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

I, the undersigned,

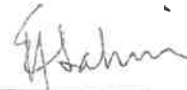
HASSEN EBRAHIM

do hereby make oath and say that:

1. I am an adult male currently residing in Gauteng.
2. The contents of this affidavit are true and correct and fall within my personal knowledge, unless otherwise stated or clear from the context.
3. I was approached by the evidence leaders to the section 194 Parliamentary Committee Proceeding for purposes of providing assistance in relation to contextualising the Public Protector ("PP") within the Constitutional and Legislative Framework of South Africa. My knowledge in relation to the creation of the office of the Public Protector arose as a result of my involvement in processes of the negotiations for the Constitution and the work of the Constitutional Assembly.
4. Apart from that I have a BA.LLB from the University of Botswana. Accompanying this affidavit is a copy of my curriculum vitae, marked "HE1", the contents of which I confirm.

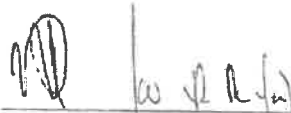


5. Accompanying this affidavit is a report prepared with reference to the Constitution of the Republic of South Africa, 1996 (*the Constitution*) and the Public Protector Act 24 of 1998 which will be marked "HE2". In preparation of the report I have had regard to the South African case law. It is in relation hereto that I will make submissions to the Committee.



NASSEN EBRAHIM

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 Worcester St on this 14 day of **JULY 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.



Captain ASB

COMMISSIONER OF OATHS



"HE1"

HASSEN EBRAHIM**PERSONAL DETAILS**

Surname : Ebrahim

Full Names : Hassen

ID Number : [REDACTED]

Date of Birth : [REDACTED]

Home Address : [REDACTED]
[REDACTED]
[REDACTED]

Contact Details : [REDACTED]
E-mail: [REDACTED]

ACADEMIC QUALIFICATIONS

1975 : Matriculated from the Secondary School - Pretoria Indian Boys High School

1976 : Enrolled with the University of Durban Westville for a BSc Degree for purposes of studying in medicine. Continued studies in 1977 at the University of the Witwatersrand, Johannesburg

1978 : Enrolled for a B Proc Degree at the University of the Witwatersrand. Interrupted my studies to go into political exile in 1979.

1981 : Enrolled with the University of Botswana & Edinburgh for a BA. LLB Degree.

1986 : Completed studies and obtained a BA.LLB from the University of Edinburgh.

2003 : Completed Senior Executives Programme at Harvard University.

CAREER DEVELOPMENT/ RESUME

1976 - Enrolled with Westville University to study BSc degree.

1977 - Enrolled with Wits University to continue BSc degree.

1978 - Enrolled with Wits University studying for a B. Proc.

- Recruited into the ANC's underground structures and remained politically active thereafter.
- 1979 - Continued studies until 22 September 1979 when I went into exile due to security reasons.
- 1980 - Completed military training in Angola. Deployed in the ANC politico-military command structures in Botswana until my return in 1991.
- 1981 - Enrolled with the University of Botswana for a BA.LLB. Degree. **Achievements:** In 1982 I was awarded the first medal by the Chief Justice of Botswana in Advocacy. Between 1983 and 1985, I continued part of my degree programme at the University of Edinburgh. In 1985 I obtained a second award for advocacy in Botswana and represented the country in Zimbabwe in the African Moot Court competition.
- 1986 - I qualified as an attorney and was admitted to the High Court in Botswana in 1986 as an Attorney.
- Entered private practice as a lawyer. Employed by Attorneys Armstrong's as Head of the Corporate Civil Litigation Department and remained in this position until my return to South Africa in 1991 after the ban on ANC was lifted.
- 1991 - Appointed as a Regional Organiser for the PWV (now Gauteng) Region of the ANC. I was responsible for the re-establishment of the ANC's legal organisational structures and branches in the country.
- 1992 - Appointed as the National Administrator of the ANC's National Negotiations Commission. I was responsible for the organisation and facilitation of the ANC's effort and involvement in the negotiations process. I facilitated the consultation process between the ANC, its alliance partners and the Mass Democratic Movement. This also entailed the provision and co-ordination of technical support, administrative and secretarial facilities during bilateral and multi-lateral negotiations.
- 1994 - Joined the Transitional Executive Council (TEC) in managing the transition between the apartheid order and the new democratic dispensation.
- Elected to the Legislature in Gauteng.
- In August of that year, I was offered the post of Chief Executive Officer of the Constitutional Assembly. My primary function was to assume executive responsibility for the establishment of a constitution making body that would allow for the maximum level of participation by the public.
- 1997 - I was appointed on 1 May 1997 as the Deputy Director-General: Corporate Services in the Department of Justice.
- In August 1997 I was appointed as a member of the IJS Board responsible for the establishment of the Integrated Justice System.
- 1998 - Participated in the development of Justice Vision 2000 which charted the way for the transformation of the Department of Justice.

- 1999 : Appointed as the Chair of the Integrated Justice System which was responsible for the integration of the criminal justice cluster of departments including Justice, Corrections, Prosecutions, Police, and Welfare. I retained this appointment until my resignation from the Department.
- 2000 : Participated as part of the Department of Justice executive team in the restructuring of the department.
- : I was tasked with the responsibility of establishing an IT Department for the Department of Justice and was duly appointed as the MD: Information and Systems Management Business Unit.
- : I developed the Department of Justice's strategy for modernisation – *e-Justice*. This strategy provided for the establishment of IT infrastructure with internet connectivity for more than 9000 users.
- : I negotiated with the European Union and the Dutch government development aid to the value of more than R300m to support the e-Justice programme.
- 2001 : My name was entered into the UN database as an international expert in constitution-making.
- 2002 : Nominated as a finalist in the African ICT Achievers Awards for service delivery in the Public Sector.
- : Appointed by Minister P. Maduna to head an enquiry into the appointment of liquidators by the Master's Office.
- 2003 : Elected by peers in both the private and public sector for an Award as the Public Sector CIO of the year. This is the highest accolade an ICT worker could receive in Africa.
- : Appointed to act as the Chair of the Development Committee by the Justice, Crime Prevention and Security (JCPS) Cluster of Director's Generals. A critical responsibility was the strategic alignment of the JCPS departments.
- 2004 : Nominated by the Government Information Technology Officers (GITO) Council as the Departmental GITO representative of the year.
- : I have since 1997 been appointed to act as the Acting DG for the Department at least once a year.
- 2005 : Appointed as the Chief Master in October 2005 with the responsibility of managing all the Masters of the High Court in the country with the task of regulating the administration of all estates.
- 2007 : Appointed as the General Manager for Systems Integration at T-Systems in October 2007. My primary responsibility as a member of the company's executive team was to lead and direct the company's multi-national Systems Integration portfolio.
- 2009 : Appointed as an Advisor to the Minister of Health in the capacity as the Chairperson of the Technical Task Team for the Ministerial Advisory Committee on Health dealing with Information Management and Strategic Planning.
- 2010 : Appointed as a Senior Technical Advisor to the UNDP Constitution-Making Project in Somalia
- 2011 : Appointed as an Advisor in the Blue Nile State of Sudan Popular Consultation process.

