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

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I, the undersigned,

**CORNELIUS JOHANNES FRANCOIS VAN DER MERWE**

do hereby make oath and say that:

1. I am currently the Senior Manager: Legal Services in the Office of the Public Protector (“PPSA”). I have only occupied this position since 1 August 2022, following a recruitment process that had commenced in May 2022.
  
2. I commenced employment at the PPSA in January 1997 as a senior investigator. In 2010 I was appointed as Manager: Knowledge Management and Research. My main task as Knowledge Manager was to provide research support at various levels in the office, including concept papers, research support, notes for speaking engagements, research on legislation and for submissions to Parliament, general research, administration and core business. These are provided at the request of the Public Protector (“the PP”), Deputy Public Protector, the Chief Executive Officer (“CEO”), the investigative component of the PPSA and at times Legal Services. Though many are lawyers, I am sometimes asked to provide specific input and research. I also provide updates on judgments handed down and the implications thereof. My



input was hardly ever sought in respect of the merits of litigation matters and/or strategic decisions to be taken in respect thereof.

3. As Knowledge Manager I was also responsible for the statutory functions and obligations arising from the Promotion of Access to Information Act 2 of 2000 ("PAIA") and the Protection of Personal Information Act 4 of 2013 ("POPI") and to draft submissions for the internal Policy Review Committee. I also sit on the Quality Assurance Committee, as well as a structure now known as the Full Bench.
4. I have also been involved in efforts to obtain an electronic case management system for the PPSA and hence have had some involvement in the Information Technology from that perspective.
5. I have also had regard to the data relating to the number of cases finalised and the backlogs; the number of reviews of reports and judgments and orders obtained and the legal fees actually incurred in each year in relation to litigation matters. I point out that these amounts would differ from the amounts reflected in the annual financial statements as the latter amounts based on the accounting standard used, includes accruals.

**A. THE CONTEXT OF MY WORK RELATING TO CENTRAL BANKS**

6. I am the drafter of the incomplete draft headed "*Public Protector's observations on constitutional principles applicable to the independence and governance of the South African Reserve Bank and proposals for the review*"

of section 223 to 225 of the Constitution" presented to Mr Kekana during his evidence before the Committee.

7. I deal with below the context in which I had drafted this document which was never completed.
8. In an email dated 14 December 2016 the PP asked me for an update on outstanding tasks that I was involved in relating to (1) the amendment of the Public Protector Act; (2) the PP Rules and (3) the Transnet matter. She indicated further that she needed a paper on the Extension of Security of Tenure Act 62 of 1997 ("ESTA"); and further referred to *"our proposal on the Amendment of the constitution (proposals include amendment of section 25 to all access to Land as a means of economic emancipation, the Bill of Rights to be applicable to citizens and remove everyone since that includes even illegal immigrants? How to have full control of the Central Bank, section 223? (This will require benchmarking without the Central Bank)."* A copy of this email is annexed marked **"NVM1"**.
9. As far as ESTA is concerned we had been invited to the portfolio committee for purposes of making a presentation.
10. With reference to the amendment to the Constitution, I did not know what proposal was being referred to. It was not raised at Think Tank meetings or at any other internal meeting that I was aware of. I sought clarity on these but did not receive a briefing, so I waited for an instruction or relevant context before attending thereto. Both Mr Nemasisi (then the Senior Manager: Legal Services) and I were tasked with the foregoing.

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11. However, thereafter the then CEO, Mr Dlamini, called me to his office and gave me what was a Private Member's Bill which he said was a submission by the late Mr Mario Oriani-Ambrosini, MP. He requested that I prepare a submission to the Constitutional Review Committee on behalf of the Public Protector based on the Bill. A copy hereof is annexed marked "NVM2".
12. I commenced with my research and became concerned about the task allocated to me for purposes of preparing the submission to the Constitutional Review Committee. I decided to address an email to Mr Nemasisi sharing my concerns with what I had discovered.
13. In this email to Mr Nemasisi, dated 30 May 2017, a copy of which is annexed marked "NVM3", together with the annexures to the email, that:
  - 13.1. On the issue of the Reserve Bank I had received instructions from the CEO to endorse draft proposals for the amendment of sections 223 to 225 of the Constitution in the submissions on behalf of the PPSA to the Constitutional Review Committee, with which I was busy.
  - 13.2. The CEO at the time indicated that it was his understanding that the draft proposals had been drafted by the late Dr Oriani-Ambrosini MP and included in Stephan Mitford Goodson's book, *Inside the South African Reserve Bank: Its Origins and Secrets Exposed* (2014), book. I annexed to this email a copy of the proposal, headed "Change to the SA Constitution – a draft submission", as well as the manifesto of the Ubuntu Party that I had found on the internet.

13.3. The proposed amendments to the Constitution (underscoring the Bill) were based on the following principles (as I understood it):

13.3.1. Parliament shall have the sole power to issue money in any form, which would be interest and debt-free.

13.3.2. The amount of money created is decided by the Monetary Trusteeship, which is comprised of no fewer than seven but no more than eleven competent individuals who have no independent private interest, to be appointed by the National Assembly and answerable to it on a regular basis.

13.3.3. The Monetary Trusteeship will meet once a month to exercise its duties and will have the full cooperation of the Minister of Finance and State Bank of South Africa (People's Bank).

13.3.4. The Minister of Finance will be responsible through his/her agencies for issuing the directives of the Monetary Trusteeship.

13.3.5. The volume of emission or the amount to be withdrawn will be measured against the price indexes computed by Statistics South Africa.

13.3.6. New money will be paid into the economy by the Treasury and withdrawn, when necessary, in order to keep prices



stable. The withdrawal will be achieved by temporary taxation.

13.4. I was asked to specifically check whether it would be possible to use this Bill as a basis for the proposed amendment to the Constitution because it was a private proposal for legislation.

