of the invoices not yet paid then payments to Seanego Inc. would be R 55 444 105, 79 as reflected in para 39.2 above.

51. The lead evidence leader noted that a breakdown was attached as **"MN17"** to the affidavit of Mr Van der Merwe and explained that she would deal with the three biggest cases on that day, and on confirmation of the figures, a breakdown of the other big drivers would be provided the following week. The subject matter was the legal costs spent by the office of the PPSA and it was stated:

"I will give you some of the costs not all, we just having to verify some numbers and the remaining case costs I will then provide you when Advocate Van der Merwe comes and gives evidence."

52. Further:

"the total cost from the financial year of 2016/17 to the end of 2022 for what was called professional and consulting fees in for that period of time came 158,000,976,155 those figures are reflected on annexure MN17 to Advocate Van der Merwe's affidavit.

ADV MPOFU: **For which year?**

ADV BAWA: **MN17 of Advocate Van der Merwe's affidavit.**

ADV MPOFU: **To 2022**

ADV BAWA: **Of, there, there, there, he has included the 2015/2016 year, and if you exclude the 2015/2016 year, then these are revised. So, there is a revised one that I've put into the folder to reflect it. Of the 158,976,150 that has been spent, 146,998,047 has been spent on legal fees. And what I'm going to endeavor to do is break down what the biggest cost drivers of the 146 million has been. And I'm going to deal with three today and deal with the others later, because we just trying to confirm the figures. By the category in relation to the ABSA CX matter, which forms subject matter of this motion, if one includes the litigation cost, the tax bill and two opinions that had been obtained subsequent to the judgment of the Constitutional Court hand it down, then the total bill in the absolute litigation came to R14,537,728 and 26 cents…."**.

53. A copy of the envisaged schedule for the ABSA CIEX case was not flighted at the time as its format had not been entirely finalised and had not yet been provided to the PP's

legal team. At the time the schedules had been prepared with reference to the 3 cases, with the rest to be led when Mr van der Merwe came to give evidence. As that was the following week it was contemplated that the case cost schedules would have been given before then to the PP's legal team.

54. Honourable member Mileham then requested that the breakdown to be provided should include which firms of attorneys and which advocates "benefitted in each case". The evidence leader further requested that there be some cap in the form of a minimum amount of R1 million placed on this, given the anticipated burden that no cap would result in. Indeed the schedule that was at that stage reflected numbers did not reflect the details now being requested. The interjection by Mr Mileham had come even prior to any schedule of this nature being provided.

55. Honourable member Herron supported the request for a breakdown per attorneys and advocate but raised a concern about the use of the word "benefitted". The chair agreed with this.

56. Adv Mpofu objected on grounds that it was (a) irrelevant and (b) the harm to others far exceeded the gain, in that it was an invasion of people's privacy. He added that one should also look at how much was spent on litigation by the other parties in the cases, such as the DA and Parliament, to give it perspective. Noticeably at the juncture the objection was not based on any distinction between legal fees and legal costs – the latter was raised for the first time during the cross examination of Mr van der Merwe.

57. After having heard Adv Mpofu's objection the Committee remained resolute that the information be provided. Honourable member Nqola proposed that the use of the word "benefitted" be replaced with "rendered services", noting that these were public funds and the Committee needed the evidence to test what other witnesses had already testified to.

58. The chair ruled that the breakdown of legal services rendered per attorney and counsel should be provided and undertook to be sensitive to the concerns raised by Adv Mpofu in relation to private financial issues and the abuse of parliamentary immunity.

59. On the same day, after the break, the evidence leader requested that the cap of R1 million be revised upwards to R2 million to avoid a proliferation of smaller matters unrelated to the Enquiry.

60. **In summary, the evidence leaders were instructed by the Committee to provide a breakdown of what was then R146 998 047. This was as reflected to the end of the 2022 financial year, as spent by the PPSA's for the rendering of legal services reflecting the attorneys and counsel for amounts expended over R 2 million. And all of this was with reference to evidence already and the cases which form the subject matter of the motion.**[10]

The evidence that was actually led

61. On 1 November 2022, the evidence of Mr Neels Van der Merwe was commenced. It was predicated on documentation from the PPSA office. It was the office of the PPSA's invoicing and accounting of what they had paid. It was not an exercise of exploring what any single person had earned or to expect a consultation with any of the service providers. If amounts were incorrect on the documentation provided to the PPSA and they were paid, then it formed part of the funds expended by the PPSA as apparent from the example reflected in paragraph 0 below.

62. At the outset of his evidence, by way of explanation, the evidence leader took Mr Van der Merwe through the events since Mr Sithole's evidence:

    62.1 Mr Van der Merwe explained that he had been asked to find an invoice from Seanego attorneys in an amount of **R416 726. 40** which had been referred to in Mr Sithole's evidence. A screenshot of the document flighted is attached as annexure **(2)** hereto – this was the invoice for media publications.

    62.2 He explained that Mr Sithole had indicated that he had not been able to trace the invoice and that it had been located through other means. The relevant pages of his supplementary affidavit were flighted and are attached as annexure (**3) and (4**) hereto.

[10] The relevant pages of the transcript as "**1.1".**

62.3 He indicated that he was the custodian of the relevant documentation relating to the expenditure on legal fees.

63. On 2 November 2022 the evidence leader reminded Mr Van Der Merwe that the Committee had requested a breakdown of how legal costs had been incurred by the PPSA and he confirmed that two schedules had been prepared in this regard. During cross-examination Mr Van der Merwe made it clear that it was part of his evidence.

64. Mr Van der Merwe was taken to the spreadsheet attached to his affidavit (which had been referred to in Mr Sithole's evidence). It was again flighted (marked as annexure **5** hereto) and referred to in paragraph 39.2 above.

65. He then provided the context to the schedules being presented. This was explained and the relevant paragraphs of his affidavit were flighted (attached at annexures **6 to 9** hereto).He explained that:

65.1 The period in question was for the years 2017 to the end of May 2022.

65.2 The amounts had been collated from the actual fee notes correlated to the actual invoices received and the PPSA payment system.

65.3 In a few instances the original fee notes or source documents could not be located.

65.4 In some instances there may not have been a separation of attorneys and advocates fees.

65.5 The purpose was to provide the Committee with an indication in broad terms as to what the PPSA was paying for in relation to legal fees, which matters were a priority and on which limited funds will be spent.

65.6 The exercise had not been for audit purposes and did not include accruals.

65.7 An amount of R 2 million had been used as the cut off.

66. The lead evidence leader then put to Adv van der Merwe that:

"Adv Bawa: If we then go to paragraph 66 onwards. We have prepared a number of schedules. We dealt with the reviews in terms of cases. I took the Committee through the labour cases and other litigation earlier on – a few weeks ago. And the outcome of cost orders endeavoured. We sought to separate those from which Adv Mkhwebane dealt with and her predecessor dealt with. The second issue that came up was the question of legal costs, and I am going to put onto the screen the revision of NM17. And this arose as I started to deal with the question of how legal costs incurred, and the Committee then requested a breakdown. Can you go to the first document? Right. Mr van der Merwe, that is the figures for consulting and professional fees for the respective financial years, as reflected in the Annual Report, correct?

Mr van der Merwe: That is correct, yes."

67. Evidence was led regarding which firms rendered services and the amounts thereof.

"Adv Bawa: And so if we take the example… We then see that for the period… and we use R2 million as the minimum cut-off for this exercise, correct?

Mr van der Merwe: Yes, only those firms that were paying in excess of R2 million.

Adv Bawa: So it does not account for the full R149 million in this exercise. And we see that two of us law firms was only engaged from the 2018 period on the schedule – the top two (sic).[11]

Mr van der Merwe: Right.

Adv Bawa: Those firm payments comes to those amounts, right?

Mr van der Merwe: Yes.

Adv Bawa: Right. So then we go across the screen, the column in line three is the total of the amount that goes into what's called attorney's fees. These are all VAT inclusive figures, correct, Mr van der Merwe?

Mr van der Merwe: That is correct, yes.

Adv Bawa: So we see that column being the amount that goes to the attorney. So let us take Seanego, for instance. Of the R55.5 million that we have accounted for, approximately R17 million is the attorney's fees.

[11] This was a reference to the firms of Seanego and VZLR that had only been engaged since 2018.

Mr van der Merwe: Attorney's fees, yes.

68. Whilst this was being done, the spreadsheets were flighted (annexures **10 to 11** hereto) which reflect: Seanego; VZLR; Chaane; Fasken; Bill M; Diale; Dyason; Adams and Adams; Bowman; Other and TGR.

69. In respect of the counsel, the following were flighted in this order being part of Column G with the amounts (annexed as **12-13** hereto): Sikhakhane SC; Masuku SC; Ngalwana SC; Mpofu SC; Shabalala; Matlhape; Mankge; Karachi; Motloenya; Seboko; Modise; Nhlapo; Ngobeni , Smith SC, Khoza; Kennedy SC; Platt and Cornwell.

70. This includes **ALL** the counsel that earned more than R 2 million the period in question based on the documentation that had been provided by the office of the PPSA. **There were no omissions in this category based on race or otherwise**. The complaint appears to be limited to the display of *"names and fees of various black counsel and attorneys"* – in other words it would seem that there would have been no objection had only the names of the white counsel been shown. The inference that there were white counsel that had earned more than R 2 million and which were not disclosed or not flighted is simply erroneous.

71. Mr van der Merwe went through the spreadsheets related to the three attorneys (the two that had earned the highest amounts (Seanego and VZLR) and one other law firm (Boqwana Burns Inc.). It was as follows:

"Adv Bawa: Right. And if you go down in that column, in column 'G', you will then see what Seanego paid out in the remaining amount to counsel, on various matters. And again, we have only taken either the counsel who have earned a significant amount of money or more money or alternatively where they have been involved in cases, which are before this Committee in some way or another. So there are many counsel that have been briefed that are not on this list, correct?

Mr van der Merwe: That is correct, yes.