- : Participated in the Office of the Chief Justice's Strategic Thinking Workshop in the establishment of the new department and Branch of Government support the Chief Justice.
- 2010 : Appointed as a Senior Technical Advisor to the UNDP Constitution-Making Project in Zimbabwe
- 2011 : Appointed by Chief Justice Ngcobo as Head of the Secretariat and member of a Committee on Institutional Models co-chaired by former Chief Justices, Justices Chaskalson and Langa, to design the basis of the new independent judicial branch of government in South Africa.
- 2012 : Appointed as a Senior Technical Advisor by the UNDP to give strategic support to the Speaker of the Somali Parliament in the establishment of parliament and the review of the Constitution.
- 2013 : Appointed as an expert in constitution-making on the UN Standby Team of Mediation Experts.
- 2015 : Appointed as a Policy Advisor to the Speaker of the 9th Parliament of Somalia. I continue to perform this function.
- 2016 : In addition to the support provided to the Speaker of Parliament, in August 2016 I started providing strategic support to the UNDP in Somalia focussing on both Parliamentary Support and the Constitutional Review Process.
- 2017 : My tasks in Somalia was extended in April 2017 when I was asked to further provide strategic support to the Minister of Constitutional Affairs.
- 2017 : Participated in a Fellowship of constitution makers organised at The Hague by IDEA.
- 2020 : International Constitution Making Consultant to the UNDP in Sudan in October 2020 for a period of five months.

MAJOR PUBLICATIONS

- 1998 - Author of Soul of a Nation – Constitution-making in South Africa, published by Oxford University Press in November 1998.
Achievements:
 - The book was nominated as one of six finalists in the Alan Paton literary Awards for historical works. The book currently enjoys the status as a critical reference study in several universities.
 - I authored scores of keynote academic papers and collaborated in the publication of several books dealing with constitutions and constitution making that have enjoyed my acclaim with leading international universities and many governments.
- 2001 - Contributing Author of The Post-Apartheid Constitutions – Perspectives on South Africa's Basic Law; Edited by Penelope Andrews and Stephen Ellmann; Witwatersrand University Press; 2001.
- 2010 - Contributing Author of Framing of the State in Times of Transition; Case Studies in Constitution Making; Edited by Laurel E. Miller; United States Institute of Peace; 2010.
- 2014 - Contributing Author of The Judiciary in South Africa; Edited by Cora Hoexter and Morne Olivier. 2014
- 2016 - Contributing author to: Reflections on the Bill of Rights, Edited by Enver Surty; December 2016.

- 2019 - Published my biography; From Marabastad to Mogadishu – Journey of an ANC Soldier; December 2019.
- 2022 - Contributing author on a book soon to be published entitled: Constitution Makers on Constitution Making

INTERNATIONAL ENGAGEMENTS

Presented papers at various international conferences including –

- 1995 : formed part of the South African delegation on senior political leaders on a visit to Germany to meet their key political leaders and study their system of federalism
- : Commonwealth Round Table Conference
- 1996 : Fiji Constitutional Review Conference
- 1997 : International Conference on the Comparative Experiences of Constitution-making in Africa
- : Participated in an international study tour of Canada, United States, and the UK on the use of technology in establishment of the an Integrated Justice System
- 1999 : Harare Conference of the Commonwealth Human Rights Initiative
Nigeria – Constitution-making: Bridging the gap between the state and civil society.
- 2000 : Presented a paper at the International Conference on Constitution-making at the University of Ohio in November 2000
- 2001 : Presented a paper at an international conference on Constitution-making in Cape Town in June 2001
- 2002 : Invited to participate in an international meeting by Oracle in Amsterdam launching e-Business solutions.
- 2002 : Acted as a special advisor in a project by Harvard University dealing with constitution-making in the indigenous American Indian territories.
- : Acted as a special advisor in an international panel assisting the Zimbabwean Constitutional Assembly.
- : Participated in an international panel of experts in monitoring the referendum in Zimbabwe and assessing the effectiveness of the Zimbabwean Constitutional Commission and the impacts of its outreach programme. The outcome of this endeavour was the production of a report on the findings of field research conducted nationwide from 17- 22 October-2000.
- 1999 – 2003 : Participated in each consecutive year in the annual International Government Leaders Conference hosted by Bill Gates at Microsoft in Seattle.

- 2002-2004 : Participated in each consecutive year in the annual international meeting of experts on Enterprise Content Management in Spain, Portugal and France hosted by Documentum and EMC.
- 2004 : Participated at an international CIO Summit in Livingstone, Zambia.
- 2005 : Participated in an international forum for the development of XML standards dealing with Justice.
- 2007 : Invited as a special advisor to an international forum to Ecuador to present a paper and give advice on constitution-making.
- 2008 : Invited as a special advisor to an international forum to Nepal to present a paper and give advice on constitution-making.
- 2009 : Participated at an international gathering of experts at a forum hosted by the Institute for Democracy and Electoral Assistance for the development of a hand-book on constitution-making.
- 2010 : Appointed as a Senior Technical Advisor to the UNDP Constitution-Making Project in Somalia
- 2011 : Appointed as an Advisor in the Blue Nile State of Sudan Popular Consultation process.
- 2011 : Appointed as the Strategic Advisor to the UNDP Constitution-Making Project in Zimbabwe
- 2012 : Appointed as a technical expert supporting the constitution-making process in South Sudan.
- : Attended a workshop of members of the Constituent Assembly in Tunis in April 2012 as a technical expert.
- : Appointed as a Senior Technical Advisor by the UNDP to give strategic support to the Speaker of the Somali Parliament.
- 2013 : Appointed as an expert in constitution-making on the UN Standby Team of Mediation Experts and provided support to Somalia, Liberia, Nepal, Sierra Leone, Yemen, Philippines and Libya.
- 2017 : Participated in a Fellowship of constitution makers organised at The Hague by IDEA.

“HE2”

THE LEGAL FRAMEWORK GOVERNING THE PUBLIC PROTECTOR**H EBRAHIM**

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A. FOUNDING VALUES AND CONSTITUTIONAL PRINCIPLES

(a) Founding Values

1. The Republic's founding values include, inter alia:
 - 1.1. the supremacy of the Constitution;¹
 - 1.2. the rule of law;² and
 - 1.3. a democratic government that is focused on ensuring '*accountability, responsiveness and openness*'.³
2. Foundational is the separation of powers.⁴

(b) Organ of State

3. The Public Protector is an '*organ of state*' as contemplated by section 239 of the Constitution.⁵
4. According to section 41(1) of the Constitution, all spheres of government and all organs of state must –
 - 4.1. be loyal to the Constitution, the Republic and its people;⁶

¹ Sections 1(c) and 2 of the Constitution of the Republic of South Africa, 1996 ('the **Constitution**').

