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

I, the undersigned,

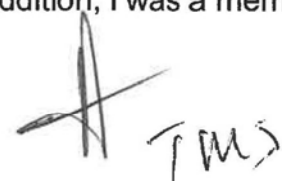
THEMBINKOSI MUNTU SITHOLE

do hereby make oath and say that:

1. I am currently employed as the Manager: Legal Services at the Public Protector South Africa ("*PPSA*").
2. The contents of this affidavit are to the best of my knowledge both true and correct and fall within my personal knowledge, unless otherwise stated or clear from the context.
3. I commenced traineeship at the Good Governance and Integrity Unit ("*the GGI*") at the PPSA as a trainee investigator during 2013 – 2014. Thereafter, I completed articles and returned to the PPSA in May 2017 as an Investigator in the Private Office ("*the Office of the Public Protector*") which was amongst other things, tasked with investigation, secretarial support and quality assurance. At the time of my appointment I was reporting to Adv Isaac Matlawe, who was then the Senior Investigator: Quality Assurance.


TMS

4. On 01 April 2018, at the request of Mr Ntsumbedzeni Nemasisi, the Senior Manager: Legal Services, I was transferred to Legal Services to assist Mr Nemasisi as the litigation workload had increased. I assisted with managing litigation in general, litigation reports, drafting legal opinions, administrative and related operational matters.
5. Mr Nemasisi left the employ of the PPSA at the end of February 2019. There was no person appointed in his position for the month of March 2019 to 30 June 2019. From 1 July 2019 Mr Alfred Mhlongo was appointed to this position which he held until the end of February 2020, whereafter the position of Senior Manager: Legal Services was not filled.
6. I was appointed as the Acting Manager: Legal Services from 1 April 2019 to 30 June 2020, whereafter such appointment was extended until further notice. The Manager: Legal Services position was advertised during May 2020. A copy of the advertisement is annexed, marked "TMS1". I was then appointed as the Manager: Legal Services with effect from 1 August 2020, or earliest date of assumption of duty. In February 2021 two Legal Advisors were appointed.
7. After Mr Mhlongo left the position Senior Manager: Legal Services, the position remained vacant and I was overseeing all legal matters, including all litigation matters. Recently, Mr Neels Van der Merwe was appointed in the capacity of Acting Senior Manager: Legal Services. Both the Senior Manager: Legal Services and I report to the Acting Head of Corporate Services– currently Mr Tyelela.
8. As part of my duties, among other things, I had to attend all management and operational meetings including, Manco, Risk, Audit etc. In addition, I was a member



of the Bid Adjudication Committee, Financial Misconduct Committee, and Security Committee.

9. Since moving to Legal Services I did not sit on the Task Team/ Task Register and Dashboard meetings. As far as investigations are concerned I attend Quality Assurance and Full Bench meetings.

A. CIEX

10. When I joined PPSA in May 2017 as an Investigator, the CIEX investigation was at its tail end. I was not involved in the investigation or quality control thereof. To the best of my knowledge, the CIEX investigation was finalised by Mr Kekana, who was responsible for doing quality assurance of same with Adv Matlawe. I was not involved in the quality control of the report at all.
11. I only became personally involved in the litigation at the stage of the leave to appeal which was already at an advanced stage. I was fully involved when the appeal was filed at the Constitutional Court for reversal of the personal cost granted by the High Court against the Public Protector ("PP").

B. VREDE DAIRY

12. To the best of my recollection my first encounter with the Vrede matter was at the August 2017 Think Tank meeting when Ms Erika Cilliers presented the update on the matter and the draft final report. The matter was also reported at the PP's Task Team meetings which sat weekly, which I attended.

Handwritten signature and initials, possibly 'TMS'.

13. Sometime in November 2017, the Vrede investigation was brought to the Head Office for finalisation. The matter was allocated to Mr Kekana and Mr Raedani assisted by myself. I can testify to my involvement.
14. At one stage in February 2018, we were called to the PPs boardroom. Mr Kekana, Mr Raedani, Adv Matlawe, Mr Nemasisi and myself were there. Mr Nemasisi raised issue and/or comments from the draft report which he read from his laptop, the details of which I do not remember. The PP expressed unhappiness that we did not include the issues raised by Mr Nemasisi in the draft report. Mr Kekana indicated that the issues could not have been included in the draft report as they did not form part of the section 7(9) notice.
15. I have considered minutes in my possession, mostly drafts, which show that the Vrede Report had served before the Think Tank and Task Team meetings on several occasions.
16. The issue of the Guptaleaks did come up during a Think Tank meeting as reflected in the August 2017 minutes which reflects that Adv Cilliers was tasked with checking whether it had any bearing and reported back that there was no link between the investigation based on the complaint and the Guptaleaks.
- (i) Vrede litigation
17. Generally, at the time the procedure for the compilation of the Rule 53 record was that the investigator would send the record through to Legal Services. The investigation team would know what documents were relied on and would provide such to Legal Services for purposes of compilation of the Rule 53 record. This

Handwritten signature and initials, possibly 'TMS'.

would include the record of decision, the draft reports, memoranda and other documentation relied upon.

