QUESTIONS FROM THE EVIDENCE LEADERS

A. INTRODUCTION

1. We have endeavoured, to the best of our ability, to formulate written questions that may assist the Committee in bringing clarity to the evidence where there is a dispute, it is contradictory, or it is unclear. We do so from the starting premise that where Courts have ruled, the judgments and orders are binding and cannot simply be rejected as the "*opinion*" of the Judge/s. With regard to dissenting judgments (or judgments that may dissent in part and concur in part with the majority), the dissent does not create binding precedent, though they may be cited as a form of persuasive authority in subsequent cases but with limited value. Given that the matters involve review applications and issues of law and because the Committee is to determine whether or not there is misconduct or incompetence, where there are questions of a legal nature included below, these, in light of the subject matter, are necessary and touch on issues which this Committee may need to have regard to in considering the Motion.

2. To assist Adv Mkhwebane with the questions set out below the most common references are indicated in Annexure **"A"** hereto. To avoid undue prolixity and to the extent necessary where judgments are referred to only the paragraph is referenced. Where references are to the court records we endeavour to reference it to the case and use the following: CR17, SARS Unit, Vrede and CIEX to refer to the particular cases; for the courts simply as HC (High Court), SCA (Supreme Court of Appeal) and CC (Constitutional Court); and to affidavits in the court records as FA, AA and RA for the founding, answering and replying affidavits respectively.

3. There are two general sections for questions. The first requires Adv Mkhwebane to either <u>agree / disagree</u> with statements. Agreement can be amplified at her discretion. Where she disagrees with a statement, this should be explained to assist the Committee, reasons provided and be supported by any evidence or reference to the record. The second are direct questions. To further assist there are some statement and quotations set out as a precursor to these questions to aid the answering of questions and there may be multiple questions broken down to aid clarity. Whilst we tried to group questions together with reference to the main cases there is an overlap when the subject matter overlaps, for example, in relation to the Executive Ethics Code that arises in relation to both CR17 and SARS Unit matters.

4. To the extent that any of the questions are duplicated in the questions from members a cross-reference will suffice. If there is any question that is unclear do not hesitate to revert. The evidence leaders will avail themselves to any queries arising.

B. QUESTIONS IN RELATION TO REPORTS REVIEWED AND ANNEXURE BM13 TO ADVOCATE MKHWEBANE'S EVIDENCE

5. Adv Mkhwebane, during oral evidence, referred to annexure **"BM13"** as a document reflecting key performance areas for the period October 2016 to February 2022:

   5.1. For what purpose was this pie-chart prepared?

   5.2. The small-print at the bottom of the document reflects that the 2021/2022 numbers have not yet been audited, so does that mean that the data relied in preparing the pie-chart in relation to the previous years were audited?

   5.3. If so, with reference to the table below, how is it that for the period October 2016 to February 2022 the pie chart reflects that only 17 reports have been reviewed and set aside to which Adv Mkhwebane had testified, and yet when regard is had to the list below, with reference to judgments and orders, the number of reports reviewed and set aside (some partially) is 30 for period ending February 2022?

   5.4. Are there any reports on the list that Adv Mkhwebane disputes were fully or partially reviewed and set aside? If so, which of the total of 36 reports (including those reviewed and set aside after February 2022) does Adv Mkhwebane say were not reviewed and set aside?

   5.5. If it not disputed, why then did Adv Mkhwebane not inform the Committee of the 13 reports, having been provided with the summary of judgments, prepared by the evidence leaders, on which these are reflected, some months prior to testifying?

6. Further the table below reflects that in addition to these 36 reports, there are a further 23 reports in relation which there are pending reviews that are not opposed.[1] Would Adv Mkhwebane agree that it is more probable than not that these reports will be reviewed and set aside?

7. Further, there are an additional 10 reports pending before the courts that are opposed and hence at risk of being set aside. Would Adv Mkhwebane agree that there is such risk pending?

8. Is it not so that had a proper audit been conducted all 30 reports should have been reflected on the pie-chart for that time period, even with the 2021/2022 not yet having been audited?

9. As it is reflected in the annual reports the number of cases finalised include cases rejected because Adv Mkhwebane has no jurisdiction to investigate; those cases that are not investigated because they are referred to other institutions; cases that were lodged and withdrawn without any investigation occurring and complaints that were resolved by the parties before the Public Protector South Africa ('**PPSA**') could conclude the investigation. As such once those are excluded from the total complaints to which the PPSA attended for the period 1 April 2016 to 31 March 2022, the caseload of the PPSA was actually only approximately 44056, inclusive of

[1] In addition, there are 5 reports in relation to which review applications were launched and at some point have either become moot or no steps were taken, but have not been withdrawn.

the 6-month period when Adv Madonsela was in office.[2] If Adv Mkhwebane disputes this to be so, on what basis is such disputed?

10. As is reflected in the revised Annexure **NM12** which represents the number of complaints received over 25 years of the existence of the PPSA, a significantly lower number of complaints were received during the period Adv Mkhwebane's term of office until 31 March 2022, (being in the amount of 47410)[3] than was received by her predecessors (Adv Madonsela – 136841) and Adv Mushwana (113948) – albeit that the latter was over a period of 7 years.

    10.1. What does Adv Mkhwebane attribute this to, apart from the covid pandemic and the referral of complaints directly to the Department of Home Affairs to attend to?

    10.2. Given that Adv Mkhwebane had been provided with more staff members and bigger budget than her predecessors, when considered with the significantly fewer new cases lodged over the 6-year period, would it not have been obvious so that the backlog of complaints carried forward would become significantly less? If Adv Mkhwebane disagrees with this, on what basis does she so disagree?

C. LIST OF INVESTIGATIVE REPORTS REVIEWED AND SET ASIDE DURING ADV MKHWEBANE'S TERM OF OFFICE & PENDING REVIEWS (OPPOSED & UNOPPOSED)

11. This schedule was compiled by the Evidence Leaders with the assistance of Committee staff and the Public Protector South Africa Office. It is mostly extrapolated from the more extensive summary of judgments and orders provided to the Committee and dealt with during the evidence of Mr Sithole and Mr Van der Merwe and been updated for purposes of assisting the Committee.

12. As **"BM13"** to Adv Mkhwebane's Part A statement dealt with the period October 2016 to February 2022, the number in the left-hand side column of the table is highlighted in green, where a report had been set aside after February 2022.

[2] See annexures NM12, "*revision of NM12 – annual cases for 25 years*" and "*revised reporting data – extended NM14*" to which Mr Van der Merwe testified in Bundle D. This amount would reduce by approximately 3937 if for the period of 1 April 2016 to 31 March 2017 the number of complaints were divided equally between Adv Madonsela who was in office from April to 14 October and Adv Mkhwebane for the remaining period until 31 March 2017.

[3] The amount for the period 1 April 2016 to 31 March 2017 was halved given that Adv Madonsela was in office from April to 14 October Adv Mkhwebane for the remaining period until 31 March 2017.

	REPORT	OUTCOME
2022/23 Reports		
1	Report No. 4 of 2022/23 issued 29 April 2022 into allegations of maladministration and improper conduct relating to irregular procurement processes by the South African Revenue Services (SARS) [sic] in the appointment of Budge, Barone & Dominick (Pty) Ltd.	Report set aside by consent of the Parties in the HC, Pretoria on 11 November 2022.
2021/2022 Reports		
2	Report No. 09 of 2021/2022 issued on 3 June 2021 in respect of decision by the MEC, Mr Lekwene.	Report declared unlawful, reviewed and set aside by the HC, Northern Cape, Division on 7 March 2022.
3	Report 49 of 2021/2022 issued on 8 October 2021 on investigation into allegations of corruption, maladministration or misuse of public funds by Senior and Executive Government officials from Mbizana Local Municipality and Eastern Cape Provincial Government Department(s).	Report reviewed and set aside on 10 February 2023.
2020/21 Reports		
3	Report No. 01 of 2020/21 issued 30 September 2020 – Investigation into allegations of maladministration against the Mogalakwena Municipality regarding the permanent appointment of Mr PJ Mashamaite.	Report reviewed and set aside on 3 August 2021.
4	Report No. 25 of 2020/21 issued 8 February 2021 – investigation into allegations of improper withdrawal of an inquiry by CCMA.	Report reviewed and set aside on 21 December 2021.
2019/20 Reports		
5	Report No 147 of 2019/20 issued 15 June 2020 – Investigation into allegations of maladministration & the irregular awarding of a contract for eradication of asbestos roofs by Free State Dep of Human Settlements.	Paragraph set aside on 6 September 2021.
6	Report No 146 of 2019/20 – Investigation into allegations of an irregular award of a tender for cleaning services to Rabbi Solutions (Pty) Ltd.	Report reviewed and set aside 3 March 2022.
7	Report No. 98 of 2019/20 issued 28 January 2020 – Investigation into allegations on irregular appointment of the Chief Financial Officer of the Commission for the Promotion and Protection of the Rights of Cultural, Religious Linguistic communities, Mr Cornelius Machiel Smuts in 2007.	Report reviewed and set aside 14 April 2022. Consent order with each party to pay its own costs.
8	Report No. 69 of 2019/20 issued 2 October 2019 – Investigation into allegations of procurement irregularities, maladministration and nepotism within the Road Traffic Management Corporation (RTMC) by the CEO, Advocate Makhosini Msibi.	Para 7 remedial action reviewed and set aside in its 26 January 2022.

9	Report No. 41 of 2019/20 issued 2 October 2019 – Investigation into allegations of procurement irregularities, irregular appointment and maladministration relating to the appointment of Ms. TH Botha by the Independent Police Investigative Directorate (IPID).	Report reviewed and set aside 2 June 2022.
10	Report No. 37 of 2019/2020 issued 19 July 2019 – Investigation into a violation of the Executives Ethics Code through an improper relationship between the President of the ANC and African Global Operations (AGO), formerly known as Bosasa.	Report reviewed and set aside 10 March 2020.
11	Report No. 36 of 2019/20 issued 5 July 2019 – Investigation into allegations of violation of the Executive Ethics Code by Mr Pravin Gordhan, MP and allegations of maladministration, corruption and improper conduct by SARS.	Report reviewed and set aside 29 July 2019. On 7 December 2022 personal costs overturned by CC.
12	Report No. 24 of 2019/20 issued 24 May 2019 – Investigation into allegations of maladministration and impropriety in the approval of Mr Ivan Pillay's early retirement with full pension benefits and subsequent retention by SARS.	Report reviewed and set aside 7 December 2020.
13	Report No. 19 of 2019/20 issued 9 May 2019 – Investigation into allegations of the irregular appointment of Carol Bouwer Productions and unconscionable use of public funds by the Mpumalanga Office of the Premier to render event management services during the former President Nelson Mandela memorial service.	Unopposed. Findings in paras 6.1 and 6.2 and the remedial action under 7.1.1. reviewed and set aside by consent. No order as to costs. 13 May 2021.
14	Report No.11 of 2019/20 issued 24 May 2019 into allegations of maladministration and improper conduct by the Gauteng Provincial Government in connection with an MoU entered into between GPG and the Gauteng Horse Racing Industry.	Report reviewed and set aside on 25 August 2021.
15	Report 10 of 2019/2020 issued on 30 April 2019 – Investigation into allegations of irregular procurement of official vehicles for the former premier of Mpumalanga province, Honourable David Mabuza, by the Mpumalanga Office of the Premier.	Unopposed. Report reviewed and set aside 13 May 2021.
2018/19 Reports		
16	Report No. 46 of 2018/19 issued on 28 March 2019 into allegations of maladministration, abuse of power and improper conduct by the FSB Executive Officer, Mr Dube Tshidi.	Report reviewed and set aside on 9 October 2020
17	Report No. 41 of 2018/19 issued 28 March 2019 – Investigation into allegations of unfair and improper conduct by the State Information Technology Agency (SITA) relating to the structuring of the pensionable portion of the remuneration package of Mr G Norton.	Report reviewed and set aside 24 May 2021.
18	Report No 13 of 2018/19 issued 5 February 2019 – own initiative investigation into the conduct of USAASA Board of Directors.	Report reviewed and set aside 28 May 2021.
19	Report No 12 of 2018/9 issued 21 August 2018 on investigation into allegations of undue delay, gross negligence, improper conduct and maladministration by the Minister of Police and SAPS for failing to provide the whistleblowers with security protection at the State's expense re the exposé of allegations of mal-administration, corruption, and the expenditure of public funds by the Umzimkhulu Local Municipality.	Report reviewed and set aside 3 June 2020.

20	Report No. 9 of 2018/19 issued 25 July 2018 – Investigation into allegations of maladministration relating to Johannesburg Roads Agency's failure to follow proper procurement processes and its alleged collusion with a prospective service provider.	Report declared unlawful, and reviewed and set aside 25 March 2021.
21	Report No 3 of 2018/19 issued 9 May 2018 – Investigation into alleged maladministration by the City of Tshwane regarding the transfer and withholding of salary of its employee, Ms MJ Masibi.	Report reviewed and set aside 7 February 2019.
22	Report no. 5 of 2018/19 issued 11 June 2018 into allegations of breach of the Executive Ethics Code by the Premier of Western Cape Provincial Government, Honourable Helen Zille.	Review failed at HC. Overturned on appeal. Report reviewed and set aside 7 February 2022.
23	Report No. 9 of 2019/20 issued 13 May 2019 on investigation into allegations of irregular appointment of Ms Suzan Malan to a position of Assistant Manager: Billing and Customer Care by the Polokwane Local Municipality.	Report reviewed and set aside 1 June 2021.
2017/18 Reports		
24	Report No. 31 of 2017/8 issued 8 February 2018 – investigation into complaints of maladministration against the Free State Department of Agriculture in respect of non-adherence to treasury prescripts and lack of financial control in the administration of the Vrede Integrated Dairy Project.	Report reviewed and set aside 20 May 2019.
25	Report No. 11 of 2017/2018 issued 9 February 2018 titled 'Report – investigation into the allegations of a violation of the executive ethics code by the Minister of Co-operative Governance and Traditional affairs, Mr David Douglas van Rooyen, MP.	Report reviewed and set aside 29 March 2021.
26	Report No. 8 of 2017/2018 issued 19 June 2017 "Report – Investigation allegations of maladministration, corruption, misappropriation of public funds and failure by the South African Government to implement the CIEX Report and to recover public funds from ABSA Bank.	Report reviewed and all remedial action set aside 16 February 2018.
27	Report 05 of 2017/2018, issued 19 June 2017 investigation into alleged improper prejudice suffered by Bapo Ba Mogale Community as a result of maladministration by the former Bapo Ba Mogale Administration and the Department of Local Government and Traditional Affairs in the management Of Bapo Ba Mogale D-Account.	Portions of the Report relating to attorney Hugh Eiser and the chair of the Independent Regulatory Board for Auditors (IRBA), Abel Dlamini declared invalid and set aside 31 July 2019.
28	Report No. 31 of 2018/19 issued 19 December 2018 into allegations of breach of the Executive Ethics Code by the Premier of Western Cape Provincial Government, Honourable Helen Zille.	Opposition withdrawn, Report reviewed and set aside.
2016/17 Reports		
29	Report No. 19 of 2016/2017, issued 18 April 2017 report – Investigation of maladministration, corruption, nepotism, fruitless and wasteful expenditure by former municipal manager, Mr Mokgele Mojaki at Ngaka Modiri District Municipality.	Certain findings and part of the review of Report 19 of 2016/2017 reviewed and set aside July 2021.

30	Report No. 15 of 2016/2017 issued 3 February 2017 into the allegations of maladministration and contravention of the Members Ethics Act 82 of 1998 by MEC of Limpopo Department of Transport, Safety and Liaison, Hon Ms Mapula Mokaba-Phukwana.	Remedial action in paragraph 8.2.2 of Report declared unlawful and set aside on 17 May 2019.
31[4]	Report 18 of 2011/2012 and Special Report 15 of 2016/2017 relating to matters that arose in 1992, which exceeds the two years and no special circumstances were advanced to justify it. #Madonsela Report	Unopposed. Reviewed and set aside. 18 November 2021.
32	Report titled "*Postponed Delivery*" issued on 23 February 2016. #Madonsela Report	Review and set limited findings against Centurion Vision Development only. 17 November 2017.
33	Report titled "*Ubuntu*" issued by the PP on 1 October 2014. #Madonsela Report	Part of report & remedial action set aside and referred back to PP for reconsideration.
34	Report NO. 5 of 2014/15 – Investigation into allegations of maladministration by the National Empowerment Fund dated 30 September 2014. #Madonsela Report	Reviewed and set aside 22 September 2017.
35	Report 4 of 2014/15 – "*Regulating a report – Investigation into a complaint against the South African Bureau of Standards relating to the withdrawal of a permit for the manufacturing and sale of motor vehicle number plates"* issued on 1 October 2014. #Madonsela Report	Report reviewed and set aside by the Gauteng High Court, Pretoria 7 March 2019.

[4] Items 31 to 35 are reports issued by Prof Madonsela and in relation to which an order reviewing and setting aside were made during Adv Mkhwebane's term of office. The list does not include Prof Madonsela reports that were reviewed and dismissed prior to Adv Mkhwebane's term of office.

MKHWEBANE REPORTS CURRENTLY UNDER REVIEW (ONGOING)		
	REPORT	**STATUS**
	PENDING MATTERS: UNOPPOSED	
	2022/23 Reports	
1	Report No. 8 of 2022/23 issued on 29 April 2022 into the allegations of improper conduct and maladministration by the Special Pensions Appeals Board with regard to the termination of the special pension of Mr Mzunani Roseberry Sonto.	Ongoing. Unopposed. Part A of the application was granted (staying implementation of the remedial action). Part B (review), the Applicant's await to be allocated a hearing date.
	2021/22 Reports	
2	Report No. 108 of 2021/22 issued on 30 March 2022 – Investigation into allegations of procurement and recruitment irregularities as well as failure by the NHLS Board to take action on allegations of corruption and improper conduct.	Unopposed. Await date of set down.
3	Report No. 14 of 2020/21, issued 21 December 2020 – Investigation into allegations of maladministration by the Department of Human Settlements, Water and Sanitation in the awarding of various tenders.	Await court date on unopposed motion roll.
4	Report No. 03 of 2020/21 issue on 28 May 2000 – Investigation into allegations of undue delays by the Standing Committee for Refugee Affairs in finalizing the adjudication process of certification applications.	Consent letter confirming draft order for order of court sent to State Attorney – 19 October 2022. Await court date on unopposed motion roll.
5	Report No 6 of 2018 / 2019 issued 11 June 2018 – "Report – Investigation into allegations that the Deputy Speaker of the Limpopo Provincial Legislature, Honourable Lehlogonolo Masoga, incurred an exorbitant mobile telephone bill – official trip to the United States of America in 2014"	Unopposed. Explanatory affidavit submitted 21 October 2018. Notice to abide served 5 November 2018. Not finalised as court asked for heads and supplementary affidavit.
6	Report No. 17 of 2018/19 issued 31 October 2018 on allegations of improper conduct and victimisation towards alleged whistle-blower in the matter between Mr Thuso Bloem and Greater Taung Local Municipality.	Review. Notice to abide. Not yet set down on the unopposed motion roll.
7	Report No.4 of 2017/18 issued 30 May 2017 – Investigation into the allegations of maladministration by the Government Pensions Administration Agency, National Treasury and Nuclear Energy Corporation of South Africa in respect of the pension benefits of Mr JWA King.	Ongoing.

8	Report No 20 of 2016/17, issued 31 March 2017 – Investigation into allegations of procurement irregularities, maladministration, nepotism, corruption and victimisation of employees within Tshwane South College.	Matter not active. PPSA attorneys have written to applicant inquiring whether they intend continuing.
9	Report No. 04 of 2020/21 issued 30 September 2020 – Investigation into allegations of improper conduct and maladministration relating to Travel and Subsistence Allowances paid by Hantam Local Municipality.	Unopposed. Await date of set down on unopposed roll.
10	Report No. 133 of 2019/20 issued on 3 March 2020 – Investigation into allegations of improper conduct and maladministration by the Francis Baard District Municipality in the Northern Cape relating to the appointment of a development planner.	Unopposed.
11	Report No. 128 of 2019/20 issued 30 September 2020 – Investigation into allegations of improper conduct and maladministration relating to the appointment of staff by the Dawid Kruiper Local Municipality in 2016.	Unopposed. Await date of set down on unopposed roll.
12	Report No. 116 of 2019/20 issued 28 January 2020 – Investigation into allegations of maladministration by the Greater Letaba Local Municipality relating to tender Number GLM030/2011 for the rehabilitation of streets in Modjadjiskloof Phase 2.	Unopposed. PPSA notice to abide.
13	Report No. 20 of 2020/2021, issued 4 December 2020 Report – Investigation into allegations of maladministration by the office for Witness Protection of the National Prosecuting Authority, when the office for Witness Protection failed to adequately inform the complainant Ms NNC Zondi of her rights to protection in terms of section 10(1)(g) of the Witness Protection Act 112 of 1998.	Review, Notice to abide 11 May 2022.
14	Report No. 14 of 2020/2021. Report – Investigation into allegations of maladministration by the Department of Water and Sanitation in the awarding of various tenders University of Limpopo.	Review. Notice to abide filed. Awaiting set down.
15	Report No.131 of 2019/20 – Investigation into allegations of failure by the Department of Health to process an appeal lodged by Mr Benjamin Sentsho following the outcome of the disciplinary process for MEC for Health North West, issued 21 February 2020.	Review. Unopposed Matter set down for 13 September 2023.
16	Report 1 of 2019/2020 issued 17 April 2019 – Investigation into allegations of improper conduct and victimisation of the alleged while-blower, Mr Mpho Seero, by the Matlosana Local Municipality.	Unopposed. Review pending.
17	Report Number 37 of 2020/21 issued 31 March 2021 – Investigation into allegations of abuse of power by the former municipal manager of Vhembe District Municipality, Mr MR Rambado, in the appointments of Ms L Tshikororo and Ms N Ramabannda.	Review. Notice to abide served. Ongoing.
18	Report No.3 of 2020/21 issued on 30 September 2020 into allegations of undue delay by the standing committee for refugee affairs in finalising the adjudication process of certification applications.	Review. Unopposed. Awaiting set down date.
19	Report No. 14 of 2018/19, issued 31 October 2018 on allegations of maladministration regarding the improprieties in the sales and transfers of properties by the North West Housing Corporation and the City of Tshwane Metropolitan Municipality.	Review. Rule 53 record filed. Notice to abide filed initial set down for 26 August 2022.
20	Report No. 66 and 67 of 2021/2022 issued 22 October 2021 Breach of the Executive Ethics Code by Mr A Bredell and Winde.	Initially opposed and opposition withdrawn. Awaiting court order.

21	Report 91 of 2021/2022 issued 31 January 2022 – Allegations of irregular implementation of the Putco Bus contract by Gauteng Department of Roads & Transport.	Opposed and then opposition withdrawn.
22	Report 109 of 2019/2020 issued 13 January 2020 Report – Investigation into allegations of maladministration and procurement irregularities by the Kwazulu-Natal Department of Health.	Opposed and opposition withdrawn. Pending.
23	Public Protector' Report No.1 of 2017/18 issued on 12 April 2017 into allegations of maladministration and undue delay by the Eastern Cape Social Development.	Initially opposed and opposition withdrawn. Pending.
PENDING MATTERS – OPPOSED		
1	Report No. 34 of 2021/22 issued 30 June 2021 – Investigation into allegations of maladministration by the Ephraim Mogale Local Municipality relating to the appointment of Ms ML Masombuka as Chief Internal Auditor.	There are 2 review applications relating to this report by Ephraim Mogale Municipality and Ms Masombuka respectively. Ongoing.
2	Report No.13 of 2019/20, issued 13 May 2019 No. 11 Report – Investigation into allegations of failure by the Govan Mbeki Local Municipality to pay an outstanding amount for services rendered by Makhambavele Construction CC.	Review. Parties have exchanged all the pleadings and heads. Applicant has since applied for a date for the hearing.
3	Report No.46 of 2019/20 – Investigation into allegations of improper failure by the Ekurhuleni Metropolitan Municipality to issue tittle deeds to the residents of Farrarmere Gardens Ext 54, Benoni , issued 16 September 2019.	Review. Opposed and parties trying to resolve it.
4	Report No.40 of 2019/20 issued on 5 August 2019 – Investigation into allegations of improper failure by the UCT to provide safety measures against the drowning of Mr MB Madiba, improper failure by the SAPS to investigate and report the drowning incident and an undue delay by the National Prosecuting Authority to recommend the re-opening of an inquest into the matter.	Review. Parties have exchanged all the pleadings except the heads of argument.
5	Report No. 34 of 2019/20, issued 28 January 2020 into allegations of irregular appointment by Mopani District Municipality.	Review. Applicant is yet to file her replying affidavit and/or heads of argument
6	Report No. 108 of 2019/20, issued 28 January 2020 – investigation into allegations of improper conduct, maladministration, and improper application of the Protected Disclosure Act 23 of 2000 and victimisation of an employee by NTP Radioisotopes SOC Ltd.	Review. Waiting for hearing date. Pleadings closed.
7	Public Protector's Report No. 26 of 2019/20 issued 1 July 2019 – Investigation into allegations of undue delay and improper prejudice by the Department of Water and Sanitation relating to the application for water licence application by Mr Ian MacDonald.	Review. Pleadings closed.
8	Report No. 30 of 2018/19, issued 19 December 2018 Investigation of maladministration in the uMzumkhulu Municipality.	Review but settlement negotiations ongoing.

9	Report No.44 of 2018/19, issued 28 March 2019 – Investigation into allegations of maladministration by the Free State Department of Agriculture and Rural Development and Department of Agriculture, Forestry and Fisheries relating to its handling of an outbreak of Brucellosis on the farm of Ms Ronel Behrens.	Matter heard – await judgment.
10	Report No. 28 of 2018/19, issued 18 December 2018 relating to investigation of improper conduct regarding Mr Mogajane's appointment at National Treasury.	Review. Pleadings closed. Waiting for court date.
UNCERTAIN OUTCOMES		
1	Report No. 10 of 2017/18 issued 27 July 2017 – Investigation into allegations of failure by the South African National Defence Force to properly implement the recommendations of the Military Ombud in the case of LT Colonel B Mvithi.	Notice to abide. Applicant has not taken any further action.
2	Report No. 26 of 2018/19 issued 19 December 2018 – Investigation into allegations of maladministration by the Master of the South Gauteng High Court, involving the irregular appointment of the Provisional Liquidator Resulting in prejudice to Mr Sipho Dube.	Review. Part A not opposed. Remedial action overtaken by events but not yet withdrawn.
3	Report No. 49 of 2019/20 issued 12 December 2019 – Investigation into allegations of maladministration and improper conduct by the Independent Development Trust in the suspension and discharge from service of Ms. Lulu Pemba.	PPSA not opposing. Agreed that each party to pay their own costs in relation to Part A. Ms Lulu Pemba is opposing the application (second respondent)
4	Report No. 13 of 2021/2022 – Report – Investigation into allegations of maladministration and improper conduct in connection with the appointment of the Ministerial Advisers by the National Department of Transport.	Review, Rule 53 record filed, notice not to oppose as the remedial action moot.
5	PPs Report No 63 of 2019/20, issued 12 December 2019 – Relates to matter dating back to 2010.	Review. Rule 53 record filed 22 August 2020. LS will file answering affidavit by end of August 2021.

D. ADV MKHWEBANE IS ASKED TO EITHER <u>AGREE / DISAGREE</u> WITH STATEMENTS IN THIS SECTION WHERE SHE DISAGREES WITH A STATEMENT, THIS SHOULD BE EXPLAINED, REASONS PROVIDED AND SUPPORTED BY ANY EVIDENCE OR REFERENCE TO THE RECORD. WHERE SHE AGREES WITH A STATEMENT, SHE MAY ELABORATE IF SHE SO WISHES.

(i) <u>General</u>

13. A Public Protector requires a core element of competence; including a basic ability to read and understand statutes, especially those that bestow powers on the Public Protector.

14. The *audi alteram partem* principle ("*audi*"), namely the right to be heard, affords parties a hearing to respond to evidence and allegations against them before a decision is made. It is grounded in the common law, the Constitution and statutes[5] and Adv Mkhwebane in her capacity as Public Protector, a Chapter 9 institution, is bound to comply regardless of whether her exercise of public power constitutes administrative action or not.

15. When Adv Mkhwebane makes a finding that criminal charges against any person are to be investigated, preferred and/or considered then that person is an implicated party and entitled to a hearing.

16. Evidence obtained in contravention of the Regulation of Interception of Communication Act and Provision of Communication Related Information Act, 2002 ("**ROICA**") is unlawfully obtained evidence.

17. A Court sitting as an appeal court, in respect of a decision where the Court a quo had set aside a report in a review application, cannot take into account anything other than what was put before the Court a quo, in determining whether the appeal should be upheld or not.

18. In determining whether Adv Mkhwebane's findings were rational, it is necessary to ascertain what process she followed in coming to the findings and what evidence was available to her at the time.[6]

19. Judicial review occurs pursuant to legality and the grounds set out in the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"). Opinions rendered by counsel do not constitute administrative action subject to judicial review.

[5] CR17 CC judgment at paragraph 120.
[6] SARS Full Bench decision at paragraph 88.

20. Adv Mkhwebane, when she came into office, had to apply her own mind and draw her own independent conclusions in respect of any report not finalised and in respect of which she signs off on. She cannot be expected to rubberstamp investigations done under the aegis of a predecessor.

21. Under the Constitution and the Public Protector Act, save for the specific exceptions defined in the Public Protector Act, Adv Mkhwebane is obliged to investigate all complaints submitted to her office if in her jurisdiction.

22. When information is provided to the PPSA, steps should be taken to authenticate or verify information, whereafter a determination is to be made as to whether it constitutes evidence on which reliance can be placed.

23. The decision on the course and scope of an investigation lies with Adv Mkhwebane.

24. After conducting a preliminary investigation of the merits, Adv Mkhwebane, may for good reason, decline to investigate a matter further. Should Adv Mkhwebane find that there is merit in the complaint that requires further investigation, she is either obliged to investigate or refer the matter for further investigation to another appropriate authority. But where an investigation is undertaken, it must be done proactively and effectively.

25. Correspondence to politicians is not addressed directly by officials within the PPSA, but was signed off by Adv Mkhwebane before such letters were sent.

26. A provisional report in the PPSA was akin to a preliminary report prepared based on an initial investigation and used as a basis for preparing section 7(9) notices or signed off as a provisional report and provided to an implicated party on which to comment.

27. From December 2016 Adv Mkhwebane discontinued the release of provisional reports and only section 7(9) notices were issued.

28. No Public Protector could not investigate matters that took place prior to the Public Protector Act coming into force or the establishment of the Public Protector's Office in 1995.

29. The practice within the PPSA was for all investigation interviews to be recorded and transcribed. Electronic copies of the transcript were stored and hard copy versions filed in investigation files.

30. Critical components of any investigation by Adv Mkhwebane should include obtaining and scrutinising documentary evidence; conducting interviews with persons with the relevant knowledge; including implicated persons; analysing information that is obtained, where necessary compelled by way of subpoena; and obtaining information that is not readily accessible.

(ii) Mainly CR17

31. Notwithstanding Adv Mkhwebane referring to "*team*" and "*they*", no PPSA employee, other than Mr Mataboge, worked substantively on the section 7(9) notice and the CR17 Report and he reported directly to Adv Mkhwebane (this is apart from the person who assisted with the diagram/ figures).

32. The CR17 Report related to an Executive Management Ethics Act ("**EMEA**") complaint lodged by Mr Maimane and Mr Shivambu regarding whether President Ramaphosa had wilfully misled the National Assembly, and if so, whether this amounted to a contravention of the 2000 Executive Ethics Code ("**2000 Code**"). The report referred to "*an EMEA investigation*" and distilled 3 issues.

33. In relation to the R500 000:

    33.1. The R500 000 was paid from Mr Watson's personal account to Miotto Trading (Pty) Ltd to EFG2, a trust account of attorneys, tasked with collecting donations for the CR17 Campaign.[7]

    33.2. There was no evidence reflected in the CR17 Report that the R500 000 emanated from an illegal source.

    33.3. There was no evidence to indicate precisely what the R500 000 was spent on as it co-mingled with other funds in the EFG2 bank account.

    33.4. The R500 000 was not declared to Parliament by the President or any other Member.

34. The crime of money laundering is not found in the Prevention and Combatting of Corrupt Activities Act 121 of 1998 ("**PRECCA**"). Adv Mkhwebane conceded to the Committee that the reliance placed on PRECCA in the CR17 Report was a material error of law. This was not conceded in the HC or CC litigation.

35. The 2000 Executive Ethics Code was the lawfully applicable Code and any reliance on a 2007 Executive Ethics Code, which had never been promulgated, constituted a material error of law.

36. By disregarding the anonymous complaint of 28 January 2019, Adv Mkhwebane erred in the application of section 4(3) of EMEA.

37. Adv Mkhwebane does not have the power to intercept private communications including emails, and if such email communication had been provided without the consent of the sender, and the recipient, then such were unlawfully intercepted and illegally obtained under ROICA.

38. Although R3 million was transferred from the personal account of Gavin Watson, CEO of Africa Global Operations (formerly Bosasa) into the account of Miotto Trading, only R500 000 thereof

[7] See Transcript 16 March 2023; p. 7992.

was paid to EFG2,[8] which transfer was effected by Mr Venter on Mr Watson's instructions. The balance of R2.5 million is irrelevant to the CR17 investigation as the evidence was that it was unrelated and earmarked as a loan to a third party which did not materialise. The R2.5 million was returned to Mr Watson.

39. Mr Watson had previously transacted through Miotto Trading.

40. There was only one intermediary account of Miotto Trading between Mr Watson and EFG2 and not "*several intermediaries*". In this regard Mr Maimane was incorrect.