Adv Bawa: Right. So essentially, one then sees this total in those columns. And we can see

across the board, if we just go to the end of this. The Dyason figure we have not included because we don't have all the documents to be able to divide it between attorneys and counsel, correct?

Mr van der Merwe: Yes.

Adv Bawa: Right. Then you see there's an 'other category', right? That is P. Those amounts are which the counsel in those columns have been paid in matters that have not been dealt with by any of these attorneys, but by attorneys who received less funds than R2 million, correct?

Mr van der Merwe: Yes.

Adv Bawa: Right. In the last column, we specifically deal with the Vrede matter and that is because the law firm who had been initially briefed in the Vrede matter does not fall into the plus R2 million category. Would that be correct?

Mr van der Merwe: Yes.

Adv Bawa: Right. And the law firms changed from appeal. So this is just the High Court matter, correct?

Mr van der Merwe: Yes.

Adv Bawa: The High Court application cost R1.135 million in the High Court, right? That is what the law firm charged.

Mr van der Merwe: Yes."

72. He explained how the amounts were broken down per case. He also confirmed the column that indicated the number of briefs signed out to each attorney and the column that reflected the breakdown per case.[12] The total amount spent on each case was pointed out.[13]

Adv Bawa: Right. If we break it down per case and the easiest way to do that is let us use one of the law firms as an example. I want to take cases that relate to matters before this motion. In particular, go to the Seanego fees. Let us go to the top. You have the date of invoice, the name of the matter; the amount of the total fees that is attributed to the attorney and that includes disbursements. For Seanego we called it 'other' because Mr

[12] **Adv Bawa: And in the 'R' column, you see the number of matters, in which that is dealt with. So for example, in line six, the counsel would have received an amount of R1.68 million, but that R1.68 million results to six different matters in which he had been briefed, correct?**

[13]

Ngobeni is not an advocate, so we did not put junior. So what is spent on 'other' and we have the SC, what the SC gets. Let us go to the combined totals. So you will see in H' there is a total of the total amount of fees spent in relation to matters in that regard.

Mr van der Merwe: Yes.

Adv Bawa: Now, in the first category, those were the invoices we referred the Committee to earlier, which relates to the Portfolio Committee and at number four, we make the point of this included the opinion on the court application for the declaratory order. So it was not totally a submission to the Portfolio Committee, correct?

Mr van der Merwe: Yes.

Adv Bawa: That came approximately just over R380 000?

Mr van der Merwe: Yes, for one submission to the Portfolio Committee.

Adv Bawa: These are what the Public Protector, correct?

Mr van der Merwe: Yes.

Adv Bawa: In the 'A' column, each one is a different brief and it reflects how many briefs got signed out to a particular attorneys firm, correct?

Mr van der Merwe: That is correct.

Adv Bawa: Right. And would it be fair to say that by far, Seanego got the most briefs?

Mr van der Merwe: Yes, most of the opinions went to Mr Seanego Inc.

73. Whilst doing this the relevant spreadsheets were on the screen and the viewer could see an indicator moving on the screen as the breakdown was explained. (annexed marked as **14-17** hereto).

74. After the hearing the evidence leader was contacted by Adv Ngalwana SC who pointed out that the calculations in respect of his earnings were wrong. As explained this led to an investigation of the figures on the spreadsheets provided during evidence. Even when provided with what Adv Ngalwana SC indicated was his total payment, it did not correlate with the information on hand.[14]

[14] The number of briefs did so correlate and though the figure given was indicated on the composite schedule, the discrepancy was recorded in the more detailed workings.

75. On 10 November 2022 the evidence leaders presented a corrected schedule.

76. Before leading the evidence, the evidence leader had informed the committee:

> "*Yesterday in an endeavour to proceed matters along and not have a to and fro on the question of legal fees I suggested that this stands over so that Adv Mpofu and I have a conversation. Last night he indicated to me that they would be satisfied if I made the corrections without reflecting the names of the persons in respect of whom the corrections were to be made. I'm in the Committee's hands in respect of that. Whatever the Committee says, if they are okay with it, we do it that way. If the Committee is not okay with it, we don't do it that way. But at the end of the day, this was ultimately done at the behest of the Committee*."

77. The chairperson ruled that the schedule be flighted with the names, as before.

78. Adv Mpofu again objected again on grounds of irrelevance and the rights to privacy of the persons so named. Again no objection was specifically raised as to a distinction between legal fees and legal costs. The objection was overruled by the chair.

79. Mr Van der Merwe proceeded and the schedule was flighted with the corrections in yellow. We attach screenshots of the amended spreadsheets flighted on YouTube marked as **19 and 20**. The inaccuracies in the information presented were not material for purposes of the Enquiry. They were explained and corrected on record as follows:

    79.1 In sharing the document on Dropbox it had not synced the changes made and some data was lost – a correct version was screened (attached marked as 19 and 20 hereto).

    79.2 A few entries were erroneously attributed to the wrong practitioner - in other words posted to the wrong column (annexure **21** is an example hereof).

    79.3 One of the law firms that had rendered services in the Absa matter at the inception of the brief was overlooked and as such the fees paid to them and counsel briefed by them had not been included – Sefanyatso Attorneys (as indicated on the screenshot annexed as **23**.**)**

80. In addition fees taken from the fee notes provided by the office of the PPSA were not correct. By way of example it was reflected that the attorney had charged VAT on the VAT inclusive amount of the Counsel's invoice.[15] It had been approved and paid by the office of the PPSA which then in effect overpaid by **R 155 767.50** but given the way the invoice had been crafted when it had been captured it was attributed in error to the counsel.[16] For ease of reference this is demonstrated by the extracts below.

TAX INVOICE

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & ANOTHER // THE PUBLIC PROTECTOR OF SOUTH AFRICA & OTHERS

Date	Description	Fees	Disbmts	VAT
	Counsel's Fee [redacted] (30 January 2020)		276,000.00	41,400.00
	Counsel's Fee [redacted] (14 January 2020)		441,600.00	66,240.00
	Counsel's Fee [redacted]		320,850.00	48,127.50
	SUBTOTAL		1,038,450.00	155,767.50
	Fees			
	Disbursements	1,038,450.00		
	VAT	155,767.50		
	TOTAL	1,194,217.50		
BANKING DETAILS				
Bank Details: [redacted]				
Branch : [redacted]				
Account No: [redacted]				

[15] This was demonstrated with reference to the fee notes as reflected in screenshots **22.1 to 22.4**.

[16] This Committee is not a taxing master. Where errors were found on invoices, or fees were charged and costs were incurred by the PPSA that was inconsistent with the tariffs it was not all relevant to bring each and every such invoice to the Committee's attention. The aforestated is being done to demonstrate that the errors made were in bone fide, and not from any dereliction.

Amount:	R276 000,00

Date		Hours	Amount
2020	RE: PRESIDENT vs PUBLIC PROTECTOR		
11-14 Jan	Perusal of First Applicant's Heads and Case law referred to	20	R56 000,00
02-Jan	Perusal of Speaker's Heads and case law and NDPP Heads Finalisation of Joint Practice Note	8	R38 400,00
3-5 Jan	Research for Heads and perusal of parts of Record referred to	2	R9 600,00
6-7 Jan	Drafting of Heads, Consultation with junior Settlement of Final Heads for service	20	R96 000,00
SUB - TOTAL	R 4 800 p/h 4 600		R240 000,00
		Vat:	R36 000,00
		Total:	R276 000,00

Banking Account Details:
Bank: [redacted]
Branch: [redacted]
Branch Code:
Account No: [redacted]

Amount:	R276 000,00

Date		Hours	Amount
2020	RE: PRESIDENT vs PUBLIC PROTECTOR		
11-14 Jan	Perusal of First Applicant's Heads and Case law referred to	20	R56 000,00
02-Jan	Perusal of Speaker's Heads and case law and NDPP Heads Finalisation of Joint Practice Note	8	R38 400,00
3-5 Jan	Research for Heads and perusal of parts of Record referred to	2	R9 600,00
6-7 Jan	Drafting of Heads, Consultation with junior Settlement of Final Heads for service	20	R96 000,00
SUB - TOTAL	R 4 800 p/h 4 600		R240 000,00
		Vat:	R36 000,00
		Total:	R276 000,00

Banking Account Details:
Bank: [redacted]
Branch: [redacted]
Branch Code:
Account No: [redacted]

DATE	DESCRIPTION	AMOUNT
17 Dec 2019 18 Dec 2019 19 Dec 2019 20 Dec 2019	Perusing and considering replying affidavit and applicants heads of argument; Drafting heads of argument – 4 days @ R30 000 per day (two thirds of SC's rate)	R 120 000, 00
06 Jan 2020	Perusing and considering heads or argument as settled by [redacted] – 3 hours @ R 3 000 per hour (two thirds of SC's rate)	R 9 000, 00
30 Jan 2020 31 Jan 2020 01 Feb 2020 02 Feb 2020 03 Feb 2020	Preparation for hearing – 3 days @ R30 000 per day (two thirds of SC's rate)	R 90 000, 00
4 & 5 Feb 2020	Hearing – 2 days @ R30 000 per day (two thirds of SC's rate)	R 60 000, 00
Subtotal:		**R 279 000, 00**
Vat @ 15%:		**R 41 850, 00**
TOTAL:		**R 320 850, 00**

81. The incorrectness of the amounts flighted did not lie with a lack of consultation but with erroneous invoices submitted to the PPSA. Explanations at this juncture would not change the amount that had been historically paid out by the PPSA, nor would they have resulted in these inaccuracies having been avoided.

82. The following advocates were added to the list of advocates, being those who had been omitted. None of them had earned over R 2 million. These were **Bham SC, Makhubela, Maenetje SC, Sello, Bruinders SC, Botes SC, Manchu and Thipe** and the amounts paid by the PPSA indicated. The corrected schedule was flighted (as appears from annexures **19-20**).