18. It is so that problems do arise with the investigation team who cannot find documents on which they relied for a report although it was available to them at the time they had drafted the report.
19. With reference to the Vrede Dairy Report, when the application was served to have the Report reviewed and set aside, I was requested by Mr Nemasisi to assist in the compilation of the Rule 53 record.
20. Initially the PPSA filed a notice to abide the decision of the Court, reserving its right to participate fully in the proceedings and to deliver an explanatory affidavit to assist the Court in adjudicating the matter and advancing oral argument.
21. Advice was obtained from Advs Ngalwana SC and Karachi, dated 6 May 2018, indicated that the financial constraints referred to required elucidation – this being the fact that the report indicated that matters were not being investigated due to *“capacity and financial constraints experienced by the Office of the Public Protector as the report did not describe what the capacity or financial restraints were. Further, that in the supplementary founding affidavit the DA expressed a view that a notice to abide was “remarkable and alarming” given the allegations in the founding papers of “bad faith and incompetence” made against the PP and that in the absence of an answer to disprove the allegations, the DA intended to ask the Court to conclude that these were justified.*

A handwritten signature, possibly 'A', followed by the initials 'TMS'.

22. The DA amended the cost of the relief sought in the application to be paid on an attorney-client scale by the PP in her personal capacity, alternatively in her official capacity. Counsel was instructed to advise whether supplementary Rule 53 reasons could be filed.
23. Counsel also advised that if there were any documentation omitted from the Rule 53 record that should have been included; that the record must be supplemented and an explanation be provided as to why such documents were not included in the original record.
24. Counsel then advised that the notice of intention to oppose and an answering affidavit be filed, pointing out that unless the PP agreed, not only with the relief sought in both applications, but with the factual basis thereof and the legal conclusions derived from them, it was not advisable for the PP to simply abide the Court's decision, if the apprehension in doing so was an adverse cost order in the event of unsuccessful opposition, as this relief was already being sought, whether the opposition was there or not.

C. FSB / TSHIDI

25. In January 2019, with reference to the FSB investigation, prior to the report coming out, an urgent application was brought by Mr Anton Mostert to interdict the investigation. However, this application was eventually dismissed by both the High Court and recently the Supreme Court of Appeal.
26. After the investigation report was issued by the Public Protector, the FSCA launched a review application in which they sought orders for the reviewing and setting aside

A handwritten signature in black ink, consisting of a stylized 'A' followed by the letters 'TMS'.

of the report. After the application was received, I requested the Rule 53 record from the investigators, Ms Mogaladi and Ms van Eeden. Counsel was briefed to advise whether the matter should be opposed and he indicated that the record did not speak to the report. After a couple of consultations between the legal team (counsel and attorney) and the investigation team, Ms Mogaladi, Ms Sekele and Ms van Eeden and Mr Madiba, who attended one consultation as I recall, the counsel prepared a memorandum of advice in which he advised of the shortcomings in the Report. Eventually, the PPSA withdrew opposition on the merits and proceeded to argue the matter on the point of remittal. The Court upheld the review on an unopposed basis and granted costs against PPSA only up to the stage of the withdrawal of the opposition. What occurred thereafter with reference to the disciplinary proceedings that ensued, I am advised, had been dealt with by Mr Tyelele.

D. THE PILLAY PENSIONS MATTER/ THE GORDHAN/SARS UNIT MATTER

27. To the extent necessary, and I am able to I will provide evidence to assist the committee with reference to my role in both the reports and the litigation, including the compilation of the Rule 53 record. To the best of my recollection, Mr Mataboge was supervising Mr Mathabela and Ms Mvuyana respectively in relation to these investigations.
28. The issues before court in respect of the two matters related to, amongst other things and apart from the merits, the interpretation of section 6(9) and section 7(9)(a) of the Public Protector Act 23 of 1994 (*“the PP Act”*).