² Section 1(c) of the Constitution.

³ Section 1(d) of the Constitution.

⁴ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) ('**First Certification**') at paras 45(c) and 106 – 113.

⁵ The definition includes '*any... functionary or institution exercising a power or performing a function in terms of the Constitution*'.

⁶ Section 41(1)(d) of the Constitution.

- 4.2. respect the constitutional status, institutions, powers and functions of government in the other spheres;⁷
- 4.3. not assume any power or function except those conferred on them in terms of the Constitution;⁸ and
- 4.4. exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.⁹

(c) Basic Values and Principles

5. Section 195(1) of the Constitution sets out the '*basic values and principles governing public administration*', which are applicable to all organs of state, including the Public Protector.¹⁰ These values and principles include, inter alia, that:
 - 5.1. A high standard of professional ethics must be promoted and maintained.
 - 5.2. Efficient, economic and effective use of resources must be promoted.
 - 5.3. Services must be provided impartially, fairly, equitably and without bias.
 - 5.4. People's needs must be responded to.
 - 5.5. Public administration must be accountable.
 - 5.6. Transparency must be fostered by providing the public with timely, accessible and accurate information.

⁷ Section 41(1)(e) of the Constitution.

⁸ Section 41(1)(f) of the Constitution.

⁹ Section 41(1)(g) of the Constitution.

¹⁰ Section 195(2)(b); *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) ('**SARB**') at para 151.

- 5.7. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(d) Constitutional Principles

6. In the *First Certification* judgment, the Constitutional Court had to determine whether the proposed text of the new Constitution complied with various 'Constitutional Principles'. Principle XXIX read:¹¹

'The independence and impartiality of a ... Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.'

7. The Constitutional Court noted that the '*independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government*' and that the '*office inherently entails investigation of sensitive and potentially embarrassing affairs of government*'.¹² It concluded that, in order to meet this standard, the Public Protector could not be removed from office based on a resolution by a simple majority of the National Assembly, and that more was required in order to safeguard the independence and impartiality of the Public Protector.¹³ The Constitutional Court therefore refused to certify the draft of section 194 of the Constitution.
8. The draft therefore had to be amended. In the *Second Certification* judgment, the Constitutional Court considered the amended text and was satisfied that the requirements of Constitutional Principle XXIX had been met, with the independence and impartiality of the Public Protector's office appropriately guaranteed, by requiring the Public Protector to be –

¹¹ *First Certification* at para 160.

¹² *First Certification* at para 163.

¹³ *First Certification* at para 163.

- 8.1. appointed with the support of at least 60% of the National Assembly, and
 - 8.2. removed only with the supporting vote of at least two thirds of the National Assembly.¹⁴
9. This is the broad constitutional framework within which the office of the Public Protector is to be understood.

B. CONTEXT: CHAPTER-9 INSTITUTIONS

10. Chapter 9 of the Constitution establishes six institutions to '*strengthen constitutional democracy in the Republic*', one of which is the Public Protector.¹⁵ These institutions '*play an oversight role over the government to enhance accountability and contribute to the constitutional project of transformation.*'¹⁶
11. Each of these institutions –
- 11.1. is independent and subject only to the Constitution and the law;¹⁷
 - 11.2. must be impartial and perform its functions without fear, favour or prejudice;¹⁸
 - 11.3. must be assisted and protected by other organs of state (through legislative and other measures) to ensure their '*independence, impartiality, dignity and effectiveness*';¹⁹

¹⁴ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC)* ('**Second Certification**') at para 134.

¹⁵ Section 181(1)(a) of the Constitution.

¹⁶ *Speaker of the National Assembly v Public Protector and Others 2022 (3) SA 1 (CC)* ('**Speaker v Public Protector**') at para 5.

¹⁷ Section 181(2) of the Constitution.

¹⁸ Section 181(2) of the Constitution.

¹⁹ Section 181(3) of the Constitution.

- 11.4. may not have their functioning interfered with by any person or organ of state;²⁰ and
- 11.5. is accountable to the National Assembly.²¹
12. The critical values that the Constitution establishes in respect of all Chapter-9 institutions are therefore independence, impartiality, dignity and effectiveness. As the Constitutional Court explained in the *Second Certification*, these institutions ‘perform sensitive functions which require their independence and impartiality to be beyond question, and to be protected by stringent provisions in the Constitution.’²²
13. In March 2019 the Venice Commission adopted a set of ‘*Principles on the protection and promotion of the Ombudsman Institution*’ (**the Venice Principles**). They note that ‘*Ombudsman Institutions have an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms.*’²³
14. These principles align with the role that the Constitution requires of the Public Protector and the constitutional values echo the Venice Principles, which provide that an ombud should be appointed ‘*according to procedures strengthening to the*

²⁰ Section 181(4) of the Constitution.

²¹ Section 181(5) of the Constitution.

²² *Second Certification* at para 142.

²³ Principle 1. The **Venice Commission**, officially the **European Commission for Democracy through Law**, is an advisory body of the Council of Europe, composed of independent experts and provides legal and constitutional advice to the Council of Europe and facilitates comparative research in constitutional matters. In the field of constitutional law. https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN [accessed 13 June 2022]. South Africa has special cooperation status with the Venice Commission, and the Constitutional Court has regularly contributed to the Commission’s research projects through its judgments.

*highest possible extent the authority, impartiality, independence and legitimacy of the Institution.*²⁴

C. OFFICE OF THE PUBLIC PROTECTOR

(a) Historical Background

15. The office of the Public Protector in South Africa has its roots in the Swedish Parliamentary Ombud, established in 1809 to ensure that public officials acted in accordance with the law and discharged their duties in a satisfactory manner. The purpose of ombud-type offices is to *'ensure that there is an effective public service which maintains a high standard of professional ethics, and that government officials carry out their tasks effectively, fairly and without corruption or prejudice.'*²⁵ Those same ethics should hence at a higher standard be applied to the Public Protector.
16. As structured in South Africa, the Public Protector, though an ombud, is not styled in the same way as an ombud exists in other countries and as such foreign jurisprudence are not helpful in the consideration of the legal principles governing the Public Protector in South Africa.
17. The precursor in South Africa to the Public Protector, the Advocate-General was created in 1979. This office was limited to financial misconduct: dealing with public money in a dishonest manner, or unlawful or improper enrichment or advantage as a result of conduct by a public body. It did not protect citizens from general maladministration.²⁶

²⁴ Principle 6.