83. **In summary, the evidence put before the Enquiry reflected a breakdown of payment by the PPSA of approximately R133 million for services rendered by law firms during Adv Mkhwebane' S tenure. The respective folders reflect the dates and amounts paid by the PPSA to each. Further reflected is which counsel had been paid by the PPSA an amount more than R 2 million and which counsel the PPSA had made payments to in relation to matters that relate to the Motion.**

84. Further, this Committee is not seized with examining any impropriety on the part of advocates and attorneys. It was never the scope of the instruction for the evidence leaders to examine the details of the invoices. The question, as will emerge in the fullness of time, is entirely different.

85. It is indeed unfortunate that the PP and her legal team appear not to have checked the facts upon which this allegation is based prior to claiming misconduct on the part of the evidence leaders or a lack of context. Care was taken to record the context of the figures as indicated and no incorrect picture was painted by either the evidence leaders or the witness as led by the evidence leaders, and in fact none were pointed to in cross-examination.

Mistakes of fact in the application

86. First, the information placed before the Committee was not racially based, as claimed in the application - "*the names and fees of various black counsel and attorneys*" (para 21), and yet the PP aligns herself with sentiments that the conduct of the evidence leaders was "*disgraceful, malicious and/or racist*" (para 46).

87. The attorney's firms and advocates whose names were identified in the evidence are those that fell within the parameters set by the Committee and as apparent from the Motion. The evidence leaders have no control over the racial demographic of the service providers who rendered services to the office of the PPSA.

88. Insofar as the PP suggests that race was a factor in identifying which names would be included this is a misrepresentation as the list that was presented was not exclusively

"black counsel and attorneys". This can be seen from the list itself. In this regard it can be reasonably assumed that the PP is aware of the briefing patterns of her own office. Further, if the PP wishes to contend in due course that these fees were paid to additional or other attorneys or counsel and not these legal practitioners, then her procedural fairness rights to provide this evidence in due course, remains available to her. In other words, if the PP wants to challenge the accuracy of the names and amounts provided by her office, then she had an opportunity to do so with cross-examination of the witness and is afforded an opportunity when she testifies.

89. Noticeably, to the extent that the alleged misconduct is alleged to be based on a "screenshot containing the fees and names of the concerned advocates and attorneys, the said screenshots were not attached to the Removal application but is now provided and annexed hereto, so that there is an informed consideration.

90. The statements that are relied upon are based on the fallacy that the names flighted were exclusively black and/or selected (presumably based on race).

91. The evidence displayed on YouTube (over which the evidence leaders have no control) in any event reflect the names of 16 attorneys' firms and 17 counsel and 1 consultant. The remaining are contained in the folders which form part of the document as provided to the Committee. Again, by way of example, the BBBEE certificate of one of the attorney firms on the list is attached marked **18**, and it reflects that it is not a majority black owned law firm. The very basis of the complaint is therefore based on false facts and the premise is incorrect from inception.

92. Similarly, while the majority of the counsel are black, there are 3 counsel who are not. When counsel briefed in the matters were added in the corrected schedule (none of whom earned over the R2 million cut off) the demographic breakdown on race remained largely the same, with the addition of only one white counsel (out of 8).

93. As the screenshots above illustrate, the names of <u>all</u> the firms and counsel were flighted not only reflected a diversity of race but the reliance on race is entirely misplaced. The racial connotation ascribed is hence contrived and is dealt with further below.

94. Further, had the evidence leaders withheld evidence on the purported basis that it may embarrass colleagues or give rise to negative sentiment in the public, then it would likely face different - and this time valid – criticism.

95. Given the instruction to the evidence leader, if the facts of which firms and counsel that rendered services to the office of the PP within the prescribed parameters given (which have not been denied) are unpalatable to the PP, her legal team and even other legal professionals, this cannot be avoided. It could also not be avoided that the same counsel and attorneys that were briefed in some of the matters appear on the list of service providers. They knew that would occur. It had been raised. The interests of these third-party legal practitioners had been raised through an objection by the PPs counsel, which objection was overruled by this very Committee, not once but twice. The disclosure hereof did not fall to the control of the evidence leaders but to the Committee and this Committee **expressly asked** for this information.

96. The evidence leaders cannot be held responsible for the conclusions drawn by social media and/or screenshots taken by an unknown person which allegedly went viral. **The screenshot is not provided, nor is there any indication of where and how many times it was flighted.** This is hearsay and speculation on the part of the PP.

97. Second, **the Youtube channel on 2 November 2022 attracted 37 680 views (screenshot 24) and not "millions of people" as alleged**. This is again an embellishment, ostensibly to create drama where there is none and to suggest prejudice to the PP's procedural rights when in truth there is none.

98. Third, as described above, the evidence leaders did give context to the figures that were flighted in respect of the period over which the fees were earned. If the PP is of the view that this was inadequately done then that is to be addressed in cross-examination of the witness, in other evidence or in argument and this cannot be constitutional at this juncture to allege bias.

99. This is clear when one has regard to the evidence led when Mr Sithole gave evidence, when an extensive summary of the judgments and orders as at 4 September 2022 were

provided. These were categorised in five folders. Mr Sithole was extensively involved in providing the information contained in this schedule which contained:

99.1 Reviews and appeals;

99.2 Own initiated litigation;

99.3 Pending matters;

99.4 Matters other than reviews; and

99.5 Matters which had commenced during the time prior to Adv Mkhwebane taking office.

100. Not only was this colour coded for ease of reference but it also reflected:

100.1 The date of the judgment/order;

100.2 The name of the case and citation if reported;

100.3 The case number, division and judge/s;

100.4 A summary of the matter/order and outcome and status of the report;

100.5 The counsel and attorney; and

100.6 The outcome specifically with reference to costs; and where Mr Sithole was in a position to advise in relation to the recovery of costs awarded in favour of the PPSA, this too was recorded.

101. As far as the judgments were concerned the evidence leaders took the Committee through the most relevant judgments which formed part of the Motion and provided a timeline in relation to those cases.

102. The volume of work to be done in so far as a distinction was made between opinion work and litigation work (High Court, SCA and Constitutional court) was distinguished in schedules provided to the Committee and this was also put out into the public domain. It clearly reflected which advocates were briefed as do the folders attached to the document to which Mr Van der Merwe testified.

103. It is hence entirely misleading to suggest that there was no context to the figures provided and as the Committee has been listening attentively to the evidence over several weeks, they would not have been so misled at all.

104. This evidence pertained to what the PPSA paid and who they paid for what cases, and the payments were made based on invoices rendered. These official, internal documents fell under Mr van Der Merwe's control, and he considered these very records when he gave his evidence to this Committee. Whilst it was initially contemplated that Mr Sithole would attend with Mr van der Merwe for the purposes of giving this evidence, the fact that this was not done created no problem as Mr Sithole was not involved in the creation of the schedules put before the Committee. There was nothing problematic with this evidence as it is underscored by invoices rendered to the PPSA. It was clear that the purpose of the evidence was to deal with the costs to the PPSA of the litigation undertaken. All of this fell squarely within the work of this Committee and its terms of reference. To suggest otherwise is therefore simply incorrect.

105. It also appears now to be suggested that Mr Sithole would be in a position to give evidence of the applicable tax deductions and other associated expenses of individual law firms and that he would have the requisite knowledge of the financial affairs of the individual third-party legal practitioners. How this would be possible – and even more so how the PP knew this to be so - even were he to be involved in every matter (which he was not), is inexplicable.

106. As to the allegations over "the complexity of the matter" (mentioned twice)[17] and the volume of the work done, these matters are not relevant to the work of this Committee. If this Committee was required to engaged in a cost-taxing exercise of such fees, then perhaps these matters might have been relevant, but that is not the work of this Committee. As Mr van der Merwe made clear he was not drawing the conclusion that Adv. Mkhwebane has committed misconduct by and/or demonstrated incompetence in the performance of her duties by **failing intentionally or in a grossly negligent manner to prevent fruitless and wasteful and/or unauthorized public expenditure in legal costs.**

107. Nor was he suggesting that the legal costs incurred were **fruitless and wasteful and/or unauthorized public expenditure.**

[17] Para 22.3 and 22.5.

108. That is for the Committee to determine. Had Mr Sithole been the one through whom this evidence was led, the evidence leaders have no doubt that in cross-examination he would have been strenuously cross-examined for his temerity to reach such conclusions when they were not foregrounded in his statement and/or feel outside his purview to conclude.

109. Fourth, **the amounts flighted were not only "*globular amounts*"**, but breakdowns were also shown and the viewer was able to see what the totals comprised of. A reasonable person watching the proceedings would not be misled.

110. Fifth, **the evidence leaders did not use the word "benefitted", "funnelled" or "gave**" during the evidence. The word most often used was "paid".

111. Sixth, **there was never any allegation (express or by implication) on the part of the evidence leaders that the fees rendered to the PPSA were not for services rendered. Invoices had clearly been rendered to that effect. Whether any invoices are erroneous is as the Committee was told going to be dealt with by the Auditor-General.**

112. In relation hereto it reflects payments made by the PPSA office to the listed advocates and attorneys whose legal services had been engaged. The evidence requested was precisely that – what had been paid to attorneys and advocates for their services rendered. It was presented as such. Whether this constituted fruitless, irregular or wasteful expenditure, is a conclusion to be drawn by the Committee after regard to the totality of evidence presented.

113. There is simply no evidence before the Committee to sustain the allegations of bias and misconduct on the part of the evidence leaders and we now turn to the complaint itself.

Accusations of racism against the evidence leaders

114. As indicated, it is demonstrably incorrect to allege that only fees paid to black counsel and attorneys was provided to the Committee. The evidence in respect of advocates and attorneys who rendered services to the PPSA was not limited to black counsel and

attorneys, nor was it any way selective, there can be no unfair conduct in this regard. In this regard, we have no doubt that if the relevant professional legal bodies are approached with such allegations, we will be exonerated based on the correct factual position.

115. In fact, even the critics recognise that there is a need for accountability for the use of public funds[18] and there should be no special exception in the case of legal practitioners who provide services and are paid with state funds.