41. Mr Maimane did not draw a correlation between the EFG2 account and the CR17 Campaign.

42. Mr Maimane, on the basis of the affidavit of Mr Venter, erroneously represented to the National Assembly and the President, in the question which he posed to the President that:

    42.1. the R500 000 was for Andile Ramaphosa; and

    42.2. EFG2 is a trust or foundation of Andile Ramaphosa.

43. There were two issues Mr Shivambu raised:

    43.1. First, "*Whether the statement made by President Ramaphosa in the National Assembly on 6 November 2018 that he saw a contract between his son's company and African Global Operations is true, and whether such existed*";

    43.2. Second, whether the President saw the contracts.

44. Adv Mkhwebane confirmed the existence of the contracts in the CR17 Report.[9]

45. The President testified that he had seen the contracts and this was uncontradicted.

46. Nowhere in this complaint does Mr Shivambu refer to the CR17 Campaign.

47. The complaint of money laundering was not directed at the President but at African Global Operations ("**AGO**") (BOSASA).

48. Andile Ramaphosa was not subpoenaed to appear before Adv Mkhwebane but only to provide an affidavit. His affidavit dated 21 February 2019 is recorded in the report; and reflected that he received R684 000 from AGO.

[8] See Transcript 16 March 2023; p. 7992.
[9] Paragraph 4.3.1.19 and 4.3.1.20 of the CR17 Report (p. 106).

49. The court papers do not allege that Adv Mkhwebane made a bona fide error in using the name of the wrong legislation dealing with money laundering and she persisted in raising a suspicion of money laundering – even after the correct law was pointed out.

50. The Prevention of Organised Crime Act, No 121 of 1998 ("**the POCA**") is not listed in the CR17 Report as legislation considered, or referred to. Thus any evidence led before this Committee that there was a reference to POCA is incorrect.[10]

51. The reference to PRECCA is in an opinion that had been prepared by Mr Ngobeni which had been provided to PPSA, under the letterhead of Seanego Inc. and was inserted into the CR17 Report at the behest of Adv Mkhwebane. For purposes of providing this advice Mr Ngobeni was appointed with Adv Mkhwebane's knowledge and consulted with her[11] to render advice, despite not being a qualified legal practitioner in South Africa.

(iii) Mainly Gordhan / SARS Unit

52. In the SARS Unit Report, Adv Mkhwebane recommended that criminal charges be investigated against Minister Gordhan, Mr Pillay, Mr Van Loggerenberg and Mr Richer but did not afford them a hearing or *audi* in relation thereto.

53. The HC ruled on the interpretation of section 209 of the Constitution and the legislation in relation to the National Strategic Intelligence Act 39 of 1994 ("**the NSI Act**").

54. The Full Bench concluded that Adv Mkhwebane's interpretation of section 209 of the Constitution is wrong in law and does not constitute a legal basis for her conclusion. This finding of law is binding. Any findings of improper conduct in contravention of section 209 would be wrong.

55. The Sikhakhane Opinion concluded that the SARS Unit was unlawful because it was in breach of section 3 of the NSI Act, not section 209 of the Constitution. The Sikhakhane Opinion used the wrong version of section 3 of the NSI Act by considering the amended section 3 of the NSI

[10] Okay, let me just say there's a reference to one Act (I don't want to do the legalese) – PRECCA is Prevention and Combating of Corrupt Activities Act (a well-known one that featured in Phala Phala). And then POCA is the Prevention of Organized Crime Act.
Public Protector Advocate Busisiwe Mkhwebane – Yes.
Advocate Mpofu – Yes different Acts of Parliament. And in the report, when reference was sought to be made to PRECCA, **there was a reference to POCA**, yes. Which is … I don't know where that goes. **But both of them relate to criminal offences. I don't want to get into that substance over form issue.**

[11] On 29 Mar 2019, at 16:20, Muntu Sithole <SitholeM@pprotect.org> wrote:
Good afternoon PP,
The attorney has managed to secure the services of Adv Ngobeni to provide an opinion in the above matter.
Adv Ngobeni is available to consult on either Monday or Tuesday at our offices.
We will request Mr Kabinde to check PP's availability on either of the two days.
Kind regards,
Muntu Sithole

Act instead of the section 3 that prevailed prior to the 2013 amendment when the SARS Unit was established.

56. Neither Adv Mkhwebane nor the investigators, Mr Mataboge or Ms Mvuyana, interviewed Judge Kroon.

57. Adv Mkhwebane did not afford Mr Van Loggerenberg an opportunity to participate in her investigation, nor did she or her investigators interview or engage with any member of the SARS Unit.[12]

58. No subpoenas were issued to seek information and or records from any of the members of the SARS Unit.

59. The mandate given to the advocates that provided the Sikhakhane Opinion was not to investigate allegations of a "*rogue unit*" or any SARS Unit, but on or about 12 October 2014 they unilaterally extended their mandate to investigate the SARS Unit, based on articles that appeared in the Sunday Times and reached conclusions in relation thereto, without giving a hearing to Messrs Johann van Loggerenberg, Andries van Rensburg or Pieter Richer in relation to the evidence on which these conclusions were premised.

60. According to the Sikhakhane Opinion (para 87), at the time they extended its mandate, they had already interviewed SARS officials, including Mr Van Loggerenberg, and those persons were not interviewed in relation to the new allegations.

61. The Pillay supplementary founding affidavit before the High Court which included the affidavit deposed to by Johann van Loggerenberg was undisputed and not challenged by Adv Mkhwebane. In Mr Van Loggerenberg's affidavit[13] it is stated:

> *"During September 2014 Johann van Loggerenberg placed the Sikhakhane panel in possession of direct allegations and evidence in support of threats to SARS, demonstrating various attacks on SARS as an institution and undermining of its officials. This was never mentioned in the report. Johann van Loggerenberg was never afforded a hearing by Sikhakhane panel or right of reply despite a request to do so."*

62. The drafting of the KPMG Report was a documentary or desktop exercise and involved no interview of any persons, collection of specific evidence or interaction with any person implicated in the KPMG Report.

63. Mr Van Loggerenberg testified that:

    63.1. SARS had publicly rejected both the KPMG and Sikhakhane Opinions.

[12] Transcript p. 441.
[13] Van Loggerenberg affidavit SARS Unit record **"VIP10"** Volume 18, p. 1179 at p. 1197 paragraph 20.5.

63.2. The parts withdrawn by KPMG included findings, conclusions and legal opinions relating to the SARS Unit having been unlawfully established and that which related to Mr Van Loggerenberg's involvement in the SARS Unit and the alleged unlawfulness thereof.[14]

64. The Kanyane Report into the allegations made by Belinda Walters against Mr Van Loggerenberg on 28 May 2014 concluded that the allegations were unsubstantiated.[15]

65. Since at least January 2019 Adv Mkhwebane was in possession of a *Noseweek* article which detailed that Mr Van Loggerenberg had extensive information and documentation in his possession relating to the SARS Unit.

66. Mr Mataboge's evidence was that the Nugent Report was not considered during the investigation in the sense that they had not gone through it and reading and analysing it in the context.[16]

67. The Sikhakhane Opinion had only "*prima facie evidence of a possibility*" and no one that they interviewed was able to indicate to them that "*either the old NRG or the new HRIU*" had equipment to carry out electronic surveillance and/or interception of communication. They in fact denied such.

68. Adv Mkhwebane's investigation of the SARS Unit related to events that occurred approximately 10 years ago[17] and therefore special circumstances under section 6(9) of the Public Protector Act needed to be shown for such investigation to take place.

69. Paragraph 3.5 of the SARS Unit Report,[18] which is in identical terms as is stated in the section 7(9) notice issued to Minister Gordhan, sets out the factors which could constitute special circumstances rather than the factors actually considered and deemed special circumstances justifying the investigation after 10 years.

70. The issues investigated in the SARS Unit Report included complaints that did not relate to EMEA and did not have to be investigated within 30 days.

71. The original complaint by Mr Shivambu did not refer to the EMEA issue.

72. Mr Van Loggerenberg was recruited in 1998, almost a decade before becoming a manager of the SARS Unit, and years prior to Minister Gordhan becoming the Commissioner of SARS.

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[14] Transcript p. 432 – 434.
[15] Transcript pp. 436 – 438.
[16] ***Advocate Bawa – Did you consider it at all Mr Mataboge?***
Mr Mataboge – No, we didn't consider it. We didn't consider it. We didn't consider it in the sense of us going through it and relying and reading and analysing it in that context. That is why it would not have been part of… because we put the document that we considered and even cited in our reports in the Rule 53 document."
[17] The subject matter of the complaints with regard to the SARS Unit occurred in 2009 and 2010 – some dated even as far back as 2007.
[18] SARS Unit Report p. 238.

73. The issue of the recruitment of staff had previously been investigated by the PPSA.[19] In 2017 a closing report was finalised and signed off by a chief investigator.

74. Mr Pillay testified that he did not have access to the policy or other relevant documentation that had existed many years ago. He indicated that he had provided these documents and processes to the PPSA in his reply on 26 August 2014 on behalf of SARS.

75. Adv Mkhwebane had regard to the documents provided in 2014 and indicated to the investigators what thereof to consider.

76. Mr Van Loggerenberg dealt extensively with the issues relating to the allegations of the unlawful procurement of equipment, the 81 investigations conducted by the SARS Unit and the manner in which such investigations were conducted in his affidavit before the SARS Unit HC matter. At the time Adv Mkhwebane did not dispute the contents thereof.

77. The affidavit deposed to by Mr Pillay in the SARS Unit HC in relation to the equipment was admitted. In paragraph 5,[20] Mr Pillay stated the following:

> *"In my founding affidavit. I address the findings of the Public Protector in respect of the recruitment of staff for the Unit and the procurement of equipment for the Unit. I maintain that whilst I was not Involved In these processes, I understood that they were undertaken in full compliance with applicable SARS Policies. No adverse findings are made against me by the Public Protector. In this regard and neither are these findings borne out by the contents of the record."*

78. This was admitted by Adv Mkhwebane in her answering affidavit:[21]

> ***"Ad paragraphs 3 to 8***
> *The allegations in these paragraphs are admitted."*

79. The obligation to investigate the factual correctness of her findings lies with the Public Protector and cannot be shifted to the persons being investigated.

80. There was no requirement in any law or SARS policy or prescript that only the holder of a degree could be appointed as Deputy Commissioner for SARS at the time that Mr Pillay was so appointed.

81. Mr Pillay had personally informed Adv Mkhwebane on 25 March 2019 that he passed matric in 1970 at Merebank Indian High School.[22]

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[19] This report is in Bundle F, item 127.1. At paragraph 5.4.23 at p. 296 of the SARS Unit Report.
[20] SARS Unit at p. 2134.
[21] SARS Unit paragraph 147, p. 2808.
[22] **"VIP11"** attached to the SARS Unit record Pillay Supplementary Founding Affidavit Vol 18 p. 1171.

82. Adv Mkhwebane did not dispute the allegations made by Mr Pillay[23] that she aware that he had a matric certificate before issuing the SARS report.

83. The charge sheet pertaining to criminal charges brought against Mr Pillay was provided to Adv Mkhwebane and reflected the address of Mr Van Loggerenberg.[24]

84. Adv Mkhwebane was aware that Webber Wentzel Attorneys represented Mr Van Loggerenberg as per their letter dated 14 June 2019 addressed to her.

85. Mr Van Loggerenberg had detailed first-hand knowledge of the SARS unit as its manager at all times from April 2008 until its closure in October 2014, except for a period of 9 months in 2012.

86. The explanation by Adv Mkhwebane in the Executive Summary that she *"tried to subpoena information and documentation from Mr Van Loggerenberg"* is an acknowledgement that his knowledge of the operations of the unit was material to the investigation and **Mail & Guardian** judgment required that the leads be followed.

87. Mr Van Loggerenberg approached the PPSA in 2016 as a whistle blower. He was interviewed by PPSA staff and provided documentation disputing that the SARS unit was a "*rogue unit*"; showing a targeted campaign to discredit Mr Van Loggerenberg, Mr Pillay and Minister Gordhan by way of a fake "*dossier*" titled "*Project Snowman*". None of the documentation provided was included in the Rule 53 record, nor considered by Adv Mkhwebane during her investigation into the SARS Unit.

88. There is no unequivocal statement in the SARS Unit Report that Adv Mkhwebane had the IGI Report. It is not specifically listed as a key source of information. Adv Mkhwebane also does not state in unequivocal terms in the SARS Report that she had the IGI Report.

89. Adv Mkhwebane did not provide either the IGI or the SSA Minister with a copy of the classified IGI Report in her possession when they met; nor did she show it to them at any stage that is evident from either the recording of the meeting of 31 January 2019, the evidence of Mr Mataboge, or the correspondence that ensued.[25]

90. The Evidence Leaders were provided with notes on a meeting with Mr Lebelo that occurred on 11 December 2018.[26] Neither the notes nor the recording of the interview with Mr Lebelo form part of the Rule 53 record.

[23] Paragraph 18 SARS Unit record Pillay Supplementary Founding Affidavit Vol 18 p. 1171.
[24] SARS Unit record PG10 Vol 3 p 216 at p. 260.
[25] SARS Unit Rule 53 record p. 4340.
[26] Bundle F, item 189, 189.45, p. 4984.

(iv) Mainly Vrede Dairy Project

91. The investigation spanned almost 4½ years; of which 14 months was during Adv Mkhwebane's term of office.

92. At the time Adv Mkhwebane took office in October 2016, the Vrede investigation was still ongoing.

93. A new investigation was undertaken at the behest of the National Assembly's Justice Portfolio Committee expressed dissatisfaction that certain issues had not been addressed in the Vrede Report. Pursuant hereto, another investigation commenced, and the Vrede 2 Report was released approximately 18 months later, on 21 December 2020.

94. In 2013, the National Treasury commissioned ENS Forensics (Pty) Ltd to investigate allegations of procurement irregularities in respect of the Vrede Dairy Project ("**NT Report**"). This was widely reported in the media.

95. The National Treasury relied on a report compiled by a senior economist from Agri SA which was one of 27 annexures to the NT Report ("**Economist Report**"). Adv Mkhwebane did not have these annexures to the NT Report at the time when the Vrede Report was compiled and did not issue a subpoena to obtain same prior to finalising the Vrede Report.

96. The Economist Report recommended that the Vrede Project should not be continued since government would not receive value for money as the costs associated with the Vrede Project were neither reasonable, nor market related.

97. No cost analysis had been undertaken as to what it would cost to investigate the entire Vrede complaint.

98. The Vrede Report, unlike the SARS Unit Report, does not record that allegations or issues raised by the complainant will stand over for further investigation, nor that any complaints would be investigated subsequently or in the next financial year due to any current financial constraints.

99. No interviews were conducted with Mr Magashule or Mr Zwane as part of the investigation. Adv Mkhwebane's meeting with Mr Magashule, which she attended alone, was, on her own version, not part of the Vrede investigation.

100. There were three complaints lodged by the complainant, Dr Roy Jankielsohn ("**Dr Jankielsohn**") on 12 September 2013, 28 March 2014 and 10 May 2016, respectively, relating to the Vrede Project.

101. Under section 182(1) of the Constitution, read with section 6 of the Public Protector Act, Adv Mkhwebane was obliged to investigate all the complaints lodged by Dr Jankielsohn that fell under her jurisdiction.

102. Six issues were raised in the Vrede Report as having not been investigated. These were: (1) the causes of cattle deaths; (2) new issues arising from the third complaint; (3) the value for money obtained by government; (4) the Guptaleaks; (5) money spent by Estina; and (6) issues relating to beneficiaries.

103. The following issues were not investigated under the Vrede Report: (1) Estina's alleged misrepresentation about its partnership with PARAS and whether it was a front company managed by the Gupta family; (2) whether the benefits to Estina were "*at the cost of the State, taxpayers and beneficiaries*"; (3) Estina's dual role as a partner and an implementing agent; (4) Estina being allowed to abandon its responsibilities in respect of the Vrede Project; (5) the impact of the Vrede Dairy Project on the farm empowerment partner (Mohoma Mobung) and the beneficiaries who were supposed to benefit the stakeholders; (6) who the true beneficiaries of the Vrede Dairy Project were with a claim to 51% of the Project; (7) the role played by Messrs Zwane, Magashule and Thabethe and Ms Dlamini in pushing through the Project; (8) whether Messrs Zwane and Magashule potentially had corrupt relationships with the Gupta family, receiving kickbacks directly or through their family following the Vrede Dairy Project; (9) whether officials who had served the interests of the Gupta family through the Vrede Dairy Project were being politically protected; and (10) whether the processing plant it charged the Department for was dysfunctional.

104. Adv Mkhwebane did not make findings on the following issues arising from the third complaint, i.e.: (1) Questions regarding Estina and the diversion of benefits from the intended local beneficiaries; (2) Value for money received in respect of public expenditure on the Vrede Project; (3) Evidence relating to the Guptaleaks; (4) Consideration of the funds that flowed to Estina and how they applied; (5) Benefits due and diverted from local farmers and residents who were supposed to participate in and eventually take ownership of the Vrede Project.

105. An issue not listed or considered in the Vrede Report was the alleged non-compliance with environmental prescripts despite a complaint in respect thereof.

106. As reported in the Vrede Report, it was Adv Mkhwebane who decided that the Guptaleaks emails did not fall within the scope of the investigation.

107. The Minister of Water Affairs' intervention in respect of the cattle deaths did not address the complainant's concerns about wasted public funds.

108. The South African Police Services ("**SAPS**") and the PPSA are fundamentally different institutions with different objectives and constitutional and legal frameworks. The mandate of the Hawks, which would include combatting and investigating crimes, is different from Adv Mkhwebane's mandate, which relates, inter alia, to impropriety or prejudice in State affairs, and ensuring administrative justice for members of the public by using the power to order binding remedial action on organs of state to address maladministration.

109. In the Vrede investigation Adv Mkhwebane did not exercise the mechanism in section 7(3) of the Public Protector Act, in the event that it is so that financial constraints hampered her from conducting investigations.

110. Initially Adv Mkhwebane did not oppose the Vrede HC application instituted on 20 February 2018, filing an affidavit on 23 March 2018, giving reasons in terms of Rule 53(1)(b) and abided with the decision of the Court, but reserving her right to file affidavits or submissions, should it be necessary.

111. With reference to the Gupta emails, there was no substantive investigation in respect thereof.

112. From the time Adv Mkhwebane took over in relation to the Vrede investigation only the following occurred:

112.1. Four additional documents were sourced, i.e. a list of employees at the Vrede Dairy Project; the milking records for the dairy farm from 1 April 2016 to 31 March 2017; the financial statements for the Vrede Dairy Farm from September 2014 to March 2017; and a company report from CIPC on Vargafield (Pty) Ltd.

112.2. Three interviews were conducted – with FS Department of Agriculture; the manager of Studbrook SA Holstein Association and with the CFO of the FS Department Development Corporation.

112.3. One in loco inspection of the Vrede Dairy Farm with FSDC and the FS Department of Agriculture took place.

112.4. One website, which is the CIPC website, was consulted, to confirm the details of Mohoma Mobung.

(v) <u>Mainly ABSA / CIEX</u>

113. The complaint from the Institute for Accountability in Southern Africa ("IASA") was not about the South African Reserve Bank's (**"SARB"**) powers and mandate in general and did not arise from the manner in which SARB's powers had been crafted, but from the non-implementation of the report prepared by CIEX in particular circumstances.

114. The investigation that resulted in the Lifeboat Report was not a systemic investigation to address a general problem.

115. The issue of changing the SARB's mandate was irrelevant to the investigation emanating from the complaint lodged by the complainant in the investigation.

116. Judges Heath and Davis had considered the facts regarding the lifeboat and advised against instituting recovery proceedings against ABSA or other parties.

117. Mr Moodley from the State Security Agency ('**SSA**') provided the PPSA with a one-page document setting out the text of an amendment of the Constitution regarding the SARB's mandate. Save for the change of the word "*Cabinet*" to "*Parliament*", this text was included in the Lifeboat Report, as remedial action, almost verbatim.

118. Adv Tshiwalule testified that a letter from SARB dated 29 November 2016[27] was received. It was forwarded to Adv Mkhwebane. It referenced an undertaking from Adv Madonsela to provide the final report with five days' prior notice to SARB. Adv Mkhwebane instructed Adv Tshiwalule to respond to the SARB letter of 25 November 2016.[28] In the response that was sent, Adv Mkhwebane neither disputed that there was such an undertaking, nor sought to repudiate from it.

119. The Lifeboat Report was not provided to the SARB before being released.

120. The SIU, SARB, National Treasury, Parliament, and Absa were not notified or afforded an opportunity to comment on changes made to the report after the Provisional Report was published in December 2016, or the amended remedial action regarding the SIU and the constitutional amendment.

121. The Rule 53 record in the review of the Lifeboat Report did not include:

    121.1. transcripts of interviews with the SSA, the Presidency or Mr Goodson[29];
    121.2. the draft research paper prepared by Mr van der Merwe on central banks;
    121.3. draft correspondence by Mr van der Merwe for submission to the Joint Constitutional Review Committee (**'JCR'**) (dated 29 May 2017); and
    121.4. an email from Adv Mkhwebane to Mr Kekana where she refers to asking the SSA to provide input and an economist in relation to a proposed amendment to the Constitution.

[27] Bundle D, item 15, Annexure **"LT6"**, p. 3288.
[28] Bundle D, item 15, Annexure **"LT9A"**, p. 3308.
[29] CIEX SFA, Bundle A, p. 1043, para 7.

122. The draft research paper prepared by Mr van der Merwe on central banks was not considered in the investigation or preparation of the Lifeboat Report.

123. Mr van der Merwe is not an economist nor did he purport to be one.

124. In the urgent application launched by the SARB, Adv Mkhwebane withdrew her opposition, and consented to the remedial action in respect of the constitutional amendment being set aside, on the basis that it was unlawful and impermissibly instructed Parliament regarding the amendment.[30]

E. DIRECT QUESTIONS

(i) Mainly CR17

125. Are the following averments contradictory, if not why not?:

125.1. In paragraph 19[31] of Adv Mkhwebane's founding affidavit in the CC rescission application, she testified that section 3 [of EMEA] does not authorise the Public Protector to investigate a violation of the Act [EMEA] itself but limits her authority to investigating a breach of the code.

125.2. In oral evidence before the s 194 Committee, Adv Mkhwebane stated that her powers under EMEA were not limited to investigating a breach of the Code, but also whether section 96 of the Constitution was breached, given that the executive's oath of office requires its members to abide by the Constitution. As such she was empowered to investigate any improper conduct in State affairs.[32]

126. In the CR17 HC founding papers, President Ramaphosa raised several grounds on which the CR17 Report should be reviewed and set aside, including that Adv Mkhwebane's reliance on PRECCA and the 2007 Executive Ethics Code constituted material errors of law.

126.1. Is it correct that all the grounds were vigorously opposed in Court only for some of them now to be conceded before this Committee? [33]

126.2. Is it correct that had Adv Mkhwebane made these concessions at the time when the application was brought in the High Court, it would have avoided millions of Rand being spent on legal costs?

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[30] Bundle A, pp. 614 – 616, paras 32 – 36.

[31] (Bundle E, item 4, paragraph 19, Pdf p. 7). "*Section 3 empowers the Public Protector to investigate **any** alleged breach of the code. The Public Protector's power to investigate is triggered by the lodgement of a complaint. This suggests that **the scope of an investigation is determined by the alleged breach of the code as contained in the complaint**. It is important to note that **section 3 does not authorise the Public Protector to investigate a violation of the Act itself but limits her authority to investigating a breach of the code.***"

[32] Transcript 28 March 2023; p. 8153, 8164, 8165, 8166.

[33] CR17 PP AA 840, paragraph 179. **179……I have already dealt with the President's broad challenges against my Report. I deny each and every ground upon which he has brought this application. I have demonstrated above that my findings and remedial action are all rational and justified. There is no factual or legal basis for any of the claims made by the President in both his affidavits. They are simply a disappointing and impermissible attempt at avoiding taking responsibility by a Head of State. (p. 840, para 179)**

127. Adv Mkhwebane brought an application for leave to appeal and a subsequent rescission application, after the Full Bench had reviewed and set aside the CR17 Report. Should a proper consideration of the CR17 HC judgment not have made it clear that at the very least, based on the material errors of law (now conceded) – apart from the other grounds on which the Full Bench reviewed and set aside the CR17 Report – there were no prospects of an appeal court reversing the decision of the court below, and even less likely was relief in the rescission application?

    127.1. In light of the aforementioned, were the costs incurred for the applications for leave to appeal and not avoidable and thus fruitless and wasteful expenditure?

128. Adv Mkhwebane classified some of the defences raised by the President as "*technical defences*".

    128.1. What are these?

    128.2. On what basis in law are such defences objectionable or unlawful?

129. Clause 2(3)(a) of the 2000 Executive Ethics Code was quoted in para [22] of the Potterill Judgment. Alerted thereto did Adv Mkhwebane:

    129.1. check the gazettes or instruct any employee (if so who), to confirm whether there was indeed a 2007 Code promulgated?; and

    129.2. If any such instruction was given, what was the outcome thereof?

130. Why did the section 7(9) notice and the CR17 report refer to both the 2000 and 2007 Codes as if both applied?

131. Did Mr Ngobeni draft, or have any involvement in drafting or settling, the recission application to the CR17 CC judgment?

132. If not, indicate precisely who did so and how such person was paid for the rendering of this service?

133. With reference to the three issues identified at p. 11 of the CR17 Report, indicate in relation to each one whether it was raised by and is attributed to the complaints of (i) Mr Maimane; (ii) Mr Shivambu; (iii) Both; (iv) Neither.[34]

[34] P. 11 of CR17 Report: (viii) Based on the analysis of the two (2) complaints lodged by Messrs Maimane and Shivambu (the Complainants) and having taken into account the fact that President Ramaphosa was then the Deputy President and thus a member of the National Assembly, the following issues have been identified to inform the focus of my investigation…..

134. What precisely was contained in either or both of the complaints that informed the decision to "*investigate and report on the CR17 Campaign of the then Deputy President Cyril Ramaphosa for the African National Congress leadership in December 2017*"?[35]

135. Was the documentary proof that Mr Maimane relied on for purposes of his question to the President the sworn statement of Petrus Venter, the erstwhile tax consultant to AGO, and the person who effected the transaction on the instruction of Mr Gavin Watson?

136. Did Adv Mkhwebane investigate whether Mr Venter was a disgruntled employee?[36]

    136.1. If not, why not?

    136.2. If so, what was the evidence in respect of the circumstances leading to him leaving the employ of AGO provided to Adv Mkhwebane?

137. Was it not Mr Venter's evidence, on the one hand, that parts of his affidavit were not true as certain things had been changed and, on the other, that he had signed the affidavit under duress but that everything pertaining to the transfer of R500 000.00 was true?

    137.1. What steps did Adv Mkhwebane take, following the principles set out in the **Mail & Guardian** case to investigate the veracity of Mr Venter's sworn statement?

    137.2. Who was it that allegedly exercised duress on Mr Venter to sign this affidavit and what steps, if any, were taken by Adv Mkhwebane to ascertain the veracity of that allegation?

    137.3. Why did the CR17 Report not indicate that, even though Mr Venter had stated under oath that everything in his affidavit insofar as it pertained to the transfer of R500 000.00 was true, this was not the case when it was confirmed that the transfer was not to Andile Ramaphosa as the EFG2 bank account was not his?

138. There was a dispute of fact in the evidence of Mr Watson versus Mr Venter relating to whether the latter's instructions were that the R500 000 was for Andile Ramaphosa. Mr Watson disputed this – as reproduced on p. 32 of the CR17 Report – stating that:

    "I did not tell Venter that the donation was to the Andile Ramaphosa Foundation."

    138.1. Did Adv Mkhwebane resolve this dispute?

    138.2. And if it was resolved, precisely how, and where is it reflected in the CR17 Report?

139. Mr Watson said he was expressly told that the President would not know that he had donated.

[35] Transcript 16 March 2023; p. 7968.
[36] The meaning to be attributed to "*disgruntled employee*" being as set out by Adv Mkhwebane during the cross-examination of several witnesses.

139.1. Does Adv Mkhwebane have any evidence that the donation was in exchange for any patronage, or that the President did know, about it, if so, what?

139.2. Mr Maimane stated that the donor had received billions of Rands in State tenders. Is it correct that this was not part of Adv Mkhwebane's investigation and there is no evidence either confirming or refuting the allegations linking the donor to State Capture in the CR17 Report?

139.3. During investigations, was Adv Mkhwebane provided with evidence linking the President to State tenders awarded to BOSASA in exchange for R500 000?

139.4. Is it correct that the two main issues of the complaint from Mr Maimane were whether or not the President may have lied to the National Assembly in his reply to the question on 6 November 2018, and the credentials or lack thereof of the donor company itself?

140. In terms of his complaint, was Mr Maimane's suspicion of money laundering premised on Miotto Trading being used as an intermediary and based on an erroneous understanding of the crime of money laundering?

141. If not, what is the illegality relied on by Mr Maimane giving rise to such suspicion?

142. Mr Watson's evidence to Adv Mkhwebane was that:

142.1. the transfer of funds to EFG2 via Miotto Trading was effected on the basis of advice from Mr Venter, his tax consultant, that this was the best way to do so;[37]

142.2. this was not the first transaction effected via Miotto Trading; and

142.3. he had not known at the time that Mr Venter's sister was a director of Miotto Trading.[38]

143. It is not so that before Adv Mkhwebane, this evidence of Mr Watson was not disputed? If this was not the case, indicate which evidence refuted this and where in the CR17 Report such evidence can be found?

144. Adv Mkhwebane testified in the HC that the funds were housed in various accounts while it was in transition to other accounts. What is meant by "*housed*" or *transitioned*?[39]

145. Adv Mkhwebane testified in the HC that she was concerned that these sums of money claimed to be ***"donations"*** created a situation of the risk of some sort of state capture by those donating such large sums of the money.[40]

145.1. What is the meaning of "*state capture*" which Adv Mkhwebane is concerned about?

145.2. What precise evidence in Adv Mkhwebane's possession gave rise to such concern?

145.3. Did Adv Mkhwebane interview any donors, given that "*some risk of state capture*" was being attributed to such donors?

145.4. Would that include President Ramaphosa, given that he was also a donor?

[37] Transcript 939, lines 25 – 30; 934 – 935, lines 34 – 35.
[38] lines 16 – 32
[39] CR17 HC paragraph 121, 818.
[40] CR17 HC paragraph 124, 819.

145.5. How does Adv Mkhwebane implicate the President and his family (not limiting it to the son to whom no section 7(9) notice is issued) in a crime using the wrong law for purposes of determining whether there a crime was committed?

146. Adv Mkhwebane's investigation confirmed that the complaint from Mr Shivambu was unsubstantiated given that, with reference to the issues raised in this complaint, President Ramaphosa had not deliberately or otherwise misled Parliament in violation of the Executive Ethics Code.

146.1. Why is there is no finding in the CR17 Report that the Shivambu complaint was unsubstantiated as confirmed in paragraph [73] of the CR17 HC judgment?

146.2. Is it not so that the President, in the CR17 HC papers, complains that Adv Mkhwebane should have concluded that Mr Shivambu's complaint was unsubstantiated,[41] and that Adv Mkhwebane denies[42] that this is so, and complains that "*the President fails to address the facts of the matter and instead looks for all sorts or technical issues to fault my investigation. This is simply disappointing and an impermissible attempt at avoiding taking responsibility by a Head of State*".[43]

146.3. Was there a finding that it was not substantiated?

146.4. If not, why the denial?

147. Where in the complaints lodged is it raised that there is an alleged conflict between official responsibilities and private interests in relation to which there is a risk?

147.1. Precisely which official responsibilities as alleged to be implicated?

147.2. Where precisely in the CR17 Report is the evidence giving rise to this risk?

148. What evidence in the CR17 Report indicated that the President did not find out for the first time:

148.1. that the R500 000 had been donated to the CR17 Campaign by Mr Watson;

148.2. that it was paid into an account identified as EFG2; and

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[41] CR17 paragraph 106, page 44.

"106 ***I have noted that the Public Protector does not make a finding in relation to Mr Shivambu's first complaint. namely, whether it is true that a contract exists between AGO and Andile Ramaphosa and whether the statement made by the President that he saw the contract is true.*** *It is clear that there is no basis for the complaint of Mr Shivambu. However, the Public Protector does not deal with it. Instead, she merely states that Mr Shivambu****'s complaint is similar to that of Mr Maimane and that. After receiving Mr Shivambu's complaint and another anonymous complaint. [V 3 – P264] she decided to consolidate "the two (2) complaints into one investigation for administrative purposes."***

[42] At CR17 HC paragraph 195.5, 195,6 and 195,7, p. 852.

[43] CR17 HC paragraph 195.5 I further deny that I did not deal with the complaint of whether a contract existed. It was not in dispute that the President's son Mr Andile Ramaphosa had business contracts with African Global Operations for which he was paid large sums of money for services he rendered to the company.

195.6. Once again. the President fails to address the facts of the matter and instead looks for all sorts or technical issues to fault my investigation. This is simply disappointing and an impermissible attempt at avoiding taking responsibility by a Head of State.

195.7. Save as aforesaid. the allegations contained herein are denied. In CR17 **paragraph 254, 612 Adv Mkhwebane stated:**

"The President had stated that his sons company had a contract with BOSASA for the provision of consultancy services and that the President went on to explicitly state that, he saw the contract that his son signed with BOSASA and that the contract dealt with issues of interpreting anti-corruption and there was nothing untoward."

148.3. that it was a CR17 Campaign account, after his question session in Parliament on 6 November 2018, when Ms Nichol told him thereof.

149. Precisely what evidence in the CR17 Report indicates that the President knew of the **existence** of **the donation from Mr Watson at the time when he answered the question in the National Assembly**?

150. Why did Adv Mkhwebane use the term "*family*"? Was there evidence of any other family member of the President's family, apart from his son, involved with AGO/BOSASA?

151. If so, what evidence referred to in the CR17 Report points to an improper relationship with AGO being attributed to (1) the President; (2) his family?