13.5. In addition to the amendments to the Constitution, the proposal contemplated that it be accompanied by draft legislation which would include a new proposed Monetary Reform Act providing for the nationalisation of the money supply but not the banking system, and would include the following provisions:

13.5.1. The statutory requirement that all commercial banks and other lending institutions hold at all times 100% reserves, putting an end to the practice of fractional reserve banking.


13.5.2. The retirement of the national debt (currently R2 trillion compared to R294 billion in 1994).

13.5.3. Permanent stabilisation on the money supply.

13.5.4. The establishment of the Monetary Trusteeship which is responsible for the future growth of a permanent and stable money supply.

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- 13.5.5. Withdrawal from all international banks and related agencies such as the IMF World Bank and Bank for International Settlements.
- 13.5.6. Establishment of the Foreign Exchange Stabilisation Fund.
- 13.6. According to the drafters of the proposal, the implementation of what was being proposed as legislation would result in of the following *“benefits being granted upon all the people of South Africa in perpetuity”*:
  - 13.6.1. An abolition of income tax and reduction in VAT (government, provinces, municipalities and organs of state will no longer have to pay interest on their loans).
  - 13.6.2. Zero inflation (it will no longer be necessary to expand the money supply for the payment of interest which is inflationary).
  - 13.6.3. Termination of business cycles.
  - 13.6.4. Full employment due to the introduction of a massive public works initiative that will reform our entire society in which every South African will participate. This will include upgrading of our roads, rails, ports, agriculture, education, science and technology and every other sector of our society.

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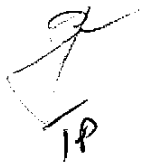
- 13.6.5. Government budget reliefs will be financed free of debt and interest.
  - 13.6.6. Housing loans at zero interest, but a small handling fee will apply.
  - 13.6.7. Housing of entire population within a 5-year period; a once-off one third reduction in the price of goods and services; permanent prosperity and abundance for all in which people can live in communities of their choice, not dictated by socio-economic constraints.
  - 13.6.8. Rapid implementation of the contribution philosophy in order to invoke the creation of abundance at every level through the expansion of community projects and de-urbanisation.
14. After regard to the foregoing and the submissions, I pointed out in the email as follows:

***“3. I do not mean to question the instructions from the PP and CEO, but APART from concerns about content and implications of the proposed amendments that we would be endorsing, I established that the draft proposals were not compiled by Dr Mario Oriani-Ambrosini, but is actually the political manifesto of a party called the Ubuntu Party, who contested the general election in 2014, but only managed 8 000 votes. Afterwards they accused the ruling party (ANC) of election fraud. The Ubuntu Party intended to submit a draft legislation as a private member’s bill if they managed***



***to get representation in the National Assembly. Apart from my concern that our endorsement of the drafts would effectively amount to the support of the political agenda of a specific party, there are other, more significant reasons why such an endorsement might constitute a huge risk for the Public Protector. (See document enclosed. "Why do we need banking reform" [www.ubuntu-party.org.za/](http://www.ubuntu-party.org.za/)")***

15. I also pointed out that the author of the book in which the legislation is contained, Mr Goodson, was both the deputy leader of the Ubuntu Party and a former director of the South African Reserve Bank ("SARB") Board, who left under a cloud of controversy as a result of his support for the Nazi economy and banking system, which presumably might form the basis of the proposed amendments. I referred to an article that was published in the South African Mail & Guardian. I pointed out that Mr Goodson was reported to hold contentious views that included admiring the economic policies pursued by Hitler in Nazi Germany and a belief that international bankers financed and manipulated the war against Hitler because they saw his model of state capitalism as a threat to their usurious ways.
  
16. Further, I pointed out that the South Africa Israel Public Affairs Committee Cape Town ("SAIPAC") strongly condemned Goodson's views, so too did a statement from the SARB. I referred to a Wikipedia write up in respect of Mr Goodson that had pointed to him being a holocaust denialist and adherence to anti-Semitic hate speech and falsehood. The matter received wide coverage in the media pointing to a number of articles in relation to which

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this had been dealt with. In fact, I specifically referred to thirteen media articles on Mr Goodson and the proposal.

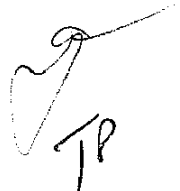
17. Whether these allegations were true or not it was in my view problematic for the PP to be endorsing the proposal with this being in the public domain. In the email I specifically stated further:

***"It might not be my place, but I feel that I would not be doing my duty to the Public Protector and this institution if I don't deal in [sic] not raise the fact that in the circumstances I am concerned that the endorsement of the proposed draft legislation prepared by the Ubuntu Party and Mr Goodson, might pose a high risk for the Public Protector, particularly in view of the fact that she is under close scrutiny by all parties."***

18. Before sending this email, I was mindful that I was not an economist and so I read up extensively on the subject matter. I still actually have the file containing my research, which I had not shared. Because I had these concerns, I was endeavouring to present an alternative narrative for the PP wanting to call for the review of the Constitutional provisions of the Reserve Bank. To that end I developed an alternative line of argument based on a need for oversight by Parliament in terms of section 55 of the Constitution and the EFF Constitutional Court judgment. I did so simply to see if I could find an alternative basis to seek such an amendment. It was this draft (and approach different to what I was instructed) that I was seeking approval for. This was encapsulated in the letter then dated 29 May 2017, a copy of which is annexed marked "NVM4", and which was annexed to the email. I had to raise this as it was not in line with what I was instructed to do.