116. Accordingly, in the absence of any proof of racism or selectiveness on any basis and in circumstances where no suggestion was made by the evidence leaders wantonly that fees were not paid by the PPSA for services rendered to the respective legal practitioners must be kept secret. No other service provider can claim such confidentiality when it comes to public funds.

117. In our view, the limitation of our apology to the inaccuracies in the figures is appropriate.

118. The suggestion that we are responsible for public prejudice, and/or alleged "*criminality and other forms of harassment and insults*" by others is illogical and sensationalist. It also bears mentioning, if it is not obvious, that both evidence leaders are female, counsel of colour who emanate from previously disadvantaged backgrounds and are well aware of the impact of discrimination in South African society in general and in the legal profession with briefing patterns and other discriminatory practices, especially against women of colour. The suggestion – because unsubstantiated as it is, it remains only a suggestion - that we would deliberately perpetuate such against members of our own profession is bizarre.

<u>Inaccuracies in the amounts</u>

119. These were not material. No case has been made out for how these rendered the proceedings unfair or to show bias on the part of the evidence leaders. In fact, it appears that the true complaint is that the names were identified and not that discrepancies in the

[18] Adv Sikhakhane letter para 3

amounts were flighted. This does not mean that there are no discrepancies in amounts between what the documentation provided by the PPSA and what counsel may have received. For example, the engagement with Adv Ngalwana SC reflects that even after he had provided the evidence leaders with the amount he indicates he was paid there still remains a discrepancy. We refer to what we have already stated in relation thereto.

No obligation to consult or notify the legal practitioners

120. The legal practitioners that rendered services to the office of the PPSA are not the subject of the Enquiry. There is no obligation on the evidence leaders to notify and/or consult them and so the failure to do so cannot be a basis for claiming bias or irregularity on the part of the evidence leaders. The suggestion that had we consulted them there would have been no inaccuracies in the amounts takes the matter no further. This would have been impractical. As it was, there were thousands of documents involving invoices and related documents provided. These were sorted per law firm. Further, as there were discrepancies between invoices and payments in some cases, consulting the legal practitioners would have been a futile exercise.

121. Further, the information concerned relates to public funds and so the right to privacy is not implicated.[19]

The proper role of the evidence leaders

122. The application seems to conflate the roles of the evidence leaders and the Committee.

123. The evidence was presented at the behest of the Committee. This is common cause and recognised in para 28 of the Removal application.

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[19] The right to privacy was described in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC), where Ackerman J posited a continuum of privacy rights, at para 67:

"… [O]nly the inner sanctum of a person, such as his/her family life, sexual preference and home environment, … is shielded from erosion by conflicting rights of the community …Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly".

124. The Committee will decide on the relevance of the evidence, and what weight it should be given, this is not the role of the evidence leaders.

125. As we have indicated above, our role is to place the facts before the Committee – we cannot decline to disclose evidence because it is embarrassing or perceived to be hurtful to colleagues.

126. It is our duty is to bring what we view as relevant evidence before the Committee. The fact that the PP disagrees that it is relevant does not make it irrelevant or unfair. She retains the right to argue that it is irrelevant, to present evidence to the contrary and to challenge the Committee's report if the Committee decides to rely on the evidence.

127. A disagreement on the relevance of evidence is a routine occurrence in hearings, enquiries and in litigation and is certainly not supportive of the allegation of bias on the part of the evidence leaders.

128. As there is simply no evidence of any misconduct or bias, we do not engage in a debate about the standard expected from the evidence leaders and/or prosecutors as it would be a pointless exercise. We repeat, this is not the standard by which evidence leaders in a sui generis enquiry of this nature need to meet in the context of the constitutional framework governing this process.

Relevance of the evidence

129. In the event, we are of the view that the evidence is relevant because it relates to the Motion. The charge in the motion to which this evidence is relevant is charge 4:

"failing intentionally or in a grossly negligent manner to prevent fruitless and wasteful and/or unauthorized public expenditure in legal costs".

130. The motion refers the evidence of Mr SH Samuel which is attached thereto. Mr Samuel accused the PP of "*reckless litigation*" and alleged that the "*growing applications for review of her reports*" had "*dire financial consequences for the PPSA*".[20]

[20] Para 4.4

131. Further,

"Adv Mkhwebane has plunged the PPSA into financial ruin as she is running the institution as a personal fiefdom. For instance, this office has for the current 2019/d 2020 financial year, budgeted R 10 million for legal fees. This is a record high amount that has been budgeted for this line item since the inception of this office. As at the end of December 2019, the expenditure on legal fees amounted to just over R 20 million, with R 6.8 million committed already for the remaining quarter. This will result in the projected overspending off just over R 17 million by the end of the financial year. This is happening because of Adv Mkhwebane's reckless litigation at office expense, on litigation that does not improve the jurisprudence of the PPSA and does not enhance its effectiveness. Other programmes in the office are suffering as a result".[21]

132. The Independent Panel did not think that the evidence was irrelevant, rather that it was unsubstantiated at that stage:

"*We do, however, accept that the allegations by Samuel are mostly too vague and general to rise to the level of prima facie evidence of misconduct or incompetence against the PP. For instance, there could be any number of reasons for the excessive amounts spent on legal fees or for the lack of vehicles for investigators and outreach officers. We have also not taken into account hearsay allegations. This Panel does not, however, believe that the evidence by Samuel can be disregarded in its entirety as contended for by the PP…*

…..

Further, the fact that Samuel may have been a disgruntled employee who has apparently been dismissed from his position by an independent entity does not mean that he may not submit relevant evidence to a member who may use such evidence when laying a charge in terms of the NA rules." [22]

133. It was thus not ruled out that excessive spending on legal fees would be evidence of incompetence, only that what was before the Panel was not sufficient to make a *prima facie* finding. The PP sought the exclusion of the evidence on the basis that there is a distinction between "*legal costs*" and "*legal fees*". The motion refers to fruitless and wasteful expenditure in respect of legal costs and so it is argued that fruitless and wasteful expenditure in respect of legal fees is irrelevant. Legal costs in the manner argued by the PP are not sustained in the context of the Motion.

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[21] Para 5.4.
[22] Para [182]

134. This is so in that the distinction is not supported, read as a whole, particularly the source of the charge which is described by the Independent Panel as "*exc*essive amounts spent on legal fees". The Independent Panel certainly did not understand the motion to be limited to legal costs in the sense that term is used in a taxation process.

135. In any event, even in that context "legal costs" includes attorney and own client costs, which are the actual fees payable by a client to an attorney in terms of their fee agreement, which is not restricted to the statutory Magistrates and High Court tariffs.

136. Expenditure on actual fees paid by the office of the PPSA thus falls squarely in the terms of the motion. The PP appears to be conflating "legal costs" and "costs orders". Legal fees is a component of legal costs.

The allegations made by third parties

137. The reliance by the PP on the statements of Adv Sikhakhane SC and Ngalwana SC; the Johannesburg society of Advocates and the Pan African Bar Association is misplaced. These constitute hearsay. They are also based on the same factual errors set out above.

138. It is unfortunate that the PP did not rely on facts within her own personal knowledge, the actual transcript or the YouTube channel to found her allegations.

The choice of witness

139. The evidence leaders foreshowed that Mr Van der Merwe would give evidence in relation to legal costs incurred as early as 8 September 2022 when reference was made to the annexure to Mr Van Der Merwe's affidavit. As it turned out Mr Sithole at that stage could not find certain documentation and the source documents on which the evidence was based were in the custody of Mr Van der Merwe. It was indicated that Mr Sithole may join him in doing so. As it turned it was Mr Van der Merwe that was involved in the restructured schedules based on the Committee's instruction.

140. The PP complaints about this evidence having been led through Mr van der Merwe. These costs were obtained from a combination of sources and not only Mr Sithole as reflected below.

Consulting and professional fees		Legal fees
revised NM17		
2016 – 2017	**R13,020,511.00**	**R6,446,036**
2017 – 2018	**R24,538,780.00**	**R20,512,818**
2018 - 2019	**R17,189,915.00**	**R16,458,737**
2019 - 2020	**R47,209,433.00**	**R48,371,187**
2020 - 2021	**R31,590,119.00**	**R31,018,307**
2021 - 2022	**R25,427,392.00**	**R24,190,963**
	R158,976,150.00	**R146,998,047.39**

141. First, the legal fees as a proportion of the consulting and professional fees as reflected in the annual reports were referred to. The relevant pages of the annual reports were already before the Committee. The legal fees amount had been provided by the Finance Unit of the PPSA. This reflected what was paid annually for legal fees as a proportion of consulting and professional fees.

142. Second, actual payments to various law firms were reflected. The only limitation was that the PPSA would have had to have paid more than R 2 million for the period from the time Adv Mkhwebane assumed office. This information too was provided by the Finance Department of the PPSA.

Legal firm	Amount
	-
Seanego (June 2018)	55,444,105.79
VZLR (2018)	14,429,810.21
Adams and Adams	7,459,886.08
Dyason	9,850,940.91
Diale	8,779,547.63
Motsoeneng Bill	7,962,778.73
Bowmans	5,616,577.31
Boqwana Burns	7,558,613.65
Prince Mudau	2,958,745.97
Tsautse	2,687,065.40
Tshisevhe	2,109,997.92
Fasken	2,080,804.49
Chaane	2,018,514.34
Cheadle	4,248,513.77
	133,205,902.20

143. Third, included in the schedules, as was demonstrated, were the schedules reflecting how the aforementioned amounts were made up. Again, these were provided by the Finance Department from the PPSA.