152. Adv Mkhwebane testified to this Committee that she had met with Andile Ramaphosa,[44] but she has also testified that she was not able to get hold of him.[45]

152.1. Which version is correct?

152.2. Explain the reason for the contradictory evidence.

153. What steps did Adv Mkhwebane take to get hold of Andile Ramaphosa, considering that his attorney's details were known?

153.1. Why was he not subpoenaed to appear?

153.2. Andile Ramaphosa's evidence was that he was only rendering services to AGO outside of South Africa in order to avoid a conflict. Is it not so that there was no evidence which reflected that Andile Ramaphosa was rendering services in South Africa to AGO or in respect of any State organ in South Africa? If this is not the case, please state what evidence there was to this effect.

154. Adv Mkhwebane states **at 184.1.4, p. 844:**

> *"What is clear is that the President was aware of payments to his son at least two months prior to Mr Maimane raising <u>the issue</u> and that on enquiring from his son , his son informed him that in December 2017. His company Blue Crane Capital (Pty) Ltd had signed an Advisory Mandate with African Global Operations."*

And at 184.1.5 and 6, p. 844:

> *"184.1.5 In his statement of 1 February 201 9, a copy of which is attached hereto as Annexure "BM11" the President actually states as follows:*
>
> *I was therefore not aware at the time that I appeared in the National Assembly on 6 November 2018 that Mr Gavin Watson had made a donation to the CR17 campaign."*

[44] Transcript p. 7995.
[45] Transcript 16 March 2023; p. 8001.

184.1.6 This is despite the fact that both Mr Chauke and Mr Andile Ramaphosa had actually discussed the issue with the President as early as September 2017. It is simply contradictory, to say the least."

155. How does it follow from the aforesaid that the fact that the President was aware that his son was doing business with AGO and receiving funds, being the "*issue*" discussed with him by Mr Chauke[46] and his son, that this necessarily means that he knew about Mr Watson's donation to the CR17 Campaign. The precise nature of the contradiction to which Adv Mkhwebane refers is not evident. Clarify, in particular but not limited to how this gives rise to the conclusion that the President knew of Mr Watson's donation to the CR17 Campaign?

156. The President informed Adv Mkhwebane that in answering the question posed by Mr Maimane that:

"PCR: It happened in a heat of the moment and I think what really stung me was here is the President, here is his son and there seems to be a corrupt relationship and that is what prompted me to answer on my feet because I thought let me give an explanation lest after the hearing it goes around being said that the President has brought his son is benefiting from a corrupt relationship and all that. So the connotations of that is what prompted me to respond and also because I knew from what he had shown me and that there was actually a contract, that whatever relationship he had with the company was based on a clear and straight forward business relationship. So, that is I think what prompted me to answer because for me it was like as I said in my statement that it was an attack. That because you are President. now your son is in a corrupt relationship, you are all benefiting from this relationship, which in my view is not correct and I felt the need to answer then and there.

*PP: * Agrees* so this EFG2 is the trust foundation, so Andile has no relations to that.*

PCR: None whatsoever.

PP: Ok."[47]

Further at **209**:

"I therefore did not have an opportunity to reflect on the question, in its totality. To examine what was being averred in the affidavit that Mr Maimane said he had in his possession. Now I felt the need to respond to what I perceived as Mr Maimane's attack on my and my son's

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[46] *38. In fact, more light is shed by Mr Bejani Chauke ("Mr Chauke"), the President's special adviser, in this regard. In his affidavit filed with the Office of the Public Protector, he confirms that indeed the President is correct that "this issue" was brought to his attention "some time ago". Mr Chauke states as follows:*

"4. In early September 2018, I heard a rumour that Mr Andile Ramaphosa, the son of President Ramaphosa, had received a donation of R500 000 (five thousand rand) from Bosasa. I then Informed President Ramaphosa of this rumour.

5. I was further advised that a R500 000 (five hundred thousand rand) deposit had been made into an ABSA account belonging to Mr Andile Ramaphosa. l enquired from Mr Andile Ramaphosa whether he had any knowledge of funds donated into his ABSA account and he responded by saying that he does not have an ABSA bank account."

39. Clearly, when the President stated that the matter had been brought to his attention "some time ago" he referred to his conversation with Mr Chauke as he alleges. In September 2018 the President became aware of the issue raised by Mr Maimane. That much is apparent, and he understood what "the issue" was." [CR17 Answering Affidavit, Adv Mkhwebane, paragraphs 38 – 39, 771].

[47] CR17 *P. 199, line 3 et seq.*

integrity. On the basis of what I knew was incorrect. Particularly when he said the rich are protected and they steal from the poor and the unemployed. Now it has been suggested to me that maybe I should have just said, "I will inquire first before answering.

But because I had some information about this relationship and there was this attack on something that touched on integrity. I felt I should answer immediately. But as it turned out I did not have all the facts.

PUBLIC PROTECTOR: Mm.

MP: In the main my reply to Mr Maimane's supplementary question was based on the information I had at the time and it is against this background that I reasonably made the assumption that the alleged payment was related to advisory mandate that my son's company had signed with African Global."

156.1. On what evidence was what the President indicated rejected as a lie and/or that the reasons provided for answering immediately were untrue?

156.2. Why does not answering immediately – as opposed to postponing his response – constitute lying?

157. At para 49, p. 779 in the CR17 HC AA, Adv Mkhwebane stated:

"49. The President's "heat of the moment response" is a concern for many reasons. The "heat of the moment" cannot justify the response he made in Parliament in fact, the President's own answer is not consistent with the claim that his answer was in the "heat of the moment". He states with conviction that the matter at hand had been raised with him "some time ago."

157.1. It is not clear on what basis Adv Mkhwebane disputed that the response was a heat of the moment response. Clarify?

157.2. Is it Adv Mkhwebane's finding that President Ramaphosa knew Mr Maimane was going to be asking this question and planned to answer it in this manner?

158. At para 48, p. 778 in the CR17 HC AA, Adv Mkhwebane stated:

"48. However, from the question Mr Maimane posed, there are at least two issues that ought to have concerned the President. The first ·is that Mr Maimane was specific that monies were transferred to a trust account called "EFG2" for the benefit of the President's son. The second is that monies were transferred on 18 October 2017 prior to his son's company Blue Crane Capital (Pty) Ltd signing the Advisory Mandate with African Global Operations."

158.1. Is there evidence, reflected in the CR17 Report, that indicates that the President knew of the account of EFG2?

158.2. Further, based on what evidence should the President's explanation that at the time he answered Mr Maimane, he had not recalled the exact dates involved, be rejected?

159. Did Adv Mkhwebane, as pointed out by the **Mail & Guardian** case, follow the leads by asking Andile Ramaphosa how it is that he had received funds from AGO prior to the written contract with his company having been concluded? If not, why not? If so, where is such recorded in the Report?

160. At CR17 AA at para 50, p. 778, Adv Mkhwebane stated:

> *"50. The* **certainty and sanctimony** *accompanying his answer is not consistent with the claim that such an answer was a result of the "heat of the moment". Instead, it is a* ***well calculated and considered*** *answer with undertakings of steps the President would take if the facts revealed that his son was less than candid when he assured him that everything was above board and the R500 000 was a payment in terms of his contract with Bosasa, a copy of which the President had seen."*

160.1. Explain precisely what Adv Mkhwebane means by "*sanctimony*"?

161. Adv Mkhwebane indicated that her reasons for disbelieving the President were as follows:[48]

> *"I found that the allegation that on 6 November 2018 during questions session in Parliament, the President deliberately misled the National Assembly is substantiated because.*
>
> *137.1. The President's "heat of the moment" response is concerning because Parliamentary Questions are an important means used by Members of Parliament to ensure that Government is accountable to Parliament (and through Par1iament, to the people) for its actions.*
>
> *137.2. The President's provocation by the question from Mr Maimane cannot justify giving poorly prepared answers and creating a risk of misleading Parliament as was done in this case.*
>
> *…..*
>
> *137.3. The President as the head of state and the epitome of the Constitution should have acted with restraint and not allow Mr Maimane's question to affect his demeanour as he had stated Jn his response, that he had felt attacked and had to defend himself and his family."*

161.1. On what basis does a spontaneous/provocative or poorly prepared response confirm that the President deliberately lied to Parliament?

162. Adv Mkhwebane also states in parara 137.2 "That his answer was untrue is common cause. That he did not have to give it immediately is also common cause." And that he did not have to give it immediately is also common cause."[49] On what basis does Adv Mkhwebane contend it is common cause when:

162.1. The President denied this. In the CR17 HC RA the President said:[50]

> *"95.2. I admit the recording of my exchange with Mr Maimane but* ***deny that anything I said was untrue or misleading****. I also admit the contents of my letter to the Speaker.*
>
> *95.3. I deny that the Public Protector's findings are borne out by the facts and refer to what is stated above and in the founding and supplementary affidavits in that regard.*
>
> *95.4. I note that In paragraph 35 part of the reason the Public Protector has found against me is that* ***in her opinion I was not obliged to give an immediate answer to a supplementary question. I point out that this cannot support the conclusion***

[48] CR17 HC paragraph 137, p. 822.
[49] CR17 HC paragraph 137.2, p. 823.
[50] CR17 HC At pp. 1266 – 1267.

that I deliberately misled the National Assembly. At best for the Public Protector, it can mean that my conduct was negligent *(which I also deny).*

95.5. ***I admit that I was familiar with my son's company's business relationship with AGO as it had been brought to my attention and I had asked him about it. But I deny that as I stood on the podium listening to and responding to Mr Maimane's follow up question I had a vivid recollection of minutiae such as the date on which my son's company's agreement with AGO was signed and the exact amounts which had been paid and the dates on which they had been paid. I did not and could not under those circumstances pay detailed attention to every word uttered by Mr Maimane and in particular, in my mind, I did not record nor attach any significance to the mention of account EFG2 and the date of 18 October 2017****.*

95.6. I repeat that ***if anything was misleading it was Mr Maimane's question. It is clear from his question that Mr Maimane himself did not attach any particular value to the description of EFG2 account as he clearly associated it with my son****.*

95.7. I also note in paragraph 41 that ***what informs the Public Protector's negative finding against me is her view that I changed my statement subsequently in my letter to the Speaker on 14 November. I deny that I did, and that letter speaks for itself. All I pointed out in my letter to the Speaker was that it had been brought to my attention that account EFG2 had nothing to do with my son and was a CR17 campaign account, and therefore that the payment of R500,000.00 was not to my son, but a donation to the CR17 campaign. I did not change anything I said on 6 November 2018****.*

*95.8. I deny that my stating in my letter to the Speaker that "****inadvertently provided incorrect information ... "is an admission that I deliberately misled the National Assembly****."*

162.2. In **para 137, p. 373** of the founding papers, the President says "*The Public Protector seems to believe that my correction of the facts was an admission that I had misled Parliament. This is preposterous.*"

162.3. Further in reply the President disputes that he had made any statement with the intention to mislead saying in this regard:

> *"61. The Public Protector has not in fact found that I deliberately misled the National Assembly. She has not pointed to a single statement in what I said in response to Mr Maimane on the 6 November 2018 that is untrue. She cannot point to anything in my subsequent letter to the Speaker either that is untrue.*
>
> *62. I must point out that paragraph 7.1.1 of the Report clearly confines the finding to on 06 November 2018, during the question session in Parliament ... Therefore, for the finding to have any hope of survival I must have deliberately said something false on the 06 November 2018 with the intention to mislead the National Assembly.*
>
> *63. The Public Protector has recorded that he also conceded in his correspondence to my office on 01 February 2019, and even in his subsequent letter to the Speaker of the National Assembly on 14 November 2018 where he sought to correct the incorrect information he provided in the National Assembly. This is repeated in paragraph 34 of the Public Protector's answering affidavit.*

64. This statement does not detract from the plain fact that the information I conveyed was a truthful answer to the question posed by Mr Maimane.

65. In paragraph 137 of her answering affidavit. the Public Protector says her finding that I deliberately misled the National Assembly was made because:

65.1. "the President's heat of the moment response is concerning because Parliamentary Questions are an important means used by Members of Parliament to ensure that Government is accountable to Parliament ..."

65.2. The President's provocation by the question from Mr Maimane cannot justify giving poorly prepared answer ...

65.3. "the President as the head of state and the epitome of the Constitution should have acted with restraint ... ·"

66. Furthermore, in paragraphs 48 and 138 of her answering affidavit, the Public Protector says that Mr Maimane's reference to account EFG2 and the fact that the payment was made on 18 October 2017 prior to the signing of the Advisory Mandate between my son's company and AGO should have put me on alert. This is nonsensical. While Mr Maimane mentioned account EFG2, he clearly had no idea what it referred to. Neither did I.

67. I have gone back to double check the date of the Advisory Mandate. And it is December 2017, and it is correct that Mr Maimane mentioned the date of 18 October 2017 in his question to me. When further information became available, I provided it. At no stage did I make any statement with the intention to mislead."

At p. 1255 in reply the President clarifies as follows:

"68. The Public Protector has on a number of occasions claimed that I admitted that I misled the National Assembly, and the latest instance of that claim is in paragraph 34 of her answering affidavit. This is demonstrably untrue. I have never made such concession whether in my correspondence to the Speaker or the Public Protector. I cannot understand on what basis the ***Public Protector finds my clarification letter to the Speaker on 14 November 2018 to be a concession that I had misled the National Assembly, deliberately or otherwise."***

163. In the application for leave to appeal to the ConCourt, Adv Mkhwebane stated as follows:[51]

> *"As confident as he was when he stated these 'facts' I am confirming that* ***the matter had been brought to his attention****, he later realised that* ***his falsehoods*** *could not be sustained and reverted to Parliament with his purportedly correct version."*

163.1. On what basis did Adv Mkhwebane draw the aforementioned conclusion?

163.2. Should this be understood to mean that he had lied deliberately in answering Mr Maimane and when "*the matter*" (i.e. what Ms Nichol told him) was brought to his attention, he reverted to the Speaker to fix the lie, although he could simply have refused to comment given that the question was out of order?

[51] CR17 HC At paragraph 45, p. 1149.

163.3. Adv Mkhwebane testified to a "*purportedly correct version*" by the President. Is the statement as written not correct?

163.4. If so in what respects, is it not?

164. As pointed out by the CR17 CC judgment at para [56],[52] incorrect information alone would not be a violation of the Executive Ethics Code. Incorrect information must be given with the intent to mislead. Precisely what evidence at Adv Mkhwebane's disposal reflected such intent and where is this identified in the CR17 Report?

165. Similarly, the CR17 Report – although it quotes paragraphs from the Nkandla judgment – does not cite the judgment as authority for the proposition that the 2007 Executive Ethics Code is the applicable law trumping the 2000 Code on the basis of a "*stare decisis*".

165.1. Is it Adv Mkhwebane's understanding that *obiter dicta* remarks are binding and form part of a system of precedent? If so what is the rationale for same?

166. Under what powers, given that this is an EMEA complaint, is Adv Mkhwebane investigating?

167. The statutory crime of money laundering is summed up in the HC FA: para 152, p. 57:

> *"152. To begin with, money laundering is a statutory offence in terms of the Prevention of Organised Crime Act 121 of 1998 ("POCA"). Nowhere does the Public Protector reference this Act in her Report. In terms of section 4 of that Act a person is guilty of money laundering if:*
>
> *152.1 he knows or ought reasonably to know that a property forms part of the proceeds of unlawful activities;*
>
> *152.2 despite that knowledge enters into an agreement or engages in any arrangement or any transaction with anyone in connection with that property or performs any other act with such property;*
>
> *152.3 the effect of any agreement or arrangement or transaction or any other act must be to conceal or disguise the nature, source allocation, disposition or movement of the said property or its ownership or must be intended to enable any person to avoid prosecution or to remove or to diminish the property in question."*

167.1. Given that the above summation of the law supports that intermediary bank accounts do not give rise to money laundering, on what basis does Adv Mkhwebane persist with such allegations?

167.2. In CR17 HC AA at para 198 (p. 856), Adv Mkhwebane responded to these paragraphs by saying they are dealt with elsewhere and denying that there was any inconsistency. Where were these paragraphs dealt with "*elsewhere*" as the crime of money laundering or the reliance on POCA was not interrogated elsewhere in the HC AA?

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[52] CR17 [56] Plainly, **this prohibition is narrow**. Members of the Executive are **forbidden from wilfully misleading** the Legislature to which they are accountable. In other words, **for a member of the Executive to breach the Code, she or he must have given incorrect information with the intention to mislead the Legislature. Incorrect information alone is not sufficient to constitute a violation of the Code. Such information must be accompanied by the member's intention to mislead.**

167.3. The only ground for suspicions of money laundering alleged is the use of intermediary accounts.[53] Is it correct that this was the only reason why the Public Protector stated there is a suspicion of money laundering?

168. Is money laundering an offence under the Executive Ethics Code that can be investigated under EMEA?

169. Where in the CR17 report is POCA referred to?

170. Adv Mkhwebane represented to the attorneys from EFG that the investigation was being conducted in terms of section 182 of the Constitution and PRECCA.[54] So on what basis is it contended that it was simply the incorrect law being referred to in the CR17 Report?

171. Does Adv Mkhwebane accept in the CR17 Report, she considered and discussed the PRECCA and concluded that her "*investigation into the issue pertaining to possible money laundering is premised on the above legislation dealing with corruption and applies not only to private individuals who offer bribes, but also to private individuals who accept bribes*" [Report para 5.3.10.720.]?

172. Round-tripping is commonly referred to as being an illegal way to inflate revenue by swopping assets or sharing transactions with the objective to increase revenue or increase the sale of shares to inflate revenue to misrepresent growth of a company. One company, for example, sells assets to another and then buys it back. On what basis did Adv Mkhwebane testify that Mr Maimane had identified "*round-tripping*"?

173. Is it not so that there was no *prima facie* evidence of money laundering and if that is not the case, identify precisely what that evidence was?

174. Is it not irrational for a PP, where there are obvious errors of law or no *audi* has being granted, to defend such decisions in a review?

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[53] CR17 HC 198. AD PARAGRAPHS 1 43 to 1 57 [V1 – PSS to 59)

"198.1 The allegations contained herein are denied. The evidence contained in the record is clear about the movement of funds.

198.2. The moving of funds from one account to another raised suspicion of money laundering.

198.3 Having regard to the alleged suspicion. reviewed the bank records of the EFG2 trust account to establish how the funds which had been collected for the CR17 Campaign were disbursed.

198.4 There were large sums of money entering and exiting this account. This compounded the alleged suspicion of money laundering.

198.5 I found that because payment of the R500 000,00 passed through several intermediaries Instead of a straightforward donation towards the CR17 Campaign, the suspicion of money laundering had merit. I therefore referred the matter to the relevant institution for probing as provided for in section 6(4)(c)(i) of the Public Protector Act.

198.6 Legal argument will be advanced at the appropriate stage as regards the legislative scheme.

198.7 It would be invidious for a court to mark the work of the Public Protector as if it were marking an academic essay or for it to expect the Report to read as a court judgment.

198.8 Save as aforesaid. the allegations contained herein are denied."

[54] CR17 HC transcript of interview p. 1002.

175. With reference to the flow of funds:

175.1. At para 166 (p. 60), the President referred to alleged material errors of fact in the CR17 Report as follows:

> *"In my Response to the Public Protector I alluded to all of the material errors of fact committed by the Public Protector. I refer to them as if they are specifically incorporated herein, particularly sections 92 to 123 of the Response. In summary,* ***the Public Protector misunderstood the flow of the funds, miscalculated the amounts paid, double counted the same amounts in certain instances, referred to incorrect time periods, and misunderstood the relationships between the various entities. I am advised that any decision by the Public Protector must be based on the accurate findings of fact. The report dismally fails this test."***

175.2. Adv Mkhwebane's response in the CR17 HC AA:

> ***"200. AD PARAGRAPH 166***
>
> *200.1 The contents of this paragraph are denied.*
>
> *200.2 I deny that the alleged ·errors' are material errors of fact relevant to the issues at hand.*
>
> *200.3 I pause to mention that while the President alleges that he was never given* audi *in respect of the evidence regarding the transfer of funds, his response to the section 7(9) notice clearly demonstrates otherwise.*
>
> ***200.4 The transfer of funds in and out of these accounts raises a suspicion of money laundering and I am entitled in law to refer the matter to the relevant authority for Investigation. The President's response in respect of donations made by CR17 to the Cyril Ramaphosa Foundation and that the Cyril Ramaphosa Foundation is a charitable trust that the President and his family have never been beneficiaries of is a disappointing response from a Head of State. He** *concedes* ***that R5 million was paid to the Cyril Ramaphosa Foundation to help fund its own communications campaign to publicize its work in the areas of education and enterprise development.***
>
> *200.5 These paragraphs again highlight the technical issues the President raises in an attempt to avoid taking responsibility.* ***I submit that the nature of the transactions lends itself to possible miscalculations,*** *but this should not detract from the fact* ***that there were suspicious transactions warranting further investigation by the relevant authorities.*** *None of these technical responses from the President take away the* ***fact that large sums of money were moving from different accounts and intermingled with funds that were already in those accounts."***

175.3. What evidence informed Adv Mkhwebane's conclusion that these transactions were suspicious?

175.4. Given the acceptance of "possible miscalculations" was the numbers checked against what the President had stated in his response to the s 7(9) notice, before giving the same figures to this Committee?

176. Clause 2(3)(a) of the Executive Ethics Code arises both in relation to President Ramaphosa and Minister Gordhan's representations to the National Assembly.

176.1. Is it not so that the section 7(9) notices in both investigations bypassed the Executive Manager and COO and were submitted directly by the Chief Investigator to Adv Mkhwebane.[55]

176.2. The CR17 Report contains four versions of the relevant phrase of clause 2(3)(a), including the version in the 2000 Code and the 2007 Code. [56]

176.3. Mr Ngobeni provided advice on the "*ministerial handbook issue*" as appears from the email chain below:[57]

From: Theophilus Seanego [mailto:theo@seanego.co.za]
Sent: Tuesday, 08 October 2019 20:30
To: Alfred Mhlongo <AlfredM@pprotect.org>; 'Phiwokuhle Mnyandu' <phiwokuhle@seanego.co.za>
Cc: Sibusiso Nyembe <SibusisoN@pprotect.org>
Subject: RE: ABSA subpoena
Good evening Mr Mhlongo
Thank you for the mail, we will forward it to our counsel team.
Kindly remind me of the document from Ngobeni that you wanted me to send to counsel, left my draft answering affidavit with Farzanah so she can incorporate my comments / suggestions.
I look forward to hearing from you.
Kindest Regards

From: Alfred Mhlongo [mailto:AlfredM@pprotect.org]
Sent: Wednesday, October 9, 2019 10:03 AM
To: Theophilus Seanego <theo@seanego.co.za>; 'Phiwokuhle Mnyandu' <phiwokuhle@seanego.co.za>
Cc: Sibusiso Nyembe <SibusisoN@pprotect.org>; Muntu Sithole <SitholeM@pprotect.org>
Subject: RE: ABSA subpoena
Good morning Mr. Seanego
Ngobeni prepared an analysis of the ministerial handbook issue relating to "inadvertently" and "deliberately" misleading of parliament after the fiasco with Pierre de Vos on our constitutional court leave to appeal in the rogue unit matter.
That is the document that you must please forward to counsel.
Kind regards
Alfred

---

[55] Bunde F, folder 190, 190.4 6757
Subject: FW: SARS Section 7(9) with PP comments.docx
Date: Tuesday, 21 May 2019 at 10:28:08 South Africa Standard Time
From: Rodney Mataboge
To: Advocate Busisiwe Mkhwebane (Public Protector)
Attachments: SARS Sec*on 7(9) with PP comments.docx, Bosasa S 7(9) EMEA PRESIDENT with PP's final comments 2.docx
Dear PP
Kindly receive the 2 draft s 7(9)s as requested.
The rogue unit one should be completed tomorrow as the response received and the EMEA issue are currently being incorporated.
Thanks madam

[56] CR17 report At paragraph cc, (p. 15) there is a version not exactly same as the 2007 version which says, "*deliberately and inadvertently*". At paragraph 2.3.3 (p. 20) – correct 2000 version. At paragraph 5.1.19 at p. 47, being what Adv Mkhwebane confirmed under oath before the Full Bench confirmed to be correct true version. At paragraph 5.1.34 at p. 50 it is stated "*inadvertently and/or deliberately*". At paragraph 5.1.28 at p. 57 reference is made to "*deliberately or inadvertently misleading*". At paragraph 5.1.34 at p. 50 the standard is referred to as including "*deliberate and inadvertent misleading*" of the legislature. The phrase "*inadvertently or deliberately*" is used in paragraph 6.3, p 99.Under the heading "*Findings*" at paragraph 7.1.3, p. 100, a conclusion of "*deliberately and inadvertently*" misleading is relied on.

[57] Bundle F, 190, 190.3. (9539.1 – 6539.3).

From: Theophilus Seanego [mailto:theo@seanego.co.za]
Sent: Wednesday, 09 October 2019 10:11
To: Alfred Mhlongo <AlfredM@pprotect.org>; 'Phiwokuhle Mnyandu' <phiwokuhle@seanego.co.za>
Cc: Sibusiso Nyembe <SibusisoN@pprotect.org>; Muntu Sithole <SitholeM@pprotect.org>
Subject: RE: ABSA subpoena
Good Morning Mr Mhlongo
Thank you for the mail.
Kindly forward the analysis to us, we do not have it.
Kindest Regards

From: Alfred Mhlongo [mailto:AlfredM@pprotect.org]
Sent: Wednesday, October 9, 2019 10:44 AM
To: Theophilus Seanego <theo@seanego.co.za>; 'Phiwokuhle Mnyandu' <phiwokuhle@seanego.co.za>
Cc: Sibusiso Nyembe <SibusisoN@pprotect.org>; Muntu Sithole <SitholeM@pprotect.org>
Subject: RE: ABSA subpoena
Good morning Mr. Seanego
Kindly request same from Ngobeni.
I also do not have it my brother.
Kind regards
Alfred

Subject: Analysis of ministerial handbook
Date: Wednesday, 09 October 2019 at 13:42:32 South Africa Standard Time
From: Theophilus Seanego
To: 'Alfred Mhlongo', 'Phiwokuhle Mnyandu'
CC: 'Sibusiso Nyembe', 'Muntu Sithole'
Attachments: image007.jpg, image008.jpg, image009.jpg, image010.jpg, image001.jpg
Good afternoon Mr Mhlongo
I called Mr Ngobeni but there was no response. I called Adv Masuku SC and he undertook to forward it to me.
Will forward same immediately upon receipt.
Kindest Regards

177. In light of the aforementioned email chain, did the use of the wrong Executive Ethics Code not arise from advices rendered by Mr Ngobeni?

178. Adv Mkhwebane's concluded in para 5.1.15 that Minister Gordhan deliberately misled **Parliament** in responding to the Parliamentary question on 16 April 2016 and it "***does not seem like a bona fide mistake*** *and thus violated Paragraph 2.3 (a) of the Executive Ethics Code.*"[58] Is this a correct understanding of how it is explained in the SARS Unit report?

179. Where in the SARS Unit Report is documentary evidence relating to the EMEA complaint,[59] apart from the complaint, referred to?

180. Minister Gordhan told the Zondo Commission that he may have been present but could not recall other than being informed by Mr Mogajane that Ajay Gupta was present.

[58] SARS Unit report At p. 254.
[59] Bundle E, item 4, 246, paragraph 4.4 headed key sources of information.

180.1. Did Adv Mkhwebane confirm that a Gupta brother was present at the meeting with Mr Ambani? How does Adv Mkhwebane conclude that Minister Gordhan conceded he had met a member of the Gupta family in June 2010, when he had no recollection hereof?

181. Identify the evidence that informed the conclusion in the CR17 Report that the omission by Minister Gordhan was "*wilful*"?

182. Minister Gordhan's version appears to be rejected on the basis that it was "*implausible when one considers the prominence of the subject of state capture in South Africa.*"[60] On what evidence could Adv Mkhwebane conclude it was implausible? Why was Mr Mogajane not interviewed?

183. The correct version of clause 2(3)(a) of the 2000 Code is quoted in paragraph 22 of the Potterill Judgment. The CR17 Report was issued on 23 July 2019 and the correct version of the Code is reflected in para 5.1.19 of the CR17 Report. Also attached marked **"PG69"** to Minister Gordhan's reply is the gazetted version of the 2000 Code. In light of this was there any confusion on part of Potterill J on the correct applicable law, or on the part of Minister Gordhan's legal representatives?

184. In an answering affidavit before the Full Court (Vol. 35, 2754) Adv Mkhwebane stated (at para 95, 2790) that:

184.1. Potterill J had committed a gross misinterpretation of the Executive Ethics Code.

184.2. Section 2.3 expressly states that Members may not deliberately or inadvertently mislead … the legislature.

184.3. Potterill J had inexplicably chosen to re-write the said provisions and adopted Minister Gordhan's view that the code only prohibits wilfully misleading the legislature and by deliberately omitting the words inadvertently from the actual Code was misleading.

185. At the time Adv Mkhwebane deposed to this affidavit, she was in possession of the 2000 Executive Ethics Code as it had been attached to that very same affidavit as **"PP6"**, and referred to at **para 231, p. 2848**. The 2000 Code uses the phrase "*wilful*" and not "*deliberate*" or "*inadvertent*". Does Adv Mkhwebane agree there is no reference to following "touchstone decisions" and applying the 2007 Executive Ethics Code in relation hereof in this affidavit nor is there any reliance on any alleged *"stare decisis*"?

186. When the Potterill Judgment was taken on appeal, why did Adv Mkhwebane instruct that Adv Masuku SC be briefed on condition that Mr Ngobeni's services are also used?

186.1. On what basis did Adv Mkhwebane give an instruction for Mr Ngobeni to assist in the matter and is it so that he was then paid by the senior counsel on brief for work done?

[60] SARS Unit report paragraph 7.1.4, p. 328.

186.2. Is it not an unusual practice for a client to give an instruction for a consultant to assist in a matter and indicate that the SC's appointment is to be subject to such appointment and then for that consultant's fees not to be paid by the instructing attorney, but by the SC?

186.3. Given that Mr Ngobeni rendered invoices, does this not reflect that he had a clear belief that he was to be paid – that was until the CEO queried payments? Did the querying of such payments by the CEO contribute to any steps being taken of any kind?

186.4. Is it disputed that the services rendered on such invoice that was rendered had been provided?

186.5. Was the engagement of Mr Ngobeni in contravention of procurement regulations? Is there any document approving the departure from SCM prescripts?

186.6. Was Mr Nemasisi's resignation linked at all to the lack of lawful procurement of the services of Mr Ngobeni or the rendering of services by Mr Ngobeni? If not what was the reason for his resignation?

187. Does Adv Mkhwebane dispute that she is included in emails in which Mr Ngobeni provides the work product directly to her and persons at the PPSA who are presumably aware of his employment, i.e. the late Mr Nyembe, Mr Segalwe and Adv Mkhwebane, after having already provided a copy thereof the previous day to Masuku SC and Mr Seanego?[61]

188. Further, does Adv Mkhwebane deny having given the instruction that the comments of Mr Ngobeni with reference to Potterill J be incorporated in the arguments?[62]

189. Adv Mkhwebane's evidence to this Committee was that there was "*a confusion*"[63] as to the 2000 Code and the 2007 Code, which "*confusion*" is mentioned for the first time to this Committee. Why was this confusion not raised in court papers?

190. After Adv Mkhwebane received the leave to appeal judgment[64] arising from the judgment of the Full Bench, or even after the CR HC judgment, was any endeavour made to check the law and gazettes in relation to the applicable law on the Code? If so what steps?

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[61] Bundle F, item 161, 3298.
From: Paul Ngobeni
Sent: Wednesday, August 14, 2019 9:33 PM
To: Adv T Masuku ; Theophilus Seanego <theo@seanego.co.za>
Subject: Argument on Appeal – Gordan vs Public Protector
Please find the attached Argument on Appeal in the Gordan vs Public Protector matter. I have done no spell check as time is of the essence.

[62] Bundle F, item 161, 3356.

[63] Adv Mpofu – "The judges – that is the full bench (8564) when they made their comment they were not aware of the confusion, the President was obviously not aware, the Constitutional Court was not aware, you were not aware, but at least now I think this Committee if there's one thing the Committee would have contributed is that that mix-up has been cleared."

[64] Bundle E, item 2.1 p. 139, paragraphs 11 and 12.

"[11] The manner in which the first respondent is capable of reaching conclusions which are unsupported by the fact and the law, a fact which supports the improper motive and biasness ground of review, is demonstrated when she deals with the applicable executive ethics code in relation to the Ambani meeting. ***It is an irrefutable fact that the executive members code 2000 does not punish inadvertent mistakes****. Yet the first respondent states in her heads of argument that "the finding that the applicable code does not punish advertent mistakes is incorrect." To start with,*

191. With reference to the concession made by Adv Mkhwebane's counsel confirming that the only legally applicable code was the 2000 Executive Ethics Code, the only explanation provided was a reliance on the Ministerial handbook. Is this correct?

192. The Full Bench in **Gordhan** accused the PP of not treating the Court with the necessary decorum. Given that the PP attached the correct Code to the affidavit (**"PP6"**), the Court took the point that the PP should "***reasonably have known of the falsity of what she was saying under oath***". Given that the 2000 Code had been attached to Adv Mkhwebane's affidavit before the Full Bench, was it correct to find she had misled the Court, her conduct was unbecoming of an advocate and officer of the Court and that she owed Potterill J an apology?

193. Is it true that what Adv Mkhwebane has stated to this Committee is not the same as what was stated to the HC in the CR17 and SARS Unit matters when responding to allegations that she used the wrong EMEA Code?

194. Can Adv Mkhwebane provide any explanation as to how it came about in the CR17 matter that different versions of clause 2(3)(a) of the Executive Ethics Code came to be used?