²⁵ *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) ('**SABC**') at para 26.

²⁶ Dlamini "An ombudsman for South Africa" *De Rebus* (January 1993) at 71 – 73. Bishop and Woolman "Public Protector" in *Constitutional Law of South Africa* 2ed (service 12-05) Chapter 24A, p 2.

18. In 1991, the Advocate-General was replaced with the office of the Ombudsman, with expanded jurisdiction to deal with allegations that the State or the general public were being prejudiced by maladministration.²⁷

(b) Establishment of the Office

19. The advent of democracy in South Africa saw the office of the Ombudsman replaced by the Public Protector.²⁸ In the *First Certification* judgment, the Constitutional Court explained the '*purpose of the office of Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics.*' The office was established to allow '*members of the public aggrieved by the conduct of government officials should be able to lodge their complaints with the Public Protector, who will investigate them and take appropriate remedial action.*'²⁹

(c) Functions of the Office

20. The Public Protector's core function as set out in section 182(1) of the Constitution as follows and these powers include (as regulated by national legislation):
- 20.1. to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
 - 20.2. to report on that conduct; and
 - 20.3. to take appropriate remedial action.

²⁷ Dlamini at 73. See also *SABC* at para 31.

²⁸ *SABC* at para 31.

²⁹ *First Certification* at para 161.

21. Additionally, although the Public Protector has the additional powers and functions prescribed by national legislation, it is precluded from investigating court decisions.³⁰
22. The Public Protector must be accessible to all persons and communities and any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.³¹
23. Like all other public bodies, the Public Protector is required to perform these functions '*diligently and without delay*'.³²
24. Bishop and Woolman describe the Public Protector's office in the following terms:³³

'The Public Protector's purpose is profitably compared with the role of the judiciary. Courts handle discrete disputes about law and conduct. They rely on correct procedure and solid, sometimes intricate, legal argument. Courts are simply not designed to handle the large number of complaints that arise from simple misunderstandings or bureaucratic red-tape, nor do they lend themselves to the resolution of injustices that turn more on unfairness than illegality.'

The Public Protector occupies a middle space in the politico-constitutional landscape. It serves the public and assists the courts and the legislature. It assists the courts by addressing those complaints about the administration of justice that fall beyond the court's purview. It assists the legislature by monitoring the performance of the executive and answering those complaints that elected representatives are unable to address.'

³⁰ Section 182(3) of the Constitution.

³¹ Section 182(4) and (5).

³² Section 237 of the Constitution.

³³ Bishop and Woolman *supra* at p 2.

(d) Competencies of the Office

25. The legislation promulgated pursuant to section 182(1) is the Public Protector Act 23 of 1994 (**'the PP Act'**). Section 6 thereof sets out certain '*additional powers of [the] Public Protector*'.
26. Under subsection (4) the Public Protector
- 26.1. *"shall, be competent –*
- '(a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged –*
- (i) maladministration in connection with the affairs of government at any level;*
 - (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;*
 - (iii) improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money;*
 - (iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or*
 - (v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person;*
- (b) to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by –*
- (i) mediation, conciliation or negotiation;*
 - (ii) advising, where necessary, any complainant regarding appropriate remedies; or*

- (iii) *any other means that may be expedient in the circumstances; and*
 - (c) *at a time prior to, during or after an investigation –*
 - (i) *if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority; and charged with prosecutions; or*
 - (ii) *if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority; and affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.'*
27. The Public Protector therefore has wide powers to investigate complaints in respect of government affairs, including
- 27.1. allegations of maladministration;
 - 27.2. abuse or unjustifiable exercise of power;
 - 27.3. discourtesy;
 - 27.4. undue delay;
 - 27.5. improper or dishonest conduct in respect of public money;
 - 27.6. improper enrichment or the promise of improper enrichment;
 - 27.7. any conduct that confers an improper advantage or promises to confer such an advantage; and
 - 27.8. conduct that results in unlawful or improper prejudice.
28. The Public Protector must also consider a range of options in addressing a particular complaint, including:

- 28.1. pursuing mediation or negotiation;
 - 28.2. advising the complainant of any further remedies that may be available;
 - 28.3. reporting a criminal offence to the authorities;
 - 28.4. reporting the matter to another public authority;
 - 28.5. resolving the issue through '*any other means that may be expedient in the circumstances*'.
29. Subsections (5) – (7) set out additional competences and constraints:
- (5) *In addition to the powers referred to in subsection (4), the Public Protector shall on his or her own initiative or on receipt of a complaint be competent to investigate any alleged –*
 - (a) *maladministration in connection with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act 1 of 1999);*
 - (b) *abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity contemplated in paragraph (a);*
 - (c) *improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in connection with the affairs of an institution or entity contemplated in paragraph (a); or*
 - (d) *act or omission by a person in the employ of an institution or entity contemplated in paragraph (a), which results in unlawful or improper prejudice to any other person.*
 - (6) *Nothing in subsections (4) and (5) shall be construed as empowering the Public Protector to investigate the performance of judicial functions by any court of law.*

(7) *The Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged attempt to do anything which he or she may investigate under subsections (4) or (5).*'

30. These provisions extend the Public Protector's wide powers to include the affairs of public entities and State-owned corporations. It also makes it clear that the Public Protector should not only be reliant on complaints lodged but also conduct investigations at his or her own initiative. As such the Public Protector is bestowed with extensive powers of oversight.
31. Unless there are special circumstances as determined by the Public Protector, a matter will not be investigated '*unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned*'.³⁴
32. The High Court has found that, if a matter is to be accepted outside of the two-year period, the Public Protector must identify the special circumstances justifying the consideration of matters that are more than two years old. Those circumstances must be specified in the Public Protector's report and must be relevant to the decision and circumstances in question. Furthermore, the circumstances must actually and subjectively have been considered by the Public Protector at the time the office decides to take on the matter – they cannot be introduced *ex post facto* by third parties.³⁵

³⁴ Section 6(9) of the PP Act.

³⁵ *Gordhan v Public Protector and Others* [2019] 3 All SA 743 (GP) at paras 18 – 20. The challenge to this High Court decision failed in the Constitutional Court: *Economic Freedom Fighters v Gordhan and Others* 2020 (6) SA 325 (CC). In *Absa Bank Limited and Others v Public Protector and Others* [2018] 2 All SA 1 (GP) (16 February 2018) the Public Protector had relied on '*special circumstances for investigating outside the two-year time limit but these circumstances were not set out in her Report*' (at para 109).