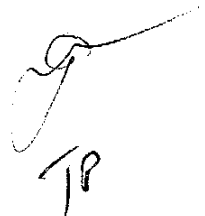
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19. I was asking for input/instructions in relation to this alternative as contained in the draft submission to the Constitutional Review Committee. As it was a PP proposal, I did not want to be outright rejecting the approach, so my thinking was to note the proposal as being a view that existed without actually endorsing it, and then looking at it from a different perspective. I was not aware at the time that the PP had met with Mr Goodson. I subsequently discovered in a tweet that the PP was promoting the Goodson book as being a good read and later discovered that she had met with him. I reiterate that at the time the proposal was provided to me it had not been presented as one emanating from Mr Goodson.
20. Also at this time I was working on submissions to the Constitutional Review Committee as part of my overall responsibilities, and not the PPSA's CIEX report. I had no knowledge of any suggestions in the context of the CIEX investigation that the Constitution should be amended or the SARB's mandate altered. My input was never sought in relation thereto.
21. Mr Nemasisi shared my email with the Senior Manager in the PP's office, Mr Joseph Lepogolo, and the CEO. Mr Nemasisi indicated that the concerns I raised were serious and suggested an urgent meeting to discuss my concerns with the CEO and PP. He indicated that he awaited a directive from the CEO in respect thereof.
22. As no further response was forthcoming, I addressed an email on Friday, 2 June 2017 to the CEO, enquiring as to whether he had a chance to look at

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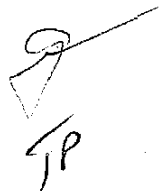
the issues raised in the emails and to consider the draft submission which I had drafted for submission to the Constitutional Review Committee.

23. The CEO then in turn sought the PP's approval to make the submissions which I proposed, saying that we are in a better position to make the submission without relying on Mr Goodson's book, seeking an acknowledgement of the risks of supporting a manifesto of a political party.
24. The PP responded on 7 June 2017 to the CEO, indicating that she was aware of my concerns and enquired whether I could propose how the Constitution could be amended to have a State Bank and Parliament oversee the State Bank. The CEO then indicated that he would meet with myself and Mr Nemasisi to discuss this concern. This meeting did not materialise.
25. In an endeavour to meet the PP's aforesaid request, I embarked on comparative research of Central Banks and commenced drafting the paper that served before this Committee. I was not given a deadline. I understood it was going to inform the PPSA's submission to the Constitutional Review Committee. It had nothing to do with the CIEX report as far as I was concerned.
26. The CIEX report was issued on 19 June 2017 and created a furore. I recall speaking to Mr Kekana thereafter. To the best of my recollection I can recall that this was triggered because of the outcry to the CIEX report. I can't recall if Mr Kekana asked me or I called him to say that I had done some research on this subject matter, though still a work in progress. I sent him the draft to see if there was something ex post facto to support the stance that had been

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taken, in that the research done up to that point in principle reflected a position that supported the recommendation of a state or central bank. This was so as I was seeking to support the instructions given to me in preparing the submission. At that point I had not yet given thought to whether it was indeed feasible or put in any countervailing views, and the document lacked a conclusion and recommendation. It was frankly incomplete. I forwarded to him a copy of the incomplete document on 20 June 2017 at 11h43, as apparent from my email annexed marked "NVM5".

27. As apparent from the email trail, a copy of which is annexed marked "NVM6(1)", at that juncture I had not even seen the finalised CIEX report and requested same from Mr Kekana and Ms Mosana for the first time on 21 June 2017, when my assistance was being sought to attend to a media query.
28. I checked my emails again and at the insistence of the evidence leaders copiously went through all my emails to make sure that I had not forwarded this incomplete document to anyone at the PP office prior to the CIEX report having been issued. It is highly improbable that I would have shared it in any other way, but more so, because it was incomplete I would not have done so at the time. My searches confirmed that, prior to 20 June 2017 (when I gave it to Mr Kekana), I had not disseminated the draft to anyone else.
29. I subsequently provided Mr Nemasisi with the same draft of my research on Central Bank in an email dated 13 September 2018, when he requested it, which is part of "NVM6(2)".

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30. Any suggestion that the content of my draft had informed the CIEX report would not have been possible. My research related to a different task which I was instructed to perform. What I had done was simply identify options and it was still in the research phase. I had not ever articulated recommendations that could serve as directives for amendments to the Constitution. So the contents of the CIEX report relating to the amendment of the Constitution could not have been premised on my incomplete research, which was only made available to Mr Kekana on the day after the CIEX Report had been released.
31. I was never requested to finalise the submission to the Constitutional Review Committee. My impression, in hindsight, is that it was overtaken by the events following the CIEX report and that the PP had decided to rather follow the route of seeking binding remedial action rather than (mere) proposals by means of a submission to the Constitutional Review Committee, but I was never consulted in relation hereto so I do not know where the proposal emerged from.
32. Suffice it to say the research was never completed and no conclusion or recommendation was ever reached.
33. I was telephonically contacted by Adv Mkhwebane on 18 July 2022 asking me to confirm the date that I provided the paper to Mr Kekana. As I had no reason not to, I provided her with a screenshot of the email of 20 June 2017 at approximately 06h24 on 19 July 2022, a copy of which is annexed marked "NVM7".

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**B. CIEX REPORT**

34. My personal involvement in the CIEX investigation and compilation of the CIEX report was as follows:

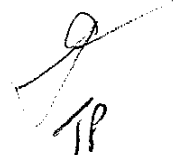
34.1. I accompanied the investigators to the ABSA offices in October 2016 as they were going to be given access to certain files – some of which were in Afrikaans and I was subsequently asked to translate these documents.

34.2. On 28 February 2017 I was asked to provide some information on the tax implications of the gift to Bankorp. This was asked in the context of a letter which had been received from Black First Land First (incorrectly) dated 26 February 2016 . A copy of the request and letter is annexed marked “**NVM8**”.

34.3. I remember doing research on it but I cannot trace any submission that I may have made in this regard.

34.4. It is apparent from the minutes of the Task Team meeting of 10 March 2017, annexed marked “**NVM9**”, that a mini-Think Tank team to go through the report was to include myself, Adv Matlawe and Adv Fourie with the focus on government communications.

34.5. The PP was informed that neither Adv Fourie nor I was available. The PP indicated that this mini-Think Tank would go ahead, in our absence, with Mr Kekana and Adv Matlawe on 14 March 2017.