195. Before the CR17 HC Adv Mkhwebane's explanation was that the error was immaterial because the findings were based primarily on the President **deliberately misleading** Parliament – in other words "*inadvertently*" was irrelevant and that it was semantics given that the 2000 Executive Ethics Code was not the standard used and yet also admitting that the 2000 Code was the correct Code:[65]

> *"127. In this regard the President alleges that I made use of a draft version of the Executive Ethics Code and that therefore "the entire investigation was influenced by a material error of law" and that the correct version of the Code states that members may not ''wilfully mislead the legislature .. whereas the version I **allegedly** relied on states that members may not "deliberately or inadvertently' mislead the legislature.*
>
> *128. He further alleges that although in some parts of the Report reference is made to the correct wording of the Code and that these references compound the scale of confusion and irrationality of the Report.*
>
> *129. I admit that the correct version of the Code appears at paragraph 5.1.19 of the Report which provides that a member may not wilfully mislead the legislature. I admit that In certain sections of the Report reference is made to a different version of the Code which provides that a member may not deliberately or inadvertently mislead the legislature. The Ministerial Handbook also refers to the version of the Code which provides that a member may not deliberately or Inadvertently mislead the legislature.*

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that was not the finding of this court as explained above. Yet the first respondent perpetuates the misunderstanding by stating: ''the applicant is cognizance (sic) of the fact that unlike the 2000 version the 2007 version of the executive code reads thus: ''members of the executive may not wilfully or inadvertently mislead the legislator to which they are accountable''.

[65] CR17 P. 820, paragraphs 129 – 131.

*130. I submit that the 'error' is **immaterial** in light of the fact that my **finding is based primarily on the President deliberately misleading Parliament rather than inadvertently doing so**. Whether the President wilfully misled Parliament or deliberately did so is one and the same thing. There is absolutely no basis for the claim made by the President in this regard.*

*131. What is concerning is that the President raises **all sorts of technical issues** but fails to address the facts."*

196. Adv Mkhwebane, when dealing with the ad seriatim paragraphs in the CR17 HC AA, stated as follows, further reiterating the correctness of the 2000 Code:[66]

"196.2. I admit that the correct version of the Code appears at paragraph 5.1.19 of the Report which provides that a member may not wilfully mislead the legislature. I admit that in certain sections of the Report reference is made to a different version of the Code which provides that a member may not deliberately or inadvertently mislead the legislature. The Ministerial Handbook also refers to the version of the Code which provides that a member may not deliberately or inadvertently mislead the legislature.

196.3. I submit that the 'error' is immaterial in light of 1he fact that the finding I made was that President Ramaphosa deliberately misled Parliament.

96.4. Save as aforesaid, the allegations contained herein are denied."

197. The President in reply responded at p. 1249, paras 51 – 60. Are the responses made by the President in the circumstances justifiable?[67] If not, why not?

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[66] CR17 AA p. 854, paragraph 196.

[67] *"51. One of the grounds of review is that the Public Protector made a material error of law in that she misread the Executive Ethics Code, and she applied incorrect principles and found that I had breached the Code in that I had inadvertently and/or deliberately misted the National Assembly ... I amplified this ground after I received the record to point out that the Public Protector had misread the Code.*

***52. The Public Protector admits her error**. She says, I admit that in certain sections of the Report reference is made to a different version of the Code which provides that a member may not deliberately or inadvertently mislead the legislature.*

*53. However, according to the Public Protector the correct version of the Code appears at paragraph 5.1.19 of the Report . . . If this explanation is accepted, **it would mean that the Public Protector worked from the:***

***53.1. wrong and correct versions of the Code at the same time. This makes no sense, especially as she included the wrong versions of the Code in her final report.** In any event:*

*There is nothing to suggest that just because the word 'inadvertently' is not used in paragraph 5.1.19, it must be referring to the correct version of the Code. **Only the incorrect version of the Code was included In the record, and there is no explanation by the Public Protector as to why, if it featured at all, the correct version of the Code was not included in the record.***

*53.2. A random reference in the middle of the Report is of no help when **the actual finding refers to both 'inadvertent' and 'deliberate' misleading of the National Assembly. My conduct could not have been deliberate and inadvertent at the same time.**54. The Public Protector further tries to mitigate her clanger by pointing out that the Ministerial Handbook also refers to the version of the Code which provides that a member may not deliberately or inadvertently mislead the legislature . . .,**I respectfully, this case is about the Executive Ethics Code. It is not about the Ministerial Handbook. If that Handbook contains an error, it does not justify the perpetuation of that error by the Public Protector.***

55. As if that is not enough, the Public Protector goes further to claim that "the 'error' is immaterial in the light of the fact that my finding is based primarily on the President deliberately misleading Parliament rather than inadvertently doing so. This smacks of desperation and cannot possibly be true. The Public Protector's finding is set out in paragraph 7.1 of the Report. It has four sub-paragraphs that alternate between the theme of deliberately misleading and inadvertently misleading Parliament."

198. In paragraph 55.1 the President stated:

> *"55.1. Paragraph 7.1.1 speaks of "deliberately misleading the National Assembly ..."*

199. Is it so that this complaint was specific to what was said in November 2018 to the House and got referred as an EMEA complaint and that the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members to the issue was to whether or not the President did or did not mislead the National Assembly was not applicable ? If this is not the case, on what basis is it alleged that this Code is applicable? Is it not listed at CR17 reports para 4.3.5, p. 38 and not even discussed under this section under para 5.1, pp. 39 – 49 nor referenced to at all. So, on what basis was it referred to at all?

200. Given that Mr Mataboge was the Chief Investigator in both the CR17 matter and the SARS Unit matter, on what basis is it alleged that Adv Mkhwebane signed two affidavits – 2 days apart – saying in the **SARS Unit** matter that the very same Code which she admits in para 5.1.19 in the **CR17** matter to be correct (**p. 820, para 129**), is incorrect? What must the Committee conclude in relation to these two contradictory versions on oath?

201. Before the Committee, Adv Mkhwebane denied deliberately using the wrong Code or changing its language, instead testifying that this was based on the CC's Nkandla matter, as well as the PPSA's institutional practice[68] of relying on the 2007 Code. Why was this reliance on *stare decisis* not indicated in any of Adv Mkhwebane's affidavits before the HC and CC, save for the CR17 rescission affidavit?

202. Is it not so that paragraph [292] of Adv Mkhwebane's written statement is inconsistent with the oral evidence:

> *"[292] The 2007 Code had since repealed the 2000 Code, but the President based his argument on the repealed 2000 Code, for obvious reasons, clause 2.3 provides that Members of the Executive may not wilfully mislead the legislature to which they are accountable, the President sought to take advantage of the fact that in terms of this Code the prohibition is against wilful misleading of Parliament."*

[68] Transcript p. 8158:

"Public Protector Advocate Busisiwe Mkhwebane – That's not correct because that's very very wrong. I never did that; I never. I think there was when Mr Mataboge was testifying, I think, one of the drafts had the 2000 code and I think ***there was an email which was shown here that I said to Mr Mataboge, 'use the 2007 code.' And, it was purely based on the fact that the Concord judgment is based on that code, the Touchstone cases, and this institution, practice wise, we've been using that.*** *And they will then say, I just, within my own evil or sinister intentions, I just pick up this code and say, 'no the facts of the matter or the way the facts are then let's apply this code.'* ***I was honestly applying the code based on the fact that it has been the practice of the institution that this is the code which is utilised. And no one was said to be held to be incompetent or misconducted themselves because they had findings against the sitting President.****"*

203. Given the concession made orally that the 2000 Code remained the only valid law, it was incorrect to say the 2007 Code repealed the 2000 Code:

> ***"Advocate Bawa –*** *Advocate Mpofu, just so that we're on the same page when you talk about them mix-up and a confusion, are we in agreement that the 2000 Code was the law, and that the 2007 Code was not the law?*
>
> ***Advocate Mpofu –*** *Thanks, Chair. Yes, that's exactly what I think has been cleared here, that is indisputable. What I'm referring to is the fact that the Constitutional Court, the Public Protector, the President to some extent as we will show, and as I say the investigators, clearly worked under a misapprehension. And I don't think any of those people was doing it just for some nefarious purpose, especially the Constitutional Court."*

204. Paragraph [293] of the Part A Statement which provides: "*Though my findings were not based on the 2000 Code, since this Code was repealed by the 2007 Code, which has consistently been applied by my predecessor and endorsed by the Constitutional Court in various matters, the 2007 Code was clear that a member of executive cannot wilfully and inadvertently mislead the legislature*" contradicts the oral evidence and the CR17 HC AA which confirmed the 2000 Code was the correct law, correct? If Adv Mkhwebane disagrees, on what basis does she do so?

205. Is it not so that the 2007 Code makes no reference to "*wilfully*", nor does it use the words "*deliberately*" and *"inadvertently*" conjunctively, but refers to the latter disjunctively.

206. Adv Mkhwebane testified that:

> "*[295] For now, it suffices to say, my findings of the breach of the 2007 Code are well-founded and substantiated."*

207. Isn't this statement contradictory to what Adv Mkhwebane had testified to, that the only law is effect is the 2000 Code? In other words, there could never have been a breach of the 2007 Code because it was not a valid Executive Ethics Code.

208. The section 7(9) notice issued to President Ramaphosa states that he had acted in good faith. Notwithstanding same, why did Adv Mkhwebane dispute this in the CR17 Report at paragraph 5.4.23:[69]

> *"5.4.23 The response incorrectly states as follows: "The Public Protector has correctly found that the President acted in good faith. That should be the end of the matter. Any suggestion that that the President contravened the Executive Ethics Code is incompatible with the Public Protector's own finding that his response to Mr Maimane was given honestly and in good faith."*

[69] CR17 Report at p. 94.

209. Adv Mkhwebane stated further, regarding the proposition in paragraph 5.4.25 to be preposterous:[70]

> *"5.4.25 I have taken note of the **preposterous argument advanced in this regard,** and I do not agree therewith because nowhere in the section 7(9) notice did I make the purported finding. Furthermore, the Rules of the National Assembly are very clear on the procedures to be followed during the question and answer sessions in Parliament."*

210. Is this incorrect, given that section 7(9) notice at p. 15(dd) states a conclusion by Adv Mkhwebane that the President's conduct is in good faith:

> *"(dd) His conduct referred to above although in good faith, is inconsistent with his office as a member of Cabinet and therefore in violation of section 96(1) of the Constitution, as referred to above."*

~~211.~~ Does paragraph 7.1.4 of the CR17 Report not bear out this finding?

212. Where in the Nkandla judgment is there an express affirmation or acceptance that the 2007 Code is the correct Code or where does it explicitly or expressly affirm or apply paragraph 2.3(a) of the Executive Ethics Code?

213. Adv Mkhwebane stated in the rescission application at para 29, p. 16 that the Office of the Public Protector had since 2009 not used the 2000 Code. Does Adv Mkhwebane dispute the extracts annexed marked **"B"**.

214. In footnote 35 of the Nkandla judgment then Chief Justice Mogoeng expressly disavowed the relevance of section 96 with reference to an argument made by the EFF that the President had breached his obligations in terms of sections 83, 96,35 181 and 182 of the Constitution. The Nkandla judgment relates to the implementation of the remedial action and not the President's compliance with the Code.

215. It was common cause that President Ramaphosa attended several fundraising dinners where he outlined his vision for the ANC and the country. Further, that the campaign team generally consulted him on the invitation lists for dinners and he was occasionally asked for guidance on donors. Is that not essentially what Adv Mkhwebane had been told?

216. With reference to the emails to which the Committee was referred, why were these emails not referred to in the section 7(9) notice nor expressly mentioned in the CR17 Report?

[70] CR17 Report at p. 95.

217. Were the emails dropped off at Adv Mkhwebane's offices in hard copy by an alleged anonymous donor or received in some other manner?

218. Why was the President or campaign managers not given an *audi* in relation thereto prior to the CR17 Report being issued?

219. Why was the FIC Report not provided to the President prior to the CR17 Report being issued?

220. Why was the President not afforded an opportunity to ask Mr Watson questions as provided for in the Public Protector Act, when correspondence reflects that Mr Watson was prepared to make himself available for such purpose?

221. However, in response to the President's complaint in the HC that he had not been afforded an opportunity to respond to the emails, Adv Mkhwebane's response refers to "*campaign reports and donors*", denying that he was not given such opportunity.[71] On what basis is this denied?

222. What precisely was the "*lot of other information"* to which Adv Mkhwebane referred to as being evidence that the President was involved or was aware about the donors and funding. List that information to which is referred[72] and which reflected that the President was "*constantly informed*" of campaign activities as testified?[73]

223. Adv Mkhwebane testified that *"the email information … belied the denial of knowledge [by the President]", **who also never disputed the emails**."*[74] When was it expected that the President was to dispute such emails if he was never provided same for response?

224. Did Adv Mkhwebane take any steps to authenticate the emails and, if not, on what basis was reliance placed thereon?

225. What evidence showed that the President received regular updates as alleged?[75]

226. On the basis of what evidence did Adv Mkhwebane rely, which is reflected in the CR17 Report or the Rule 53 record, that shows the contrary and that:

    226.1. the President knew about Mr Watson's donation;

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[71] CR17 Report 195.4, 853:

"195.4. I deny that the President was not given an opportunity to respond to the allegation that he was aware of campaign reports and donors. The section 7(9) notice clearly envisages this. I deny that I was duty bound to share evidence with the President during my investigation."

[72] Transcript 16 March 2023, p. 7893.

[73] Based on interviews, emails, invitations and instructions, Adv Mkhwebane testified that '*the President was **constantly informed** of the activities of the campaign by the campaign managers whereupon his advice and approval on specific matters would from time to time be sought.*' [Transcript 16 March 2023; pp. 8000 – 8001.]

[74] Transcript 28 March 2023; p. 8127.

[75] The aforesaid is requested on the basis that the evidence leaders have not come across evidence indicating that the President had been constantly informed or been provided with regular updates and none are evident from the CR17 Report.

226.2. the President knew about the EFG2 account by name;

226.3. the funds were a benefit received by President Ramaphosa;

226.4. there was interference with his official duties or the performance of his duties?

227. Based on which of the emails that Adv Mkhwebane referred the Committee to in oral and written evidence,[76] is it presented that President Ramaphosa knew the specific identity of any donor or precisely how much they donated?

228. Adv Mkhwebane referred to a *News24* article[77] in which the journalist claimed to have verified certain information in the emails. What steps did Adv Mkhwebane to authenticate and ensure that the emails were legally sourced before relying on them for purposes of the CR17 Report?

229. Did Adv Mkhwebane follow up any of the leads from the emails that would contradict that which is stated in the media article? Does the *News24* article not *prima facie* indicate that Adv Mkhwebane should have conducted an investigation and not take the emails at face value?

230. On what basis do the emails amount to evidence that President Ramaphosa knew who the donors were or the amounts they donated?

231. Given that Adv Mkhwebane and Mr Mataboge were the only persons privy to the documentation in the CR17 investigation, what steps were taken to ascertain how these documents had leaked, if any? If no steps were taken, please indicate.

232. Ms Baloyi testified that an hour before meeting with the President to deliver the section 7(9) notice, she was afforded an opportunity to peruse the draft section 7(9) notice. Why was she not afforded an opportunity to provide input prior to this? Was she directed to destroy the document after she had read it, and if so why?[78]

233. Ms Baloyi testified that the CR17 investigation was conducted by external people and not in terms of the ordinary process. Was any EM or COO involved in the investigation and if so, to

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[76] (1) **An email of 17 November 2017** from the President's legal advisor, Ms Nicole, to the President [Committee affidavit, part I; paragraph 259]. The email dealt with '*fund raising and events*', and set out various fundraising targets, fundraising events (such as cocktail events), calls that the President needed to make to raise R30 000 000 and further people that Ms Nicole wanted to approach for funds.

(2) An **email of 12 November 2017** from Ms Nicole to the President, stating that '*Stavros says the following will fund if we had a small cocktail party. I need to discuss diary with you.*' [Committee affidavit, part I; paragraph 260].

(3) An **email from the President to '*a person named Donald*'**, in which the President asked Donald to transfer R20 000 000, seemingly to '*Ria Tenda Trust Standard Bank*', and noted that he would call Donald '*to confirm all this*' [Committee affidavit, part I; paragraph 261].

[77] Bundle H, item 31; 31.7; 31.7.5 at p. 502.

[78] Bundle A, p. 2174: Baloyi HC record paragraphs 66 – 70 and Adv Mkhwebane's response Bundle A, p. 2416, paragraphs 137 – 141.

what extent?[79] Was the report quality assured and were there any team meetings to deal with the section 7(9) notice? Kindly provide detail if answer is in affirmative.

234. The emails between Adv Mkhwebane and Mr Mataboge refer to sharing the draft SARS Unit and Bosasa reports with "*SC*" for finalisation. Adv Mkhwebane's legal representative suggested that "*SC*" is a reference to Adv Sikhakhane SC. Was Adv Sikhakhane SC involved in the SARS Unit report? If so, how were his services procured and would it be reasonable to assume that his fees for doing so would be reflected in fee notes, reference to the work product rendered to Seanego Inc.

235. If "*SC*" is not Sikhakhane, who is "*SC*" and how were his or her services procured?

236. Did Adv Mkhwebane put before the Committee all CR17 emails[80] in her possession relating to President Ramaphosa's involvement in the CR17 Campaign? If not, why not and has she had sight of and regard to any emails not so put before the Committee?

237. In respect of the sealing of documents, the following exchange occurred during the oral evidence with Adv Mkhwebane:[81]

> ***"Advocate Mpofu -*** *Yeah, All right. Now, let's stop there, because when we deal with what I call the base documents, this becomes a central thing. And Chair, again for the sake of progress, we won't but* ***we also can't show all of the emails and all that****. I think the role of the emails, if we show one or two, what we are really after is what role did the emails play, rather than the contents per se; so that's the first reason. The second reason is that* ***even if we had all the emails, we can't show them because they are sealed somewhere in Gauteng****. So these ones we can show because they come from the pleadings and not from the sealed documents. Right. Okay, fine. All right, can we then go back to paragraph 258, so that we deal with what I am going to call the base documents, which we are going to use in your testimony."*

At 8011:

> ***Public Protector Advocate Busisiwe Mkhwebane –*** *Then, "I pause here and state that the records which include* ***emails*** *and bank records which I intend to rely on as evidence were sealed by the High Court in order to prevent them from being made public." That was done … [inaudible] … by the Deputy.*
>
> ***Advocate Mpofu –*** *Deputy Ledwaba.* ***That's what I was mentioning earlier.*** *So those bank statements, bank records and so on ... [inaudible] … you saw them before they were sealed, correct?*
>
> ***Public Protector Advocate Busisiwe Mkhwebane –*** *Yes … [inaudible] … sealed.*

[79] Bundle A, p. 2174, Baloyi HC record paragraphs 66 – 70; Adv Mkhwebane's affidavit, Bundle A, p. 2416, paragraphs 137 – 141.
[80] The index of the Rule 53 record is Bundle E, item 10, item 05 and the emails are reflected in item 36 in the record index comprising pp. 309 – 316, i.e. seven pages.
[81] Transcript 7977 – 7978.

Adv Mpofu – *Analysed?*

Adv Mkhwebane – <u>Yes. After we issued the report.</u>

Adv Mpofu – *Alright. 267?*

Adv Mkhwebane – *"Over and above showing how the money was moved around,* ***<u>the sealed records revealed that as false the version that the President was ignorant of the identity of the donors of the CR17 Campaign</u>****". When we go to the Constitutional Court Judgment,* ***because we availed all the information to the Constitutional Court."***

238. If the emails relating to the CR17 Campaign that was put before the Committee represented a "*cross section*" only (as stated by Adv Mpofu below), how does this accord with the Rule 53 record which does not reference further emails?

> *"This is just two paragraphs that I want you to go through, so that we do not come back to the contents of the emails. This is, if you like a cross-section of the emails, and which indicated to you that the President knew what was going on. We will come to that later. And you then read paragraphs 260 and 261 of the affidavit."*

239. Did any of the emails refute what the CC concluded at paragraph [73] of its judgment?[82]

240. Where in the CR17 report is there an explanation or rationale as to why apparently unauthenticated emails were preferred over the evidence of the campaign managers?

241. The index (annexed hereto as annexure **"C"**) to the Rule 53 record, prior to any request made to Deputy President Ledwaba for any documentation to be sealed, reflected the emails as being only 7 pages. Do these 7 pages comprise all the emails in the Rule 53 record? Were these emails leaked prior to the filing of the Rule 53 record and appeared in the media? Does Adv Mkhwebane know how or by whom the emails were leaked?

242. The correspondence between the parties reflects that Ledwaba DJP did not seal emails and afforded parties an opportunity to bring an application in the event any party wanted the bank statements that were so sealed – unsealed. The correspondence located **at Bundle E, folder 10, item 06, the pdf pages from 66 to 124** It is so that no application was brought.

242.1. In the letter of 29 August 2019, which is part of the correspondence annexed, Adv Mkhwebane's attorney of record indicated that she had an obligation to make available all the documents that formed the basis of her findings which included every scrap of paper throwing light, however indirectly, on those proceedings, both procedurally and evidentiary. Does Adv Mkhwebane agree with this and if not why? Does Adv Mkhwebane accept that the standard referred to herein was not complied

[82] *"[73 … With regard to Ms Donne Nicol, one of the managers, the report states:*
"She also confirmed virtually all what the other two (2) members of the fundraising campaign had mentioned. For instance the **<u>pre-condition made to the donors that they should not expect any favours for having contributed to the campaign, as well as their identities and amounts pledged being deliberately concealed from President Ramaphosa</u>.**"

with in respect of the CR17 Report, the SARS Unit Report, the CIEX matter and the Vrede matter?

242.2. DJP Ledwaba had invited any party aggrieved by the sealing of such documents to bring a formal application to have it set aside. Why did Adv Mkhwebane not bring a formal application to unseal the documents?

242.3. On what basis did Adv Mkhwebane annex parts of the FIC report, which was sealed, to her affidavit?

242.4. Why did Adv Mkhwebane analyse the bank statement only after issuing her report. What purpose did this serve?[83]

243. Adv Mkhwebane testified that the emails constituted confirmed evidence.[84] What did they confirm and can such confirmation be based on emails that were not authenticated or legally obtained?

244. What invitations and instructions before Adv Mkhwebane precisely reflected that President Ramaphosa had been "constantly informed of the activities of the CR17 Campaign"?

245. When reliance is placed on emails, is it a reference to the 7 pages in the Rule 53 record or additional emails as well?

246. What evidence reflected that President Ramaphosa had met with donors during the banquet function or that he had broader interaction with donors "whom he knew well".

247. On what basis is it alleged that because President Ramaphosa made speeches, relaying a vision for the ANC and South Africa, at dinners at which potential donors attended constituted proof that he actively participated in the campaign?[85]

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[83] Adv Mkhwebane testified:

"Adv Mkhwebane: "I pause here and state that **the records which include emails and bank records which I intend to rely on as evidence were sealed by the High Court in order to prevent them from being made public**." That was done.

Adv Mpofu: That is what I was mentioning earlier, so those bank statements, bank records and so on, you saw them before they were sealed, correct?

Adv Mkhwebane: Yes.

Adv Mpofu: Analysed?

Adv Mkhwebane: **Yes. After we issued the report."**

[84] So the version of all these people, the managers, the President? 'No, there was a deliberate plan that he must not know' and so on, and so on. So let us call that the version. And then you subsequently **got to acquire confirmed evidence contained in the emails.** You are now the 'judge' because these two things, at least at face value, look like they are contradicting each other. You then had to assess, that is your job, to assess the evidence, as you said earlier, correct?

Adv Mkhwebane:Yes, the investigator; but yes, under my direction.

Adv Mpofu: When I say 'you' now, I mean plural, Public Protector. Okay, good.

Adv Mkhwebane:Besides the email, SC and Chairperson, remember the evidence of one of the people who donated and who was part of one of the dinners.

……

of hearing a version from somebody and when you have the objective evidence of an email that is not denied, then you can test it. That is more or less the methodology that you were using, correct?"

Only information in the emails and what one person had to say about a dinner – we are told by Adv Mpofu it is Gavin Watson, so going to go to exactly what he said later.

[85] Committee affidavit, part I; paragraph 269; Transcript 16 March 2023; p. 7984.

248. Adv Mkhwebane testified that Mr Watson told her that he had attended a dinner with President Ramaphosa.[86] Mr Watson's affidavit indicated that the dinner he had attended was the Back to School dinner in 2016 or 2017,[87] and that it he had not attended at a CR17 Campaign dinner.[88] On what basis did Adv Mkhwebane conclude such?

249. Was Adv Mkhwebane in possession of any evidence contrary to what Mr Watson had indicated to her under oath? On what basis was Mr Watson's evidence ignored?

250. Are internal party elections legally State affairs, if so why?[89]

251. On what basis, given the context of section 4 of EMEA, is Adv Mkhwebane empowered to investigate a political party's election campaign[90] simply because it was raised in correspondence?[91] Where does EMEA provide for own initiated complaints?

252. Is it correct that in the CR17 matter (and SARS Unit), no three-strike rule was applied for purposes of issuing subpoenas, as in the Vrede matter?

253. Does Adv Mkhwebane disagree with the HC that:

> *"[77] Mr Maimane's complaint was not about the CR17 Campaign.*
>
> *[78] Mr Shivambu's complaint similarly had nothing to do with the CR17 campaign."*?

254. At para 11.2.1 (p. 306) Adv Mkhwebane indicated that the President exposed himself to "*a risk of conflict between his official duties and his private interests or used his position to enrich himself and his son through businesses, owned by AGO*". If this is a suggestion that the President's goodwill was being bought and he was accepting donations that had strings attached, what evidence in the CR17 Report supports this?

255. If the undisputed evidence that the President did not know about the donation from Mr Watson is accepted, on what basis could it be expected that he had exposed himself to any risk?

256. The President, in his HC founding papers, set out the nature, purpose and operations of CR17 (paras 50, 73, pp. 22 – 31), including referring to a media statement that had already been

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[86] Transcript 16 March 2023; p. 8002.
[87] CR17 **"MCR18B"** p. 326 at paragraph 12.
[88] CR17 **"MCR18B"**, p. 324.
[89] Is it not so that it was rejected by the HC that Adv Mkhwebane had the power to investigate the CR17 Campaign (see in particular paragraphs [91], [99], [100], [106] and [109] of the judgment pp. 1091 – 1097). It was similarly rejected by the CR17 CC at paragraph [64] onwards (see in particular paragraphs [72],[78], [88], [91] and [92] where it was concluded that the donations were not for personal benefit but because internal party elections were not State affairs).
[90] Questions relating to the CR17 Campaign are asked based on the factual issues, albeit that legally the law was clear that Adv Mkhwebane had no jurisdiction to investigate the CR17 Campaign.
[91] Transcript 16 March 2023; p. 7973.

released in August 2017 that described the purpose of the CR17 Campaign). This too was set out in his response to the section 7(9) notice but was not encapsulated in the CR17 Report:[92]

> *"27. From the outset. CR17 determined that the campaign should not focus simply on promoting an individual's candidacy but should also present a vision of the ANC and the country by electing an ethical leadership collective. The campaign dedicated much effort and resources towards organisational renewal and cadre development, developing a range of communications products that covered policy issue s, current debates and struggle history.*
>
> *28. One of the communications platforms was a weekly newsletter , known as #Siyavuma. which was sent to supporters by email. #Siyavuma covered organisational matters. policy issues and ANC history, among others."*

257. In response Adv Mkhwebane stated:[93]

> *"191. AD PARAGRAPHS 50 to 73*
>
> *191.1 I have already dealt with the content of these paragraphs elsewhere in this affidavit.*
>
> *191.2 The contents of these paragraphs are denied in so far as they are inconsistent with what I have stated above.*
>
> *191.3 I deny that I had no authority to investigate the CR17 campaign and that there are no factual or legal basis for the finding that the President was duty bound to disclose the CR17 donations."*

258. The averment that the CR17 Campaign did not focus simply on an individual candidacy (as stated in the founding papers at para 54, p. 24) remained undisputed. If Adv Mkhwebane disagrees, indicate where in the HC AA is it reflected.

259. In oral evidence before this Committee the identities of the persons who donated to the CR17 Campaign was explained at length. Why was this not included in the CR17 report if it was relevant to the findings in the report?

260. The CR17 campaign management testified before the State Capture Enquiry that more than R200 million was collected whilst President Ramaphosa indicated that it was just more than R300 million. Before the section 194 Committee the amount of donations was spoken of in the region of R1.2 billion although with an acknowledgement that some money "*may have moved twice*".[94] Has the amount been inflated or exaggerated beyond what could reasonably be true? Is the amount of R1.2 billion supported in the CR17 Report or the documents in the Rule 53 record?

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[92] CR17 Annexure **"MCR21"** at p. 329.
[93] CR17 HC AA paragraph 191 at p. 842.
[94] Transcript 29 March 2023, p. 8262.

261. Why was the Committee not informed that the amount of R1.2 billion or thereabouts was materially inconsistent with the information before Adv Mkhwebane at the time the CR17 Report was compiled?

262. What evidence before Adv Mkhwebane indicated that President Ramaphosa and his family were beneficiaries of the Cyril Ramaphosa Foundation? If none, on what basis does Adv Mkhwebane say that the Ramaphosa family benefitted from money paid to the Cyril Ramaphosa Foundation? Is it not so that President Ramaphosa informed Adv Mkhwebane as to the reason why funds were paid to the Cyril Ramaphosa Foundation? Why was this not referred to in the CR17 Report?

263. Is it not so that the President's response to the section 7(9) notice (which was annexure **"MCR21"** in the CR17 HC founding papers) extensively set out the funds received by the CR17 Campaign, and pointed out the incorrectness of the figures which Adv Mkhwebane reflected in the section 7(9) notice? Notwithstanding this, is it not so that this information was simply disregarded and the same figures pointed out by the President to be incorrect were simply repeated in the CR17 Report. On what basis did Adv Mkhwebane reject the President's explanation as contained in his section 7(9) response? Why is the CR17 Report silent in relation hereto?

264. Adv Mkhwebane's evidence was that determination of the funds paid into the EFG2 Trust account constituted a "*very complicated financial analysis process*" to which was referred as "*bush accounting*".[95] Why make no reference to the President's response to the section 7(9) notice (from paras 97 *et seq* (363 – 369) where it was reflected that Adv Mkhwebane in the first instance had double-counted amounts, not taking into account inter-account transfers?

265. Is it not so that all that Adv Mkhwebane did in evidence to the Committee was to add up the deposits made into EFG2, Ria Tenda and Linked Environmental Services accounts as a simple addition exercise without regard to the fact that there were inter-account transfers? For example, if R100 was paid into the EFG2 account and that same R100 was transferred into the Ria Tenda account and then transferred into the Linked Environmental Services account, then on the methodology used by Adv Mkhwebane it would have counted as R300. Is that not the underlying erroneous premise on which the amount of R1.2 billion was reached as a total?

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[95] "*Adv Mkhwebane: I will just read the first three. "From the evidence received by my office an amount of R191 482 227.43 was deposited into this EFG2 Absa Trust Account, between 6 December 2016 and 1 January 2018."* ***So it was almost a period of two years, or one year and some months.*** *"The R190 108 227 was transferred out of this account in the same period."* ***So it was a very complicated financial analysis process, so having a lawyer investigating the matter was difficult for us because all the information*** *... **I mean this R190 million who were paid for that. So we just summarised key issues.***
Adv Mpofu: Yes, fair enough. In other words, you did what we call bush accounting."
Adv Mkhwebane: Definitely."

266. Is it not so that there is no evidence in the CR17 Report that any of the funds that were paid into the CR17 Campaign came from an illegal source?

267. Is it not reflected in the response to the section 7(9) notice what the money received was used for (extensively set out in pp. 355 – 363 as part of the response to the section 7(9) notice and was incorporated into the papers before the HC)? Included was an explanation as to why funds were transferred to the Cyril Ramaphosa Foundation. Is it correct that this explanation did not get included into the CR17 Report, nor was it disputed in the HC?

268. Given that Adv Mkhwebane was provided with the objectives of the Ria Tenda Trust in President Ramaphosa's response to the section 7(9) notice (**"MCR21"**, p. 359), on what basis was it disputed that he neither established the Trust, nor had a role in directing its operations? Adv Mkhwebane's evidence was that there was one director of the Ria Tenda Trust.[96] Is it not incorrect as there are four trustees?

269. Precisely what evidence did Adv Mkhwebane have that President Ramaphosa's son was being unlawfully enriched and not rendering bona fide services elsewhere in Africa? Does Adv Mkhwebane view the amount of R171 000 per month as a significantly large sum of money?

270. Does Adv Mkhwebane have any evidence to show that either President Ramaphosa or his family participated in the transfer of the R500 000 from Mr Watson to the EFG2 account?

271. Adv Mkhwebane sought Mr Ngobeni's assistance in respect of the Gordhan related litigation, i.e. the SARS Unit litigation. Mr Ngobeni had previously expressed the view that Minister Gordhan was a "*serial offender*" that Adv Mkhwebane should combat "*public distortions, falsehood and misleading statements made by politicians*" about investigations being conducted by her. Did Adv Mkhwebane regard herself as waging a war against Minister Gordhan or any other politician ? if so on what basis did she do so?

272. Does Adv Mkhwebane take issue with the dicta as set out in paras [123] – [127] of the CR17 CC judgment? Is it not so that despite getting judgment in the CR17 matter from the CC, the instructions remained to appeal the SARS Unit matter knowing that the remedial action which implicated Johann van Loggerenberg was bad in law as he had been denied *audi* and for that reason alone the SARS Unit Report would be set aside (apart from all the other reasons). Is this not fruitless and wasteful expenditure?