33. The Supreme Court of Appeal approved this interpretation of section 6(9) of the PP Act.³⁶ A Full Court of the High Court has subsequently expanded hereon in relation to section 6(9):
- 33.1. The Public Protector is not at liberty to investigate any complaint, irrespective of its vintage.³⁷
- 33.2. The PP Act is clear: generally, the Public Protector should only investigate complaints regarding conduct that occurred within the two-year period.³⁸
- 33.3. Factors that apply to all complaints investigated by the Public Protector cannot constitute '*special circumstances*' within the meaning of section 6(9). Thus, for example, the Public Protector cannot cite persistent prejudice to a complainant or section 195 of the Constitution to justify investigating conduct that occurred more than two years earlier.³⁹
34. The office of the Public Protector offers aggrieved members of the public a mechanism through which to address their complaints about the exercise of public power. The requirements for reporting a complaint to the Public Protector in terms of the PP Act prescripts are fairly undemanding. The Public Protector's personnel are obliged to '*render the necessary assistance, free of charge, to enable any person to comply with*' the reporting requirements.⁴⁰

³⁶ *Government Employees Medical Scheme and Others v Public Protector of the Republic of South Africa and Others* [2020] 4 All SA 629 (SCA) at para 34 stated that the incident giving rise to the complaint occurred in June 2013, and although it was only lodged sometime after February 2016, despite the point having been pertinently raised by the appellants, no special circumstances as contemplated in s 6(9) of the PPA were raised by the Public Protector. In footnote 8 the SCA specifically referred to the dicta in the Gordhan matter.

³⁷ *Gordhan v Public Protector and Others* [2021] 1 All SA 428 (GP) ('*Gordhan II*') at paras 29 – 30.

³⁸ *Gordhan II* at paras 32 – 33.

³⁹ *Gordhan II* at para 26.

⁴⁰ Section 6(1) and (2) of the PP Act.

35. On the one hand, the office of the Public Protector fulfils a similar function to the courts, particularly in their exercise of their judicial-review powers. On the other, the office is also markedly different from the courts: it does not follow formal procedures, and its personnel are obliged to assisted aggrieved persons to report their complaints; it is concerned with impropriety and prejudice rather than limited to questions of lawfulness; and it is aimed at being far more accessible to ordinary South Africans.

(e) Core Principles

36. In *SABC* – one of the earlier cases dealing with the Public Protector – the Supreme Court of Appeal set out the following principles with reference to the Public Protector:

36.1. The Public Protector is like the ombud in comparable jurisdictions and serves as an *'important defence against maladministration and corruption.'* The office serves to ***'watch the watchers and to guarantee that the government discharges its responsibilities without fear, favour or prejudice.'***⁴¹ It will often be a last defence against bureaucratic oppression, corruption and malfeasance in public office.⁴² Its *'objective of policing state officials to guard against corruption and malfeasance in public office forms part of the constitutional imperative to combat corruption.'*⁴³

36.2. The Public Protector is not subject to national executive control and is independent from the national sphere of government. The office is ***'outside government'***.⁴⁴

⁴¹ *SABC* at para 2.

⁴² *SABC* at para 29.

⁴³ *SABC* at para 44.

⁴⁴ *SABC* at paras 24 – 25.

- 36.3. The PP Act establishes that the Public Protector's powers go '***much beyond***' the functions ordinarily associated with an ombudsman.⁴⁵ Unlike the South African Advocate-General and Ombudsman which did not have the power to take remedial action directly, the Public Protector has a '*vast array of measures available*' to take remedial steps in response to maladministration or corruption.⁴⁶
- 36.4. The Public Protector occupies a '***unique position in our constitutional order***' – the office is neither a court nor an administrative decision-maker.⁴⁷ The Public Protector '*cannot realise the constitutional purpose of her office if other organs of state may second-guess her findings and ignore her recommendations*'; accordingly, the Public Protector may determine an effective remedy for State misconduct, and direct its implementation; the findings, decisions and remedial action of the Public Protector may not be ignored and must, if they are disputed, be challenged through judicial-review proceedings.⁴⁸
37. In the 2016 case,⁴⁹ the Constitutional Court reached similar conclusions:
- 37.1. The Public Protector is '***pivotal to the facilitation of good governance in our constitutional dispensation***', such that '*the Constitution guarantees the independence, impartiality, dignity and effectiveness of this institution as indispensable requirements for the proper execution of its mandate. The obligation to keep alive these essential requirements for functionality and the necessary impact is placed on organs of state.*'⁵⁰

⁴⁵ SABC at para 29.

⁴⁶ SABC at paras 31 and 42.

⁴⁷ SABC at para 45.

⁴⁸ SABC at para 53.

⁴⁹ *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) ('**the 2016 case**').

⁵⁰ *The 2016 case* at para 50.

- 37.2. **The name of the office was carefully selected:** the incumbent is not an Advocate-General or an Ombudsman, but someone who *'is supposed to protect the public from any conduct in state affairs or in any sphere of government that could result in any impropriety or prejudice'*.⁵¹
- 37.3. The office of Public Protector has wide and constitutionally crucial powers:⁵²

'The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs, and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector... Hers are indeed very wide powers that leave no lever of government power above scrutiny, coincidental embarrassment' and censure. This is a necessary service because state resources belong to the public, as does state power. The repositories of these resources and power are to use them on behalf and for the benefit of the public. When this is suspected or known not to be so, then the public deserves protection and that protection has been constitutionally entrusted to the Public Protector... Our constitutional democracy can only be truly strengthened when: there is zero tolerance for the culture of

⁵¹ The 2016 case at para 51.

⁵² The 2016 case at paras 52 – 54.

impunity; the prospects of good governance are duly enhanced by enforced accountability; there is observance of the rule of law and respect for every aspect of our Constitution as the supreme law of the Republic is real. Within the context of breathing life into the remedial powers of the Public Protector, she must have the resources and capacities necessary to effectively execute her mandate so that she can indeed strengthen our constitutional democracy.'

37.4. In order for the Public Protector to be effective, **complying with the remedial action ordered cannot be optional.**⁵³ It would be at odds with the rule of law for the subject of an investigation to determine whether to comply with the Public Protector's report.⁵⁴

38. As it is:

38.1. The Public Protector has distinct and original powers, conferred directly by the Constitution, to –

38.1.1 conduct investigations into State affairs or the public administration;

38.1.2 prepare reports flowing from investigations, and

38.1.3 direct that appropriate remedial action be taken. In a departure from conventional regimes, the Public Protector's remedial action cannot be ignored and, if framed in a peremptory manner, must be implemented as directed – **it is binding**.

38.2. **The Public Protector's powers are essential components of the constitutional architecture designed to give effect to the Constitution's**

⁵³ *The 2016 case* at paras 56, 67 – 68 and 73.

⁵⁴ *The 2016 case* at paras 72 and 75.

founding values: the supremacy of the Constitution and accountable governance.

- 38.3. Moreover, it is essential that the very public whom the office is meant to serve respects the office of the Public Protector and that the Public Protector is in every way above reproach.