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- 34.6. On 13 March 2017 I was invited to attend a mini-Think Tank with Adv Fourie, Adv Matlawe and the PP to peer review the then draft version of the report. At that stage I was provided with an executive summary, for discussion purposes but which was said to have factored in responses received from the Presidency, SARB, the Treasury and submissions from Mr Oatley. A copy hereof is annexed marked "**NVM10**".
- 34.7. This draft, provided to me by Mr Kekana, was clear that at that stage, based on the submissions made by the Presidency, that *"the Presidency disputed the intended remedial action by stating that the preserve of the power to appoint a commission of inquiry is vested in the President in terms of section 84 of the Constitution. The Presidency is not bound to accept the advice which a commission of inquiry might give. The Presidency did not dispute anything else except what is stated to the Commission."* The draft made no mention of state or central banks, nor did it make any reference to amendments to the Constitution.
- 34.8. I provided written inputs on the draft as best I could, not being apprised of issues, and forwarded it raising a number of issues that we needed to look at in the formulation of the issues as identified in the draft.
- 34.9. After providing my inputs, I was not involved further in the finalisation of the CIEX report.

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35. I did attend a meeting with Adv Ngalwana SC on 16 August 2017 after the urgent court application challenging the CIEX report was launched. Why I was asked to attend was not clear, as I had minimal involvement in the report, but I think that I was included because I had previously done an opinion on the issue of prescription in another matter and Mr Nemasisi wanted me to explain this to the counsel. The issue of prescription was one of the grounds for review. I had rendered advice on prescription in a context that was entirely different to the CIEX investigation. My sketchy notes taken at that meeting are annexed marked "**NVM11**".
36. I do recall at some point after the litigation had run its course I was asked to do an affidavit for the PP to clarify my recommendations in relation to the CIEX report. When Mr Sithole reminded me I indicated to him that I was not sure whether my evidence would be helpful, pointing out that I had no involvement. My research was also never completed. I heard nothing further in relation hereto.

**C. COMPLAINTS**

37. I was requested to prepare statistics regarding the PPSA's handling of complaints by the PPSA's Communications Department (Mr Segalwe) for the purpose of providing an overview of the achievements of the office after 20 years. The schedule is annexed marked "**NVM12**". I have updated these figures.
38. In addition I deal with the annual statistics as it appears in the annual report relating to the PPSA caseload. I have confirmed the information below with

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Ms Machebane Mothiba who is Senior Manager: Strategic Support and the person who collates the data received from the various PPSA branches for purposes of the providing the statistics as reflected in the PPSA annual reports. The schedule of the period for Adv Mkhwebane is filed herewith. As she had served 6 months of the 2016/2017 period, this has been allocated at 50% for ease of reference.

39. In order to understand the statistics the following has been confirmed with Ms Mothiba with reference to the 2020/2021 financial year.

39.1. The statistics from Head office (collectively reflected as CSM, Administrative Justice and Service Delivery and Good Governance Integrity ("GGI"), PII Inland and PII Coastal) and the nine provinces are reflected. In previous annual reports the former category was separated but are now reflected simply as head office. The combined statistics reflect the globular totals for the PPSA as reported in the annual reports.

39.2. All complaints made to the PPSA are given a complaints number, but not all complaints are necessarily investigated. There is also a distinction between cases handled and cases finalised.

39.3. Finalised cases in any financial year would include investigations completed but would also include:

39.3.1. cases that have been withdrawn by complainants;



39.3.2. cases where the complaints have been resolved by the parties prior to the investigation commencing;

39.3.3. cases that are referred to other institutions; and

39.3.4. cases which are rejected because the PPSA has no jurisdiction.<sup>1</sup>

39.4. These are recorded in the annual report as “**Closed without investigating**”, and are to be distinguished from complaints that are:

39.4.1. **Substantiated:** When the office confirms the allegations of the complainant; and

39.4.2. **Not substantiated:** When the office does not confirm the allegations of the complainant.

39.5. To use the 2020/2021 statistics as an example with reference to the table found on p. 48 of the annual report, a copy is annexed marked annexed marked “**NVM13**”.

39.6. The similar figures for the other financial years are annexed marked The schedule is annexed marked “**NVM14**”. and the same explanation would similarly apply.

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<sup>1</sup> It does so happen that on occasion the investigation is commenced or does occur and only then is it is determined that the PPSA has no jurisdiction.



- 39.7. The starting point is that each year there is an amount of complaints brought forward, which is carried over from the previous financial year (the backlog) which for 2020/2021 was **3363** complaints.
- 39.8. The total of cases carried over to the next year for the most part would already exclude those that fall into the categories of cases that are referred to other institutions and cases which are rejected because the PPSA has no jurisdiction, save that in the few days before the cut-off date for the counting of complaints for financial year-end there may well be some cases that have not yet been assessed. But these would not make a significant difference and would then simply be accounted for in the next financial year.
- 39.9. To this is added the number of new complaints received which was **5108** new complaints totalling **8471**.
- 39.10. The matters reflected as having been finalised total **6927** cases. Whilst the table reflects the number of cases falling in the PPSA's jurisdiction as **5259**, that figure does not exclude the categories reflected in paragraphs 39.3.1 and 39.3.2 above.
- 39.11. From this amount to determine the actual workload one would deduct those cases that have been "**Closed without investigating**" which as reflected on p. 20 of the 2020/2021 Annual report constitute **21% of the finalised complaints, with 40% of the complaints having been upheld and the remaining 39% having not been substantiated.**

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39.12. This means of the 6927 finalised cases:

39.12.1. Closed without investigating (29%) - **2009**;<sup>2</sup>

39.12.2. Substantiated (40%) – **2771**; and

39.12.3. Unsubstantiated (39%) – **2147**.

39.13. The total claims investigated amount to **4918**.

39.14. As reflected on page 37 of the 2020/2021 annual report investigations conducted by the PPSA fall under the categories of

39.14.1. Early Resolution (ER) constituting 18% - **851**;

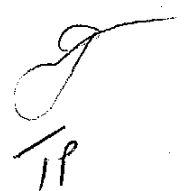
39.14.2. Service Delivery (SD) constituting 62 % - **2971**; and

39.14.3. Good Governance and Integrity (GGI) and very complex GGI matters constituting 20% - **932**.

39.15. This totals **4754**. The difference in the total reflected in paragraph 39.13 and this total being an amount of **164** is most probably because a decision is taken after an investigation has commenced for such to be referred for a determination is made that the PPSA has no jurisdiction or for another reason it is not completed.