273. In the CR17 Report it is alleged that Mr Watson had indicated initially that he had also donated to the campaign of the erstwhile ANC candidate for the ANC presidency, Nkosazana Dlamini-

[96] *"And one of the people you will be showing now or who has the benefactor,* ***is the sole director of Ria Tenda****, which is in the report, but maybe Adv Mpofu will show you."*

Zuma,[97] but that he later retracted this in an affidavit, claiming he had never donated to her campaign.[98] Is this not incorrect if one has regard to the following exchange between Adv Mkhwebane and Mr Watson:

> *"PP ask did you donate to NDZ?*
>
> *Much laughter follows.*
>
> *Watson: my sister these things that you ask, they're hard. I don't want to put myself in trouble. Wait let me explain to you properly. Have you seen what is being published in the papers? . I'm the polony in the sandwich here.*
>
> *PP agrees with him. She says yes, I see that too. That's how I see it too.*
>
> *Watson: you see that now. PP says yes, true. She says you are (the polony in the sandwich).*
>
> *Watson says and now these things are in the papers, I am being targeted here.*
>
> *PP says in the background (or over him) yes, because you are seen as taking the work away from some people (or something to that effect).*
>
> *PP says going back to the question that your blood is green, black and gold.*
>
> *Now you had 2 people coming from the same organisation has something like this happened before where you donate to a campaign (rather than the organisation) that's why I am asking.*
>
> *Watson says you see my sister I helped both of them; I helped both of them. I don't want to get into those things but I helped them both and they both know it. You see in the newspapers, these things are. But they want to put me in the middle of these things. What has happened here is wrong, really."*?

274. Mr Watson, during his interview with Adv Mkhwebane, indicated that he had had a fall out with Mr Venter, pointing to certain irregularities that had arisen for which an ongoing investigation was being conducted. Did Adv Mkhwebane ascertain the credibility of Mr Venter's evidence, and especially his evidence that parts of his affidavit were not correct, despite having been deposed to under oath, ostensibly because it was signed under duress?

275. Was the remedial order directed at the NDPP in the CR17 Report[99] together with the monitoring function[100] not an intrusion on the powers of the NDPP?

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[97] Transcript 16 March 2023; p. 8002.
[98] Transcript 16 March 2023; p. 8003.
[99] CR17 paragraph 8.2.1 (104):
"Within thirty (30) days of receipt of this Report take note of the observations contained in paragraph 7.3.1. as well as the recommendations contained in paragraph 7.3.3 of this report. And in line with section 6(4)(c)(i) of the Public Protector Act, conduct further investigation into the prima facie evidence of money laundering as uncovered during my investigation, and deal with it accordingly."
[100] CR17 paragraph 9.4 (105):
"The National Director of Prosecutions must. within thirty (30) days from the date of the issuing of this Report ***and for approval of the Public Protector, submit an Implementation Plan to the Public Protector indicating how the remedial action referred to in paragraph 8.2.1 will be implemented."***

276. When Mr Maimane raised money laundering, why did Adv Mkhwebane not inform him that it does not fall under her jurisdiction and advise him to lodge a complaint with the South African Police Service as was done in the Absa / Vrede matters?

277. Why did Adv Mkhwebane direct the NDPP in the SARS Unit matter to expedite the criminal trial against Mr Pillay and other former SARS officials?

278. Why would a matter be referred to the NDPP for investigation when the power to investigate crime lies with SAPS?

279. Notwithstanding that the HC and the CC had made it clear what the elements of the crime of money laundering is, the evidence of Adv Mkhwebane, including before this Committee, remained that the movement of money from one account to another is indicative of illegality. On what basis do such transfers amount to money laundering?

280. Adv Mkhwebane's evidence before the Committee had been that, in directing the NDPP to investigate a criminal offence and how to go about doing this, she was acting in accordance with the Nkandla judgment. Where in the Nkandla judgment is there a reference or support for directing the NDPP to investigate any criminal offence.[101]

281. Based on what evidence did the Public Protector in the letter dated 7 August 2019 accuse the NDPP of "*having unilaterally engaged with the President's attorneys and at the President's behest*"[102] thereby suggesting collusion between the NDPP and the President's office?

282. Does the Public Protector Act limit the powers of a PP vis-à-vis the NDPP to notifying them of facts evidencing an offence? Where in the Public Protector Act does it permit a PP to instruct the NDPP how to prosecute? Does Adv Mkhwebane agree that same would constitute an interference with the prosecutorial powers and independence of the NDPP and be inconsistent with section 32(1)(b) of the National Prosecuting Act?

283. On what basis does a public body divest itself of an obligation to grant a hearing when it makes an adverse conclusion against any person by asserting that a different institution would in due course provide such hearing?[103]

284. It is understood on the evidence before the Committee, and confirmed that it is accepted by Adv Mkhwebane, that:

    284.1. The remedial action ordered by the Public Protector is binding against such persons against whom it is ordered;

[101] Transcript 16 March 2023; p. 8096; Transcript 28 March 2023; p. 8119.
[102] At paragraph 15 of the letter – p. 1117.
[103] CR17 At paragraph 69.3, p. 1259.

284.2. The NDPP could not ignore either the remedial order or monitoring instruction issued by the Public Protector; and

284.3. Adv Mkhwebane has no powers to direct the NDPP to investigate the allegations of money laundering or of any crime, or to direct the NDPP to submit an implementation plan as to how it intends going about the criminal investigation.

285. Precisely what evidence did Adv Mkhwebane have in her possession that reflected that the Speaker was being unduly influenced to support the President's case?

286. Does Adv Mkhwebane agree that when transgressions are referred to Parliament by the PP, the referral cannot be directed in a way that assumes the powers of Parliament?

287. Does Adv Mkhwebane understand the order that had been made by the CR17 HC as a personal cost order against her in light of her oral evidence in relation to the costs before this Committee to the following effect:

287.1. Reference was made to a precedent of personal cost orders.[104]

287.2. "*Protection of the untouchables*" – the latter being those who are implicated in the investigation and who have donated to the CR17 Campaign.

288. Should Adv Mkhwebane's evidence be understood to be that the judgment of all the Courts who have found against her are because these judges seek to protect "*the untouchables*" and not because she either misapplied the law, failed to give *audi*, made egregious comments against public officials or committed similar unbecoming or unlawful conduct – see, for example, summary of paras [198] – [212] in the CR17 HC judgment?

(ii) <u>Mainly Gordhan / SARS Unit</u>

289. Is there any material source relied upon that is not listed in the key sources in the SARS report? If so, what was relied on and why was it not listed?

290. Whilst the PP supported the evidence of Ms Mvuyana and Mr Mataboge, alleging that they stand uncontested, the following appears to be contradictory:

290.1. Adv Mkhwebane indicated that her conclusions were reached based on independent investigations and not simply a reliance on the reports of Adv Sikhakhane , KPMG and others.

290.2. Ms Mvuyana's evidence was that she was not aware of any other investigations apart from these reports and the recordings. She had not been given the affidavit of Mr Lebelo, and if any evidence of Mr Lebelo made its way into the report, it was not put there by Ms Mvuyana. Ms Mvuyana also did not have the IGI Report.

290.3. Mr Mataboge claimed to have not read the Lebelo affidavit, so he could not have inserted parts of it into the report. Mr Mataboge also testified that he did not read the IGI Report, though he had it. It is not clear on what basis either Ms Mvuyana or

[104] Transcript 16 March 2023; p. 8075.

Mr Mataboge can claim to "*support*" the rationality of a report in which material aspects thereof they appear to have had no knowledge about.

290.4. Can this contradiction be clarified?

291. Mr Pillay's criticism was that the SARS Unit Report had accepted allegations about him and discarded almost everything that he had said.[105] Where in the SARS Unit Report is the reasons proffered or the basis given as to why Mr Pillay's extensive explanations as provided under oath in response to the section 7(9) notice was rejected?

292. Adv Mpofu SC put to Mr Van Loggerenberg, that Adv Mkhwebane relied on reports done by senior counsel, a Judge, an audit firm and OIG, who all found that the Unit was unlawful.[106] In contrast, Adv Mkhwebane's evidence was that she did not rely on those reports and only used them as leads and that they corroborated her independent investigation. Clarify which version is correct?

293. In response to the letter from Mr Pillay and Mr Van Loggerenberg's attorneys calling on the PP to stop making defamatory and false statements, Adv Mkhwebane wrote the following email to her staff and attorney, Seanego Inc, on 15 June 2019:[107]

> *"There is proof of threats to arrest for money laundering, threats to poison me and actually my Protector has been poisoned (we have proof from the doctors) My car tempered (sic) with Witnesses who fear for their lives confirmed two people died mysteriously when they spoke about the rogue unit Peega arrested for rhino poaching after speaking out (set up) Mokoena charged for non existent tender irregularity and frustrated until she resigned"*

293.1. What evidence did Adv Mkhwebane have of the veracity of the allegations made in this email?

293.2. Did the content hereof influence Adv Mkhwebane's findings of the unlawful activities of the SARS unit?

293.3. Was it Adv Mkhwebane's belief that members of the SARS unit had made the threats against her and/or attempted to poison her and/or her Protector? If so, what proof did she have ? If not, what was the relevance of the content of the email to the truth or otherwise of the statements she made in respect of unlawful activities of the "rogue unit"?

293.4. Is the reference to the SARS Unit as the "rogue unit' and the suspicions of unlawful activities referred to in the email indicative that Adv Mkhwebane was no longer objective in so far as the activities of the SARS unit were concerned? If not, what other reasonable explanation is there for the content of the email?

294. From para 5.5.24 of the SARS Unit Report Adv Mkhwebane has regard to submissions of Mr Keletso Manyike who alleged that the SARS Unit was used for political meddling. On what

[105] Transcript p. 2313.
[106] Transcript p. 449.
[107] Bundle F 161 p. 3221.

basis was his evidence preferred to that of Mr Pillay and Mr Gordhan given that no interview or signed affidavit was obtained from him by investigators?

295. Mr Pillay on affidavit, in response to a subpoena,[108] stated as follows:

> *"A subsequent admission by retired Judge Kroon under oath, in March 2019 that **all members** of the so-called "Kroon Advisory Board" had deliberated the statement (between May to June 2015) that the "unit was unlawfully established" as put forth by the so called "Sikhakhane panel". The Kroon Advisory board then concluded that it was indeed wrong to have concluded this. **These facts can be determined from retired Judge Kroon and the members of the board directly**."*

295.1.1. Having been so informed, did Adv Mkhwebane follow up with Judge Kroon and/or any members of the board directly to confirm whether or not they had done an independent investigation or whether they had simply reiterated what the Sikhakhane Panel had said?

295.2. If not, on what basis did Adv Mkhwebane dispute the evidence of Mr Pillay?

296. In the HC FA a media article was attached which quoted Judge Kroon saying "***we revisited it and discussed it, and it was concluded we should not have made that statement***. *We should have restricted our comments to the members of the unit having engaged in unlawful activities. We did not have the full information.*"[109]

296.1. Given that this was not refuted by Adv Mkhwebane in answering this, on what basis was this not accepted?

297. Is it correct that the only reference to Judge Kroon in the SARS Unit Report is at para 2.5[110] as part of what SARS had submitted to the Public Protector?

298. What evidence did Adv Mkhwebane have to support that Judge Kroon issued the apology in his personal capacity and not on behalf of the Board?

299. If the Sikhakhane Opinion incorrectly interpreted the NSI Act – as confirmed by the Courts – then both Adv Sikhakhane and his juniors, and by extension the SARS Advisory Board headed by Judge Kroon did so too. Is this disputed?

300. Given that SARS has publicly stated it was abandoning any reliance on the Sikhakhane Opinion, what purpose would it have served to have it reviewed and set aside even if, as a matter of law, it was possible to do so?[111]

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[108] SARS Unit record Annexure **"PG10"**, Volume 3, pdf 383, specifically at paragraph 31.7.10.
[109] Annexure **"PG15"** p. 748, Volume 8.
[110] Page 256.
[111] Transcript p. 484.

301. Why was the finding in the Sikhakhane Opinion at paragraph 82 ignored:

> *"However, as a general rule, it was accepted that the Unit did not have the required equipment to carry out such electronic surveillance or interceptions."*

302. Did the Sikhakhane Opinion find that there was a suspicion which it did not put higher that a *prima facie* case that may justify further investigation?

303. Is it not so that the Sikhakhane Opinion did not provide corroboration for Adv Mkhwebane's findings that the SARS Unit had interception capabilities?

304. Is it correct that the suggestion that the Sikhakhane Panel Report was widely repudiated, was contained in the written submissions of Adv Trengove SC made to and accepted by the Full Bench.

305. Is it disputed that both the Sikhakhane Opinion and the Trengove Opinion were only legal opinions and not binding?

306. In the SARS report (para 5.2.15.6) it is indicated that the SARS Unit utilised the investigative methods listed in paragraph 5.2.15.6 of that report – which are attributed to the opinion by Advocates Trengove SC and Nxumalo. In her oral evidence, Adv Mkhwebane confirmed that the activities listed by Trengove SC and Nxumalo were *"the type of activities used by the unit at the time, what they included according to the Trengove SC opinion"* and *"so that is what the opinion was saying .. this unit was doing"* (p 8360 to 61). The opinion in question does not state that these activities were actually taking place. At para 2.3 the authors state that the list of activities in question is a *"[l]ist of activities that must be considered whether they fall within the scope of SARS' investigative powers".* Further, at paragraph 35 it is stated that:

307. "*the Sikhakhane Opinion found certain specific methods employed by the SPU to be unlawful. Those methods and a list of additional methods ('special investigative methods') were presented to us to consider whether it is lawful for SARS to use them*".

308. In light of the aforementioned, Adv Mkhwebane is asked to indicate whether she accepts the following:

308.1. The opinion did not relate to whether the activities took place or not, but whether, if the listed activities had/were to take place, they would be lawful.

308.2. Trengove SC and Nxumalo did not investigate, consider or make any finding on whether the SARS Unit actually utilised the listed methods.

308.3. Adv Mkhwebane's reliance on the opinion to substantiate the findings that the unlawful activities took place was erroneous.

309. The following statements were made in the Sikhakhane Opinion:

> *"*80. Notably, **all of those we interviewed, who knew about the NRG/HRIU and/or who were part of it remained adamant that the unit did not have the capacity to intercept communication. In fact, all the unit's operatives, both in respect of the old NRG and the new HRIU, either asserted that the unit did not have equipment to carry-out electronic surveillance and/or interception of communication or were uncertain about whether such surveillance and/or interception of communication had occurred or not**;
>
> *82 However, as a general rule, it was accepted that the unit did not have the required equipment to carry out such electronic surveillance or interceptions ... ;*
>
> 160 Ms Walter makes various allegations of other confidential taxpayer information having been disclosed to her by Mr Van Loggerenberg which is expressly disputed by Mr Van Loggerenberg. The same applies in relation to alleged interceptions made by SARS;
>
> . . .
>
> 186.3 Although he was indeed Intimately involved in the functioning and later management of the NRG, **there is no direct evidence linking him to any illegal interception of conversations of Ms Walter or any other taxpayer ...***"*[112]

310. As per the standard set by the **Mail & Guardian** case, what independent investigations did Adv Mkhwebane follow to confirm or refute whether this was indeed so?

311. Adv Mkhwebane's evidence was that she used the Sikhakhane and KPMG Reports and the other opinions as 'leads' and also conducted her own investigation and presumably therefore independently acquired and verified information. There is no evidence in the Report or the Rule 53 record of any evidence having been independently acquired and verified. Evidence appears to have emanated from the Reports, the Opinions or some of the documentation that underscored the closing report in 2014. Who did this independent investigation on which is relied?

312. Adv Mkhwebane relies on the Sikhakhane Opinion as supporting her conclusion that an Intelligence Unit was created in violation of legal prescripts, but contrary to the Sikhakhane Opinion, she does not rely on its findings that says SARS had no interception capacity. How does Adv Mkhwebane explain this selective reliance?

313. At paragraph 85,[113] Minister Gordhan alleges that Adv Mkhwebane relied heavily on the "*discredited report by the Sikhakhane Panel*". This is not denied in her answering affidavit and there is no response to this allegation. Does Adv Mkhwebane maintain she did not rely on the Sikhakhane Panel but only used it as a "*lead*" or "*corroboration*"?

[112] The "*he*" to which is referred is Mr Johann van Loggerenberg.
[113] At p. 173.

314. In the HC, Mr Pillay, in his founding affidavits, submitted that the Sikhakhane Panel was fatally flawed in fact and law based on the following:

> *"**36.2.3.1** My Submissions to the Sikhakhane panel in August and September 2014.*
>
> ***36.2.3.2** My submission in December 2014, which I prepared after the Sikhakhane panel had been delivered, which I addressed to the then SARS Commissioner, Mr Tom Moyane.*
>
> ***36.2.3.3** A legal opinion obtained by SARS in January 2007.*
>
> ***36.2.3.4** A legal opinion obtained by the then National Intelligence Agency in 2007.*
>
> ***36.2.3.5** A legal opinion obtained by SARS in May 2007.*
>
> ***36.2.3.6** A legal opinion obtained by the then SARS Commissioner, Mr Moyane, in September 2015.*
>
> ***36.2.3.7** A legal opinion obtained by Mr Pravin Gordhan in March 2016."*

315. Does Adv Mkhwebane accept that she did not respond to these allegations which Mr Pillay repeated in his answer to the section 7(9) notice and that the contents of the documents upon which Mr Pillay relies for purposes of indicating that the Sikhakhane Opinion was flawed in fact and law are not traversed or considered in the SARS Unit Report?

316. The Sikhakhane Opinion appears to have relied on allegations made by the Sunday Times as the basis upon which it concluded that there was a *prima facie* suspicion of illegal activities which warranted further investigation. If that is the case, given that the Sunday Times itself retracted these allegations as fake news, is it not correct that the conclusion in the Sikhakhane Opinion would be left without basis?

317. KPMG paid back to SARS the R23 million it received in payment for its report. Ms Mvuyana's evidence was that she was not aware of the KPMG retraction despite it being extensively reported. Is Adv Mkhwebane aware of the retraction and subsequent repayment?

318. Mr Van Loggerenberg's evidence was that he had never participated in the acquisition of spying equipment for any of the units he managed; that no money had been spent on such equipment; that all equipment was submitted during the planning phase, disclosed during Internal Audit and Auditor-General Asset Audits and he did not know about the SARS regulation authorising the purchase of so-called spying equipment and he had never made application in respect thereof.

    318.1. Is it not so that this was corroborated in the recordings on which Adv Mkhwebane relied, being the conversation with Mr Moyane in which it is confirmed that Mr Van Loggerenberg was quite strict about what equipment could or could not be obtained, and that the SARS unit did not have surveillance equipment?

318.2. On what basis is it alleged that in any of the units overseen by Mr Van Loggerenberg that spying or interception equipment was acquired? If so, what proof is relied on in this regard?

319. Was Adv Mkhwebane's instruction that the references to the Gene Ravele dossier be removed from the SARS Unit report informed by him having publicly denied that an illegal unit existed at SARS?

320. Did Adv Mkhwebane have regard to the representations which the Head of Forensics made to the Adv Dumisa Ntsebeza panel in 2017 / 2018 which had been instituted by the South African Institute of Chartered Accountants? In those representations he stated or implied that some of the findings and recommendations were imposed on them by external parties not part of the process and that it was a "*copy and paste job*" as testified to by Mr Van Loggerenberg.[114] This was also stated in paragraph 91.6, p. 1657 of Mr Pillay's affidavit in the High Court which was not refuted.[115]

321. In Paragraph 5.2.5 of the SARS Unit Report, dealing with the submissions from SARS dated 5 February 2019, reference is made to a few paragraphs from the Nugent Report. Apart from the paragraphs that SARS drew to her attention, are there any other references to the Nugent Report in the SARS Unit report, what indications are there that any further regard was had to this Report?

322. One of Adv Mkhwebane's criticisms of the Nugent Commission is that it offered no analysis of the legal issues that the Sikhakhane Panel dealt with.[116] Where in the SARS report does Adv Mkhwebane provide such legal analysis? Is it not correct that while the SARS Unit Report relies on the provisions of the NSI Act, Adv Mkhwebane's answering affidavit before the High Court relies on section 209 of the Constitution. Was this shift in the legal position based on the fact that the reliance on the NSI Act was already then found to be indefensible?

323. Does a finding that something may have taken place constitute a finding of wrongdoing or misconduct on a balance of probabilities?

324. In paragraph 3.10 of the SARS Unit Report the following statement is made: "*The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.*" Is this statement not incorrect given that both Mr Pillay and Minister Gordhan disputed Adv Mkhwebane's power and jurisdiction to investigate the complaint on the grounds that the matters under investigation had occurred more than 2 years previously?

[114] Transcript p. 453.
[115] Pillay affidavit, Volume 16.
[116] Paragraph 118, p. 2798 (pdf 1021).

325. Good governance and integrity issues take up to 24 months to investigate. The issues relating to the SARS Unit were complicated and required time to be fully investigated. The EMEA complaint alone could have been investigated faster. Why did Adv Mkhwebane not limit her investigation to the EMEA complaint in order to meet the 30-day deadline?

326. In her evidence Adv Mkhwebane testified that it was practice to confirm the issues with the complainant to "*avoid issue creep*". Was there any "*issue creep*" correspondence with the complainants? Please submit.

327. Since Adv Mkhwebane allegedly did not have the recruitment policy that applied at the relevant time, what evidence in her possession pointed to irregularity in the recruitment of personnel?

328. Adv Mkhwebane says she was not provided with a recruitment policy for the relevant period. What precisely is the relevant period? Where is this period identified in the SARS Unit Report?

329. The SARS Unit Report does not state that it is a review of the closing report, nor point to any specific "*mistakes*" emanating from this closing report as grounds for such review.

    329.1. Is it not so that Adv Mkhwebane, in compiling the SARS Unit Report, relied on exactly the same information extracted from the closing report, with regard to the documentation provided to those investigators in relation to recruitment, payments and contracts of people?

    329.2. If not, what new evidence or independent investigations occurred in the compilation of the SARS Unit Report in relation to recruitment?

330. Did Adv Mkhwebane interview Mr Manyike? If not, why not?

331. Mr Van Loggerenberg's complaint, *inter alia*, was that the SARS Unit Report wrongly identified Mr Manyike as a member of the SARS Unit. If this is disputed, on what basis is such disputed?

332. What independent investigations were conducted to authenticate the submissions made by Mr Manyike on which Adv Mkhwebane relied?

333. Mr Pillay's submissions in respect of recruitment are dealt with in the SARS Unit Report in four paragraphs,[117] albeit that it is dealt with extensively in his response to the section 7(9) notice. Do these paragraphs properly reflect Mr Pillay's submissions?

334. Adv Mkhwebane initially gave the instruction that all references to the Gene Ravele dossier be removed from the SARS Unit Report. This was met with a response from Ms Mvuyana that to do so would mean that Minister Gordhan would no longer be directly implicated in the alleged

[117] SARS Unit report 5.4.21 – 5.4.24.

irregular recruitment of staff, but that there would still be a finding against Mr Pillay. Does Adv Mkhwebane dispute the relevant correspondence in this regard?

335. Is it not so that no steps were taken to investigate the veracity of the allegations made in the Gene Ravele dossier which were relied upon by Adv Mkhwebane? If this is denied, Adv Mkhwebane is requested to indicate where in the SARS Report such steps are referred to.

336. Precisely which independently obtained evidence was relied upon for the conclusions reached in respect of recruitment?

337. Was SARS subpoenaed to provide the policy deemed applicable by Adv Mkhwebane?

338. Is it not so that a policy which had existed many years prior thereto could reasonably no longer have been available in 2018?

339. Is it disputed that only SARS could have been in possession of such policy, and that a person no longer at SARS would not have the policy unless he had taken it with him when he left?

340. Would it not have been the responsibility of Mr Lebelo, given his position at SARS at the time, to have provided Adv Mkhwebane with a copy of that policy?

    340.1. Was Mr Lebelo asked to provide Adv Mkhwebane with a copy of that policy when he was interviewed?

    340.2. Was Adv Mkhwebane present during this interview?

    340.3. Was it Mr Lebelo that had provided Adv Mkhwebane, alternatively Mr Mataboge with the incorrect address for Mr Johann van Loggerenberg?

341. Having considered the complainant's' evidence in the 2012 complaint, did Adv Mkhwebane have regard to the response provided by Mr Pillay at the time? If so, where in the SARS Unit Report are the comprehensive responses which Mr Pillay indicated he had provided in 2014 dealt with?

342. Mr Pillay's evidence is that, of the persons listed in paragraph 14.3.4.2 of the section 7(9) notice, only two had been members of the SARS Unit in March 2017, namely Mr Timothy Mabaso and Mr Eric Khwela. What evidence did Adv Mkhwebane have at her disposal to the contrary?

343. On what basis and on what evidence does Adv Mkhwebane base her view that the Customs Border Control Unit and the SARS Unit were the same unit with different names ? (The SARS Unit being the alleged "*Rogue Unit*" and the CBCU being a specialised Border Investigation Unit who had been specifically trained on border patrol and investigative skills, whose establishment was announced in the 2006 / 2007 SARS Annual Plan as published).

344. On what basis did Adv Mkhwebane reject the evidence of Mr Pillay in his representations in response to the section 7(9) notice:

> *"179 To the best of my recollection, and this should be reflected in the SARS letter dated 26 August 2014 under my hand, SARS provided the Public Protector with copies of the post advertisements, shortlisting, Interview documentation and other relevant evidence, facts and descriptions of the recruitment of staff for the unit. I record that the Public Protector seems to be seeking minutiae from records dating back over ten years ago.*
>
> *"191 I do not have access to the Policy or other relevant documents of the time. The Public Protector's setting out of portions of the Policy alone is a narrow, selective and blinkered reading of the SARS Recruitment and Selection Policy and South African Revenue Service Act and other related policies and practices at the time, including, but not limited to, the practice of headhunting and appointments in exceptional circumstances.* ***To the best of my recollection, the necessary documents and processes were set out under my hand in reply to the Public Protector on 26 August 2014 on behalf of SARS."***?

345. Did Adv Mkhwebane take into account, when drawing negative inferences from documentation not being provided to her, that some ten years had lapsed since the events that she was investigating? If so, where is this referenced in the report?

346. In any event, is it not correct that in August 2014 when the policy had been in Mr Pillay's possession, he had made it available?

347. Detailed in paragraph 3.2.8 of the closing report,[118] is the Recruitment and Selection Policy RS001/05, reflected as being in the possession of the Public Protector.

347.1. Why was the aforementioned policy (which had only been signed off on 11 October 2017, when Adv Mkhwebane was already the Public Protector) not considered when the complaint was reconsidered? What rational explanation exists for the selective reliance on the evidence that was submitted during the investigation of the 2012 compliant?

347.2. On what basis could the non-provision thereof now be laid at the door of SARS?

347.3. Is it not so that according to the closing report[119] SARS had indicated that there had been adherence to this Recruitment and Selection Policy RS001/05 in the hiring of individuals implicated by the complainant and the appointment of members that constituted members of the NRG in line with the policy? On what basis, given that the closing report refers to this policy, can it thus be refuted by Adv Mkhwebane?

348. The reason for investigating the SARS Unit was stated as "*public interest*" and the need for the matter to be dealt with conclusively. Given that the SARS Unit had been the subject matter of numerous investigations, on what basis did Adv Mkhwebane conclude that her investigation was

[118] Bundle F At p. 2546.
[119] SARS Unit t paragraph 4.1.3.

necessary or could produce anything different to what numerous other bodies had already stated?[120] Was the investigation a proper use of limited PPSA resources?

349. In response to a request to indicate what special circumstances Adv Mkhwebane relied on it is stated that "*based on the available information from reliable sources that the surveillance equipment illegally acquired was still being used to intercept communication between people by the Unit which was not completely disbanded*".[121]

349.1. This averment is not included in the SARS Unit report, why not?

349.2. Ms Mvuyana's evidence was[122] that she had no knowledge as to where this information emanated from; she had never seen it and it did not appear in documents that she had. However, according to Ms Mvuyana' s drafting notes headed "*Discussion of draft with PP*"[123] at 4940, the following is stated (for ease of reference this page is is contained in the annexure marked **"D"**):

"*JM → in CPT (information received – SARS bug the house in CPT – journo call to take photos of Cape Town alcohol – issue articles talking → include the drive*"[124]

349.3. Are the initials "*JM*" a reference to Julius Malema, and if not, to who do those initials relate? And is it so that Adv Mkhwebane obtained this information from "JM" that electronic equipment was still being used for bugging? And if not, from who?

349.4. Where is the interview recordal or notes of the meeting with "JM"?

349.5. How was this communicated to Adv Mkhwebane?

349.6. Where did Adv Mkhwebane obtain this information as relayed to Minister Gordhan? And if it is an alleged anonymous source, what steps did she take to verify the veracity of such allegations?

349.7. Precisely what evidence did Adv Mkhwebane have to prove that (1) the SARS Unit had not been disbanded; and (2) that surveillance equipment was still being used by such members of the SARS Unit?

350. Adv Mkhwebane testified that the cameras installed in 2014 or 2015 were still there and operational.

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[120] SARS Unit (viii) p. 223.

[121] *"With regard to paragraphs 2.1 and 2.2 of your letter, please be informed that the reasons for my acceptance and investigation of matters which arose more than two years from the occurrence of this incident due to 'special circumstances' in terms of section 6(9) of the Act, please be informed that this is* ***based on the available information from reliable sources that the surveillance equipment illegally acquired*** *at astronomical* ***costs is still being utilised to intercept communications between people by the unit which was not completely disbanded****. So this is a matter of special interest as public funds are still being used for illegal purposes."*

[122] Transcript p. 7240.

[123] Bundle F, item 180, 189.43, p. 4936.

[124] ***Ms Mvuyana –*** *Okay, there was information received in Cape Town. Allegedly SARS bugged a house in Cape Town, I'm not sure which house now. "Journo" is journalist. "Called to take photos of alcohol – issues articles talking about ... include the drive." So this must have been information in a drive provided but this was not in the report. So unless this was the information that was being referred to in ... I can't, no, but this is July now. Okay, no. I don't recall. But that's the story that, it's shorthanded. But I don't recall it in the report, so I don't* ***think. It must've been a passing comment or we decided not to include it****."*

350.1. Which complainant indicated that whatever incident occurred at the DSO offices in 2014 / 2015 was caught on camera by an alleged camera that had previously been installed?

350.2. Alternatively, on what basis and on what evidence is it confirmed that the cameras were actually still there?

350.3. If so why was this not recorded in the SAR Unit Report as a "*special circumstance*" for investigating, nor was it stated before the Court.

350.4. What verification was done in respect of information provided to Adv Mkhwebane via email and forwarded to the investigators when information contained therein find their way into reports?

350.5. What precisely did Adv Mkhwebane allege was still being tapped and listened to, which constitutional rights were being violated that warranted an investigation?

351. In her oral evidence Adv Mkhwebane referred to blackmail. Was this information verified and why was this not referred to in the Report ?

352. Adv Mkhwebane's oral evidence refers to somebody who had been killed "*driving to a particular place*". Where did this information emanate from, who provided it and what verification was done in respect thereof? Why was this not contained in the Report.

353. In Adv Mkhwebane's answering affidavits she quotes from US law. On what basis does US law have any relevance in relation hereto? Is this a product of Mr Ngobeni having been briefed to deal with this matter in the background?

354. Neither Ms Mvuyana nor Mr Mataboge, were able to inform the Committee that they had evidence that the surveillance equipment was still being utilised. Ms Mvuyana disavowed being the person who inserted it into the report. Mr Mataboge's evidence was that he did not conduct any independent investigations. So, given that nobody else was involved in the drafting of the report, the conclusion to be reached is that this information was provided through Adv Mkhwebane. Is this disputed?

355. Is it Adv Mkhwebane's evidence that Ms Mvuyana has expertise in the identification and evaluation of equipment used for covert intelligence?

356. In the Sikhakhane Opinion there was no evidence of any equipment being unlawfully procured. KPMG attributed equipment to a "*generic unit*". Mr Van Loggerenberg testified that the KPMG Report did not attribute any interception equipment to any specific unit. On what basis is it then stated that the Sikhakhane and KPMG Reports corroborated the conclusions in the SARS Unit Report?

357. Based on the section 7(9) notice the source in relation to the allegations pertaining to the equipment is the KPMG Report. If this is not so, indicate precisely what the source was.

358. It was put to Mr Van Loggerenberg in cross-examination that the list of equipment KPMG regarded as "*interception equipment*" had not been withdrawn and that this was evidence of "*rogueness*". Mr Van Loggerenberg denied this, testifying that the KPMG Report had not attributed the equipment to the SARS Unit but had ascribed it to SARS.[125] Is it not so that this is borne out by the KPMG Report?

359. On what basis is Mr Van Loggerenberg's evidence disputed that he had never participated in the acquisition of spying equipment for any of the units he had managed, no money had been spent on such equipment and that all the equipment of the units that he had managed was submitted during the planning phase, internal audit and AGSA Asset audits?

360. Precisely which information as contained in the Rule 53 record reflects that Adv Mkhwebane independently considered documents and independently conducted investigations relating to resources of the SARS Unit or which demonstrated that it was an illegal spying unit?

361. What precise incidents of illegal surveillance did Adv Mkhwebane have direct evidence of?

362. Is it not so, even apparent from the recordings that Adv Mkhwebane relied on - albeit unauthenticated – that some members were conducting private work and not engaged in a SARS project?

363. Is it not so, if the recording is taken at face value, that certain members were using private equipment and were moonlighting?

364. To the extent that any equipment had been bought for installation at the DSO, it was done with the funds of the DSO and that equipment was retained by the DSO, according to this recording. Does Adv Mkhwebane accept this?

365. Adv Mkhwebane testified to this Committee that "*we independently uncovered that there is this equipment*". Indicate precisely what investigation was conducted and where is it recorded in the SARS Report that equipment had been independently uncovered? Further, where is it recorded that a batch of equipment different from that referred to in the KPMG Report had been found and was attributed to SARS. Precisely what in the Rule 53 record reflects such independent investigations and what had allegedly been "*uncovered*"?

366. During the cross-examination of Mr Van Loggerenberg, Adv Mpofu SC relied on a letter from Mr Kieswetter dated 18 February 2021, putting to Mr Van Loggerenberg that the equipment of the SARS Unit remained stored in a basement. Mr Van Loggerenberg disagreed. When asked if Mr Kieswetter was lying, he explained that the equipment referred to was the equipment that was

[125] Transcript p. 505.

contained in photographs in the Rule 53 record of the review application, which had nothing to do with the SARS Unit. Accepting that the equipment was being kept in storage, Mr Van Loggerenberg denied that it belonged to the SARS Unit or that any of the people in the High Risk Investigative Unit had ever seen this equipment or used it.