144. Fourth, the schedules were prepared in relation to the aforestated law firms summarising the fee notes received for each matter from the aforementioned law firms and reflecting the total amount paid as per the invoices. Where counsel/consultant was engaged the total was separated to reflect the fees paid to counsel for services rendered for the PPSA office. For example, and for each of the references, in relation to an invoice, which had already served before this Committee and is attached marked **25**, the following is reflected in the table:

Submission to Portfolio Committee on Justice and Correctional services	**206,413.43**	105,588.43	R 100,825.00	-

145. Fifth, the schedule of several of the above law firms is put before the Committee reflecting what the PPSA paid each law firm and what the PPSA was billed in relation to each junior or senior advocate or Mr Ngobeni, as reflected on the invoice which is then reflected in the same row as aforestated with reference to their name. For example,

Ngobeni
45,625

146. Sixth, the date of payment is apparent from the payments schedule reproduced above hence one can readily see from the schedule the period over which the PPSA paid fees and the recipient of those fees. The schedule for each law firm clearly reflects the number of matters that the PPSA paid any one person and column S on the "firm fees" page on the corrected schedule reflect the number of matters in relation to which the PPSA paid certain counsel.

147. Seventh, this evidence related to how the **R 147 million**[23] - being a rounding off of the **R146 998 047** as the amount spent by the PPSA on legal fees for the period 2016-2022, was spent.

148. Mr Sithole was not involved in the preparation of the schedules ultimately created, though he had earlier been involved in providing information. Initially, when the schedules were being prepared it entailed meeting with both Mr Sithole and Mr van der Merwe, but for the purpose of revising schedules in line with the Committee's request it did not require the involvement of Mr Sithole. Moreover, how it was expected for Mr Sithole to go behind Bills rendered by counsel is baffling. The invoices also related to matters in relation to which Mr Sithole also actually had no involvement as he had indicated in his evidence that some of the cases preceded his appointment in legal services and occurred when Mr Nemasisi was the Senior Manager Legal Services, whereafter he was succeeded by Mr Mhlongo. The latter appeared on the PP's initial witness list.

149. It is hence not the view of the Evidence leaders that there was no context to the evidence rendered or that it should have been led through Mr Sithole.

[23] As some later invoices were paid and included of the next financial year an adjustment was required but for purposes hereof is immaterial.

150. The aforegoing and the instruction followed by the Evidence leaders to put this evidence before the Committee does not amount to an illegality as the PP alleges in para 30 nor does the application demonstrate that the evidence leaders have been engaged in efforts to have the PP removed "by hook or by crook" as suggested in para 41. Unfortunately, it is loose language such as this that permeates this entire complaint.

151. As to allegations made in paras 43 and 44, the rulings in relation to relevance are made by the Committee and not the PP or the evidence leaders. Whilst the allegation is made that the evidence leaders have *"over an extended period of time"* reference is only made to ad hoc occurrences.

152. Furthermore, the context of the questions posed to Mr Sithole is explained below – the conclusion that this was premised on Mr Sithole having given *"evidence which to them seemed to be helpful to the Public Protector"*. Again this appear to be fabricated as no reference to when this was indicated had been provided. In the absence of meaningful details this can't be dealt with. At no stage had the evidence leaders indicated that Mr Sithole's evidence was helpful to the PP. This is for the Committee to determine.

153. In addition the allegations that at least four witnesses testified that their witness statements had been written and spoon-fed by the evidence is not borne out. Reference is made only to two witnesses then only with a paucity of detail.

154. The fact that the PP would have preferred another witness or wishes to challenge the personal knowledge of the one who testified does not render the proceedings unfair. These are matters for argument when her counsel addresses the Committee on how the evidence before it should be assessed and weighted. As we have said, if the PP regards this evidence as erroneous in any respect, then her procedural fairness rights to present contrary evidence remains available to her in these very proceedings.

155. The evidence put before the Enquiry reflect that the evidence leaders have always been balanced and fair, and were this application be unsuccessful we will continue to do so in fulfilling our obligations to the Committee.

156. This application, brought belatedly, does not sustain allegations of actual bias or even any apprehension of it and has resulted in a distraction from preparation for witnesses to be led by the PP.

157. Even with the application there is nothing to sustain such allegations.

F. SECOND GROUND: CROSS-EXAMINATION OF WITNESSES

158. This Committee is not a court of law and the rules that apply to court proceedings do not automatically apply to the Enquiry and cannot simply be transposed to these proceedings.

159. Clause 3.1 of the Amended Directives provide

> *"All matters of evidence shall be considered in the context of the Committee's function in terms of Assembly Rule 129AD which requires the Committee to establish whether or not Adv Busisiwe Mkhwebane is incompetent and/or has misconducted herself as alleged in the Motion, for purposes of presenting its findings and recommendations to the Assembly."*

160. Further, clause 3.3 of the Amended Directives provide

> *"The Evidence Leaders will present the oral, documentary and other evidence before the Committee in accordance with the Rules of the Assembly, the Terms of Reference, this Directive and any other directives that may be issued by the Chairperson."*

161. Clause 4.1 provides that witnesses are to submit sworn written statement and to thereafter appear before it (if determined necessary) to answer oral questions related to the subject-matter of the Enquiry. Under clause 4.2 it is provided that the evidence leader will present the evidence of a witness to the Committee.

162. Clause 6.7 of the Amended Directives permit the Evidence Leaders in presenting evidence, to **ask any questions**, including leading questions, of any witness. It is quite clear and not unusual given the nature of the Enquiry that only the evidence leaders are entitled to ask leading questions given the role that they have.

163. Clause 6.16 provides that after members have posed questions the Evidence Leaders **may ask any questions arising or seek clarity from the witness in relation to questions posed to such witness**, whereafter the Chairperson shall excuse the witness from the Hearings. This relates to questions arising from the cross-examination and/or questions from the members.

164. It is trite that the word "any" is of wide and unqualified meaning[24] and the powers granted to the evidence leaders to be able to ask any questions of witnesses – of whichever and whatsoever nature be it those invited by the Committee to appear or witnesses whose evidence the PP seeks to place before the Committee - is in accordance with this wide interpretation. This is particularly so given that the evidence leaders have the task of ensuring that evidence material to the determination of the Motion is put before the Committee. Nothing in the Terms of Reference limits the nature of the questions to be asked by the evidence leaders and it is deliberately not characterised as either cross-examination or re-examination.

165. There is nothing in the context of the powers and functions of the evidence leaders with reference to the task of the Committee that warrants a limitation to be placed on the nature of the questions to be asked by the evidence leaders of any of the witnesses, or which precludes cross-examination if required. Whilst courts determine that when parties in adversarial proceedings - being the nature of the proceedings in a court – can declare witnesses to be hostile, there is no such requirement in these proceedings.

166. Clause 5 headed "evidence leaders" provides as follows:

> *"The Enquiry is inquisitorial in nature and the Evidence Leader does not act as a prosecutor. The role of the Evidence Leader is limited to presenting the evidence and putting questions to the PP or other witnesses* ***with the aim of empowering the Committee to assess the merits of the evidence in line with its mandate.***[25] *The*

[24] *R v Hugo 1926 AD 268 at 271; and Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd 1983 (1) SA 254 (A) at 261B – D.*

[25] **5 EVIDENCE LEADER**
The Enquiry is inquisitorial in nature and the Evidence Leader does not act as a prosecutor.
The role of the Evidence Leader is limited to presenting the evidence and putting questions to the PP or other witnesses with the aim of empowering the Committee to assess the merits of the evidence in

format for questioning (whether oral or by way of statement with a view to limiting issues in dispute) will be determined by the Evidence Leader in consultation with the Chairperson."

167. Clause 5 does not limit the nature of the questions to be asked by the evidence leaders - the only limitation is that the questions put should be directed at equipping the Committee to make an assessment of the merits of the evidence. Irrespective, whether it is called cross-examination or clarificatory questions or re-examination, the evidence leaders are entitled to ask such questions. It is nonsensical, as has been argued by the PP's legal counsel, that the evidence leaders cannot cross-examine. The argument previously had been that the evidence leaders are not permitted to ask the PP questions. This would lead to an absurdity given the role of the evidence leaders in this process, and this is similarly the case in relation to any other witness.

168. We have set out the aforegoing so that the dispute as to what the role of the evidence leaders is should be put to rest once and for all. It is clearly apparent from this application again that the function of the evidence leaders in relation to the asking of questions is misconstrued.

Mr Sithole specifically

169. **In light of the aforegoing it is disputed that the questions asked of Mr Sithole in reply were in contravention of the Directives. As stated above, the evidence**

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line with its mandate. The format for questioning (whether oral or by way of statement with a view to limiting issues in dispute) will be determined by the Evidence Leader in consultation with the Chairperson.
The use of an Evidence Leader will in no way limit or impede the right of members to put questions of substance or clarity to any witness in the exercise of Parliament's constitutional oversight function, as specifically reflected in section 194 of the Constitution.

leaders are entitled to ask any questions, even questions which would be regarded as cross-examination in a court of law. Nothing in the rules or the Directives precluded this. Whilst objections were repeatedly raised and the Chairperson ruled in relation thereto, the evidence leaders abided by the rulings and the PP's legal team continued to interrupt the questioning repeatedly with objections, which were overruled. If the PP is aggrieved by those rulings then such can be addressed when she leads her evidence and can be included in any future review application brought after the National Assembly makes a decision, in the event any such decision is adverse to the PP. For the sake of this submission not being misconstrued we clearly state that we <u>express no opinion in relation thereto at all.</u>

170. As pointed out at the time, the evidence leaders do not "have witnesses". Persons were identified with information relevant to the Enquiry, asked to provide statements and give oral evidence and assisted in the preparation of those statements.

171. After the members had asked questions and before putting questions to Mr Sithole, Adv Bawa SC had stated:

" Upfront, there are a number of issues that I am going to raise in relation to what was said by Mr Sithole during the cross-examination and in response to the Committee. I will be putting a number of questions to Mr Sithole."

172. After the first of very many objections Adv Bawa stated:

"Adv Bawa: Chairperson, there were things that Mr Sithole brought up in cross-examination that were new. I am entitled to obtain clarification in respect of those issues raised, and in respect of questions and answers relating to the Members. I do not intend going beyond that extent of clarification, except in one respect, and that was the opinions that Mr Sithole had provided as an indication of what had been given by Mr Ngobeni – which was provided to Mr Mpofu. I may not even go to the opinions directly depending on what Mr Sithole's answers are. There was no cross-examination. I want to continue without interruptions, so that the Committee can continue with the agenda for the day."