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<sup>2</sup> In some instances investigations do occur, before the matter is actually closed.

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39.16. In relation to the foregoing some 73 reports were finalised that are signed by the PP.<sup>3</sup> These fall into the following categories:

39.16.1. **Closing reports** – these are reports that are issued after an investigation has confirmed that the allegations were unsubstantiated or matters were resolved before the issuing of the report.

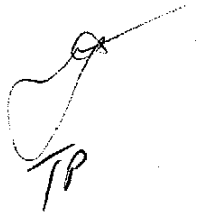
39.16.2. **Formal reports with findings and remedial action** – these refer to a report issued at the conclusion of the investigation, where the allegations are substantiated. The report covers the findings as well as detailing the remedial action to be taken.

39.16.3. **Advisory reports** – reports issued to communicate the Public Protector's point of view or recommendation in respect of a matter investigated by her, or to refer a matter for action by another appropriate public body or authority, without necessarily having made a finding or taking remedial action as envisaged in section 182(1) (b) and (c) of the Constitution.

39.17. Most of these reports relate to GGI matters. It is unlikely that a closing reports and advisory reports would be subjected to a review but there have been occasions where a dissatisfied complainant had

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<sup>3</sup> This does not refer to ones that are done at provincial level.



taken the decision to issue a closing report on review. The PPSA does not in the annual report distinguish among the type of reports issued.

#### **D. BACKLOGS**

40. In the 2015/2016 report the overwhelming majority of the cases finalised did not result in formal investigation reports. This is because a significant number of the matters are resolved through alternative dispute resolution mechanisms, where we bring the parties involved in conflict together, mediate, negotiate or conciliate and emerge with settlement agreements signed by both parties. This was also so in the 2016/2017 year.
41. The backlog had been a long running difficulty, with some cases running beyond four of five years. Though we have powers to collect evidence, there are long waits for information being provided to the PP office – the delays at times inordinate. To her credit, Adv Mkhwebane tried a different approach and she implemented a new model for investigations being done top down. This was implemented in an endeavour to eliminate or significantly reduce the backlog and included weekly Task Team meetings and extracting commitments for deadlines by when investigations would be completed. This further gave rise to consequence management arising from deadlines not being met from around the middle of 2017.
42. Further, a COO was appointed to manage, and reduce the backlog. Ms Baloyi had been effective in ensuring that there was a significant dent in the backlog, and under her supervision the numbers improved. She developed good



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relations with investigative teams and put systems into place to speed up investigations and manage the quality control thereof.

43. On backlog the 2016/2017 annual report reflected as follows:

*"The goal of the institution is to produce quality investigations promptly. In doing so, we reduced the backlog of cases that were two years and older as at 1 April 2016 by 62%. At the same time, cases older than a year as at 1 April 2016 were reduced by 77%. We managed to resolve the majority of our cases in line with approved investigation plans. Investigation plans set out timeframes for each investigation, thus giving both the investigator and complainant an estimated time that it will take for an investigation to be completed. If during investigations, the scope of work is increased due to various factors, the investigation plan is amended and approved.*

*61% (417/684) of cases two years and older were finalised by end of 2016/2017. The reason was the complexity of some of the cases<sup>2</sup> that needed to be resolved by Alternative Dispute Resolution (ADR), lack of responses by some institutions and capacity constraints.*

*There was a 76% (359/475) reduction in cases older than a year as at 1 April 2016 . This is due to investigation teams dedicating time to reducing the backlog.*

*The main reasons for uncontrolled case backlogs are:*

- The absence of an electronic case management system;*
- Delays by organs of state in providing information; and*
- or/and availing themselves for meetings.*

44. Both Adv Madonsela and Av Mkhwebane focused on reducing the backlog.

45. In 2018/2019 the annual report (at p. 25) reflected as follows:

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*“In striving to achieve promptness is finalisation of cases, turnaround times of 6 months for finalisation of early resolution matters was adopted whilst service delivery matters have a timeframe of 12 months to be finalised and conduct failure matters (GGI) need to be finalised within 24 months from date of receipt by the institution. Of the cases finalised during the period under review, 99% were completed within these turnaround times, which is a step in the right direction towards full compliance. At the same time, 77% of backlog cases that were two years and older were finalised. The plan is to eradicate the backlog going forward.”*

46. In the 2019/2020 annual report the following was reported:

*“For instance, in 2019/20 we exceeded our target of finalising at least 7 000 matters in our caseload by nearly 5 000. The achievement of this target had a positive effect on a related target of finalizing investigation reports. The objective was to finalise 56 reports. We more than doubled it, finalising a record 137 reports. This means 81 more reports were finalised. Summaries of selected reports, all of which were impactful in their respective ways, and a sample of matters settled by way of alternative dispute resolution methods can be found in pages 27 to 61.*

*We also finalised 95% of our caseload within the set turnaround times. Early Resolution matters must be finalised within six months, Administrative Justice and Service Delivery matters must be put to bed within 12 months while the more complex Good Governance and Integrity matters must be wrapped up in 24 months.”*

47. To achieve the foregoing the investigators and senior staff were working extensive hours.

#### **E. REVIEW OF REPORTS AND LEGAL FEES**

48. Given that the bulk of the PPSA budget is spent on its human resources (employment costs), as apparent from the table annexed marked “NVM15”, being a summary of the revenue received by the PPSA, and the proportion thereof spent on human resources, the remaining funds have to be used to fund the operations of the PPSA Office countrywide, to conduct investigations,

outreach, administrative costs like stationery and telephone expenses etc. With burgeoning litigation costs, it obviously meant that other costs had to be curbed. This also meant that investigators were restricted from conducting investigations physically. They became unable to interview witnesses in person or to source the services of expert witnesses. It also had a significant impact on training. All of this impacted on the quality of the investigations conducted and would have a knock-on effect on the quality of the reports that could be produced. It results in the number of reviews increasing, resulting in greater legal costs and less money being available for operations. Even in cases where the PPSA has not opposed, courts have awarded costs against the PPSA.