366.1. Where in the letter from Mr Kieswetter does it say that the equipment belonged to the High Risk Investigating Unit? And this was in fact confirmed in later correspondence by Mr Kieswetter?

366.2. Does Adv Mkhwebane accept that the equipment referred to by Mr Kieswetter was the same equipment which Mr Van Loggerenberg disputed was that of the SARS Unit?

367. Mr Pillay pointed out that the equipment referred to related to equipment to be found in the ACAS storage room, another SARS Unit and was not "NRG" – being one of the names of the SARS Unit - equipment. What independent investigations were done to refute this?

368. On what basis was the list of "*equipment*" presented to the public by the then Minister of Police and the then Minister of State Security, Nhleko and Mahlobo, respectively, in a press conference on 2 March 2016 attributed to the SARS Unit in question?

369. In the public announcement that was posted on You Tube during which Adv Mkhwebane indicated that she intended to issue a section 7(9) notice to Mr Gordhan she used the phrase "*rogue unit*" on three occasions without the qualification "*so-called*". As this was prior to the investigations being completed, on what basis did Adv Mkhwebane refer to it as such?

370. Is it accepted that the High Court is entitled to have regard to evidence put before the Court? Given that excerpts of the founding and answering affidavits in the litigation instituted by Ms Basani Baloyi against Adv Mkhwebane and Mr Mahlangu were attached to Mr Pravin Gordhan's replying affidavit in the review?[126]

371. As Adv Mkhwebane's stated under oath in the answering affidavit filed in opposition to Ms Baloyi's case as follows:

***"It is well known that I have even had to resort to issuing reports on YouTube so as to avert attempts to sabotage."*[127]**

371.1. Why is the High Court not entitled to have regard thereto?

[126] An excerpt of Adv Mkhwebane's answering affidavit is attached marked "PG76", Bundle A, p. 8298, at para 141.
[127] Bundle A, p. 8363.

372. Adv Mkhwebane's evidence in the Committee was that on or about 3 June 2019 she announced on YouTube that she intended to issue a section 7(9) notice to Mr Gordhan in the SARS Unit investigation, and this was confirmed in the video clip that was shown to the Enquiry.

372.1. Given that a section 7(9) notice is issued to persons who are implicated in investigations who may potentially have findings made against them, is it fair, or consistent with the constitutional right to dignity for an implicated person to learn via a social media or the media about the imminent issuing of a section 7(9) notice rather than directly from a Public Protector?

373. Based on recordings of interviews between Mr Van Rensberg and investigators working with Adv Brassey SC, and which Mr Helgard Lombard and Mr Johan de Waal had with Mr Tom Moyane,[128] Adv Mkhwebane concluded,[129] that during June 2007 until November 2007, Mr Pillay and Mr Janse van Rensberg had irregularly recruited Messrs Lombard and De Waal and /or authorised them to intercept communication at offices of the DSO and NPA without an interception direction issued by a judge in terms of the Regulation of Interception of Communication and Provision of Communication Act.[130]

373.1. Were these recordings lawfully obtained for the purposes of the investigation, if so how?

373.2. Both Mr Mataboge and Ms Mvuyana testified that the recordings relied upon had not been authenticated so on what basis were they regarded as reliable evidence?

374. The transcript of the recordings to which Adv Mkhwebane referred, and which was annexed to the affidavit of Mr Moyane differs with the transcripts which form part of the Rule 53 record that served before her and are also differently collated – is that not an indication in and of itself that the recordings were not reliable and/or may have been tampered with or was incomplete?

375. Is it not so, as confirmed by Ms Mvuyana, that no efforts were made to interview any of the persons featured on the recordings: namely Mr Lombard; Mr de Waal, and also Mr Van Rensberg?

376. Given that the Rule 53 record constitutes all documents and records relied upon during the course of the investigators that culminated into the SARS Unit Report, why was the Committee not referred to the transcript in the Rule 53 record?

377. In her oral evidence Adv Mkhwebane testified that she had spoken to Mr Moyane.

377.1. Why is there no record in the SARS Unit Report, the Rule 53 record or in any of the affidavits before the courts hereof?

[128] These recordings from paragraph 5.5.2 to paragraph 5.5.18.
[129] as reflected in paragraph 5.5.34 of the SARS Unit Report.
[130] Bundle E, Folder 7, Item 4, Vol 2, p. 177.

377.2. When precisely did this discussion take place, where and for what purpose and who was present?

377.3. If no investigator was present, why not?

377.4. On what basis could any reliance be placed on any conversation with Mr Moyane?

377.5. Was this conversation recorded? If so, provide this recording.

377.6. Was a minute taken? If not, why not?

377.7. Is it so that this is now being disclosed for the first time to this Committee?

377.8. What weight if any should be placed on what Mr Moyane is alleged to have said to Adv Mkhwebane?

377.9. If there is no record of this conversation and the contents of what was stated, on what basis can it be said to have been part of the investigation.

378. There are further recordings available on the *News24* media site[131] which indicate that the recordings relied upon by Adv Mkhwebane are incomplete. Why were these not obtained, or if obtained, given that they reflect that Mr Moyane knew there was no rogue unit having been so apprised in this recording?[132]

379. Why were the other recordings of conversations with the same persons not obtained from Mr Moyane?

380. Further, the additional recordings contain evidence which, if authentic, support Mr Van Loggerenberg's version. Does Adv Mkhwebane accept that she should not have relied on unauthenticated, unverified and unreliable, and what may well have been, incomplete recordings as she did?

381. In the recordings it is stated that:

381.1. Mr Lombard was recruited by the Scorpions to install equipment at the offices of the DSO; and not Mr Pillay.

381.2. Mr Lombard was paid by the NPA for the equipment that he installed at the DSO's office and that it was Mr De Waal's task to transcribe / type out recordings retrieved from the devices installed in the DSO at its behest.

382. In light thereof what evidence precisely was relied on to conclude that:

382.1. Mr Lombard and Mr De Waal had been recruited to do so by Mr Pillay and Mr Van Rensberg; and

382.2. it was done irregularly so?

383. On what basis can it be said that these recordings constitute evidence that Mr de Waal was recruited by Mr Pillay and by Mr Van Rensberg to intercept communications at DSO?

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[131] https://www.news24.com/news24/Investigations/listen-moyane-knew-sars-unit-wasnt-rogue-additional-recordings-show-20230607

[132] This recording has the same evidential weight as the recordings that Adv Mkhwebane relied on.

384. What other evidence was relied upon, and what independent investigations were conducted to support a finding that Mr Lombard and Mr de Waal were recruited by Mr Pillay to do illegal interceptions at the DSO and the NPA?

385. In the recordings both persons speaking to Mr Moyane, identified as Messrs Lombard and De Waal disavow that they operated unlawfully. On what basis does Adv Mkhwebane conclude to the contrary?

386. In these recordings – as is evident from the transcripts which form part of the Rule 53 record[133] and attached to Mr Moyane affidavit which Adv Mkhwebane put before the Committee:

386.1. Mr Lombard and Mr de Waal confirmed that the SARS unit had no interception capabilities. It was also confirmed by Mr Van Rensberg. In the circumstances why was this not reflected in the SARS Unit report?

386.2. Neither Mr Gerrie Nel nor Andre Leask was aware that Mr Lombard and Mr de Waal were employed at SARS, because they had not presented themselves as SARS operatives;

386.3. They confirmed that the DSO / NPA paid for the devices installed by Mr Lombard (and not SARS) and the DSO retained this equipment. In other words the DSO was bugging its own offices.

387. Given the above, on what basis does Adv Mkhwebane attribute this activity to instructions given by Mr Pillay that the offices of the DSO be bugged?

388. For what reason did Adv Mkhwebane not interview Mr Nel or Mr Leask? Is it not so that given her powers under the Public Protector Act she would have been able to do so?

389. Is it not so that the recordings do not show that SARS had interception capabilities, or that Mr. Gordhan, or Mr. /Pillay of Mr Van Loggerenberg or even SARS as an entity for that matter had orchestrated the bugging of the DSO / NPA offices. If Adv Mkhwebane states that this is not so, on what basis does Adv Mkhwebane disagree?

390. As neither Adv Mkhwebane, nor the investigators were party to the conversations in the recordings, is it not so that they are not only unauthenticated but, without more, constitute hearsay evidence?

391. Is it not so that the veracity of the recordings was never ascertained and yet findings and binding remedial action was recommended after placing reliance on their contents?

392. Mr Van Loggerenberg testified that the recordings are incomplete and that the transcripts are poor, and contrived. It was not put to Mr Van Loggerenberg in cross-examination that this was

[133] Bundle E, Folder 7, Item 3, Vol 29, "**PG47"**, **"PG48"**, **"PG49"**. Vol 30, **"PG50"**, **"PG51"**, **"PG52"**.

not so. Does Adv Mkhwebane dispute Mr Van Loggerenberg's description of the recordings and if so, on what basis?

393. Given that the judgement was penned by Potterill J, does Adv Mkhwebane dispute that she was in those circumstances attributing the conduct of a gross misinterpretation of the Executive Ethics Code and deliberately omitting words to a sitting judge of the High Court?

394. In paragraph 14.6.4 of the section 7(9) notice dated 1 June 2019[134] it is stated that "*SARS in their response dated 05 February 2019 did not dispute that Mr Pillay did not have a degree and that he possessed a Matric certificate*". Paragraph 14.6.4 of the 3 June 2019 version of the notice states the same. In paragraph 5.6.4 of the SARS Unit Report Adv Mkhwebane states that "*SARS in their response dated 05 February 2019 did not dispute that Mr Pillay did not have a degree and that he did not possess a Matric certificate.*"

394.1. Is it not correct that a reading of the section 7(9) notice indicates that the investigators were aware that Mr Pillay possessed a matric certificate.

394.2. Was Mr Pillay or SARS requested to produce Mr Pillay's matric certificate?

394.3. Was Adv Mkhwebane aware of the material change between the section 7(9) notices and the report in respect of the fact that Mr Pillay was in possession of a matric certificate. If so, what steps did she take to establish what the true factual position was ? If not, should she not reasonably have been aware, as the signatory of both?

395. The versions of the SARS report drafted by Ms Mvuyana[135] are the same as the section 7(9) notice in that it is stated at paragraph 5.6.4 that Mr Pillay possessed a matric certificate. This was changed in the version produced at 21h14[136] to Mr Pillay *"did not possess a matric certificate".*

395.1. This change was made after Mr Mataboge interacted with Adv Mkhwebane to obtain her input on the draft report, correct?

395.2. Was Adv Mkhwebane aware of the material change between the aforementioned earlier reports and the subsequent versions, including the final report, in respect of the fact that Mr Pillay was in not possession of a matric certificate. If so, what steps did she take to establish what the true factual position was ? If not, should she not reasonably have been aware, as the signatory of the final report that such changes had been made?

396. Paragraph 5.2.26 of the version produced at 21h14 stated that "*SARS and Mr Gordhan conceded that Mr Pillay only possessed a Matric certificate at the time of being employed by SARS in 1999*". This contradicts what is stated in paragraph 5.6.4 of the same draft, correct?

[134] Bundle F, item 189, 189.7 p. 3996.
[135] Bundle F, item 189,189.55 p. 5326 dated 4 July 2019 and 189.53 dated 4 July 2019.
[136] Bundle F, item 189, 189.57 p. 5481.

397. This final version of the SARS report was produced after Adv Mkhwebane had provided input to Mr Mataboge and Ms Mvuyana correct? Is this disputed?

398. Did Adv Mkhwebane instruct Mr Mataboge and/or Ms Mvuyana to amend paragraph 5.2.6 to state "*SARS and Mr Gordhan conceded that Mr Pillay did not possess a degree qualification nor a Matric certificate*" as is contained in the final report?

399. What steps were taken by Adv Mkhwebane to confirm the existence or not of Mr Pillay's matric certificate with the educational authorities?

400. On the basis of what precise evidence at her disposal does Adv Mkhwebane dispute that Mr Pillay matriculated in 1970 at Merebank High School?

401. Adv Mkhwebane was advised by Mr Paul Ngobeni[137] that where the Public Protector contemplates making a finding against a person to their detriment in a report, the person so implicated must be notified of a decision contemplated as well as afforded the opportunity to make written or other representations.

    401.1. Is the finding that Mr Van Loggerenberg's "*criminal conduct*" should be investigated by the National Commissioner of Police and that the OIGI recommendation that criminal charges be investigated against him to his detriment?

    401.2. If so, why was he not afforded the opportunity to make representations?

402. Were any steps, other than a call to the SARS whistle-blower, a former employee of SARS, ever taken to establish the correct address of Mr Van Loggerenberg? If so, what steps were taken? Was Adv Mkhwebane satisfied that her investigators had made every reasonable attempt to find Mr Van Loggerenberg?

403. Can Adv Mkhwebane explain why she did not consider the evidence provided by Mr Van Loggerenberg in 2016 which confirmed the history of the SARS unit and the matters that it dealt with which confirmed that the activities of the SARS unit were not unlawful?

404. In her answers[138] to the committee questions arising from the meeting of 15 July 2022, Adv Mkhwebane indicated that "*the buck stopped*" with Mr Pillay and Mr Gordhan to collate the information of Mr Van Loggerenberg and avail it to the PP. Does this mean that she abdicated her investigative responsibility in regard to members of the public in ascertaining the truth of her findings?

[137] Bundle F, item 161 p. 3166.
[138] Paragraph 11 of PP's answers to member's questions arising from meeting 15 July 2022.

405. Even if Adv Mkhwebane was of the view that Mr Van Loggerenberg was not an implicated person in the SARS report, it must be accepted that he was the witness with the best evidence (personal knowledge) on the activities of the SARS unit. Is this disputed?

406. Mr Van Loggerenberg testified that Adv Mkhwebane could have publicly asked him to contact her office, i.e. on YouTube. Considering the public announcements made by Adv Mkhwebane, was there any reason that she did not do so?

407. Considering that Adv Mkhwebane knew that Mr Van Loggerenberg was in contact with her office via his attorneys, why did she accept the assurances of her "*trusted officials*"[139] that he could not be found?

408. Both Mr Mataboge and Ms Mvuyana testified that only the former SARS employee was asked for Mr Van Loggerenberg's address, yet in Adv Mkhwebane's answer to the committee's questions,[140] she said that "*a subpoena was issued after engaging SARS HR to provide us with his address*". Which version is the correct one?

409. In her answer to the committee's questions,[141] Adv Mkhwebane said that "*all efforts to trace [Mr Van Loggerenberg] were actually undertaken*". This was contradicted by the evidence of Ms Mvuyana and Mr Mataboge who testified that no significant steps were taken to trace Mr Van Loggerenberg after it was found that the address was incorrect, apart from a google search. On what basis does Adv Mkhwebane allege that all efforts were made to trace Mr Van Loggerenberg?

410. Adv Mkhwebane said that she did not know that the attorneys had a "*mandate to receive subpoenas*" in response to a question why she did not serve the subpoena on Mr Van Loggerenberg's attorneys.[142] Can Adv Mkhwebane explain why she did not simply ask the attorneys whether they would provide their client's contact details or arrange for him to get into contact with her office and/or collect the subpoena?

411. In light of the fact that the investigators had the correct spelling of Mr Van Loggerenberg's surname, why does Adv Mkhwebane allege that this "*may have contributed to the difficulties in tracing*" Mr Van Loggerenberg?[143]

412. Apart from him having written two books about the unit, the article in *Noseweek* indicated that Mr Van Loggerenberg had vital information regarding the activities of the SARS unit. Why did

[139] Paragraph 11 and 12 of PP's answers to member's questions arising from meeting 15 July 2022.
[140] Paragraph 12 PP's answers to member's questions arising from meeting 15 July 2022.
[141] Paragraph 20 PP's answers to member's questions arising from meeting 15 July 2022.
[142] Paragraphs 21 – 22 PP's answers to member's questions arising from meeting 15 July 2022.
[143] Paragraph 31 PP's answers to member's questions arising from meeting 15 July 2022.

Adv Mkhwebane not delay the investigation into the SARS unit until such time as she was able to subpoena Mr Van Loggerenberg?

413. Adv Mpofu put the following proposition to Adv Mkhwebane:

> *"**Public Protector Advocate Busisiwe Mkhwebane –** That's the letter, the response of the Minister. All these letters are dealing with the issue of the report.*
>
> ***Advocate Mpofu –** The report, yes. Okay, now, would anybody reading all those letters, **given the content of those letters, some of which will have gone through, I think, with Mr Mataboge, can anyone who has read those documents ever think that you were concealing in this report** that you had a report anonymously dropped at your offices, **given what is actually written in those letters.***
>
> ***Public Protector Advocate Busisiwe Mkhwebane –** Definitely not. A reasonable person would not think like that.*
>
> ***Chairperson Mr Richard Qubudile Dyantyi –** Sorry, just keep the mic closer.*
>
> ***Public Protector Advocate Busisiwe Mkhwebane –** A reasonable person will never think like that, and a person who will assist and adjudicate this matter with an open mind will never think like that."*[144]

414. Was the aforegoing intended to represent to the Committee that the correspondence made it clear that Adv Mkhwebane had the IGI Report?

415. To what extent is all the preceding correspondence being relied on as evidence that Adv Mkhwebane was not concealing that she had the IGI Report.

416. Is it Adv Mkhwebane's position that she stated in the SARS Unit Report in express terms that she had the IGI Report?

417. Apart from the letter of 20 February 2019,[145] point out precisely where in any of this communication is it indicated that Adv Mkhwebane is in possession of a classified IGI Report. If there is no such reference, explain what was meant to be represented to the Committee?

418. Is it not so that in the letter of 20 February 2019 the SSA Minister advised Adv Mkhwebane that the IGI did not have a legal mandate to investigate SARS in terms of the Intelligence Services Oversight Act ("**the Oversight Act**") and SARS-related activities could not have been commissioned by the former SSA Minister.

419. If this is correct, then is it not so the entire IGI Report, to the extent that it sought to investigate SARS, would be unlawful? Would Adv Mkhwebane agree with that at a level of principle?

[144] Mkhwebane Transcript pp. 8323 – 8325.
[145] Item 4.4.1.12, p. 32 of the SARS Unit Report.

420. If the SSA Minister invokes his powers under section 7(7)(c) of the Oversight Act to request that the IGI conducts an investigation, then the SSA Minister must have the power over the subject matter for which it is instructing an investigation, is that not so?

421. Does Adv Mkhwebane accept that the IGI Report contained the identities of members, former members, sources, methods and intelligence of the SSA?

422. Adv Mkhwebane testified that pararagraph 4.4.1.29 of the SARS Unit Report which included under "*Further documents blurred and/or not listed due to their nature*" included the IGI Report? If so, how come neither Mr Mataboge, nor Ms Mvuyana was aware hereof?

423. Is it not the position that Adv Mkhwebane had allegedly obtained the information in relation to Mr Pillay's matric qualifications in a meeting with Minister Gordhan?[146]

424. Is it not so that Adv Mkhwebane was specifically requested to supplement her Rule 53 record by providing any and all documents comprising the "*independent evidence obtained*" referred to in paragraph 5.5.23 of the Report[147] and the attorneys of record provided the Respondents with nothing?

    424.1. The implication being that there was no independent evidence to provide.

425. Did Adv Mkhwebane meet alone with the SSA Minister. Why was that so? And why is there no record or minutes of that meeting? What were the security concerns in respect of recording such meeting?

426. As Adv Mkhwebane was not in possession of the Gene Ravele dossier, where did she obtain the information from? Why did Adv Mkhwebane not interview Gene Ravele?

427. On what basis is Adv Mkhwebane as a matter of law simply permitted to omit a critical report that she referred to in her report from a Rule 53 record without making any mention as to the basis upon which it is being omitted? If the Respondents had not brought a Rule 30A notice, would Adv Mkhwebane have disclosed the IGI Report?

428. What precisely did Adv Mkhwebane seek more information from the IGI for purposes of determining the veracity of the allegation of the existence and activities of the Intelligence Unit? Is it not so that the subpoena to the IGI and the discussion was limited to getting the IGI Report from him?

[146] Bundle E, folder 5, p. 1455 and Bundle E, item 9, p. 5375.
[147] Bundle E, folder 7, item 5, p. 1455.

429. It is reflected in the SSA Minister's letter of 20 February 2020 that she had requested Adv Mkhwebane to return the report to her as a matter of urgency at the meeting of 15 February 2020. Contrary, to Adv Mkhwebane's evidence, as apparent from Minister Letsatsi-Duba's correspondence and affidavits there was no undertaking given that she would provide Adv Mkhwebane with a copy of a declassified report? What documentation does Adv Mkhwebane rely on in this regard?

430. Precisely which correspondence from the SSA reflects what is stated in paragraph 5.2.29 of the SARS Unit Report that the SSA Minister undertook to request the Director-General to avail a declassified copy of the report as stated in the SARS Unit Report.

431. Where in the SARS Unit Report does it state that the IGI Report had been dropped off at the PPSA Offices anonymously? Adv Mkhwebane stated in the SARS Unit Report that she had it "*on good authority*" what the findings of the IGI Report were. Why not "*the IGI Report stated as follows …*" or "*I have ascertained from the IGI Report that …*"

432. Adv Mpofu asked Adv Mkhwebane the following:

> *"**Advocate Mpofu –** And would you look at the Minister and the IGI Advocate Govender, collectively speaking, as good authorities on that issue?*
>
> ***Public Protector Advocate Busisiwe Mkhwebane –** Correct."*

433. Was Adv Mkhwebane suggesting that the "*good authority*" in the SARS Unit Report was meant to be the IGI, Adv Govender and the SSA Minister. How would the Minister, IGI or Adv Govender know whether the report Adv Mkhwebane had was indeed the confidential report or not a fake when they never looked at the report that she had? It is so that the IGI Report is also not mentioned in the section 7(9) notice, not so?

434. The SSA Minister, the IGI and Adv Govender could not confirm that the report Adv Mkhwebane had was indeed the report in *Noseweek* or the actual authenticated report because they never saw the report that Adv Mkhwebane had, is that not so? In fact, the *Noseweek* article[148] made it quite clear that Mr Johann van Loggerenberg was in possession of what the *Noseweek* described as "*multiple data and evidence including a memory stick containing whatever information and data was in his possession*". Was this not a lead which Adv Mkhwebane should have instructed the investigators to follow up on?

435. Is it not so that none of the information, as far as Adv Mkhwebane was aware, that was in Mr Van Loggerenberg's possession informed the report? On what basis could it be ignored?

[148] The *Noseweek* article was provided to Ms Mvuyane by Mr Shivambu attached to an email dated 24 January 2019 and one finds it at Bundle F, folder 189, item 189.15, p. 4375.

436. The IGI Report was reviewed and set aside prior to the litigation being completed. The implementation of that part of Adv Mkhwebane's remedy would have become academic, is that not so?

437. Adv Mkhwebane seeks to rely on a charge sheet prepared by the NPA.

437.1. Is the mere existence thereof regarded as a sufficient basis upon which Adv Mkhwebane can draw the conclusion that it constitutes corroborative evidence?

437.2. Absent a conviction, is there any proof of the truth of the allegations contained in a chargesheet?

437.3. Is this not also the case in respect of a charge sheet in a disciplinary enquiry?

438. When in SARS Unit Report Adv Mkhwebane says "*I have it on good authority that the findings of the OIG Report inter alia were that …*" Is it not so that nowhere in the meeting that took place with the IGI were the findings of the report discussed or confirmed?

439. On what basis does Adv Mkhwebane believe she is entitled to be exempted from the Rules of Court by simply omitting documentation from the Rule 53 record, without alerting the litigants of having done so for whatsoever reason?

440. With reference to paragraph 4.4.1.29 of the SARS Unit Report when Mr Mataboge was asked what documentation it referred to, his evidence, contrary to what Adv Mkhwebane stated, was that it referred to information that relates to people's IDs and so forth that are personal and would be blurred so that their personal information is not shown in the documentation of the equipment that was blurred in the report.[149]

441. What does Adv Mkhwebane understand "*authentication*" to mean?

442. Does Adv Mkhwebane accept that the meaning of "*explicitly*" means "*fully revealed, leaving no question as to meaning or intent*" juxtaposed with the meaning of "*expressly*", which ordinary meaning is "*in direct or inexplicable terms*" or "*definitely*" or "*directly*"; and "*on good authority*" means "*to know or to believe something because you have been told that it is true by someone you trust*". Does Adv Mkhwebane disagree with any of the aforegoing definitions? If so, in what respects?

443. The draft of the section 7(9) notice up until 1 June 2019 reflected that the IGI Report could not be utilised because declassification thereof was still awaited.[150]

[149] Transcript p. 6826.
[150] Bundle F, folder 189, item 189.7, p. 3996 at paragraph 14.

444. On what basis is it alleged that Dr Dintwe confirmed the existence of the SARS Unit at the meeting on 31 January 2019? Precisely where in the recording (not the transcript) is this evident?

445. Is it correct that at the time Adv Mkhwebane had included in remedial action a recommendation that the totality of the IGI Report be implemented, she was not yet in possession of an authenticated declassified report as indicated in her letter of 2 February 2019.

446. In paragraph 5.2.7 at p. 264 of the SARS Unit Report, Adv Mkhwebane states that "*in an attempt to determine the veracity of the allegations of the existence and the activities of the Intelligence Unit*" she sought information from IGI and that the information was attributed to the report. What was the independent information she had in respect of such activities, given that the evidence to this Committee was that the IGI Report was only corroborative?

447. Precisely when did the IGI relay the findings of the IGI Report to Adv Mkhwebane if it is such that he and Adv Govender are included in the "*good authority*" referred to in paragraph 5.2.33 of the report.

448. In paragraph 5.2.62 of the SARS Unit Report reference is made to "*evidence obtained during the investigation*" which indicates that the State Security Report found, among other things, that SARS "*created a covert unit …*" Precisely what evidence is being referred to?

449. In paragraph 5.2.63, reference is made to documentary evidence showing interception and monitoring of communications – precisely what documentary evidence is referred to?

450. Mr Pillay in his AA[151] states in terms that "*the Public Protector appears to have insight into but rather coyly denies having possession of. If such report does exist, her possession or use of it would clearly constitute criminal conduct on the part of Adv Mkhwebane who, as a former State Security Agency operative, remains bound by National Security and Intelligence legislation.*"

451. In Adv Mkhwebane's AA[152] she states the following:

> *"3. I have addressed the allegations made in the Applicant's affidavit which are largely repeated in the Eighth Respondent's ("Mr Pillay") affidavit. When I deal with Part B of the application, which relates to the prayer for the review and setting aside of my report, I intend to deal with the allegations in Mr Pillay's affidavit that relates to the review application. For now, I intend to only deal with allegation in Mr Pillay's affidavit in so far as they support the relief sought in Part A. (**PP Answering affidavit to Eighth Respondents Affidavit Vol 16 p 1577** dated 17 July 2019)*
>
> *15. It is the Minister of State Security who may request from me the details that appear to trouble Minister and Pillay on whether I am in possession of the office of the Inspector*

[151] P. 1181 at paragraph 32.3 dated 15 July 2019.
[152] Volume 16, p. 1557 dated 17 July 2019.

General of intelligence's report. Mr Pillay has no such lawful basis to ask me to confirm whether I am in lawful possession of documents in the control of the State Security Agency.

16. The allegation that I am a former State Security operative deserves no answer other than that it does not form a legal basis on which an interdict should be granted."

452. Where, in response to the allegations from Mr Pillay, does Adv Mkhwebane actually deny (1) the averment that she does not have the report; and (2) that she is not a former State Security operative?

453. When Minister Gordhan challenges Adv Mkhwebane to indicate whether she is in lawful possession of the IGI Report, Adv Mkhwebane does not respond nor play open cards in this regard. Where Is it apparent from the aforestated allegation from Minister Gordhan and Adv Mkhwebane's response that she has the IGI Report?

453.1. Despite indicating that Adv Mkhwebane will deal with the allegations in Mr Pillay's affidavit when she answers the main application, however when she does so, she only responds to his supplementary founding affidavit[153] and only answers 17 paragraphs.[154]

453.2. In answering the supplementary affidavit Adv Mkhwebane fails to state whether she is in possession of the IGI Report or not.

454. Is it not so that Adv Mkhwebane does not admit to being in possession of the report? The applicants take the point that Adv Mkhwebane had not satisfactorily addressed the allegations that she was in unlawful possession of its IGI Report., where in the answering papers does Adv Mkhwebane actually answer that "*I do have it in my possession and I used it for purposes of compiling the report*"?

455. It is apparent from the founding affidavit that Mr Pillay filed that Minister Gordhan indicates that Adv Mkhwebane is in illegal possession of the IGI Report in contravention of the law.[155] Adv Mkhwebane denies she was in illegal possession of the report but does not state that she actually has it. Instead, what she says is "*The Minister of State Security was wrong to allege that the Public Protector was illegally in possession of the OIGI Report.*" The effect hereof is a clear impression created that Adv Mkhwebane actually did not have the IGI Report. Is that not so?

456. Minister Gordhan in terms says that the position remains that Adv Mkhwebane makes findings based on the IGI Report and requires the implementation of its recommendations "*including criminal prosecutions – or while she claims not to have seen it or to possess it*". Where is the allegation that Adv Mkhwebane refutes this and says "*Actually you're wrong, Minister Gordhan. I do have the report.*"?

[153] Volume 18, p. 1171 dated 25 September 2019.
[154] AA paragraphs 3 – 4 and 12, p. 2755 and Volume 35.
[155] Paragraph 67, p. 1406.

457. Minister Gordhan queries the haste with which the report was released, indicating that its suspicious timing on the eve of the inauguration of President Ramaphosa and prior to the selection of his Cabinet, when all Adv Mkhwebane had to do was to wait for the outcome of the request to the SSA Minister to provide her with a declassified copy of the IGI Report. This places into dispute the true motive of the purpose behind Adv Mkhwebane's rushed completion and release of the SARS Unit Report. What is Adv Mkhwebane's comment in respect of the allegation by Minister Gordhan that there was an ulterior motive behind the timing on which the SARS Unit Report was released?

458. In paragraph 5.2.27 of the SARS Unit Report it is recorded as follows:

> *"In an attempt to determine the veracity of the allegations of the existence and the activities of the Intelligence Unit I sought more information from the Inspector-General of Intelligence …"*

459. When the SSA Minister deposes to a supporting affidavit on 12 June 2020 and states at paragraph 7 (p. 3483) as follows: *"In an attempt to determine the veracity of the above complaint, the PP apparently sought more information from the current IGI*". Adv Mkhwebane responds to this in an affidavit signed on 20 July 2020,[156] headed "*Ad para 7":*

> *""48. The allegations contained herein are denied insofar as they reflect that I apparently sought more information from the IGI, I only sought to be provided with a declassified report to enable me to perform my duties as mandated by the Constitution and the PP Act."*

459.1. Which version is correct? – the SARS Unit Report or the affidavit as stated under oath.

459.2. The SSA Minister, in paragraph 8, goes further and states as follows:

> *"8. At the time of compiling the PP report , the PP concedes under paragraphs 5.2.32 and 5.2.33 [of the report] thereof that she was not furnished with the IGI report but nonetheless had it on good authority (own emphasis) that the findings and recommendations of the IGI report were that ..."*

459.3. Adv Mkhwebane responded to the allegation as follows:

> *"ad para 8*
>
> *49. The fact that I had it on good authority what the findings and recommendations of the IG report does not mean that I was wrong in what the contents of the IGI report are and there is no evidence to indicate that the contents of the IGI report states otherwise."*

460. Is it not so that Adv Mkhwebane does not tell the HC that the "*good authority*" is the IGI. Does she indicate that she was actually in possession of the IGI Report? Why not?

[156] Volume 42, p. 3437 at 3554.

461. Is it not so when the judgment says in paragraph 113 that,

> *"The Public Protector relies on this report despite explicitly stating that she has not seen the report. She relies on it because she has it on good authority. That it was found in the report that …"*

462. Does Adv Mkhwebane say that what the Court is referring to is not a reference to precisely what is being alleged before the Court and the manner in which Adv Mkhwebane has not responded to the allegations clearly by stating in terms that she has the report? In other words, she does not state explicitly which means "in a clear and detailed manner, leaving no room for confusion or doubt" as defined in the Oxford Dictionary, that she is in possession of the IGI Report.

463. At paragraph 15 the judgment records "*Despite the fact that the Public Protector, according to the report has never seen or verified the contents and findings of the IGI Report.*" This deals with what is contained in the letter of 22 February, where Adv Mkhwebane makes it clear that the report she has is not verified and that she does not even know whether she has the classified report that she used in her possession as having been verified. The SARS Unit Report too does not say in terms that Adv Mkhwebane has seen the report or verified it.

463.1. In response to the affidavit of the SSA Minister, Adv Mkhwebane states:

> *"50. I have already alluded to the fact that in arriving at my findings, I have considered, inter alia, the IGI Report. The IGI Report was not the only source of information that informed my findings."*

463.2. Is that not so that on affidavit to the HC, Adv Mkhwebane made it quite clear that the IGI Report was a source of information that she used to reach her conclusions? Does this not contradict what Adv Mkhwebane told the Committee that the report was only corroborative of her independent investigations?

464. Is it correct that Adv Mkhwebane's affidavit in response to the SSA Minister was prepared by Adv Masuku SC, and in respect of which Adv Mkhwebane had instructed that Mr Ngobeni also be placed on brief for purposes of preparing such ?