D. APPOINTMENT OF THE PUBLIC PROTECTOR

(a) Higher Threshold

39. The Public Protector is appointed by the President, on the recommendation of the National Assembly,⁵⁵ for one non-renewable term of seven years.⁵⁶ The National Assembly's recommendation must be supported by at least 60% of the members,⁵⁷ which is higher than the threshold required for some other Chapter-9 institutions, such as the members of the Electoral Commission or the South African Human Rights Commission.⁵⁸
40. The appointment of the Public Protector is also materially different from the appointment of judicial officers.
41. The Constitution requires that the nominee for the office of Public Protector must have the support of a substantial majority of the National Assembly and it is hence a political appointment.

⁵⁵ Section 193(4) of the Constitution.

⁵⁶ Section 183 of the Constitution.

⁵⁷ Section 193(5)(b)(i) of the Constitution.

⁵⁸ Section 193(5)(b)(ii) of the Constitution.

(b) Requirements for Appointment

42. The Public Protector must be a South African citizen, a *'fit and proper [person] to hold the particular office'* and must comply with any other prescribed requirements.⁵⁹
- 42.1. The Constitution does not define the term *'fit and proper'*, but the office does require *'high standards'*.⁶⁰
- 42.2. The Constitution sets no bar to the length of time an individual has been a citizen in order to be appointed Public Protector. There is no constitutional obstacle to a naturalised citizen person becoming a Public Protector (and for that matter a Deputy Public Protector).
43. Section 1A of the PP Act stipulates more detailed requirements that an individual must meet in order to be eligible for office:

'The Public Protector shall be a South African citizen who is a fit and proper person to hold such office, and who –

- (a) *is a Judge of a High Court; or*
- (b) *is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or*
- (c) *is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at a university; or*
- (d) *has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or*

⁵⁹ Section 193(1) of the Constitution.

⁶⁰ SARB at para 207.

- (e) *has, for a cumulative period of at least 10 years, been a member of Parliament; or*
- (f) *has acquired any combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years.'*

44. The PP Act therefore stipulates that an individual must be '*fit and proper*', and separately must meet one of the experience requirements set out in section 1A(3). That section requires significant experience – at least a decade – in legal practice, legal education, the administration of justice, public administration, public finance or as a member of Parliament. The PP Act therefore requires that the Public Protector has the necessary experience in the law, administration and/or accountability to head and guide the office of the Public Protector for which such appointee would ultimately bear responsibility for.
45. The constitutional and statutory requirements '*obviously suggests that the incumbent must be someone **who is beyond reproach, a person of stature and suitably qualified***'.⁶¹
46. Both the National Assembly and the President must make decisions in respect of the Public Protector's appointment and must be satisfied that the individual in question meets the standard of fit and proper.
47. The Venice Principles record that the selection of an ombud should be '*transparent, merit based, objective, and provided for by the law.*'⁶² As recently reminded

'The Public Protector holds an onerous responsibility in serving the public. As part of her duties she is required to demonstrate that justice is being

⁶¹ SABC at para 30.

⁶² Principle 7.

*served. Such outward act of transparency exudes confidence in not only the public but in the administration of justice.*⁶³

(c) Objectively Fit and Proper

48. In *the NDPP case*,⁶⁴ the Constitutional Court was concerned with whether a particular individual was appropriately qualified for the office of the National Director of Public Prosecutions ('NDPP') and, in particular, whether he was '*fit and proper*' as required by national legislation.

48.1. Whether an individual is '*fit and proper*' to be NDPP is not dependent on whether the President, as the appointing authority, is of the subjective opinion that he is fit and proper, but whether his fitness and propriety are objectively evident:

48.1.1 Although the President appoints the NDPP, the Constitution requires Parliament to determine the details of the NDPP's qualifications.⁶⁵ In order for both to discharge their respective functions, the prescribed qualifications must be objective.

48.1.2 The legislation does not provide that the NDPP must be fit and proper '*in the President's view*', thereby granting the President a discretion. Instead, it stipulates that the NDPP must be fit and proper.⁶⁶

⁶³ *Sesoko and Others v The Office of the Public Protector and Others* (74427/19) [2022] ZAGPPHC 390 (1 June 2022) at para 59.

⁶⁴ *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) ('*the NDPP case*') at paras 19 – 20.

⁶⁵ The *NDPP case* at para 21.

⁶⁶ The *NDPP case* at para 22.

- 48.1.3 The fact that determining fitness and propriety entails a value judgment does not mean that the decision is subjective.⁶⁷
- 48.1.4 The Constitution guarantees the independence of the NDPP; a subjective determination of fitness and propriety would be inconsistent with that guarantee.⁶⁸
- 48.1.5 Neither the Constitution nor the national legislation can have intended that an NDPP would be vulnerable to differing opinions as to his fitness and propriety (if, for example, a new president was to assume office).⁶⁹
- 48.2. As evident from the applicable legislation, the purpose of the President's power to appoint an NDPP is to ensure that the incumbent ***'is sufficiently conscientious and has the integrity required to be entrusted with the responsibilities of the office'***, and to discharge those responsibilities honestly, independently and to ensure the fair administration of criminal prosecutions.⁷⁰
- 48.3. Any evidence regarding the incumbent's *'credibility, honesty, integrity and conscientiousness'* would be relevant and material to the exercise of this power.⁷¹ *'It does not matter for the purposes of evaluation of credibility whether a person is dishonest and devious to a court, to a commission of enquiry, to an employer or to anyone else for that matter. Dishonesty is dishonesty wherever it occurs. And it is much worse when*

⁶⁷ The NDPP case at para 23.

⁶⁸ The NDPP case at para 24.

⁶⁹ The NDPP case at para 25.

⁷⁰ The NDPP case at para 49.

⁷¹ The NDPP case at paras 62, 69 and 86.

*the person who had been dishonest is a senior government employee who gave evidence under oath.*⁷²

48.4. This would equally apply to the Public Protector.

(d) Characteristics of Fitness and Propriety

49. The standard of '*fit and proper*' is the traditional standard by which the Courts determine whether an advocate or an attorney should remain in practice or should be struck from the roll.⁷³ It is, at present, also a threshold requirement for anyone seeking admission as a legal practitioner.⁷⁴ The jurisprudence in this regard establishes the following:

49.1. Determining whether an individual is '*fit and proper*' to practise as an advocate or an attorney involves a value judgment but is ultimately '*an objective finding of fact*'.⁷⁵ The requirement that a practitioner be '*fit and proper*' is closely linked to the overarching need to protect the public by ensuring that it is not exposed to persons who should not be in practice.⁷⁶

49.2. One requirement of fitness and propriety for a legal practitioner is that of absolute honesty: even dishonesty outside of the courtroom, or in respect of relatively '*trifling*' matters, can render an individual unfit and improper.⁷⁷ Any form of dishonesty under oath can render an individual

⁷² The *NDPP* case at para 84.