E. LITIGATION MATTERS

Handwritten signature and initials, possibly 'A' and 'MS'.

29. The final decision on the course of action to follow in relation to any case lies with the PP. The PP decides whether matters should be opposed and whether appeals should be proceeded with. In most instances the PP acts on legal advice received either internally or externally.

(ii) Procedure

30. I will testify as to the procedures followed in litigation matters, including the appointment of attorneys and advocates.

(iii) Approval of invoices

31. Approval of invoices lies with the end user department, which is Legal Services, being the recipient of the service, which has to confirm the amount payable for legal fees. The person who confirms the fees signs off on the GNR form which serve as confirmation of the invoice rendered. There is what is called a GNR process form, an example which is annexed, marked "TMS2", which will indicate to the Supply Chain Management and the CFO the amount to be paid as proof that such has been verified by Legal Services. Where I deal with the matter I would sign off on it.

32. Prior to the GNR process being implemented, and during the tenure of Mr Nemasisi, payment was processed through a short memorandum signed by the Senior Manager for the CFO's and CEO's approval, respectively.

33. The Public Protector has no part in the administration of the processing of invoices.

34. There is a PPSA panel of attorneys bound by PPSA tariffs. I am advised that these documents are not annexed but are in the bundles before the Committee. The

Handwritten signature and initials. The signature is a stylized 'A' with a horizontal line through it. To the right are the initials 'TMS'.

PPSA panel and tariffs are revised every three years. Attorneys are engaged by way of a written appointment letter to which a written acceptance is to be provided that reflect an acceptance of the terms of the appointment as at the time of appointment to the panel. An example is annexed marked "TMS3". On instructions advocates are appointed by attorneys. Litigation includes reviews of reports.

(iv) Withdrawal of cases

35. On or about 18 April 2018, the PP gave an instruction that opposition on all pending judicial review matters be withdrawn, save for the ones in which hearing dates had already been allocated and that it be indicated to the Court that the PPSA abides. The instruction from Mr Nemasisi was that in the withdrawal of opposition it be reflected that this arises as a result of financial constraints at the time being experienced by the PPSA and that the PPSA would reserve its rights to fully participate in the proceedings and would deliver an explanatory affidavit to assist the Court in adjudicating the matter and to advance oral argument at the hearing thereof. This is apparent from the email trail annexed, marked "TMS4".
36. A copy of the matters in respect of which we were instructed to file withdrawal notices ("TMS5"), as well as the draft letter ("TMS6") indicating that this was being done purely "*motivated by the financial constraints facing her office and the desire to better spend her floundering resources on promoting public administration and protecting individuals from abuse by the State*" are annexed. We were subsequently instructed not to withdraw in respect of three matters that appeared on the list.

F. LITIGATION STRATEGY

37. There were no documented guidelines upon which a decision to litigate must be taken. I crafted a Litigation Strategy 2020 – 2023, which was approved by the PP on 2 November 2020. It is in fact recorded in paras 1.11 and 1.12 with specific reference to achieving its first strategic objective as follows:

- “(1) In achieving this objective, every application for review of the Public Protector’s power exercised in terms of the enabling legislation must be approached with the view of upholding and enhancing the constitutional objectives of the Constitution.*
- (2) Furthermore, the budget allocated to the office to fulfil the mandate will be of no consequence if the resources used for conducting investigations are put to waste through Reports that are reviewed and set aside on unopposed basis. It is for this very reason that the Constitutional Court rightly held that the remedial actions issued by the Public Protector are binding. If it were not so, the Constitutional mandate would have been severely undermined.”*


38. The strategic objective outlines the factors that would guide the determination as to whether an application should be opposed or not. In terms of the strategy, guidelines are set out for the compilation of the Rule 53 record and Legal Services is tasked with preparing a memorandum detailing a litigation strategy and recommending the actions for approval by the PP. It further contemplates that the Executive Manager and responsible investigator must peruse the review application and assist Legal Services in identifying of verifying facts alleged in the founding papers for determining whether the merits should be opposed or not.

39. The strategy provides that the risk that is to be attached to the head of institution are either criticism and/or personal and/or punitive costs must be mitigated through



delegations of authority to investigative staff where affidavits should preferably be deposed to by the responsible Head of the Investigation Branch directly responsible and familiar with the facts of the case under investigation or review. In preparing the answering affidavits in review applications, that the names of the investigators and their direct supervisors who conducted the investigation be mentioned as having assisted the PP and that they file confirmatory affidavits.