173. The questions were asked clearly for purposes of obtaining clarity given what had been stated at the time – that there was a disjuncture between the evidence given when the evidence leaders led Mr Sithole and the evidence provided to the PP's legal team. Any

summation at this juncture and before all the evidence is led is premature and unnecessary - as the complaint is one that the evidence leaders cannot cross-examine. The evidence leaders refute this.

174. The evidence leaders do not have a version but do have an obligation ensure that the evidence before the Committee is of such a nature that the Committee can *assess the charges contained in the motion in order to determine whether the PP is incompetent and/or has misconducted herself.* To that end, if the evidence leaders seek to explore further evidence that they deem necessary to put before the Committee, there is no impediment to do so. The proposition in para 51 of the Removal application is of a general nature applicable to court proceedings which require the declaration of hostile witnesses when a witness is called by any one party - that is not applicable to this *sui generis* enquiry.

175. In the haste to find fault with the evidence leaders the language which allows the evidence leaders to ask “any questions” and the trite meaning given to “any” is overlooked.

176. This did not result in any unfairness nor does it taint the proceedings. If the PP wishes to have that evidence excluded, that can be raised in argument and the Committee would need to decide that issue or the PP can give evidence to the contrary when she testifies. Also, if the PP wishes Mr Sithole to come back and give further evidence in relation to any questions, as he had indicated – unlike other witnesses - nothing stops the PP from calling him again.

177. The conclusion drawn in para 55 is unsustainable in light of the totality of the evidence led by the evidence leaders, and the witness statements that were taken, and in relation to which evidence as not orally led, yet still provided to the PP.

178. The views expressed by Mr Sithole are no more than that – his views.

179. The conclusion sought to be drawn is again one of bias akin to what is dealt with in a recusal application. The remaining conclusions are not sustained by the contents of the application.

G. THIRD GROUND: WITNESS STATEMENTS

180. In paras 57 and 58, respectively, of the Removal Applicant, the PP alleges that:

180.1 the allegations about judgments concerning the PPSA, as set out in Mr Samuel's affidavit of 7 July 2022 ('**the Second Affidavit**'), were not within his personal knowledge, and had been '*unethically fed*' to him by the evidence leaders. This allegation is patently false.

180.2 In essence, in relation to Ms Thejane, that what was contained in her statement was the evidence of the evidence leader and not that of Ms Thejane. This allegation too is manifestly false, and we shall demonstrate below Ms Thejane's own involvement in the drafting and finalisation of her affidavit. The PP in support of this assertion seeks to rely on Ms Thejane's evidence under cross examination regarding her knowledge (or lack of it) of the affidavit of Ms Ponatshego Mogaladi, as well as the allegation that the Motion had somehow been changed by the evidence leaders. We deal with these more fully below.

181. As set out in detail above, it is reiterated that under the Committee's terms of reference, the task of the evidence leaders is to '*present the evidence of a witness to the Committee*' (clause 4.2(a)), to empower the Committee '*to assess the merits of the evidence in line with its mandate*' (clause 5). Their ultimate goal is to '*support the Committee under the direction of the Chairperson*' (clause 9).

182. Part of the evidence leaders' task is to interview witnesses and to prepare statements on their behalf, reflecting their evidence, for consideration by the Committee. This is much the same as Adv Mkhwebane's legal team's role in preparing witness statements for the witnesses that she intends to call. For example, although she is legally qualified, in the Committee's proceedings, Adv Mkhwebane prepared responses to members' direct questions with the assistance of her advocates and attorneys and whilst those were not written under oath, she confirmed the correctness thereof whilst under oath before the Committee. The implication appears to be that if, for example, there appears to be anything different in the written submissions prepared by her legal representatives to what Adv Mkhwebane may testify to, then this should lie at the doors of her legal

representatives. One only has to make the proposition to see how preposterous it is, and at a level of principle should be rejected.

183. The evidence leaders' approach is in line with standard practice within the legal profession. Individual deponents rarely draft their own affidavits. Rather, attorneys and advocates consult with those individuals and prepare drafts based on the information provided by such witnesses during the consultations, to ensure that the affidavits are appropriately framed and structured for the relevant tribunal.

184. The deponent then considers the draft in question and directs the legal representative as to the changes that should be made, if any, to ensure accuracy, before a final affidavit is signed and filed. The deponent attests to the affidavit under oath confirming the accuracy of the information contained therein. In this case a number of the deponents had legal degrees and would have been aware of this process and the need to ensure the accuracy of the affidavits deposed to.

185. Thus, for example, clause 23.2.2 of the LPC's Code of Conduct provides that the '*nature of work undertaken by counsel*' includes '*to prepare any documents required* for *use in any court or arbitration or other adjudicative proceedings*'.

186. That is what happened in the preparation of both Mr Samuel and Ms Thejane's statements.

(i) Response to Para 57 – Mr Samuel

187. For his part, Mr Samuel is expressly mentioned in paragraph 10.1 of the Motion and is therefore someone with whom the evidence leaders had to consult. Numerous consultations were held with Mr Samuel for purposes of preparing an affidavit for the Committee during which, among other things, the Motion and the affidavit that he filed with the Speaker on 11 February 2020 ('**the Initial Affidavit**')[26] were discussed.

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26 Bundle A pp 2136-2147.

188. The Initial Affidavit makes a number of serious allegations, including that Adv Mkhwebane was responsible for '*tyranny*' and '*an orchestrated plan to destroy the PPSA*' (para 3.1).

189. Mr Samuel alleged that Adv Mkhwebane had engaged in '*continued reckless litigation*' that had '*dire financial consequences for the PPSA*' (para 4.3). As an example of this '*reckless*' litigation, the Initial Affidavit describes the Vrede Dairy litigation (para 4.4). Mr Samuel argued that one of the ways in which Adv Mkhwebane had '*plunged the PPSA into financial ruin*' was through '*reckless litigation, at office expense, on litigation that does not improve the jurisprudence of the PPSA and does not enhance its effectiveness*' (para 5.4).

190. On 9 March 2020 Mr Samuel wrote to the CEO of the PPSA to obtain detail on all of the litigation in which the PPSA had been involved since Adv Mkhwebane took office (including the costs incurred by the PPSA in relation to that litigation).[27] The Committee will recall that it is this affidavit that is included as part of the Motion. His evidence was that he sent this correspondence because he was concerned about the number of review applications on which the PPSA was spending money – i.e what the PPSA was paying out in legal fees.[28] This was the genesis of the complaint in the Motion.

191. On 10 March 2020 Mr Samuel wrote to Adv Mkhwebane to ask her to resign.[29] His correspondence stated that he did not intend to '*repeat all the cases you have taken on*

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[27] Bundle D pp 2198-2199 annexure **SS5**.

[28] Mr Samuels stated in para 5.3 *"Adv Mkhwebane has plunged the PPSA into financial ruin as she is running the institution as her personal fiefdom. For instance, this office has for the current 2019/2020 financial year, budgeted R10 million for legal fees. This is a record high amount that has been budgeted for this line item since the inception of this office. As at the end of December 2019, the expenditure on legal fees amounted to just over R20 million, with R6.8 million committed already for the remaining quarter. This will result in the projected overspending of just over R17 million by the end of the financial year. This is happening because of Adv Mkhwebane's reckless litigation, at office expense, on litigation that does not improve the jurisprudence of the PPSA, and does not enhance its effectiveness. Other programs in the office are suffering as a result. The Independent Panel in this regard stated: "….We do not believe that section 194 of the Constitution or the NA rules exclude misconduct or incompetence in the context of labour relations from being considered. We do, however, accept that the allegations by Samuel are mostly too vague and general to rise to the level of prima facie evidence of misconduct or incompetence against the PP.* ***For instance, there could be any number of reasons for the excessive amounts spent on legal fees or for the lack of vehicles for investigators and outreach officers."***

[29] Bundle D pp 2536-2537 annexure **SS31**.

and lost due to your unending quest to pursue a personal and/or political *agenda*'. The letter then expressly referred to the decision of '*the full bench of the North Gauteng High Court today, that you "lack the basic knowledge of the law and its practical application".*' That was a direct quotation from paragraph 146 of the Full Court's judgment in the **CR17** matter.

192. The evidence leaders did not assist Mr Samuel to prepare the Initial Affidavit or the abovementioned correspondence. In fact, at the time he prepared and dispatched these documents, no evidence leaders had even been appointed nor had the section 194 process commenced. The contents of the Initial Affidavit and the letters can in no way be attributed to the evidence leaders, yet the documents clearly demonstrate Mr Samuel's personal knowledge of the judgments handed down against the PPSA, and the financial implications of the associated litigation. Those concerns were elaborated upon in Mr Samuel's Second Affidavit.

193. This was reiterated repeatedly by Mr Samuel during consultations with him, where he confirmed that he had been deeply concerned about the various judgments – and making reference to specific judgments- handed down against the PPSA during Adv Mkhwebane's tenure.

194. Moreover, whilst the evidence leaders settled the Second Affidavit, large parts thereof, including those related to the judgments, were not drafted directly by them.

195. At the outset in his evidence before the Committee, Mr Samuel agreed '*in part*' that he did not have personal knowledge of all the information in his affidavit, which was '*mostly information that has been fed to you by the evidence leaders.*' This was the exchange:

I'm going to argue that you have no personal knowledge of all the information that you alleged in your affidavit, and that it is mostly information that has been fed to you by the evidence leaders. Do you agree?

Mr Samuel: I will agree with you in part, but not entirely. I've stated that in my affidavit.

Adv Mpofu: Yes, that's fine. In part is good enough for now. I'll also argue that you have

not familiarised yourself with the court decisions that you discuss in your affidavit, but that that is just a way of introducing those court decisions into evidence via you. It could have been anybody sitting there, all you have to say is, "Yes, yes, yes". But then anymore, I could do that. In other words, there is nothing peculiar about you regarding those court decisions. You don't have a special knowledge of them. Maybe let me put it that way. Am I right?