49. More reports have been issued by Adv Mkhwebane, than had been the case with her predecessors. As reports became more of a focus and more reports are produced, it has meant more reviews. As more reports are produced – which is time, and labour intensive and costs more – as opposed to alternative dispute resolution - this makes the position even more precarious. It is also so that a number of the backlog cases were more complex and required a substantive report which required remedial action and hence required that a report be produced.
50. It must be borne in mind that the PPSA is an ombud. Even after the Constitutional Court confirmed the binding nature of the PP's remedial action, and the fact that it has a "legal effect", it has no enforcement mechanism to ensure that the remedial action which it imposes be complied with. However, the remedial action must be complied with. This gives rise to review

applications. However, unless an interdict is obtained pending the review, the implementation is not suspended.

51. It is also so that some of the procedural errors that do occur when reports are incurred, for instance in relation to the acceptance of the complaint or the commencement of the investigation, cannot be rectified and the report will inevitably be set aside if fundamentally flawed, when taken on review. Once a report is set aside, unless remitted, the investigation is not revisited. In a number of instances these reports do not go through the prescribed assessment process or there is not sufficient time when it does reach the quality assurance structures for it to be properly quality assured.
52. Turning to the quality assurance process, I can confirm that some high profile matters are reported by the relevant investigation team/ unit directly to the PP. In fact in relation to some of these reports I have no recollection of them having ever served before the quality assurance structures on which I sat.
53. There is a Quality Assurance Standard Operating Procedure Manual which has existed since 2007, and under which the Think Tank was created. The Think Tank ceased existing in 2018. There are also investigation service standards, regulating timeframes within which investigation activities are supposed to take place, which the PP had brought into effect on 1 April 2017. These I am informed already forms part of the electronic bundle before the Committee.
54. Litigation has always been the domain of Legal Services, acting on instructions from the PP directly, who has to approve all possible actions taken

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in respect of a matter. In fact this was formalised in the Litigation Strategy that came into effect in 2020.

55. Of course decisions to litigate have financial implications. In my understanding, from litigation reports to the Management Committee on which I sit, the process during the time of Mr Nemasisi entailed that he would write a memorandum to the PP and they would then decide what would happen in respect of a matter, from which a decision would emerge in relation to the future course of action and the external legal representation to be appointed (if any). As best I can recall Mr Mhlongo adopted the same approach. Memos would also be sent to the CEO to appoint a firm of attorneys to represent the PPSA, and subsequently to sign off on the payment of legal fees. An example hereof is annexed marked “NVM16”.
56. It is unclear whether, in utilising the GNR approach, that provides for the end user, (legal services) to sign on the form that the service has been rendered and the invoice should be paid, that the CEO's attention is drawn specifically to the cost of the litigation in each matter prior to such payment being effected. The costs of each case have not been reported at Manco meetings. I have confirmed with the CEO that once there is a litigation decision taken by the PP, the CEO is neither apprised of, nor signs off on the legal fees incurred. Her role is limited to signing the offer of appointment extended to the attorney's firm appointed and it does permit for the appointment of counsel.
57. Under Mr Sithole, whilst some matters are dealt with by external legal service providers, there are matters that were dealt with internally – both unopposed

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and opposed matters. Internal opposition was part of the litigation strategy since 2020. This was done to curtail costs. In some of these matters Mr Sithole sought to appear personally, albeit that Legal Services laboured under the mistaken belief that because he was admitted as an attorney that he had rights of appearance. Most recently in a matter in the Northern Cape this came to a head when the court pointed this out.

58. Legal costs incurred is to be verified by the end user, being Legal Services, who is responsible for confirming that the service is delivered at the PPSA tariffs in accordance with the written appointment letter by an attorney on the PPSA's list of attorneys.
59. It is so that there was an increasing number of reports have been taken on review. This is apparent from the Table of cases that will be presented to the Committee explaining the nature and scope of the litigation that has been embarked on.
60. There have been cases where, in my view the PPSA, could have opposed matters more vigorously because the litigation and the judgment served to curtail essential powers and the discretion of the Public Protector, but it is also so that certain reports were so weak that they would inevitably be reviewed and set aside, and no purpose is served in putting up a defence of any kind. Further that where the report is found to be fundamentally flawed in some way then no purpose is served in seeking to establish any principle as the report is unlikely to withstand court scrutiny.

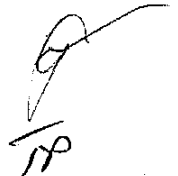


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61. As I was not part of the litigation strategy adopted in each case I am not in a position to definitely provide an answer as to why some cases are vigorously opposed, whilst others are not during the same time period, when the same financial resources and constraints would have existed. I can only say that in some cases where there would be an apparent principle of interest to the PP in relation to which jurisprudence is required to be developed would warrant pursuing litigation. This is one of the guidelines envisaged in the Litigation Strategy.
62. I accept that ultimately the decision whether or not to litigate any case lies within the discretion of the PP.
63. Whilst it may well be that a lack of funds could also have meant that reports that should be defended were not being defended, resulting not only in a waste of the resources put into compiling such report, but it also means that the complainant who lodged the complaint with the PPSA would, despite his/her complaint, be left without any recourse or remedy or implementable outcome.
64. Over several years there has been a significant increase in the amount of the PP budget spent on litigation and related matters i.e. legal opinions obtained. Not all relate to the review of reports.
65. Whilst there was a spate of litigation evident after the Nkandla judgment, it is also so that a number of the reports challenged would not withstand legal scrutiny on review, making it susceptible to challenge. As far as I can ascertain it does not appear that any report that was not defended has withstood legal scrutiny.