465. At which point did the SSA acquire ownership of the equipment that the SARS Unit Report wanted returned to SSA?

466. Is it not so in the replying affidavit to which Minister Dlodlo deposed to on 11 October 2019 it is denied that there was an undertaking given to Adv Mkhwebane to provide her with a declassified report and Minister Dlodlo accused Adv Mkhwebane of

> *"deliberately misleading the Court insofar as she states that I undertook to provide her with a declassified report of the IGI and infer that I failed to honour my undertaking in this regard, the undertaking to provide the Respondent with a declassified report was conditional upon her returning the 'classified' and 'secret' report which she claimed to have received anonymously".*

467. Adv Mkhwebane's testimony was that she did not rely on the IGI Report, yet in her affidavit in this interlocutory application, she states:

> *"The …. report was referred to an relied on by me in my report … The interdict sought by the Minister SS would amount to interdicting the 'release, publication and/or public access pf the PP's report' to the extent that I refer to and rely on the OIGI Report for some of my findings and remedial action.*
>
> *I refer to and rely on the OIGI report in a number of findings."*

467.1. Given that Adv Mkhwebane had under oath stated that she had referred to and relied on the IGI Report for some of her findings and remedial action in her AA in the interlocutory application dated 5 September 2019 (at paragraph 3.2), on what basis was it indicated to this Committee that in fact the report was not relied on but simply confirmed the conclusions she had independently come to?

468. It argued on behalf of Adv Mkhwebane before Judge Mngqibisa-Thusi as reflected in the judgment handed down on 29 October 2019 that if the IGI Report was reviewed and set aside she would be hamstrung in defending the findings made in the SARS Unit Report. On that basis, is it not apparent that the factual findings in the IGI Report was relied on (and not simply corroborative) by Adv Mkhwebane in the SARS Unit Report?

469. In fact, Adv Mkhwebane went further in paragraph 19 of this affidavit and stated as follows: "*If the IGI Report is interdicted and expunged from the court record, my report will be stripped of crucial evidence relating to the matters that I cover in my report.*" In this affidavit it is apparent that Adv Mkhwebane advised the Court that the IGI Report was relied on for purposes of making findings in her report. Is this not contradictory to what was indicated to this Committee? At all material times the IGI Report was regarded by Adv Mkhwebane as a critical "*source of evidence*". On what basis can a classified report be relied upon without any safeguards or without any regard to the status of the document?

470. Having addressed a letter to Minister Dlodlo on 25 June 2019, why was a response not awaited prior to the release of the report in early July? Given that the IGI Report was concluded on 31 October 2014, five days prior to the conclusion of the Sikhakhane Report on 5 November 2014, on what basis could it have been alleged as was done in paragraph 14.2.25 that the IGI Report was as a consequence of a recommendation in the Sikhakhane Report that the activities and functions of the SPU be investigated by the IGI? Is it not so that the IGI Report was not as a result of the Sikhakhane Report

471. On what basis would Ms Mvuyana and Mr Mataboge be able to corroborate whether or not Adv Mkhwebane had represented to the SARS Unit Full Bench HC[157] that she had explicitly

[157] SARS Unit Full Bench HC – **Gordhan v Public Protector** [2020] ZAGPPHC 743 (7 December 2020), Bundle C, folder 3, item 18.

stated in her report that she had not seen the IGI Report? For what reason was the IGI Report omitted from the key source list in the SARS Unit Report? Key source of information should include correspondence with various institutions and their responses. The exchange which ensued with the SSA Minister dated 22 February 2019 and 27 February 2019 appears to have been deliberately omitted from the key source of information. Why is that?

472. Before the Committee Adv Mkhwebane had testified that the SSA Minister had undertaken to provide her with a declassified copy of the IGI Report and reneged on her agreement to do so. In the letter of 22 February 2019 Adv Mkhwebane states in terms that she had taken steps to ascertain whether the document received by her office is indeed what it purports to be, i.e. a secret document from the IGI, and disputes that she is in possession of an "*authentically classified secret document*". Given what is stated to the SSA Minister, on what basis is it then alleged that the report had been "*authenticated*" by the IGI, Dr Dintwe, on 31 January 2019?

473. Is it not so that on 18 January 2019 a subpoena was issued to the SSA Minister for the provision of the IGI Report without having afforded the Minister any prior communication. How does that compare with the failure to have issued an subpoenas in the Vrede matter when he indicated in his response on 15 January 2019 that the IGI Report should be requested from the Minister? If not, on what basis was a subpoena issued three days later, requesting the IGI to attend at the Offices of the PPSA with a copy of the IGI Report knowing that as a matter of law it had to be obtained from the SSA Minister? How does this accord with the principles of mutual cooperation?

474. Is it not so that Adv Mkhwebane represented to the SSA Minister that as at 22 February 2019 "*I sought and continued to seek confirmation from your office and that of the Inspector-General of Intelligence that the document I have is indeed the same classified document that you have.*" Adv Mkhwebane claimed that the subpoena issued against the SSA Minister under discussion was a means by which she thought to bring to the attention the unlawful disclosure of classified information. Is the issuing of a subpoena to bring to the attention of a Minister that the document that they are in possession of not a drastic step to take?

475. Further in the letter of 22 February 2019, Adv Mkhwebane sought confirmation from both the SSA Minister and the IGI Minister as to "*whether the document I have is the same as the report your good offices may have*" in order for her to "*confirm its authenticity*".

    475.1. If the document in Adv Mkhwebane had already been authenticated on 31 January 2019, as indicated to the Committee, for what reason was such still being sought in this letter of 22 February 2019.

    475.2. If so, on what rational basis was the SSA Minister being threatened with court action if she did not react within seven days to her letter?

476. Does Adv Mkhwebane accept that the IGI Report came to be in her possession unlawfully, given that the alleged unidentified person who had dropped it off at the Offices of the PPSA was in unlawful possession thereof? Given the classification of the report and that Adv Mkhwebane was in unlawful possession thereof, did she regard it as hampering her use thereof as relayed by the IGI in his letter of 4 February 2019 to the SSA Minister?

477. Is it not so that the version of the IGI Report that was in Adv Mkhwebane's possession was not shown to the IGI during the visit of 31 January 2019 at all?

478. On what basis in law did Adv Mkhwebane conclude that because members at the PPSA had top security clearance, it meant that them "*and you*" could access all classified documents? When this was pointed out to Adv Mkhwebane as not automatically being the case in the letter from the SSA Minister of 27 February 2019, did she check the law in respect hereof, or seek senior counsel's opinion in relation hereto?

479. Is it not so that as at 27 February 2019 the position of the SSA Minister was that Adv Mkhwebane had to "*return the documents and any copies thereof without any further delay*" and the SSA Minister would then in turn ensure that the report is verified? For ease of reference the two letters are annexed marked **"E"** and **"F"**.

    479.1. On what basis is Adv Mkhwebane exempted from complying with the provisions of the Minimum Information Security Standards ("**MISS**") given the content of the SSA Minister's (Letsatsi-Duba) letter of 27 February 2019?

    479.2. On what basis was it concluded that the Minister gave any undertaking that she would provide Adv Mkhwebane with a declassified report at that juncture?

480. As the correspondence is not attached to the SARS Unit Report any reasonable person reading the SARS Unit Report would not know what the contents thereof would be?

481. Excluded from paragraph 4.1.1 of the SARS Unit Report (p. 31) being the key sources of information:

    481.1. the letter to the IGI from the Public Protector dated 8 January 2019;[158]

    481.2. the letter from the Public Protector letter to the SSA Minister dated 22 February 2019;

    481.3. the letter from the SSA Minister to Adv Mkhwebane dated 27 February 2019;

    481.4. the affidavit of Luther Lebelo;[159]

    481.5. specific reference to the IGI Report; and

[158] It was not included in the Rule 53 record and was provided to the Respondents pursuant to a request under Rule 30A(1) in which the Respondents sought to compel the Applicant to remedy the non-compliance with Rule 53. This was then later provided under the supplementary record.
[159] Bundle F, item 90, 90.2.

481.6. the Gene Ravele dossier.

482. Is it not so that in none of Adv Mkhwebane's correspondence issued during January 2019 or in the subpoenas to the IGI or the SSA Minister was it disclosed that she had in her possession a copy of the "*classified report*"?

483. How did Adv Mkhwebane purport to authenticate the copy of the purported IGI report in her possession.

(iii) Mainly Vrede

484. Is it not so that the Vrede Report focused on technical issues such as whether the Vrede Project constituted a public private partnership and whether the Department had monitoring mechanisms in place instead of the substantial issue of the diversion of government funds and allegations of corruption? If not, why not?

485. In paragraph 7 of the HC AA in the Democratic Alliance application, Adv Mkhwebane stated that she had utilised the statutory "*opt-out option not to investigate even those complaints that fall within her jurisdiction*". Similarly, in paragraph 5 of the CASAC application. However, in paragraph 9 Adv Mkhwebane indicated that she had decided "*to defer the investigation of some of the conduct complained of due to financial constraints*". Are these statements not contradictory?

485.1. What precluded Adv Mkhwebane from issuing an instruction to have a search and seizure carried out at the Department, the offices of implicated officials to obtain evidence relating to the Vrede Dairy Project, Estina and to subpoena individuals with knowledge to explain the funds paid to Estina?

485.2. Adv Mkhwebane repeatedly noted that invoices or financial records "*were not submitted*" by the Department, concluding that financial statements "*could not be verified*" as there was no evidence of a proper monitoring system in place for the Project. Why did Adv Mkhwebane not instruct that such be subpoenaed?

485.3. Why were subpoenas not issued to in relation to the Free State Department of Agriculture and Rural Development's offices to obtain records?

485.4. Why was no one subpoenaed to appear before Adv Mkhwebane to give evidence on the expenditure and accounting related to the Vrede Project?

485.5. The PPSA's powers to subpoena were invoked without hesitation in the Pillay Pension matter, the SARS Unit matter and the CR17 matter. Why was the same approach not followed in the Vrede investigation?

485.6. Why was there was no request to the Financial Intelligence Centre ("**FIC**") to obtain the requisite financial information of any of the companies like Estina (Pty) Ltd ("**Estina**") involved or implicated in the Vrede Project as was sought expeditiously in the CR17 investigation?

485.7. It was evident from the National Treasury's investigations that they had not spoken to the sole director of Estina. Was it not incumbent on Adv Mkhwebane to subpoena him as she had done with the campaign managers or, at the very least, subpoena him to get a statement as she had done with Andile Ramaphosa, in the CR17 investigation?

485.8. Why was Mr Thabethe, the Head of the FS Department of Agriculture, Ms Dlamini, the Department CEO, Mr Vasram and Mr Chandrama Prasad, the Estina project manager not subpoenaed to give evidence under oath before Adv Mkhwebane?

485.9. There does not appear to be any impediment or reason provided in the Vrede HC papers, nor evidence, as to why Adv Mkhwebane could not have obtained the Economist Report from the National Treasury or consulted with the senior economist that had provided such report, by subpoena or otherwise. If there was, what was such impediment?

486. In the PP statement Part B at para 72 it is indicated that once an implicated party deals adequately with issues in response to a section 7(9) notice, Adv Mkhwebane had no choice but to refrain from imposing any remedial action on them. This is referred to as a trite principle.

486.1. Why was the same approach not adopted in relation to CIEX, CR17 and the SARS Unit investigations?

486.2. Does this also mean that once Adv Mkhwebane receives a full explanation in the response to the section 7(9) and such explanation is then rejected, an explanation for such rejection is required in the finalised report issued? If not, why not?

487. How can it be said that, at the time the third complaint was lodged (10 May 2016), the investigation had been completed, when (a) a site inspection only occurred later in April 2017; (b) certain important witnesses still had to be interviewed and significant documentary evidence acquired; (c) section 7(9) notices were only issued on 17 June 2017, but even so, nothing precluded supplementary notices from being issued; (d) the Vrede Report was issued in February 2018, twenty months after the third complaint had been submitted?

488. Given the procedures to lodge complaints and service delivery periods, if the third complaint was not included as part of the complaints contained in the Vrede Report, it would have had to be lodged, processed, considered separately and the complainant given feedback thereon and reasons why such could not be dealt with. Did this occur?

489. Adv Mkhwebane claimed that issues in Vrede were not investigated due to financial constraints:[160]

489.1. Yet, in the SARS Unit matter – the issue of the "*Rogue Unit*" had already previously been investigated by a number of bodies, was over 10 years old and even with scarce resources of the PPSA, Adv Mkhwebane decided to not only investigate this issue again, but proceeded to defend the findings in relation to the SARS Unit at significant cost, similarly so with the CR17 matter, especially given that reviewable grounds are now conceded before this Committee?

489.2. In November 2017 Adv Mkhwebane had provided an instruction that further information should be sought from the Ministers of Agriculture and Trade and Industry to ascertain "*how a project such as the Vrede Project should be properly run, and then benchmark Vrede against that*". Is this not an indicator that the investigation was still ongoing in 2017?

[160] Mkhwebane Statement Part B, paragraph 74.

489.3. How does Adv Mkhwebane explain this inconsistency?

490. It was alleged in the Vrede matter that it would "*not have been appropriate to take remedial action on issues which had been investigated or under investigation by the Hawks*". Also, in para 62.25[161] in the Vrede HC AA, that how Estina spent the R342 million was not investigated because it was dealt with by the Hawks.

490.1. Is it not correct that Adv Mkhwebane would be more readily able to release her report than in the case of a criminal prosecution?

490.2. This, in the sense that the elements of a criminal offence must be proved by the State beyond a reasonable doubt, whereas Adv Mkhwebane does not have to meet that high standard when making findings requiring remedial action?

490.3. Is it not so that criminal charges would not necessarily cover or detail all those implicated in maladministration in respect of whom remedial action could be issued?

490.4. On what basis is a Hawks investigation a substitute for Adv Mkhwebane's investigation of a complaint properly lodged before her, especially as Chapter 2 of the Corrupt Activities Act specifically contemplates that a public protector may investigate a complaint in respect of matters even where the Hawks have a simultaneous jurisdiction in relation to corruption involving public money?

490.5. Was this so, even though there were ongoing complaints in relation to the Vrede Dairy Project in the public domain and large amounts of public funds unaccounted for.

490.6. In the SARS Unit case Adv Mkhwebane investigated issues that had previously been investigated, notwithstanding the fact that criminal charges were pending and other investigations had been ongoing or completed.

490.7. Can Adv Mkhwebane explain why would a Hawks investigation preclude her from fulfilling her constitutional obligations?

490.8. In the CR17 matter Adv Mkhwebane sought to investigate and subpoenaed evidence based on a suspicion of money laundering,

490.9. How does Adv Mkhwebane explain this inconsistency in her approach?

491. It was alleged that certain issues like value for money were investigated by the National Treasury and it would be a waste for Adv Mkhwebane to do so again.

491.1. Is it not so that this was decided without regard to the annexures to the NT Report? [162]

491.2. How could this be so when the NT Report provided no remedy and in the face of complaints that sought an investigation of government expenditure on infrastructure, machinery and cattle, the extent to which Estina would contribute to the Project and whether it was benefitting from the supplier of cost and goods and services, as well as several claims of highly inflated costs – none of which Adv Mkhwebane provided answers for?

491.3. Yet, in the Vrede Report there was significant reliance placed on the NT Report?

491.4. Is it not so that the NT Report dealt with a public private partnership agreement, and Adv Mkhwebane investigated it again?

491.5. The Vrede Report set out a number of observations about various procurement irregularities that had already been addressed extensively by the National Treasury.

[161] Vrede Record p. 694.
[162] Vrede Record p. 693, paragraph 62.2.3.

491.6. On what basis can it be contended that the National Treasury's investigation, initiated in 2013, would have prevented investigating the Project's value for money?

491.7. Is it not so that overlaps with another investigation or the NT Report did not preclude the PP's investigation?

491.8. Yet there was no compunction to investigate the SARS Unit by Adv Mkhwebane even though it has been investigated by one or several other bodies, including her own office on aspects thereof. On what basis did Adv Mkhwebane distinguish between the two?

491.9. When the NT Report reflected that the batch pasteuriser could have been installed for R450 000 but had been acquired for R60 000 000, on the basis of the dicta in **Mail & Guardian** was Adv Mkhwebane not required to dig further, especially in circumstances where forensic investigators recorded that the project was not likely to yield value for money to the State?

491.10. In contrast in CR17 the mere mention of a suspicion of money laundering – where Adv Mkhwebane did not even have jurisdiction – sparked off an extensive investigation, and Adv Mkhwebane sought FIC's assistance.

491.11. Explain this inconsistency in approach?

492. In the SARS Unit matter Adv Mkhwebane relied on an IGI report without confirming whether or the actual physical report she had was not a forgery. In CR17 reliance was placed on emails – the contents of which was never confirmed. Yet in Vrede the fact that information had not been verified is used as a basis to avoid an investigation? Explain this inconsistency in approach?

493. What reason would there have been for "*deferring the investigation into the politicians*" to a subsequent investigation, and then in the Vrede report, issue remedial action that those persons in relation to whom the investigation is being deferred, actually be those to implement remedial action against officials, in circumstances whether it had already so that the remedial steps recommended by the NT had not been implemented.

494. Is it not the case that the first time the deferring of the investigation of the third complaint was referred to was in the answering papers in the High Court? In relation to the investigation of the third complaint Adv Mkhwebane had given the following explanations:

494.1. In the Vrede HC AA, Adv Mkhwebane explained that her failure to investigate the third complaint was because the issues raised in the third complaint "*fell under the issues / conduct investigated in the first and second complaints*".

494.2. In the executive summary of the Vrede Report it is stated that the third complaint was not investigated "*due to capacity and financial constraints*".

494.3. In the Vrede HC AA at para 179, Adv Mkhwebane said that the third complaint could not be addressed because the investigation had already progressed too far, and was already at an advanced stage – although some of the third complaint already formed part of what was in the earlier complaints.

494.4. In paragraph 107.5 of the answer in the CASAC matter she stated "I did not decline to investigate any complaint lodged with my office".

494.5. To this Committee Adv Mkhwebane stated:

> *"[T]he issues raised therein largely overlapped with the first and second complaints. The exception was the issue of the shareholding of the beneficiaries.*

This issue was left out because the investigation was at an advanced stage and the issue had not been incorporated in the 6 months preceding my occupation of office. This failure must be placed at the door or Mr Samuel and Prof Madonsela."[163]

494.6. Is there not a contradiction on the reasons given?

494.7. Also, were there not issues omitted other than that of beneficiaries?

495. In the Vrede Report circulated by Mr Ndou, who was the Executive Manager, on 17 February 2018 only three issues were listed as not having been investigated: (1) the cattle deaths; (2) value for money; and (3) the Guptaleaks. The draft that he circulated contained no statement relating to PPSA's resource constraints[164] being the impediment for why it was not so investigated.

495.1. Were "*financial constraints*" simply not inserted in February 2018 to create a reason to justify a lack of investigation of certain of the complaints?

496. It was put to Adv Raedani in cross-examination that Adv Mkhwebane's version would be that all three complaints were "*rolled into one*" and that "*most of those complaints were addressing the same thing, that's why the team and her regarded them as one thing and assessed them as such*".

496.1. Is this not incompatible and materially different from what had previously been stated to the Vrede HC and in the Vrede Report?

497. Is it not contradictory to put to Adv Raedani that the Portfolio Committee had called on the PPSA "*to investigate specific issues which had not been raised in the previous complaints*" and then cross-examine to the effect that "*the issue of beneficiaries*" was a "*crossover issue because it was raised even in the first cluster of complaints but it was also part of the second investigation*"?

497.1. If not, explain why?

498. Adv Mkhwebane represented that Estina did not fall under the Public Protector's jurisdiction as Estina is a private company.

498.1. Did Estina not receive public funds?

498.2. Adv Mkhwebane requested from FIC bank statements of AGO and Miotto Trading in the CR17 investigation, which were also private companies. Why the distinction?

[163] Mkhwebane Statement Part B, paragraph 86.
[164] Bundle D, Ndou **"LRN16"**, p. 3747, paragraph (vii).

499. As the first and second complaints expressed concern about the government's R342 million investment in the Vrede Project, how could "*value for money*" be ignored?

500. What impeded an evaluation of the inflated costs? If there were resource constraints, when was this first identified and discussed with those involved in the investigation?

501. Why could one of the staff at the PPSA not have been used to assess market value of goods and services by simply obtaining quotations from suppliers or conducting desktop research?

502. Given that an earlier draft of the Vrede Report included the statement that the price of milking equipment, the gate and guardhouse on the cows were considerably higher than the prevailing and current market rate.[165] Also, the available information said that there had been significant overpayment in relation to cows, as well as in respect of the 72-point milking parlour. Why was the price-comparison information that the investigators had on file not adequate?

    502.1. Are these not indicators of significant maladministration associated with the Vrede Project that required further investigation? Why was the approach of following the money not applied?

503. What does Adv Mkhwebane mean when she stated in the Vrede HC AA that she was not able to access documentation from Estina because it had "*closed shop*". What steps were taken to subpoena the company officers?[166]

504. Adv Mkhwebane testified in the Vrede HC AA that issues like the movement of funds required forensic investigation at the cost of almost R1 million.[167]

    504.1. How was this figure reached and when precisely was it calculated?

    504.2. Yet, in CR17 the movement of millions of rands could be reported on in the absence of any forensic investigator being employed. How is this inconsistency explained?

    504.3. Is it not so that no expert consultants or private forensic investigators were required for purposes of the compilation of the Vrede 2 Report?

505. In paragraph 44 of the Vrede HC AA, Adv Mkhwebane stated that it was not possible to investigate any conduct which required additional financial expenditure and that "*difficult decisions had to be made about the allocation of resources and the investigation of complaints*".

    505.1. Why was no other complaint pointed to as not having been investigated?

    505.2. where in the annual report is it indicated that any particular investigations could not be pursued because of financial constraints?

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[165] **"LRN16"**, p. 3751.
[166] Vrede Record p. 694, paragraph 62.2.6.
[167] Vrede Record p. 725, paragraph 107.7.

506. In his section 7(9) submission the Premier stated that:

> *"a Guesthouse, which was procured in the town of Vrede to accommodate individuals responsible for the implementation of the project, is included in the amount of R2,6 million. It was necessary to buy this property, given the fact that there were no facilities in existence on the land in question at the commencement of the project."*

506.1. Was this followed up on?

506.2. Was the title deed provided?

506.3. Was it lawful to report on construction costs of a guardhouse and a gate and include the acquisition of a guesthouse as part thereof?

506.4. On what basis would the Department be paying for the accommodation of service providers in the context of the implementation of the Project given the vast millions already paid in respect thereof?

506.5. Was any documentation sought from the Premier in respect of this averment?

506.6. Why did Adv Mkhwebane not get confirmation hereof?

507. Why were the photographs specifically removed on the evening of 8 February 2018 from the final report?

508. In respect of the overpayment on cows, i.e. that R6 212 000 was spent to purchase 351 dairy cows, which should not have cost more than R3 374 000, the invoices in the possession of Adv Mkhwebane indicated that the cows were not purchased from well-known registered breeders.

508.1. Does this not constitute sufficient evidence to have shown significant overpayment in respect of cows, i.e. by more than 84%?

508.2. For what reason were the concerns as highlighted in the NT Report ignored and why was the aforementioned information in respect of the cows excluded?

509. On what basis did Adv Mkhwebane allege in her answering affidavit at para 62.23 in the CASAC application that it was not necessary to "*make further investigations*" regarding the value for money obtained given the findings and recommendations contained in the NT Report when there were numerous price inflation issues that the NT Report had not considered and in respect of which Adv Mkhwebane had evidence and should have made findings?

510. On what basis did Adv Mkhwebane reach this conclusion without having been in possession of the economist's analysis regarding the Vrede Project's value for money?[168]

[168] It was Exhibit 27 to the NT Report. It was not included in the Rule 53 record, nor were any other exhibits to the NT Report.

511. It appears from the drafts of the Vrede Report being circulated on or before 7 February 2018 that Adv Mkhwebane was entirely capable of assessing at least some of the claims of overcharging under details itemised in the complaints in order to ensure administrative justice. These items were excluded from the Report on 8 February 2018 when Adv Mkhwebane settled the final report. Why did she do so?

512. The first complaint raised concerns that the beneficiaries were not receiving an equitable or proportional share in the Vrede Project; the second complaint reiterated these concerns, setting out additional concerns about implementation of the Project, stating that the beneficiaries were being prejudiced by the improper diversion of public funds; and the third complaint amplified these, also alleging that the contract concluded by the Department benefitted Estina at the expense of the beneficiaries, the latter being sidelined and used as "*pawns*" to justify the Project. Was much of this information not already in the public domain during the investigation?

513. It was detailed in the Vrede Report that matters relating to the beneficiaries were not investigated due to a lack of information. Whilst the Vrede Report records that the PPSA received a list with 78 names of beneficiaries and 62 identity documents, the Rule 53 record includes a list of 80 beneficiaries with contact numbers for 71 of them and physical addresses for the majority of the listed individuals, including the names and contact numbers of the management committee comprising the chair, secretary and treasurer. Did this not constitute sufficient information to identify the beneficiaries and to obtain information directly from them?

514. Adv Mkhwebane disclosed in the Vrede HC AA that the PPSA's Free State Office had requested an engagement with the beneficiaries during the April 2017 site visit, but that her office had expressly instructed that the beneficiaries not be invited.[169] For what reason did Adv Mkhwebane not want the beneficiaries to be present and available at the time of the 2017 site inspection?

515. Is it the role of the public, politicians or political parties to obtain statements in an investigation? If not, why was reliance placed on Mr Maimane to obtain statements from beneficiaries? If he had complied was there not a risk of conflict of interest, the complaint having been submitted by a member of his party at the time?

516. When no assistance was forthcoming from Mr Maimane, as it was believed he would provide, why was no further instructions given to obtain the details?

517. Is it not so, in light of the use of the beneficiary contact list during the Vrede 2 investigation, that the averments made by Adv Mkhwebane in her Vrede HC AA that whilst she may have had information relating to the beneficiaries' details, she was unable to investigate their concerns because she did not have information that would enable her to verify the accuracy of the

[169] DA HC AA paragraphs 55 – 57.

beneficiary list she had or to "*make an assessment of how each had been impacted / prejudiced by the Project*" was incorrect because the Vrede 2 investigation was conducted from the information without a forensic investigator being engaged? Did Adv Mkhwebane engage any outside resources? Is it not so that she did only used the PPSA's ordinary sources and investigation techniques?

518. In the memo provided to Adv Mkhwebane on 25 January 2018 it was noted that "*[t]he evidence in respect of the Project's intended beneficiaries still needed to be considered*" so how could the report be finalised by 8 February 2019?

519. Even if the Vrede 2 Report had not been conducted, evidence would have emerged during the Zondo State Capture Inquiry which we now know would have reflected further on the shortcomings of the Vrede Report, is that not so? Officials that had previously not been consulted or interviewed as part of the Vrede Report and beneficiaries appeared before the State Capture Commission is that not so.

520. Is it not so that much of that to which is referred to in the Vrede 2 Report was already in existence when the Vrede Report was compiled?

521. On the eve of finalising the Vrede Report, the Senior Manager: Legal Services, Mr Nemasisi, drew attention to the fact that key witnesses still needed to be interviewed and important documents still needed to be obtained .On what basis was his advice not followed?

522. Why do none of the meeting reports or documentation, including Task Team minutes or Think Tank minutes reflect discussions that the Vrede investigation could not be pursued because of funding constraints?

523. Adv Mkhwebane's position appears to be that the investigation had been completed and the provisional report prepared so the Guptaleaks could not be investigated. Is this not contrary to the approach taken in the CR17 matter where it was testified that it was incumbent on Adv Mkhwebane to follow where the leads take her in order to fulfil her mandate? Does the following statement in the Vrede HC AA at paras 91.5 and 91.6[170] not reflect a contrary approach was followed in Vrede:

> *"91.5 The Public Protector is not compelled, on the basis of media publication, to investigate allegations on own initiative , especially under the current capacity and financial constraints the office is experiencing.*

[170] Vrede Record p. 708.

91.6 Even if I have jurisdiction to investigate fraud , theft and money laundering, those would in any event been referred to the Hawks, as it is an appropriate statutory body to investigate such allegations."?

524. In CR17 a significant part of the report was dedicated to show *prima facie* money laundering, yet in Vrede Adv Mkhwebane expresses the view she has no jurisdiction. Again, this markedly contrasts with the approach adopted in the CR17 investigation, particularly where the complaints lodged did not include the CR17 complaint, but were pursued. How does Adv Mkhwebane explain this?

525. Is it not so that a copy of the OUTA Report had been in Adv Mkhwebane's possession from when it had been delivered to the Offices of the PPSA in 2017?

525.1. Yet such was only acknowledged in 2020 and it was only in 2020 that OUTA was requested to submit an affidavit relating to the authentication of the "*Gupta emails leaks*" to which they responded.

525.2. Why was this the case?

525.3. Why was it not given to Ms Cilliers or the Investigative Team?

526. The reasoning in Vrede to exclude the Guptaleaks because the Zondo Commission would or might consider is again contradictory to the approach taken in the SARS Report where other bodies' investigations were not given as the reason to exclude it from the investigation. How does Adv Mkhwebane explain this?

527. There does not appear to be any reason for the urgency in getting the report out on 8 February 2018. Evidence before this Committee indicates that this push to get the report out on that specific day was at the behest of Adv Mkhwebane.

527.1. Is this disputed?

527.2. If not, what was the reasons for the apparent rush?

527.3. What precise pressure required the Report to be issued on that particular day?

527.4. Given Adv Mkhwebane's insistence on finalising the Report on that night, that she was both responsible and accountable for what is correct and what is incorrect in that Report?

527.5. The follow up investigation took a further 18 months?

527.6. Was the urgency to complete the Vrede Report influenced by the appointment of the Zondo Commission in January 2018?

528. Where in the Report, or in the HC were the following disclosed:

528.1. the resources that was in fact allocated under Adv Mkhwebane's tenure to investigate the Vrede complaint;

528.2. an assessment of the importance of this investigation in comparison to other matters which continued to be investigated;

528.3. comparative resources allocated to other investigations at the time;

528.4. specific resources, financial and otherwise, required and lacking to undertake the task needed to advance the investigation; or

528.5. efforts made to call upon organs of state or public functionaries to assist in performing any task required to advance the investigation.

528.6. In the absence of the aforegoing, how could it be determined that Adv Mkhwebane could not complete the investigation of Vrede complaints?

529. Adv Raedani's evidence was that the capacity and financial constraints were inserted into the Vrede Report at Adv Mkhwebane's behest. This was at a meeting with himself, Messrs Kekane and Nemasisi. Further, that it was not backed up by evidence.

529.1. Is this disputed?

529.2. If so, on what basis?

530. Is the inference to be drawn that notwithstanding that the Vrede investigation brought to light gross irregularities and hundreds of millions of rands in unauthorised public expenditure, suspected corruption involving high ranking ANC politicians in the Free State Province and associates of the Gupta family, that Adv Mkhwebane could simply not investigate it, because of funds shortage?

531. It was never denied in the questioning of Mr Ndou that Adv Mkhwebane had expressed a concern to him that "*Adv Cilliers was doing the bidding of the Democratic Alliance*". On what basis had Adv Mkhwebane come to this conclusion?

532. Is it not so that by not implementing the recommendations of the NT Report and not disputing the findings contained therein openly, Mr Magashule effectively rendered it nugatory?

532.1. Why was Adv Mkhwebane satisfied with Mr Magashule's recommendation that he was awaiting her report when there were clear recommendations from the NT Report?

532.2. Did Adv Mkhwebane do anything about her disagreement with the NT Report, other than ignore the recommendations?

533. During the cross-examination of Mr Samuel it was alleged that subpoenas in respect of politicians would not be issued and that it was improbable that such stage had been reached because the PPSA had not yet offered the politicians what was referred to as customary opportunities to submit information voluntarily prior to the issuing of a subpoena.

533.1. Was the "*due opportunity to submit information voluntarily*" as applied in Vrede, applied in the Pillay Pension matter; in the CR17 matter and in the SARS Unit matter?

533.2. In fact, was it not the case that they were subpoenaed to an interview with Adv Mkhwebane without any preceding request.

533.3. Similarly, Mr Andile Ramaphosa was issued with a subpoena at first instance without any request prior thereto for him to provide a statement willingly.

533.4. How does Adv Mkhwebane explain this inconsistency in approach?

534. On what basis should this Committee not accept Mr Samuel's evidence that during the site visit in April 2017 he specifically requested Adv Mkhwebane to permit subpoenas to be issued and she refused? Could it be that she forgot this had been requested because she could also not remember that Mr Samuel was there?

535. In paragraph 80 of the Part B statement, while Adv Mkhwebane denied having issued an instruction "*to not make finding against any politicians*", the evidence of Mr Ndou is not denied that she had espoused the view that there should be no adverse findings in the Vrede Report.

535.1. In respect of the dispute regarding the ambit of the desire Adv Mkhwebane expressed to Mr Ndou, it is so that in the draft of the report circulated by Mr Ndou on 7 February 2018, there were in fact no findings against any politicians?

536. The Vrede 2 Report concluded that the Vrede Project was subject to political involvement and undue influence; that the politicians breached their constitutional obligations; that funds were improperly appropriated to Estina; and that there were failures by the politicians which caused prejudice to the beneficiaries. Adv Mkhwebane signed off on the Vrede 2 Report in 2020. Was this investigated without forensic assistance and based on evidence readily available to the PPSA?

537. Adv Mkhwebane explained[171] that she removed the remedial action in respect of the Auditor-General as it "*does not do forensic and due diligence investigations*" and further because the PPSA does not assign functions to the Auditor-General. Was this not a misconception of the relevant law given section 4(c)(ii) of the Public Protector Act and the Public Audit Act 25 of 2004.

538. Is the reasoning applied in respect of the SARS Unit matter as opposed to the Vrede matter not contradictory in that in the Vrede matter Adv Mkhwebane indicated that she wanted all implicated officials who worked on the Project to be included in disciplinary action and hence removed the recommendation of disciplinary action against the accounting officer? In fact, making the accounting officer the person responsible for taking the disciplinary action as well. And yet, when this is raised in the SARS Unit matter, the answer given is that the accounting officer is the person is to be held to account?

539. If the discretion lay with the Premier to determine who was implicated, it may have resulted in no steps being taken against the accounting officer, especially given that the Premier had already recorded in his response to the section 7(9) notice that there was "*no credible basis for taking disciplinary action against the head of department*"?

[171] Paragraph 59.5 of the CASAC HC AA; paragraph 61.9 of the DA HC AA.