Mr Samuel: That is correct.

196. Mr Samuel was unequivocal despite being repeatedly pressed and made it quite clear that:

'I was not in any way persuaded to say whatever I said by the evidence leaders'.

197. In respect of the judgments he referred to in the affidavit:

197.1 He rejected the claim that he was not familiar with the judgments.

197.2 He said:

'I am familiar with the cases but I don't have in-depth knowledge on them'.

197.3 He said:

'I did read these judgments in the past, and as I said in my affidavit, what concerned me was the negative publicity and the way these judgments, the comments made by the judges, panned out in the public. They had the effect of making the public lose faith and trust in our Office. That is what I quoted in those affidavits. That's what concerned me. I agree. I am not fully conversant with each and every case for the detail that you're referring to'.

197.4 He stated that he had last read the CR17 judgment **'a long time ago when it first came out'**. He admitted that anyone reading his second affidavit could reasonably assume that he had read the CR17 judgment, which he had. He rejected the allegation that he intended to create the impression that he had read the judgment recently, noting **'I wanted to draw attention to the remarks made by the judges, as I went on to those paragraphs'**.

197.5 Mr Samuel admitted that he was not quoting the CR17 judgment paragraphs from memory; rather: '**When I was drafting or preparing for that affidavit [inaudible], I didn't have access to those cases. I had requested I had requested to the official that was assisting the evidence leader to go and extrapolate those paragraphs because that's what I had referred to in my initial affidavit'** and in the letter where he asked her to resign. He also admitted that the same applied to the quotes from the Vrede, FSCA and CIEX judgments.

197.6 However, Mr Samuel rejected the notion that this evidence was the evidence leaders rather than his own: **'I had requested them to put this go and quote them so yeah that was my request, so in all fairness they were from me because that's what I asked them to do'.** He rejected the notion that he was a **'phantom witness'** and reiterated that **'I signed this affidavit and I stand by the contents how the contents have come about. Was by my direction that I'm prepared to stand for'.**

197.7 He did, however, admit that if the evidence leaders had misquoted a paragraph, he still would have signed the affidavit. But he believed that the quotes reflected **'exactly what was in the court cases'.** (We don't have recollection of a misquote being raised. If that had been the case it would have been in error or oversight and hardly tantamount to bias or misconduct).

197.8 He admitted that the evidence in his second affidavit had undergone a **'big transformation'** and **'quite a big revolutionary change'** compared to his first affidavit, with the number of judgments included in the second affidavit that had not been mentioned in the first. However, he later explained that the first affidavit was dated 11 February [2020], and he wrote correspondence in March [2020] that referred to judgments and comments from judges, and he then brought those judgments and comments into his second affidavit. He was also clear that he was not purporting to be an expert on the judgments, but that he had relied on the comments they contained.

198. After cross-examination, Mr Samuel was questioned by the members of the Committee. In relevant part, Hon. Maotwe asked Mr Samuel if he drafted his affidavit, because he had not read the judgments referred to therein. His response was that the second affidavit was drafted **'by the assistant to the evidence leaders, based on the information that I had given them and what they retrieved. And the draft was sent to me to look at and read through. I did that over two days to satisfy and made some changes, yes, to the extent that it was drafted with my direction I agree that, physically it was not drafted by me'**. He indicated that this was standard legal practice: where lawyers prepare affidavits **'because they know what needs to be to be zoomed into and by my direction, it was to go into those comments'**.

199. He reiterated that he had not perjured himself, that he had read the judgments **'at the time they came out'**, but did not revisit them before deposing to the second affidavit. He confined his affidavit to the **'scathing comments'** made by the judges, which were public knowledge. He also denied being fed information by the evidence leaders.

200. Mr Samuel has been an employee of the PPSA since 1 December 2000. At the time of the Initial Affidavit, he had been in service for two decades, and had served in leadership for more than 10 years. He was therefore well acquainted with the PPSA, the public perceptions surrounding the office and the relevant jurisprudence. Prior to being interviewed by the evidence leaders, Mr Samuel had, on more than one occasion, raised his concerns about the critical jurisprudence regarding the PPSA's reports and the office's expenditure on litigation. The courts' decisions were also a matter of general public knowledge, given the high level of public interest in, and reporting on, such matters as the CIEX and Vrede litigation. Not only were the judgments matters of public record, and accessible to anyone with an internet connection, but the evidence leaders had, during consultations from bound law reports in chambers, read certain paragraphs from judgments with Mr Samuel and when Mr Samuel indicated that he no longer had access thereto, copies were made of some of the judgments for him, and provided to him.

201. It is objectively clear that, even before the Committee commenced its work and long before any engagement with the evidence leaders, Mr Samuel was aware of, and

deeply concerned by, the numerous judgments handed down against the PPSA, and the cost of the litigation thereof and impact on the services that the PPSA could no longer render due to financial constraints. Those concerns are the express reason he took the extraordinary step of addressing correspondence to the PP and filing the Initial Affidavit with the Speaker, notwithstanding the blowback he anticipated receiving.

202. Mr Samuel's affidavit was –

202.1 based on his instructions and various consultations had with him;

202.2 based on information that was within his personal knowledge acquired as a result of his office (as is borne out by correspondence and the Initial Affidavit), and was in any event much discussed in the public domain; provided to him in draft form several times prior to deposition, so that he could verify its contents and stipulate corrections where necessary, which he did; and

202.3 was only signed once he confirmed that he was satisfied with the contents thereof.

203. Despite being repeatedly pressed in very aggressive cross-examination, Mr Samuel maintained that the Second Affidavit was his – that it reflected his knowledge and his concerns. He admitted that he had not read some of the judgments **recently** but was clear that he had read them (as borne out by the abovementioned correspondence and the Initial Affidavit) and that he instructed that references be made thereto in the affidavit prepared for purposes of the Committee.

204. Mr Samuel was not '*unethically fed*' any information as is being alleged. This claim is opportunistic and it is false. There is, furthermore, no suggestion that the statements in the Second Affidavit are incorrect: they do, in fact, accurately reflect the judgments discussed.

205. Paragraph 2 of Mr Samuel's affidavit expressly stated that some averments in his affidavit were not based on his direct knowledge, but on information made available to

him, which he had no reason to doubt. Furthermore, the concession was completely irrelevant to the substance of Mr Samuel's evidence; it had nothing to do with his testimony regarding the goings on in the PPSA.

206. We turn now to deal with the allegations made in regard to the statement of Ms Thejane.

Response to Para 58: Thejane evidence

207. The preparation of Ms Thejane's affidavit occurred in a similar manner.

208. Her first meeting with the evidence leaders was on 24 June 2022. It was a physical meeting at the offices of the PPSA. At this meeting, Ms Thejane was shown the Motion by the evidence leaders, who sought to establish from her whether she had any information on the charges set out in the Motion. Ms Thejane shared that she had not had any involvement in the SARB / CIEX matter, in the Vrede matter, nor had she had any involvement in the FCSA matter set out in the charges in the Motion. When it came to charge 4 however – which is the charge relating to intimidation, victimisation and harassment of staff in the PPSA, either the PP herself or Mr Vussy Mahlangu – Ms Thejane, as did the other executive managers , shared the information she regarded as harassment, victimisation and intimidation.

209. It was initially envisaged by the evidence leaders that the executive managers would place their evidence to the Committee via a joint statement to be prepared for them. This was because much of the information, the bulk of which related to what they described as intimidation, harassment and victimisation as detailed in charged 4, had commonalities. This approach was also favoured at the time in order to save time and costs, the plan being that the executive managers would then give their oral evidence to the Committee together, based on their joint statement.

210. After individual and joint consultations were held with the executive managers, a joint statement was prepared for them for their consideration. It was provided to them on about 7 July 2022. It was based on what they had communicated to the evidence

leaders of their experiences in the PPSA and written documentation provided by them. They then also provided changes to the joint statement. A consultation was held between the evidence leaders and the executive managers, together with the CEO, on or about 9 July 2022 to discuss the contents of the draft joint statement.

211. Thereafter, however, the executive managers expressed reservations about the joint statement approach, mainly on the basis that in this way each one of them would be binding themselves under oath to information that may not necessarily be known to an individual executive manager, or an experience that did not belong to that individual, but to another executive manager - and that the time periods of their experiences and work did not necessarily overlap. In particular, there was also the issue of Ms Mogaladi, whose suspension was only germane to her. Despite the commonalities in their experiences, they expressed their preference to proceed by means of individual statements, containing information which was in their direct individual knowledge.

212. Individual statements were then prepared for the executive managers, based on information provided by them to the evidence leaders of their experience in the PPSA.

213. A first draft of Ms Thejane's individual statement as recrafted was sent to her on 17 August 2022. The issues which Ms Thejane broadly wished address in her affidavit, as per the information she communicated to the evidence leaders, were: (a) the backlog projects; (b) the setting of unreasonable deadlines; (c) what it is that made the deadlines unreasonable; (d) the culture of fear that this created; (e) the effect on the quality of reports; and (f) the lack of involvement of executive managers in litigation. Her draft affidavit covered these issues. The evidence leaders requested her to consider and provide instructions regarding questions asked and comments made in the draft affidavit.

214. Later on the same day 17 August 2022, Ms Thejane sent the evidence leaders six email communications providing further information and instructions on the issues that she had raised and which were foregrounded in her draft affidavit. In one of these emails, Ms Thejane commented to an aspect of the evidence that had by then been

led by Mr Gumbi Tyelela, regarding what she knew of the reasons why Mr Samuel could not be served with the disciplinary charges against him.

215. Further work was then done by the evidence leaders to Ms Thejane's affidavit.

216. On 1 September 2022, another draft of Ms Thejane's affidavit was sent to her by the evidence leaders. By then Ms Mogaladi had already given her evidence to the Committee. Ms Thejane was requested to read the draft of her affidavit carefully, and she was urged to feel free to delete and amend any portions. This was to ensure the accuracy of the contents of the affidavit. Ms Thejane was also furnished with a transcript of the evidence of Mr Futana Tebele and asked to comment thereon.