40. Furthermore, that oppositions in matters would be withdrawn where legal or factual points become moot (para 3.8). Litigation is accompanied by a litigation protocol also approved by the PP, dated 2 November 2020. It states that the protocol seeks to ensure that the Accounting Authority and the Executive Authority are involved in the proceedings. It contemplates that the memorandum must be signed by Legal Services, supported by the Executive Manager: Corporate Services, the COO and the CEO. It must be recommended by the DPP and approved by the Executive Authority.
41. Subject to the delegation of authority framework, all pleadings and review applications must be signed by the Executive Authority. It must be brought to the attention of the investigator and Head of the Investigation Branch for their comment and input.

A handwritten signature consisting of a stylized 'A' followed by the initials 'TMS'.

G. ADVICE RENDERED

	Date modified	Type	Size
TAWBONKWE	6/25/2022 8:02 AM	File folder	
PANEL OF ATTORNEYS	6/25/2022 8:02 AM	File folder	
Pulco	6/25/2022 8:02 AM	File folder	
WITHDRAWAL	6/25/2022 8:03 AM	File folder	
Affidavit Rule 53(1)(b) Vrede investigatio...	3/26/2018 10:44 AM	Adobe Acrobat D...	2,722 KB
FW PUBLIC PROTECTOR ABONGILE MAD...	5/5/2021 3:12 PM	Outlook Item	220 KB
legal Opinion and Litigation Strategy- Vr...	2/28/2018 3:32 PM	Adobe Acrobat D...	2,514 KB
legal Opinion and Litigation Strategy- Vr...	5/21/2018 2:50 PM	Adobe Acrobat D...	512 KB
Legal Opinion by Adv Ngaiwana SC on Iv...	4/4/2019 5:04 PM	Adobe Acrobat D...	399 KB
Litigation Strategy Memo 03 February 20...	2/3/2019 9:29 AM	Adobe Acrobat D...	494 KB
Maeneta & Ferreira SC	11/12/2019 11:12 AM	Adobe Acrobat D...	468 KB
Meeting PP Minister Of Justice and CRI R...	12/1/2021 9:57 AM	MP3 File	127,241 KB
Memo for the sanction of Ms Mogaladi a...	4/13/2021 4:53 PM	Adobe Acrobat D...	439 KB
Memo re prospects	9/28/2018 8:51 AM	Adobe Acrobat D...	1,036 KB
Memorandum on consent order R H	11/1/2019 3:54 PM	Microsoft Word 97...	50 KB
Prelim Memo - DA et CASAC v Public Pro...	5/11/2018 9:24 AM	Adobe Acrobat D...	203 KB
Public Protector Ramaphosa Opinion 11...	4/12/2019 1:56 AM	Adobe Acrobat D...	782 KB
PUBLIC PROTECTOR TAX OPINION V1	5/8/2019 1:00 PM	Adobe Acrobat D...	164 KB
RE APPLICATION FOR LEAVE TO APPEAL -...	5/17/2018 11:03 AM	Outlook Item	90 KB
RE APPOINTMENT LETTER RE REQUEST F...	1/7/2019 1:06 PM	Outlook Item	292 KB
Review of the Sanction of the Chairperso...	4/28/2021 4:43 PM	Adobe Acrobat D...	289 KB
SAA matter 27.05.2019(1)	5/27/2019 11:25 AM	M4A File	64,523 KB

42. I provided the evidence leaders with the aforementioned written legal advices that deal with prospects. Whilst I also provided other information, I did not provide all the legal advices received. I will be able to deal with questions arising for purposes of assisting the Committee in relation hereto to the extent that I have knowledge.

H. LITIGATION INCLUDING REVIEWS OF REPORTS

43. Between 31 March 2016, when the Constitutional Court handed down judgment in EFF v Speaker of the National Assembly, and 15 October 2016 when

 TMS

Adv Mkhwebane assumed office, there were approximately twenty five (25) review applications with it being clear that the number would increase in future.

44. I provided the Evidence leaders with the following:

44.1. A report of matters as they were pending (opposed/unopposed) in September 2020;

44.2. A report of unopposed matters as at 17 August 2022;

44.3. A report of matter opposed externally as at 20 August 2022; and

44.4. A report of matters opposed internally as at 20 August 2022.

45. Based on a consideration hereof, and with reference to historical Litigation reports and Contingency reports, reported and unreported judgments and orders made available to them, the evidence leaders prepared a comprehensive schedule. I have provided input in relation thereto and been provided with various drafts thereof for purposes of providing outstanding information, confirming the contents thereof and to respond to queries arising from the information. This was done for purposes of assisting the Committee. I must state that at times, the consolidation of litigation reports was an administrative challenge. Therefore some reports may not provide the full and/or actual litigation matters that were pending at that time. This is due to the fact that, amongst other things, the litigants sought no relief against the Public Protector, and some were applications in which a litigant sought to enforce the implementation of the remedial action.