539.1. So, in relation to Mr Thabethe, having made the binding remedial action non-specific, left to the Premier it could conceivably have resulted in Mr Thabethe facing no disciplinary action?

540. As was the case with the CR17 matter and the SARS Unit, critical information is omitted from the Rule 53 record. Why was this documentation omitted:

540.1. The April 2017 Draft, which contained express adverse findings against senior politicians and had been utilised as the basis for the section 7(9) notices.

540.2. The drafts circulated by Messrs Ndou and Nemasisi on 7 February 2018, which contained adverse findings in respect of the claims of overcharging and set out various concerns about gaps in the investigation and the report.

540.3. The photographic evidence which was damning (at least in respect of the overcharging allegations regarding the gate and the guard house).

540.4. Mr Nemasisi's email correspondence to Adv Mkhwebane, which elaborated on his concerns about the investigation and the report.

540.5. Several emails including those relating to Adv Mkhwebane's consideration of the OUTA Report.

541. How does Adv Mkhwebane explain the following that appears to be an inconsistency?

541.1. At paragraph 97.2.1,[172] Adv Mkhwebane stated that she became aware of the Vrede matter during a roadshow in the Free State: 16 – 17 March 2017.

541.2. In the HC affidavits Adv Mkhwebane indicated that she was aware of the Vrede investigation shortly after assuming office in October 2016 and was participating in Think Tank discussions on the draft report in December 2016.[173]

542. On what basis is the following alleged:

"*It was difficult for the Public Protector to make or draw an inference that prices of goods and services were inflated, due to the fact that there was no procurement process followed and the Public Protector could not test the markets to determine market value of goods and services procured without the necessary documents which proof the actual price for the goods and services procured [sic]*"

when compared to an earlier statement that value for money was not investigated, precisely because National Treasury had done an investigation?

542.1. Is the Vrede Report in itself not internally contradictory in this regard?

[172] Vrede Record p. 716.

[173] HC AA at paragraph 91.1. See also HC AA at paragraph 47.

Earlier on in the same High Court answering affidavit, Adv Mkhwebane stated the following:

"Upon assuming office in October 2016, and in March 2017 I familiarised myself with the Provisional Report and the investigation (both of which had by this stage been completed)."

543. Is it not so that information relating to the procurement process does not require a conclusion as to whether or not highly inflated prices had been paid?

543.1. Would this not have been readily obvious from the pictures that had been removed from the final version of the Vrede Report?

543.2. Yet in the SARS Unit matter where information was not provided to Adv Mkhwebane, it was said to have led to the inferential conclusion that equipment must have been illegally procured.

543.3. How does Adv Mkhwebane explain the contradiction?

544. Is it not so that the third complaint contained a direct complaint relating to the Gupta family and its involvement in the Vrede investigation?

544.1. Was this not sufficient public interest and reason to investigate the Guptaleaks ?

545. The Selfe FA indicated that apart from the Guptaleaks, between mid-2013 and early 2014 already newspaper reports alleged that the Project was "*fraught with procurement irregularities and possible corruption*", "*strongly suggesting*" that the Guptas, the then MEC for the Department of Agriculture and Rural Development, Mr Mosebenzi Zwane and Premier Ace Magashule were playing key roles in pushing it through without due process and highlighting the Gupta family's central role as beneficiaries of the scheme or even prior to the Guptaleaks' emergence in or around June 2017. There were other reports in the public domain in respect of the Vrede Project that would have constituted leads that the according to the **Mail & Guardian** standard, would have required investigation. Why, when Adv Mkhwebane took over the investigation, were these not pursued?

546. OUTA prepared a report on State Capture, entitled "*No room to hide: A president caught in the act*" that was published on 28 June 2017.

546.1. What did Adv Mkhwebane do with the copy provided to her?

546.2. The word "*money laundering*" in CR17 sparked off an investigation, and this report did not? Why not?

547. In para 87.2,[174] Adv Mkhwebane alleged that the media reports either preceded her appointment as Public Protector or emerged after the investigation had been completed.

[174] Vrede Record p. 705, paragraph 87.2.

547.1. If it is not correct that media reports implicating the MEC only "*emerged after the investigation had been completed*", then the proposition that the Guptaleaks could not be considered because the investigation had already been closed would be incorrect?

547.2. Yet, in the SARS Unit matter, the evidence before this Committee is that if any evidence came to the fore at any stage prior to a report being published, it should be taken into account and investigated. Even if it meant that a supplementary section 7(9) notice had to be issued.

547.3. Why did this not apply?

547.4. Also, the facts in the SARS Unit matter had also preceded Adv Mkhwebane's appointment – by almost ten years and still it was investigated. Is that not so?

548. The evidence indicated that on 13 July 2017, Adv Mkhwebane sent an email to Mr Samuel and Adv Cilliers, indicating that letters to the Premier and Minister Zwane regarding allegations flowing from the Guptaleaks should be prepared. Why were such letters never sent or followed up, if not prepared, by Adv Mkhwebane?

549. What was widely publicised was that the Guptaleaks indicated that Mr Zwane, officials from his department and a local gospel choir was hosted in India on an all-expenses paid tour by the Guptas. Further, that the then Premier's son and the then President's son were treated to overseas holidays by the Gupta family and that documents were drafted by Gupta associates, forwarded to the then Premier's son to be "*put on an official letterhead of the Office of the Premier*". As this was widely publicised at the time, on what basis did Adv Mkhwebane simply ignore it given its import on the Vrede Report?

550. The evidence before the Committee from Mr Ndou was that he had raised the Guptaleaks with Adv Mkhwebane on several occasions, including in an email in September 2017, but that Adv Mkhwebane was of the view that it did not form part of the investigation. Given the aforestated and that the Guptaleaks at the time implicated the Premier and the MEC, was Adv Mkhwebane not obliged to investigate?[175]

551. Information provided to Adv Mkhwebane must be verified and authenticated before it is relied upon, whether it is provided anonymously or otherwise, in order for it to constitute evidence? Was the approach to the Guptaleaks informed by such concerns? If so, why?

552. In her statement,[176] Adv Mkhwebane states that "*it was Adv Cilliers who took a decision not to include the Guptaleaks*". On what basis does Adv Mkhwebane abdicate such weighty decisions to investigators who are not even part of management?

[175] Vrede Record p. 11, paragraph 10.
[176] Mkhwebane Statement Part B, paragraph 82.

553. The lack of investigation of the Guptaleaks was not attributed to capacity and financial constraints, but it was stated in the Vrede Report that such "*do not form part of the scope of this investigation*".

554. Is it not so that the Vrede Report did not assess any evidence regarding alleged non-compliance with environmental legislation or set out any conclusions or findings in respect thereof? Further, there is no explanation in the Vrede Report for this?

555. Does the progress of investigation depend on investigations being conducted by complaints to substantiate that there is merit to the complaint?

555.1. If not, then on what basis was the complaint in relation to non-compliance with environmental legislation regarded as an unsubstantiated complaint simply because the complainant had been requested to provide further information and had failed to do so.

555.2. Was there not an obligation on Adv Mkhwebane to investigate the complaint?

555.3. As opposed to CR17, where the mere mention of money laundering had resulted in an extensive investigation, in Vrede aspects of the complaints are excluded because the complainant did not do the work.

555.4. Why such disparate treatment?

556. When the Vrede Report was issued on 8 February 2018, it was less than 2 months before the PPSA would receive its budget allocation for the 2018/2019 period, providing requisite funds, if such was needed and the Vrede Report was still issued though with shortcomings – at the very least with several issues not investigated. Why did Adv Mkhwebane not delay the release to the next funding period and inform the complainant hereof?

557. Where in Adv Mkhwebane's answering affidavit is it expressly stated that the provisional report could not be attributed to Adv Madonsela as she had not approved and signed off on it?

558. Did Adv Mkhwebane inform the court that the provisional reports had gone through several permutations before being finalised?

559. Reliance was placed on the oral evidence from Adv Madonsela denying that she had prepared a provisional report, and yet in the Rule 53 record filed by Adv Mkhwebane, at p. 58 is provided a provisional report which was attributed a date November 2014.[177] The name of Adv Madonsela without any signature appears on the last page thereof.

[177] Rule 53 record, pp. 1027 – 1105.

560. Why was this draft report included in the Rule 53 and not the later draft provisional reports, more particularly the April 2017 report on which the section 7(9) notice was based which were prepared whilst Adv Mkhwebane was in office?

561. Why then did Adv Mkhwebane, in her affidavit, specifically referred to "*the provisional report of my predecessor*" with reference to remedial action contained in the November 2014 report.[178]

562. Did Adv Mkhwebane not represent in her HC AA in the CASAC matter that both the provisional report and the investigation had been completed by the time she assumed office in October 2016 and in March 2017? In other words, under the hand of Adv Madonsela?[179]

563. Is it not so that Adv Mkhwebane laboured under the belief that there was a provisional report, and even in the affidavit filed to the SCA seeking leave, referred to the provisional draft report as such, relying instead on the version that the draft report had no legal status but was a working document, i.e. work in progress.[180]

564. Is it not so that in the application for leave to the CC, Adv Mkhwebane represented that the investigation had been completed and that there was a provisional draft report which had been completed by Adv Madonsela and which only required section 7(9) notices to be issued? Is this not factually incorrect?[181]

565. Where in Adv Mkhwebane's AA does she state that the draft which she had included in the Rule 53 record under Adv Madonsela's name is not one that she had finalised?

565.1. Is the statement in Adv Mkhwebane's Vrede HC AA that Adv Madonsela had completed a draft provisional report not incorrect?

565.2. Further, that the November 2014 "*had been completed by my predecessor*".[182]

565.3. The affidavit contained various allegations indicating that Adv Madonsela had signed off on the November 2014 draft, including its identification of issues for investigation and its proposed remedial action in which case that would have been both incorrect and misleading.[183] Was this not misleading?

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[178] Vrede Record p. 706, paragraph 90.2.

[179] In her CASAC HC AA p. 2141, paragraph 15 Adv Mkhwebane stated:

"15. When I assumed my duties as the Public Protector, an investigation regarding the Vrede Dairy Project ("the Vrede Project") was already well under way and nearing completion. A draft provisional report ("the Provisional Report") had been ***completed*** *by my predecessor." At p. 2156,* paragraph *45, Adv Mkhwebane stated:"45. Upon assuming office in October 2016, and in March 2017, I familiarised myself with the Provisional Report and the investigation (both of which had by this stage been completed)."*

[180] Vrede Record p. 2830, paragraph 28.1:

"I could realise that an aspect contained in the draft report is not correct and seek to remedy that aspect, and this does not warrant an inference of bad faith or dishonesty or ulterior motive."

[181] Vrede Record p. 2974, paragraph 18.

[182] CASAC HC AA at paragraph 15.

[183] See paragraph 18.

566. Is this not borne out by paragraph 47[184] where Adv Mkhwebane stated that in October 2016 and March 2017, both the provisional report and the investigation had been completed?

566.1. Is this correct, considering what transpired thereafter and what was still being investigated?

566.2. Also does it not now contradict the evidence that the November 2014 provisional report had not been finalised by Adv Madonsela?

(iv) Mainly Absa / CIEX

567. Shortly after Adv Mkhwebane took office, Adv Tshiwalule provided her with a working draft of the provisional report (which had been updated to include details from Adv Madonsela about an interview she had attended) and all evidence he had collected in respect of the IASA's complaint.[185] Adv Mkhwebane effected changes to this provisional report which differed in material respects from that which had been prepared by Adv Madonsela. Who was consulted in the making of these changes and where did the changes emanate from?

568. Did Adv Mkhwebane have the complete SIU Report, prepared by Judge Heath at the time she recommended remedial action to be undertaken by the SIU? If not, why not?

569. Why were the meetings with the Presidency held on 25 April 2017 and 7 June 2017 not disclosed in the Lifeboat Report?

570. Why were the meetings with the Presidency not recorded and transcribed? Why did Adv Mkhwebane instruct that they should not be recorded?

571. Describe in full what was discussed at these meetings with the Presidency.

572. Why did Adv Mkhwebane inform the CC that "*she did not discuss the final report / new remedial action or the Presidency*", when at the very least she discussed the new remedial action in respect of the SIU?

573. Indicate precisely where in the Lifeboat Report "*import of the Presidency's submissions*" are dealt with.

[184] Vrede Record p. 679.
[185] Bundle D, item 15, p. 3143, paras 14,15 and 19; Transcript pp. 2403 – 2404.

574. Why were the meetings with the SSA on 3 May and 6 June 2017 not disclosed in the Lifeboat Report, given the use of the document received from the SSA?

575. Why were these meetings with the SSA not recorded and transcribed? Why did Adv Mkhwebane instruct that they should not be recorded?

576. Describe in full what was discussed at these meetings with the SSA.

577. In her answering affidavit in the litigation, Adv Mkhwebane explained that the meeting with the SSA was necessary because it was the successor to the signatory of the CIEX agreement. The PPSA needed to confirm the agreement; the payment of CIEX; whether the CIEX Report had been partially or wholly implemented and why the CIEX Report had not been implemented, even though paid for.[186] By contrast, it was put in evidence and before this Committee that Adv Mkhwebane sought economic advice from the SSA, and advice about her remedial action's impact on economic stability.[187] Which version is correct?

578. On what basis is it alleged that the SSA "*virtually initiated the investigation*"? What does this mean?[188] When and how did the SSA do this?

579. What role would the SSA have to play in the recovery from what is alleged the "*Reserve Bank had given away illegally*"?

580. Why would the meeting with the SSA have been classified, alternatively, why would the minutes or notes of the meeting be classified?

581. On what legal basis – even if classified – would Adv Mkhwebane have had the power to voluntarily waive the classification when it involved the SSA?

582. Is it Adv Mkhwebane's position that the persons from the SSA with whom she met had personal knowledge as to the meetings that the SSA's predecessor had previously held with CIEX? Were any of them present with Mr Masetlha at that stage? So, if not, on what basis would they have been able to assist her?

[186] Bundle A, p. 844, para 175.
[187] Transcript p. 833.
[188] Transcript p. 2448.

583. Did Adv Mkhwebane's meeting on 3 May 2017 only involve Mr James Ramabulana and Mr Arthur Fraser from the SSA? Do either of them have background or appropriate qualifications in economics?

584. How did Adv Mkhwebane know Mr Moodley?

585. Why did Adv Mkhwebane believe that Mr Moodley was sufficiently knowledgeable and qualified or had the necessary expertise in order to advise on amending the Constitution to change the mandate of the Reserve Bank? Based on precisely what information at her disposal at the time did Adv Mkhwebane introduce Mr Moodley as an economist?

586. Annexed is a copy of Mr Moodley's LinkedIn profile and a brief bio from the internet marked **"G"**.[189]

586.1. Where does he describe himself as having expertise in economics or a skillset that equips himself as an economist?

586.2. Based hereon, is it accepted that Mr Moodley does not have the specialist qualifications or experience or expertise of an economist to equip him to advise on the amendment of the Constitution?

586.3. Is it Adv Mkhwebane's position that the single page provided by Mr Moodley during his meeting with her and Mr Kekana, containing a draft constitutional amendment or proposed recommendations to be inserted into the final report, was drafted by him?

586.4. If not, where did the document supplied by Mr Moodley originate from?

587. What is Adv Mkhwebane's understanding of the primary object of the SARB?

588. What was intended by the phrase "*meaningful socio-economic transformation*"? How was this going to be achieved by the SARB?

589. On what basis does Adv Mkhwebane have the power to make such a recommendation?

590. Protecting the South African economy is within the constitutional competence of members of the National Executive? Why should the SARB also have been required to pursue this objective?

[189] The linked in profile could not be downloaded. https://www.linkedin.com/in/maiendra/?originalSubdomain=za. The comprehensive CV was provided on the internet as what appears to be a conference package at which Mr Moodley presented a paper. They are jpeg files.

591. For what reason was the remedial action amended, from directing National Treasury to take legal action against Absa to recover the accrued interest (in the Provisional Report) to directing the SIU to do so (in the Lifeboat Report)?

592. Precisely what internal work done in the PPSA gave rise to the idea of altering the SARB's mandate as part of the CIEX investigation?

593. Why did Adv Mkhwebane seek to make submissions to Parliament's JCR:

593.1. on amendments to section 25 of the Constitution?;
593.2. to make the Bill of Rights only apply to citizens, and not to all residents?; and
593.3. to effect amendments to section 223 of the Constitution ?[190]

594. As this request had already been made in December 2017, how could it have been informed by Mr van der Merwe's draft submissions.

595. Where in the mandate of the Public Protector did it fall to Adv Mkhwebane to make proposals of this political nature given her role as ombud to remain independent and impartial and not reflect any partisan political preferences?

596. Was it within Adv Mkhwebane's mandate to endorse the Private Members' Bill initiated by the Ubuntu Party seeking to amend sections 223– 225 of the Constitution which Bill was accompanied by draft legislation that proposed withdrawing South Africa from all international banks, including the International Monetary Fund, the World Bank and the Bank of International Settlements?

597. Where in the mandate of the Public Protector did it fall to make such proposals?

598. As the draft correspondence prepared by Mr van der Merwe to the chairperson of the Constitutional Review Committee dated 29 May 2017[191] appears not to have been provided to Adv Mkhwebane and the CEO did not revert to Mr van der Merwe in relation thereto, what happened to it?

599. Were submissions made to Parliament?

[190] Bundle D, p 4100, annexure NVM1.
[191] Bundle D, p 4114, annexure NVM4.

600. Why did Adv Mkhwebane require Mr van der Merwe to *"propose how the Constitution could be amended to have a state bank and Parliament oversee the state bank"?*[192]

601. Mr van der Merwe's draft submissions on central banks was still incomplete when the Lifeboat Report was issued on 19 June 2017 and was only provided to Mr Kekana in incomplete draft form after the Lifeboat Report had been issued.

    601.1. On what basis is it alleged that Mr van der Merwe's research informed the amendment to sections 223 – 225 of the Constitution?

602. What evidence was Adv Mpofu SC referring to when he put the proposition that there was an accumulation of evidence,[193] leading to the amendments in the relief sought?

603. Why was Mr Van der Merwe not instructed to complete the submissions to Parliament's CRC?

604. Is the evidence that the phrase "*based on the need for oversight by Parliament"* in the draft correspondence dated 29 May 2017, prepared by Mr van der Merwe give rise to the amendment in the Lifeboat Report?

    604.1. If so, how is it that Mr van der Merwe was not involved in this process?
    604.2. When and from whom did she receive this draft letter?
    604.3. Why were the drafters of the affidavits not apprised hereof and it was not provided as a reason for the High Court proceedings?
    604.4. Why was it never raised at consultation with counsel at which Mr van der Merwe was in attendance?

605. SARB complained that it was not afforded the report and an opportunity to comment. Adv Tshiwalule explained, this undertaking had been made at the 2013 meeting by Adv Madonsela. In the SARB letter of 25 October 2016, one of its complaints had been that it had not received a response to its correspondence regarding the 10-day comment period since 2013.[194] Given that Adv Mkhwebane was informed of this undertaking and instructed Adv Tshiwalule to respond to the letter, why was this not honoured given the principles of mutual cooperation?

[192] Bundle D p 4071 paras 22-24.
[193] Transcript p. 2518.
[194] Transcript p. 2458 and Transcript p. 2462.

606. Why was SARB not entitled to expect that the PPSA's undertaking to provide it with the Lifeboat Report five days before publication would not be honoured? Why did Adv Mkhwebane not comply with this undertaking?

607. Would it not potentially have averted a significant financial loss to the country, which was not disputed in the HC, had this been done, especially given the later concession by Adv Mkhwebane that the relief sought in relation to the amendment of the Constitution was unconstitutional?

608. Adv Mkhwebane instructed Mr Kekana to "*find a way*" to include a recommendation in the report to amend the Constitution to "*cater for the nationalisation*" of SARB. Why was he not apprised on "*what purpose or motive such a recommendation would serve*"?

609. What qualified SSA to provide input in respect of changing the SARB's mandate?

610. Why was the SARB not consulted in relation thereto?

611. What quality assurance process was followed once the changes to the Lifeboat Report regarding the SIU and the constitutional amendment had been implemented?

612. Why was the Executive Manager at PPSA excluded from consideration hereof?

613. Why was the provisional report in the CIEX matter not quality assured based on the processes in place at the PPSA at the time? Is it not so, like with CR17, it was simply again, Adv Mkhwebane and an investigator quality assuring it?

614. Why did Adv Mkhwebane ask Adv Tshiwalule to do desktop research about the operations of other countries' reserve banks and the extent of state control in respect thereof? What was the link between this and the complaint from IASA?

615. What in the complaint required Adv Mkhwebane to consider the mandate of other banks?

616. Precisely what evidence was accumulated during the period of December to June when the Lifeboat Report was released that pointed to the direction of the remedial action as was issued?

617. The events in respect of which SARB was said to have acted unlawfully had occurred prior to the Constitution coming into effect on 4 February 1997. If this is accepted, on what basis was the formulation at section 224 of the Constitution allegedly blamed for what had happened in the past?

618. Is it disputed that in order to fall within the jurisdiction of the PPSA, the focus of the investigation was to be that "*what the government had done in respect of the CIEX Report*" and not what transpired in relation to the loan by SARB to Absa?

619. What was Adv Mkhwebane's expertise to deal with matters of monetary policy and economic fundamentals underlying section 224 of the Constitution?

619.1. Does Adv Mlhwebane have financial and economic expertise?

619.2. If so, then Adv Mkhwebane should have easily and readily understood President Ramaphosa's submissions on the CR 17 Campaign funds in his response to the s 7(9) notice and attend to matters arising in the Vrede investigation ?

619.3. Why was an economist consultant not engaged to address these issues during the investigation, and yet one was engaged for purposes of answering the court papers?

620. Given that the CIEX report was the subject of the investigation:

620.1. Was consideration given that the CIEX Report that had been produced was simply unreliable;

620.2. not supported by sufficient evidence to warrant the implementation of the recommendations therein; and even if not,

620.3. was hindered by prescription;

620.4. could potentially have resulted in prejudice and embarrassment for South Africa, if it failed.

620.5. Further that the production thereof had, up to that point, come at a cost that may not have been commensurate with the content of that CIEX report.

621. What investigations were done to explore the aforegoing to ascertain whether the non-implementation of the CIEX Report - the actual subject of the investigation- was worth implementing?

622. Given what had been paid to CIEX up to that point, could Adv Mkhwebane rule out that those officials or politicians involved in the appointment of CIEX had simply just cut the losses and abandoned the CIEX report? Did Adv Mkhwebane consider this as part of the investigation?

623. Given that there were repeated warnings about the dangers of the possible impact of the Lifeboat Report on the monetary system generally, the correspondence received by the PPSA in November from the SARB's attorneys, the acceptance that the matter required caution and given that the investigation had already taken so long (through no fault of Adv Mkhwebane), is it not so that the failure to notify, *inter alia*, SARB or to engage with interested parties in respect of the new remedial action amounted to a total failure of the statutory obligation to observe *audi alteram*

partem, and was done knowingly given the response such an amendment was likely to evoke? I.e. an interdict to stop the recommendation from being made, or an urgent review, was likely inevitable?

624. The concerns regarding the appointment of a Commission of Inquiry had already been addressed in the Provisional Report, therefore what was the basis for now having a discussion with the Presidency in April and June 2017 – after the fact?

625. On what basis can the CIEX HC be criticised for its categorisations of the meetings with the Presidency as secretive given the failure of Adv Mkhwebane to be open and transparent in respect of what those meetings was about?

626. The explanations given in respect of these meetings were new matters put before the CC for the first time. It is so that they were not disclosed to the HC and for that reason, why was the HC orders not justifiable?

627. In the HC, Adv Mkhwebane indicated she had on advice from economic experts, concluded that "*[a] common view seems to be that the lender of last resort function of central banks should not be used to subsidize errors of judgment, since this could give rise to moral hazard, which in tum leads to reckless lending, which reflects misallocation of resources by banking institutions.*"[195]

    627.1. Precisely where in the Rule 53 record does it show that this information was obtained during the course of the investigation?

    627.2. Who precisely provided this information?

    627.3. What was the nature of their economic expertise?

    627.4. Adv Tshiwalule testified that, during the course of the investigation it was never suggested that the services of an economist be engaged?[196]

    627.5. Which economic experts did the PPSA appoint/consult for purposes of the investigation?

    627.6. When were they consulted, who attended the consultations and what did each expert advise?

628. In the answering affidavits before the Courts there was no endeavour to characterise Mr Goodson as an economics expert? Rather, the meeting with Mr Goodson was regarded as a key source of information on the basis that "*he was a former board member of the SARB Board and had inherent knowledge on the workings of the SARB*".[197] Is this disputed?

[195] Consolidated AA, Bundle A, p. 815 at para 86.
[196] Bundle D, item 15, p. 3150, para 39.
[197] Consolidated AA, Bundle A, p. 851 at para 165.3(b).

629. Adv Mkhwebane explained that whilst the Lifeboat Report concludes that Absa had in fact repaid the R1,500 000 000 to SARB, it was suggested in the litigation that Absa had "*never paid a single cent*" to SARB. Is this not misleading?[198]

(v) Other

630. Is it not also so that the general practice, and in fact according to the position adopted is that all meetings are meant to be recorded and that certain key meetings were not recorded:

630.1. The meetings that took place with the Presidency.
630.2. The meeting that took place with Luther Lebelo.
630.3. The meetings that took place with the SSA agents.
630.4. Part of the meeting that took place with Mr Zwane.
630.5. The meeting that took place with Mr Magashule.
630.6. The meeting with Mr Goodson and other economic experts.
630.7. The meeting or interaction with Mr Moyane.

631. Key information also appears anonymously in both the CR17 and SARS Unit matter.

631.1. How frequently does the PPSA receive anonymous information?
631.2. What protocols, if any, are in place for purposes of the authentication and verification of anonymous information be it from a truly anonymous source or a protected disclosure?

632. Given that one of the guiding principles of the PPSA's Disciplinary Management Policy and Procedure is that *"discipline should be applied in a prompt, fair, consistent and progressive manner"*, Adv Mkhwebane is requested to answer each of the questions below either in the affirmative or in the negative, and to furnish reasons for her answer to each question. It is to be noted that these questions relate only to the disciplinary charge preferred against Mr Samuel which arose out of the alleged assault incident with Mr Nchaupe Peter Seabi in December 2011.

633. In paragraph 133 of Adv Mkhwebane's second statement she states : "*The former PP and the EXCO had already exonerated Mr Samuel of any wrongdoing despite the criminal conviction.*"

633.1. Does Adv Mkhwebane dispute Mr Samuel's version that the former PP and the EXCO, and therefore the PPSA as an office, was aware of the assault, had considered it and resolved that no wrongdoing had occurred? If so, on what basis?
633.2. Does Adv Mkhwebane dispute that Mr Samuel was entitled to assume that the matter was closed as between himself and the PPSA when he was exonerated by the PPSA leadership, and no disciplinary action would be taken against him thereafter?

[198] Consolidated AA, Bundle A, p. 832 at para 148.

633.3. Does Adv Mkhwebane contend that it was nevertheless fair on Mr Samuel, on 11 March 2020 and thereafter, to pursue disciplinary charges against him in the circumstances?

633.4. Given that the assault occurred on 14 December 2011 and Mr Samuel was served with disciplinary charges on 11 March 2020, more than eight years later, does Adv Mkhwebane contend that the disciplinary proceedings against him were pursued promptly? What is her explanation for the delay?

633.5. Did Adv Mkhwebane take any steps when she became aware of the criminal charged to contact her predecessor, or instruct the CEO to contact the CEO who had been there at the relevant time to ascertain if there had been an investigation prior to any disciplinary steps having been taken?

634. In paragraph 130 of her second statement (Part B) to the Committee for the purposes of this Enquiry, Adv Mkhwebane states that the reason that Mr Samuel was charged in relation to the assault, when disciplinary charges were referred against him on 11 March 2020 is the fact that the office of the PPSA has been sued by Mr Seabi for damages as a result of the assault. It is so that this reason for pursuing a disciplinary against Mr Samuel in relation to the assault was corroborated by Mr Vussy Mahlangu in his oral testimony.[199] Adv Mkhwebane is requested to answer following questions:

634.1. Given that Mr Seabi's damages claim came to the knowledge of the PPSA on 23 November 2017, and the advice of the Legal Services Manager was that disciplinary proceedings be pursued against Mr Samuel, why were these not pursued promptly?

634.2. After Adv Mkhwebane enquired about the status of the matter on 18 June 2018, why did she not ensure that disciplinary steps were then pursued against Mr Samuel as promptly as could happen in the circumstances?

634.3. Were there any consequence management steps taken against the relevant employees for the failure to have pursued disciplinary proceedings against Mr Samuel promptly, and if Adv Mkhwebane's answer is in the negative, she is requested to furnish reasons why not.

634.4. The disciplinary charge against Mr Samuel was only served on him on 11 March 2020, a day after he had written a letter to Adv Mkhwebane on 10 March 2020 requesting her to resign, and after he had lodged his first affidavit impugning Adv Mkhwebane's conduct to the Speaker in February 2020; and requested information about legal expenditure incurred by Adv Mkhwebane from the acting CEO on 9 March 2020.

634.5. In those circumstances, does Adv Mkhwebane contend that the disciplinary action against Mr Samuel was not a retaliation taken by her and/or the PPSA leadership?

634.6. Adv Mkhwebane is requested to explain why Mr Samuel was not charged for the assault during 2017 after the damages claim came to the attention of the PPSA; during 2018; and during 2019? And if any consequent management steps were taken against anyone for not preferring charges?

635. Mr Tyelela further testified that in February 2018 there was a submission that went to Adv Mkhwebane about the matter of Mr Samuel and the assault charge "*where we were advising that we should wait for the court process to be finalised… we should not charge Mr Samuel we*

[199] Transcript, p. 1696.

should wait for the appeal. And then the PP did not agree..."[200] Adv Mkhwebane is requested to explain why she did not agree with the advice from the human resources department.

636. Does Adv Mkhwebane contend that the disciplinary charges against Mr Samuel were unrelated to the statements he had made, affidavits he had deposed to and queries he had made regarding her conduct and her fitness for office?

[200] Transcript, p. 2926.

NO.	DESCRIPTION[201]	REFERENCE
1.	The NT Report is the report commissioned by the National Treasury in 2013 for ENS Forensics (Pty) Ltd to investigate allegations of procurement irregularities in respect of the Vrede Dairy Project	Bundle A, item 13, Annexure 2C, 1352-1388
2.	The 'CIEX Report' means the PPSA's Report No. 8 of 2017/2018	Bundle A, item 4, pp. 12-70
3.	The Public Protector's Report 31 of 2017/2018 relating to the Vrede Integrated Dairy Project ("**the Vrede Report**")	Bundle A, p. 1208; as part of the Rule 53 record and as annexure **"JS3"** in the court record at Bundle E, item 5.1. References are solely made to the paragraph numbers of the Vrede Report and not to a page number.
4.	(Report No. 36 of 2019/2020) ("**the SARS Unit Report**") – Report on an investigation into allegations of violations of the Executive Ethics Code by Mr Pravin Gordhan, MP as well as allegations of maladministration, corruption and improper conduct by the South African Revenue Services. **Note**: The so-called "*rogue*" unit (as referred to in documentation and by Adv Mkhwebane, and in documents in its various permutations) will be referred to herein as the **SARS Unit.**	Numerous places in the bundles, but the one to which reference is being made herein is at Bundle E, folder 7, item 4, p. 216. References will be made mostly to the paragraph numbers.
5.	CR17 Report – Report 37 of 2019	Bundle E, item 1, 10
6.	The Vrede 2 Report is the report of the Public Protector issued on 21 December 2020	Bundle H, item 9. It is also at Bundle F, Vrede subfolder 56, item 77 with pagination.
7.	Bosasa / CR17 Record containing the HC and CC papers record	Bundle H, folder 31, item 31.7, subitem 31.7.5
8.	CR17 CC Judgment	Bundle C, folder 3 item 12
9.	The SARS Unit Full Court judgment is **Gordhan v Public Protector** (Case No: 48521/19)	Bundle C, folder 3, no. 18
10.	CR17 HC Judgment 10 March 2020	Bundle C, folder 3, 30
11.	Potterill judgment – **Gordhan v Public Protector and Others** (48521/19) [2019] ZAGPPHC 311; [2019] 3 All SA 743 (GP) (29 July 2019)	Bundle C, folder 3, item 36
12.	**Public Protector v South African Bank** 2019 (6) SA 253 (CC)	Bundle C, Folder 3, item 37

[201] The references to HC FA, Vrede HC AA and HC RA refer to the respective founding, answering and replying affidavits in the court records.

13.	**Public Protector v South African Reserve Bank** [2018] ZAGPPHC 175 (28 March 2018) ("**Leave to appeal judgment**")	Bundle C, Folder C, item 44
14.	**South African Reserve Bank v Public Protector** 2017 (6) SA 198 (GP) (15 August 2017) ("**the Murphy judgment**")	Bundle C, Folder C, item 50
15.	Second affidavit of Mr Sphelo Samuel, submitted to the Committee	Bundle D, item 8
16.	Affidavit of Mr Tebogo Kekana	Bundle D, item 11
17.	Affidavit of Mr Vussy Mahlangu	(Bundle D, item 12
18.	Initial affidavit of Mr Sphelo Samuel, submitted to the Speaker	Bundle D, item 13)
19.	Affidavit of Mr Kekana together with annexures	Bundle D, item 11, p. 2577
20.	Affidavit of Adv Tshiwalule together with annexures	Bundle D, item 15, p. 3140
21.	Affidavit or Mr Van der Merwe with annexures	Bundle D, item 24, p. 4060
22.	Transcripts of recordings relating to the operations of the SARS Unit	Bundle E, Folder 7, item 4, Vols 29 and 30, **"PG47"** to **"PG52"**
23.	Public Protector letter to the Minister of State Security ("**SSA Minister**") dated 22 February 2019	Bundle E, item 15.1
24.	SSA Minister letter to Adv Mkhwebane dated 27 February 2019	Bundle E, item 15.2