217. Another draft of Ms Thejane's amended affidavit was sent to her on Friday 2 September 2022. By that time Ms Mogaladi had given her evidence to the Enquiry, and this draft had in it the paragraph that Ms Thejane had read the portion of Ms Mogaladi's affidavit that dealt with the manner in which Dashboard meetings had been dealt with.

218. Ms Thejane responded on Sunday, 3 September 2022, attaching a draft with her amendments. This draft was sent from an email address that did not appear to be that of Ms Thejane. It was nevertheless settled by the evidence leaders, for signature and commissioning on the next day.

219. However, on the next day when the affidavit had to be commissioned and signed, the evidence leaders were called by Ms Thejane who explained that the version presented to her for signature was not the correct version. According to Ms Thejane, she had been experiencing problems with her work assigned laptop during the previous weekend, which is why she had emailed what the evidence leaders took to be her final draft on 3 September 2022 from what she said was her daughter's email address. However, she had made changes to the draft affidavit sent to her on 2 September, but these changes did not appear on the affidavit sent to the evidence leaders on 3 September, and which was being presented to her for signature and commissioning. It

appeared that she may not have saved the changes that she made on the draft sent to her on 2 September.

220. In short, on Monday 5 September, Ms Thejane indicated that she could not sign the affidavit, and that she required more time to go through the affidavit and ensure that the draft she would sign was the affidavit that she was satisfied with. This was agreed. During the course of the morning, the evidence leaders sent the affidavit to Ms Thejane's work email address for her consideration

221. Ms Thejane then considered the draft; made the changes that she wished to make and after she was satisfied, the affidavit was commissioned later in the afternoon of 5 September 2022.

222. In her evidence in chief, Ms Thejane confirmed that she had read the affidavit of Ms Mogaladi and agreed with Ms Mogaladi's characterisation of how Dashboard meetings were run. She then proceeded to describe, in her own affidavit and her evidence in chief based on her own experience independently of Ms Mogaladi's affidavit, how she experienced those meetings being run. She attached annexures to her affidavit in support of this.

223. On 7 November 2022, Ms Thejane was provided with a copy of the transcript of her evidence to the Committee on 10 September and 13 September, in preparation for what was to be her cross examination on 10 November 2022.

224. Under cross examination, and more than 8 weeks after she had given her evidence in chief and had been questioned by members of the Committee, Ms Thejane however said that she had not read the affidavit of Ms Mogaladi, although she had followed her evidence whilst it was being led.

225. In the questions that were put to her by the evidence leaders in re-direct, Ms Thejane confirmed the following:

225.1 That she had been shown the Motion by Adv Bawa SC in the meeting at the PPSA offices, and that the contents of charge 4 were explained to her; and further that she was sent a copy of the Motion before she gave her evidence on 10 September 2022.

225.2 She was sent a copy the affidavit of Ms Mogaladi before she signed her affidavit on 5 September 2022.

225.3 Early on during the consultations with Ms Thejane, she had indicated to the evidence leaders that she had no direct knowledge of matters relating to Mr Vussy Mahlangu. In the drafting of her affidavit, the manner in which charge 4 was presented did not include Mr Mahlangu, because that was not the issue which Ms Thejane would deal with in her affidavit. The claim that charge 4 was amended by the evidence leaders is without foundation. But again this is not an issue of bias or misconduct but one to be addressed in argument at the appropriate time.

225.4 The manner and circumstances under which Ms Thejane gave evidence to this Committee with an almost eight-week break in her evidence as it was, did not present ideal circumstances under which to give evidence before this Enquiry. The undesirability of this situation was pointed out by the evidence leaders and the Chair. Whilst it is not clear why Ms Thejane contradicted herself in her evidence, there is no basis upon which to lay the blame at the foot of the evidence leaders; or upon which it can be said that the evidence leaders are guilty of misconduct as a result of this. Unfortunately, witnesses sometimes contradict themselves for various reasons (which may include lapse of time or purely the rigours of cross-examination), and it hardly forms the basis for bias, real or perceived, or misconduct on the part of the persons (in this case the evidence leaders) who provided assistance to them in the preparation of statements made by them under oath.

H. FAIRNESS

226. This application has had the effect of distracting the evidence leaders from preparing questions to be asked of the witnesses that will be giving evidence in the upcoming few days and undermining their preparation.

227. Fairness dictates that should other allegations emerge in argument which are not foreshadowed in the written application provided to the evidence leaders, that the evidence leaders be afforded a further opportunity to respond in writing thereto. We reserve the right to file a further written response to any new matter raised in oral submissions, should we deem it necessary to do so. We are nevertheless mindful of the need for this Enquiry to be completed as scheduled and for the Committee to reach its decision in this matter, sooner rather than later.

I. CONCLUDING REMARKS

228. We have realised that it is necessary for the role of evidence leaders to be understood. It needs to be emphasised that the evidence leaders are not decision markers in any manner or form. To be clear, the evidence leaders have no decision-making powers in this forum. We raise these matters because of posts on Twitter made a by member of this very Committee that had been brought to our attention. This Member has openly expressed his negativity towards the evidence leaders and has suggested that we will cause the proceedings to run into next year. These accusations have come even after the failure of the application for Adv Bawa SC's recusal based on vexatious allegations.

229. This is why we have to emphasise the obvious once more: the evidence leaders make no decisions in this Enquiry – the Committee and its members do.

230. We are here to do a job and should be permitted to do so without being subjected to personal and professional ad hominem attacks. We are entitled to be protected in this Committee process from unwarranted personal attacks, and not to be subjected to personal attacks coming from outside persons irrespective of whether they are regarded by some to be eminent or not.

231. We should also not be subjected to personal attacks from any member of the Committee either in this forum or on social platforms. If a member has the requisite evidence (not simply conjecture, rumours, gossip, speculation or where provided with such information has at the very least done a due diligence or verification thereof) that we have engaged unprofessionally, incompetently or unethically with this Committee, it must be raised properly before this Committee and be dealt with as expected in a parliamentary committee tasked with a serious constitutional obligation. We state that it is unfair for members of this Committee to openly express their disdain of any one of us on social media platforms, in circumstances where we are simply doing our job.

232. We are not politicians so we accept that we may listen to or hear evidence differently to members of the Committee. Our witnesses were drawn largely from senior ranks in the office of the Public Protector. We did not go “hunting for them” as has been suggested, and it is insulting to professionals who are part of our senior public service to disparage them by suggesting that they were being paraded before this Committee, when they have simply sought to assist the Committee.

233. As independent senior and experienced legal practitioners who are in good standing with our Bar Council, we regard these attacks and this application to be a slight on our professional ethics which we hold in high regard.

234. We also do not have any need to engage in political rhetoric, conjecture or simply plain untruths in the public arena, the latter, for whatsoever reason or motive, being deplorable and insulting to the parliamentary process. We have not heard one witness say, of their own accord, that anything had been added to their affidavits or accusing us of having doctored their affidavits in any way and without their knowledge. We would welcome anyone pointing to such statements having been made by any witness for whom assistance was provided in preparing draft affidavits. Of course, in the absence of real evidence resort is had to fabrications, which is what unfortunately permeates this removal application.

235. Before this process commenced we were not labelled as controversial, in fact we were probably rather boring legal practitioners. Our curriculum vitae were provided and presumably scrutinised by members of the Committee. Our appointment was publicly known before we commenced work. Our legal work in reported cases is publicly available. Hard working members of the Committee would obviously have done their due diligence before our appointment and if they thought our appointment would be controversial or detrimental to the work of this Committee undoubtedly this would have been raised. Accusations now that any of the evidence leaders are controversial (stated as fact without personal knowledge or real evidence or justification) are unfounded. In relation thereto we can only surmise that these allegations have been proffered designed to create atmosphere and to establish some sort of relevance in the public space. As independent legal practitioners we have no need to play to the public because we do not have to justify our existence in the same way as politicians do who have to seek votes from the public to ensure their continued political future. We have every confidence that rational, honest and fair-minded members of the public committed to the rule of law in a democratic South Africa are not fooled by machinations or plain untruths.

236. We, the evidence leaders have no defenders in this forum. We have often, because of the non-adversarial stance we must adopt given the nature of this process, had to sit back and bear in silence, snide remarks, rude comments, *ad hominem* attacks on us, our integrity, here and in social media spaces, with no censure on those who perpetrate it, and though we do not have a presence on these social media platforms, from time to time the odd post is brought to our attention and to that of our families.

237. Given the perception created that there is large scale condemnation of the accounting of how funds from the office of PPSA was spent, we wish to place these exaggerated claims in context. May we thank those from the organised legal profession and from the public who have sent us overwhelming messages of support. These include messages from academia, retired members of the judiciary, the advocates and attorneys' profession, organised legal practitioner groups and ordinary members of the public who have reached out to us, especially after the last round of accusations. They themselves have condemned the attack on the evidence leaders and they certainly have not shared the sentiment that our conduct was as described "disgraceful, malicious and/or racist."

Instead, these persons have encouraged us to continue to assist this Committee in the interest of all South Africans. We state clearly that none of these members of the public or the organised legal profession have shared the views of Advocates Sikhakhane SC, and Ngalwana SC and those persons they purport to represent.

238. Sadly, a common thread that emerged from these accusations is that when all else fails, there is resort to accusations of racism. This appears to be the case here.

239. Finally, it seems that there is a perception that one needs only to be accused of racism in order for it to stick, in order for it to be real, without any substantiation or justification whatsoever. We state clearly, this is not the case and it cannot be right. Going forward, we request this Committee not to be side-tracked any longer, and to continue with its work according to the time schedule it has set for itself.

240. We undertake to continue doing our work, in line with our role and responsibility as evidence leaders, with focus, fairness and diligence to the PP, the Committee and the rule of law .

N BAWA SC

N MAYOSI

26 November 2022.