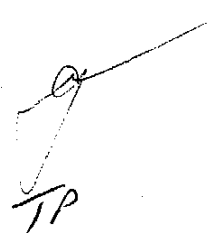
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66. The following schedules have been prepared.
67. First, reflecting the number of cases in the courts relating to the number of reviews, labour cases and other litigation, and indicating the stance adopted by the PP in relation to each as well as the outcome and the cost orders granted. Endeavours were made to separate those that were already ongoing when Adv Mkhwebane was appointed. This has been compiled with Mr Sithole's assistance.
68. Second, reflecting the legal costs incurred for the years 2017 to the end of May 2022. These have been collated, for the most part, with reference to the actual fee notes that have been paid, with the amounts as being the actual amounts reflected on the PPSA payment system, correlated to the actual invoices received. In a few instances the original fee notes or accompanying disbursement document could not be located. In some instances there may not have been a separation of the attorney's fees and advocate's fees. These reflect what constitutes the amount spent on legal fees, the attorneys engaged and the counsel briefed in each year. This should provide the Committee with an indication, in broad terms as to what, the PPSA was paying for in relation to legal fees and which matters were regarded as a priority, on which the limited funds were to be spent. This exercise was not done for audit purposes, nor does it reflect the accruals that are taken into account in relation to the annual financial statements. In this regard given that it was done per calendar year, the end figures would not correlate to the amounts in the financial statements as there would be a difference in the yearly dates used as cut offs.



But what it would reflect is an annual figure for legal expenses and a five-year snapshot.

69. Further the amount in the annual financial statements that reflects a globular figure, identified as including professional and consulting fees, is inclusive of legal fees. I have enquired from the Acting CFO, who has been involved in the compilation of the last three annual financial statements, as to how much has been spent on professional and consulting fees on the one hand and legal fees, on the other. A copy of his response is annexed marked "NVM17".
70. In any event, historically as far as the employment of consultants is concerned, there was an endeavour for invoices to be submitted for consulting work through Legal Services at the time Mr Nemasisi was in office, but he refused to sign off in relation thereto. I was apprised hereof by Mr Tebele, who then also reported this to the evidence leaders in my presence and that of the current CEO. This had occurred at the time he was Acting Head of Corporate Services to whom Mr Nemasisi would have reported. MR Tebele indicated that he had been so informed by Mr Nemasisi. He mentioned Mr Ngobeni by name. At the time I did not know of the invoices to which the Committee had specifically been referred, and it appears that instead of Mr Ngobeni being paid as a consultant that he was then paid through the attorney's firm.
71. Third, the amount spent on the cases before this Committee. This has been compiled with Mr Sithole's assistance.



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72. Fourth, the reports that have been reviewed and set aside or remitted. There are also a number pending, some of which are opposed and a number that are not. In relation to a number of reports, notices to abide or a withdrawal of a notice to oppose has been filed. It appears that after there had been a withdrawal or a notice to abide filed, that the PPSA office file becomes inactive. As such, until the evidence leaders enquired as to the outcome hereof, the orders in relation to a number of these matters were not followed up on. This meant that the outcome would only have been known in relation to these cases if the order had been sent to the PPSA by the applicant.
73. It is also so that a number of the cost orders against the PPSA have not been actioned. There is also no provision made in relation to all of these cost orders in the contingencies to the annual financial statements, probably because some of these orders may not have reached the PPSA and as it seems that the State Attorney does not pursue the cost orders against the PPSA.
74. The annual budget for Legal Services for the 2022/2023 financial year was R14 726 264. An additional amount of R 1,5 million has been allocated for labour matters. In a report by Mr Sithole provided to the leadership recently in July 2022 it reflected that there were nine litigious matters currently being opposed where external representation (attorneys and counsel) was engaged. There was a number that were opposed but internally. It is likely that the PPSA Legal Services is going to exceed this budget, give the contingencies, the expected Bills of Cost, the costs of the section 194 proceedings before Parliament and other legal services. The cost estimates for the proceedings pending before the Western Cape High Court in the amount of R 1.5 million.

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**F. ELECTRONIC CASE MANAGEMENT SYSTEM**

75. The PPSA has been operating on a manual case management system for a lengthy period of time. The processing and other tasks in the PPSA is supported by paper and hardcopy information: facsimile, telephonic transmission; email, data files created from Microsoft Office Professional applications. It meant that file audits had to be physically conducted by Provincial Representatives or Executive Managers in the absence of an electronic case management system. With Covid restrictions and with cost containment, it has not always been possible for on-site file inspections to be conducted. A huge amount of time and resources are spent on manual case management activities, the manual collation of statistical, performance and management data and the producing of reports. Adv Mkhwebane, as well as her predecessor, are on record that the workload, capacity constraints and the lack of technology as a critical enabler (rather than a lack of commitment or effort on the part of staff) adversely affected the quality and turnaround times of service delivery by the PPSA, as well as the efficiency of the core business of the PPSA, the effective use of resources, and the maintenance of accurate record-keeping and institutional memory of the PPSA.
76. A decision was taken by Adv Madonsela that before further efforts and resources were to be invested to procure a case management system, urgent action was required to analyse the existing business processes of the PPSA and resolved to invest in the creation of a competent process engineering capability to review the PPSA business processes and to facilitate changes to the operations of the PPSA.

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77. In 2014/15 the PPSA embarked on a Business Process Re-engineering (BPR) process, aimed at the review and assessment of its business processes and operational procedures and model. The high-level Terms of Reference for the BPR Project was to analyse the PPSA business processes based on manual operations, including case management activities, customer relations management, the collation of statistical, performance and management data and the producing of reports.
78. The BPR project was expected to inform design specifications and process performance measurement for the procurement of an electronic case management system. A business process analysis report on the PPSA investigation processes was signed off in 2015. In fact in the 2015/2016 financial year there was a budget of R5 million under capital expenditure mainly for the case management system (CMS project). After a feasibility study of the CMS system, it was found that it would cost R50 million and Public Protector South Africa did not have this money to invest in the CMS project. As a result the R5 million budgeted was not fully utilised.
79. There was preference for a partnership model rather than relying primarily on external service providers, as the thinking was that it was more likely to result in a long term commitment dedicated to the organisation. Through donor funding facilitated with the support of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), the report informed the drafting of functional design specifications and the appointment of a Primary Service Provider for the Conceptual Stage, including the development of user requirements by Accenture South Africa.