⁷³ *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) ('*Kekana*') at 654B-C.

⁷⁴ Section 24(2)(c) of the Legal Practice Act, No 28 of 2014.

⁷⁵ *Kekana* at 654D – E; *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) ('*Geach*') at paras 50 – 51.

⁷⁶ *Geach* at para 67.

⁷⁷ *Kekana* at 655A-D. *Fine v Society of Advocates of South Africa (Witwatersrand Division)* 1983 (4) SA 488 (A) at 495A-G.

unfit and improper. **Fitness and propriety therefore demands ‘absolute personal integrity and scrupulous honesty’.**⁷⁸

- 49.3. Another requirement is that of **reliability and utmost good faith in dealings with the courts:**⁷⁹

*‘[T]he professions of advocate and attorney require the utmost good faith from all practitioners and aspirant practitioners; in my opinion the applicant’s **failure to disclose material facts** in the circumstances of the present case was a failure to show such good faith... it is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court.’*⁸⁰

- 49.4. **Practitioners must not exploit loopholes to suit their own interests, or show disregard for the law,**⁸¹ or fail to disclose relevant facts and considerations to the courts.⁸² Advocates are subject to an over-arching **duty not to mislead: they must not mis-state facts, or knowingly conceal the truth, or make charges without supporting evidence; they must disclose all relevant legal authorities (even those against them) and must disclose relevant documents and evidence.**⁸³

⁷⁸ *Kekana* at 655F-656A. Confirmed by the Constitutional Court in *General Council of the Bar v Jiba* 2019 JDR 1194 (CC) at para 1.

⁷⁹ *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A) at 790B-F; *Johannesburg Society of Advocates v Edeling* 2019 (5) SA 79 (SCA) (*‘Edeling’*) at para 17.

⁸⁰ *Ex parte Swain* 1973 (2) SA 427 (N) at 429H and 434H.

⁸¹ *Edeling* at para 20.

⁸² *Edeling* at paras 22 – 24.

⁸³ *Van der Berg v General Council of the Bar of SA* [2007] 2 All SA 499 (SCA) at paras 16 – 17.

- 49.5. Practitioners also have a **duty to remain abreast of the law and legal developments, and to ensure that legal submissions are accurate**.⁸⁴

*'[I]t is the obligation of counsel to never mislead a court. **Care must be taken that this does not occur through ignorance or negligence.** It is self-evident that to mislead a court deliberately is a very serious breach of that obligation. A judge is entitled to take counsel at their word. **When an argument is advanced and authority is cited, there is a tacit representation by counsel that no contradictory authority is known to him.** Where such a representation is made and there exists a reported superior court's decision in point disapproving the authority cited in support of a proposition, counsel commits an act of negligence if he is ignorant thereof. Where counsel has actual knowledge of the superior court's decision, and remains silent and relies on the disapproved dictum, in my view, counsel misleads the court.'*

50. The norms regarding fitness and propriety for legal practitioners are a useful guide in determining, at a minimum, what renders an individual *'fit and proper'* for the office of Public Protector, particularly given the similarities between the activities they are required to conduct. In this regard, a *'fit and proper'* individual must demonstrate absolute personal integrity and scrupulous honesty; must always be reliable and show good faith; must demonstrate proper knowledge of and regard for the law; must not mis-state facts, conceal the truth or make unsubstantiated allegations; and must disclose all relevant evidence in the appropriate forum.
51. **However, the general standards for fitness and propriety for legal practitioners are lower than the standards required to be observed by senior constitutional office-bearers.** Thus, a constitutional office-bearer may be removed for conduct such as legal incompetence, even if that legal competence

⁸⁴ *Ulde v Minister of Home Affairs and Another* 2008 (6) SA 483 (W) at para 37.

would not be sufficient to render the individual unfit and improper to practice as an attorney or advocate generally.⁸⁵

52. Given the Public Protector's high constitutional status, and their role in ensuring clean and honest government, the principles must apply with even greater intensity to any incumbent who should ensure throughout their tenure and at all material times that the Public Protector:

- 52.1. ***at the very least must meet the constitutional requirement of being 'fit and proper' – as an objective requirement.⁸⁶ Fitness and propriety can be determined based on the required institutional competence, as well as the constitutional obligations that the individual will be required to discharge;***
- 52.2. ***must be beyond reproach, a person of stature and suitably qualified, acting with dedication and capable of maintaining high standards;***
- 52.3. ***is sufficiently conscientious and has the integrity required to be entrusted with the responsibilities of the office of the Public Protector and to discharge the substantial constitutional duties and obligations;***
- 52.4. ***must exercise powers and functions with actual and demonstrable independence, impartiality, dignity and effectiveness, as well as the ability to discharge sensitive functions irrespective of whether or not it may antagonise any powerful (or otherwise) functionaries and do so without any indications of dishonesty, incompetence and***

⁸⁵ *Jiba and Another v General Council of the Bar of South Africa and Another* 2019 (1) SA 130 (SCA) at para 18.

⁸⁶ See *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C) at 34H – 35G, approved by the Constitutional Court as 'the leading authority' in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 168 fn 132.

- partiality all of which are incompatible with an office that aimed at ensuring clean and accountable governance;*
- 52.5. *must hence discharge all responsibilities honestly, independently and ensures a fair administration of the office of the Public Protector and in the work done by the office of the Public Protector;*
- 52.6. *must maintain credibility, scrupulous honesty, personal integrity and conscientiousness;*
- 52.7. *must maintain reliability and utmost good faith in all the dealings as Public Protector including in its dealing with courts – but in every other respect openness and transparency should permeate the workings of this office and save in very exceptional circumstances, through its work (and even in any litigious matter) must at all times act in utmost good faith and be scrupulous in all its dealings, be it in relation to complainants, the subject matter of the complaint or persons implicated in investigations and to a court. In relation to the latter the same scrutiny facing practitioners when in a Court of law should lie with the Public Protector, especially where such bears the mantle of being a qualified legal practitioner; and*
- 52.8. *must remain abreast of the law and legal developments and ensure that the application of the law is accurate, as neither ignorance, nor negligence should permeate the work of the Public Protector.*
53. *At all times the Public Protector must not put personal interest over and above the public interest and not put personal interest above those of the office of the Public Protector and the mandates of such office; and*
54. The Public Protector's institutional competence requires that the incumbent should throughout the period of tenure be capable of undertaking and managing investigations in accordance with the constitutional and legislative framework discussed above, understanding and applying the Constitution and the laws that regulate the public administration and affairs of State, maintaining an office that is

accessible to members of the public and complying with the requirements of good constitutional citizenship (see para 74 below).