Handwritten signature and initials, possibly 'A TMS'.

46. In addition a schedule detailing the labour related matters in relation to which I provided input was also prepared and put before the Committee when Mr Tyelele gave evidence. Some of the fees incurred were detailed therein. The Acting Senior Manager: Legal Services will address the issue of legal fees incurred. I provided the invoices and supporting documents that I had in my possession and under my control as I had approved payment in a number of invoices and I had insight in relation thereto. The cases took place in various courts and the cost orders have been varied and, where necessary, I could assist the Committee in relation thereto. To the best of my knowledge, the PP in her personal capacity has been ordered to pay costs in the following cases:

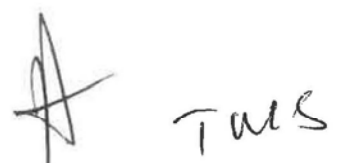
46.1. **Reserve Bank v Public Protector** (CIEX/ABSA case);

46.2. **DA, CASAC v Public Protector** (Estina Integrated Dairy Farm case);

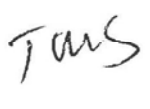

46.3. **Pravin Gordhan v Public Protector** (Misleading of Parliament and SARS "*intelligence unit*" case) (though the initial personal costs order was overturned in relation to the Part A relief, this was not the case in relation to Part B. The leave to appeal is still pending at the Constitutional Court);
and

46.4. **Commissioner of Revenue Services v Public Protector** in the court below but this was set aside on appeal by the Constitutional Court.

47. Thus at the time of the filing of this affidavit there are only two personal cost orders which have been granted against the Public Protector, which have not been overturned on appeal.

Handwritten signature and initials, possibly 'TMS'.

48. There have been a number of costs orders against the PPSA. There are some in favour of the PPSA and in some cases there are no cost orders. It is so that where costs have been ordered against the PPSA, then the state department have generally not pursued the execution of this cost order. The remainder of the matters in which cost orders were granted against PPSA are either still under the taxation process or the parties have not taxed and/or submitted their bills for taxation or there is simply delays.
49. The costs paid by the PPSA in respect of the taxed bills are as follows:
- 49.1. Absa Ciex – R1 939 923.62 – April 2019;
 - 49.2. SABS – R392 542.35 – November 2020;
 - 49.3. Zolile Abel Dlamini – R351 296.73 – November 2020
 - 49.4. Hugh Eisar – R398 562.44 – November 2020;
 - 49.5. GEMS (SCA) – R414 065.69; December 2020;
 - 49.6. Johannesburg Roads Agency – R355 463.18 – June 2022, and
 - 49.7. CAWE & Others (review of report) – Taxation pending.
50. The PPSA may recover costs awarded in the PPSA favour in relation to the following:
- 50.1. Marion Mbina Mthembu – R356 089.29;

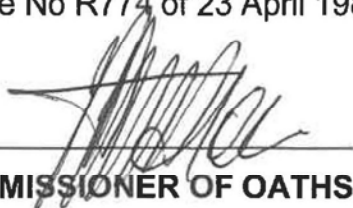


- 50.2. Mr Muzikayifani Gamede – R122 728.43;
- 50.3. Department of Arts & Culture – R135 000 – January 2019;
- 50.4. CAWE & Others (Interdict) –R73 415.39;
- 50.5. Mapula Mokaba Phukwana – Costs for condonation, postponement and dismissal of the review application. Taxation process pending;
- 50.6. Minister of Finance (VPF Interlocutory application) –Taxation process pending;
- 50.7. Anton Mostert – Taxation in progress
- 50.8. Mr Pravin Gordhan – (Ivan Pillay Pension – Strike out application); and
- 50.9. The President/State Capture though no steps have as yet been taken in relation to this personal costs order.



THEMBINKOSI MUNTU SITHOLE

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 24 day of **24 AUGUST 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

AMIGO NDLOVU
COMMISSIONER OF OATHS
 Practising Attorney Gauteng
Mabotja Attorneys
 189 Lunnon Road
 Hillcrest Office Park, Barbet Place,
 Hillcrest, Pretoria, 0083