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80. At that juncture as reported in the 2016/2017 annual report part of the R6.5 million capital budget was supposed to be used for the implementation of the case management system (an online tool to manage and record cases).
81. The next phase in the project was the development of an electronic case management system for the PPSA, as well as the CMS Solution Stage (i.e. design, development and implementation of an electronic Case Management System). However, this was affected by a decision from the PPSA leadership after October 2016 to abandon projects supported by donor funding. The PPSA endeavoured to find the requisite budget internally to proceed with the advertisement of a tender for a service provider in 2017.
82. The project was in progress and it was envisaged that it would be completed in the 2017/2018 financial year. The tender process was abandoned as the bids exceeded the funds available.
83. During the latter part of 2017 the PPSA was alerted to the development of the NHRI Hub, an open-source web-based application at the Office of the Ombudsman for Samoa, through newsletters and communications issued by the Asian Pacific Forum of National Human Rights Institutions (APF). The APF has provided ongoing support to the development of NHRI Hub, but it remains an independent product.
84. After an initial assessment and evaluation of the different modules within the application and its capabilities and functions, as well as other features such as deployment environment, costing and security, the PPSA team was satisfied that the NHRI Hub application could cater for the basis case and



document management needs of the PPSA, or be adequately adapted and customised to the needs of the Office.

85. When we presented the proposal to the PPSA Leadership, concerns were noted in relation to the security of the system as well as the prospective service provider. It was resolved that the proposed system and developer should be vetted by State Security Agency ("SSA"). This was in September / October 2017.
86. The PPSA team met with a team from SSA and presented the request, as well as other issues that the then security Manager, Mr Neshunzhi, had identified regarding his portfolio. The SSA vetted the system and had some concerns, primarily in relation to the hosting of the database.
87. The discussion ended up with an SSA proposal to assist the PPSA with the actual development of a case management system, based on their capacity and resources to *"advise on technical requirements, customize and ensure that the correct security layers and requirements are implemented in the system"*.
88. The role of the SSA was to advise on technical requirements, customise and ensure that the correct security layers and requirements are implemented into the system which would be paid for and owned by the PPSA. At that point it was envisaged that the SSA would have some responsibility in terms of system maintenance and support.



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89. A proposal was subsequently developed by the SSA and presented to the PPSA leadership. This process was abandoned, however, because of the quoted costs (approximately R30 Million), and after the matter came to the fore during the PP's engagements with the Parliamentary Portfolio Committee. The Portfolio Committee recorded serious concerns about the proposed involvement of the SSA in the development of a system and the risks of potential unauthorised access to the complete database and records of the PPSA.
90. The engagement with the *pro bono* service providers for the open source NHRI Hub system subsequently resumed in 2018, and the PPSA entered into an agreement for the customization and development of the system on a *pro bono* basis. The development was, however, interrupted when the developer fell ill during the Covid 19 pandemic in 2020 and was unable to proceed.
91. In 2021 the PPSA embarked on the in-house development of a case management system with the assistance of a developer who was seconded to the PPSA from the South African Social Security Agency (SASSA). The development was concluded in January 2022 and the PPSA is currently in the process of rolling out and implementing its own case management system, developed internally.

**G. GENERAL**

92. The PPSA does not have a document classification system in place. The PP Act only requires confidentiality. Documents have not been classified in accordance with the Minimum Information Security Standards.

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93. Frankly, our service delivery matters do not require any classification and these are by far the majority of complaints received by the office. None of these complaints deals with information that has been classified.
94. In 2017 – 2018, approximately 70% of the matters were service delivery complaints and 30% GGI matters about ethical and unethical behaviour, procurement, elements of corruption, etc. The only time I came across a document in relation to which secrecy was involved it was the Bankorp contract, and then it involved no classification.
95. During the initial period of the PP's office it dealt with bread and butter matters. The complainant was the person in the street and they did not generally raise politically sensitive matters. Nor was the PP office relevant on any political front. Although the Imvume Report had come out in 2005 this was felt more after the Nkandla investigation.
96. In so far as this Committee has been informed that drastic measures had to be taken at the commencement and during Adv Mkhwebane's tenure to turn around and improve a culture of poor performance within the PPSA, my experience, particularly from my involvement in work process and workload analysis, do not support a contention that the backlog referred to can solely be laid at the feet of the staff of the institution.
97. Apart from the capacity and resource constraints referred to earlier in my affidavit, the situation within the PPSA could also be attributed to fact that changes to the focus and strategic direction of the institution are not always

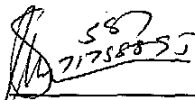
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aligned to or supported by an investment in the most important resources of the organisation namely it staff.

98. Finally, in the Vrede matter, the issue arose of financial constraints in the context of an investigation in the report. Whilst austerity measures were being implemented in 2018 in relation to the PPSA Offices, I am not aware of any directive in the PPSA office at the time that any investigation should not be conducted because of financial constraints.

  
\_\_\_\_\_  
**CORNELIUS JOHANNES  
FRANCOIS VAN DER MERWE**

I certify that the above signature is the true signature of the deponent and that he has acknowledged that he knows and understands the contents of this affidavit which affidavit was signed and sworn to before me in my presence at PRETORIA on this 01 day of **SEPTEMBER 2022**, in accordance with Government Notice No R1258 dated 21 July 1972, as amended by Government Notice No R1648 dated 19 August 1977, as further amended by Government Notice No R1428 dated 11 July 1980, and by Government Notice No R774 of 23 April 1982.

  
\_\_\_\_\_  
**COMMISSIONER OF OATHS**  
MASHAKIWA