55. In addition, the scheme of the PP Act also makes it clear that the Public Protector must be capable of managing an office that comprises numerous personnel across the country.

E. STANDARDS OF CONDUCT

(a) Investigations

56. Albeit in a somewhat different context, the Constitutional Court said the following about determining the proper standard of conduct for a public office-bearer:⁸⁷

'The question of what would constitute improper conduct can be answered with reference to two linked issues: institutional competence and constitutional obligations. From an institutional perspective, public officials occupying certain positions would be expected to act in a certain manner because of their expertise and dedication to that position.'

57. The Public Protector may conduct an investigation,
- 57.1. on own initiative;
 - 57.2. based on complaints or information that come to the Public Protector's attention,⁸⁸ and **may determine the format and procedure for any investigation.**⁸⁹
58. These investigations must be conducted without fear, favour or prejudice and complainants need to be dealt with in a manner that enhances dignity, with respect

⁸⁷ *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC intervening)* 2017 (9) BCLR 1089 (CC) at para 8, cited with approval in *SARB* at para 154. See also *SARB* at para 195.

⁸⁸ Section 7(1)(a) of the PP Act.

⁸⁹ Section 7(1)(b)(i) of the PP Act.

to their complaints, of whatsoever nature, in order to enhance the efficacy of the office of the Public Protector.

59. Documentary and evidentiary records are subject to a general rule of non-disclosure and may not be disclosed '*to any other person*' during the course of an investigation, unless the Public Protector determines otherwise.⁹⁰
60. The Public Protector must be active when conducting an investigation: '*she is not entitled to be passive, supine and static in her approach. Nor can she fail to address complaints or allegations without good cause or narrow the scope of investigations to the point that they do not meaningfully address the allegations and prima facie evidence of misconduct and impropriety in public affairs.*'
61. Furthermore, '*when the [Public Protector] receives complaints of impropriety or abuse of public office, she is obliged to use the powers vested in her... to ensure that the complaint is properly and effectively addressed. Where an investigation is required, it should be conducted as comprehensively as possible, in order to inspire public confidence that the truth has been discovered, that her reports are accurate, meaningful and reliable, and that the remedial action that she takes is appropriate.*'⁹¹

(b) Procedural Fairness

62. The Public Protector is subject to a statutory duty to observe procedural fairness, in that if it appears that any person may be adversely affected or detrimentally implicated by a finding, that person must be afforded an opportunity to respond, which may include allowing that person to give evidence and to question witnesses

⁹⁰ Section 7(2) of the PP Act.

⁹¹ *Democratic Alliance v Public Protector* [2019] 3 All SA 127 (GP) at paras 34 and 36.

who have appeared before the Public Protector. This duty is entrenched in section 7(9) of the PP Act which expressly provides:⁹²

*'(9) (a) If it appears to the Public Protector during the course of an investigation that any person is **being implicated in the matter being investigated and that such implication may be to the detriment of that person** or that an **adverse finding pertaining to that person** may result, the Public Protector shall **afford such person an opportunity to respond 'in connection therewith, in any manner that may be expedient under the circumstances.***

*(b) (i) If such implication forms part of the evidence submitted to the Public Protector during an appearance in terms of the provisions of subsection (4), **such person shall be afforded an opportunity to be heard in connection therewith by way of giving evidence.***

(ii) Such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before the Public Protector in terms of this section.'

63. The aforesaid includes providing those implicated and those against whom adverse findings are made in the remedial action proposed by the Public Protector, an opportunity to be heard in relation thereto. In *Public Protector v President of the Republic of South Africa*⁹³ the majority judgment of the Constitutional Court held:

⁹² Section 7(9) of the PP Act. See generally SARB and the conclusion at para 207 that the '*Public Protector's entire model of investigation was flawed*' in that, among other things, '*she failed to engage with the parties directly affected by her new remedial action before she published her final report.*'

⁹³ [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021) at paras 122-126; see also *Sesoko and Others v The Office of the Public Protector and Others* (74427/19) [2022] ZAGPPHC 390 (1 June 2022) at para 82; *Msibi v Office of the Public Protector and Others* (75594/2019) [2022] ZAGPPHC 37 (26 January 2022) at para [28]; *President of the Republic of South Africa v Public Protector and Others (Information Regulator as amicus curiae)* 2020 (5) BCLR 513 (GP) at 156.

[123] Whenever an individual is implicated during the course of an investigation, the Public Protector is obliged to afford such person an opportunity to respond to the implicating evidence, if the implication may be detrimental to that person or if a finding adverse to him or her is anticipated. The form or manner of the response depends on the circumstances of each case. For example, if the implication was made in a sworn statement, a response in a sworn statement would suffice.

[124] Where that implication was made in oral testimony, the implicated person would be entitled to adduce controverting evidence before the Public Protector. In addition, that person has a right to question witnesses who gave the relevant testimony. This questioning must be done through the Public Protector. Implicit in this process is that the affected person would be afforded an opportunity to make representations on the relevant evidence. Ordinarily the questions should be put to witnesses in the presence of the affected person or her legal representative.

[125] It cannot be gainsaid that the Public Protector's investigation may implicate the rights in the Bill of Rights. Consequently, the **Public Protector Act in** terms of which those investigations are undertaken must be interpreted in a manner, where reasonably possible, that promotes the objects of the Bill of Rights. **Section 7(9)** declares that if it appears to the Public Protector at any time during the course of an investigation that an adverse finding or a detrimental implication may result, the Public Protector must afford the affected person a hearing. Implicit in the language of **section 7(9)** is that where it appears that a particular remedial action adverse to the affected person may be taken, the Public Protector should afford that person an opportunity to make representations on the contemplated remedial action. If the section were to be read otherwise, the procedural fairness it guarantees would be seriously undermined. There is no reason in principle or logic that fairness envisaged in the provision should be restricted to findings or implication by evidence. The bigger risk to the affected person's rights is posed by the remedial action. And **section 7(9)** should not be given a meaning that is antithetical to the rule of law.

[126] For all these reasons, I conclude that when the Public Protector contemplates taking remedial action against the subject of an investigation, that subject is entitled to an opportunity to make representations on the envisaged remedial action. For a proper opportunity to be given, the Public Protector must sufficiently describe the remedial action in question to enable the affected person to make meaningful representations.

[127] The High Court here held that the Public Protector's remedial action had serious implications for the President, including being a suspect in a criminal charge that carries a punishment of up to 30 years' imprisonment. The High Court concluded that the failure to afford the President a hearing before the decision on the remedial action was taken was fatal to the validity of that remedial action. This conclusion too is beyond reproach.

[128] In addition, the President has complained that the e-mails on which the Public Protector relied were not disclosed to him and that he was denied the opportunity to make representations on those e-mails. In his supplementary affidavit, the President stated:

"Furthermore, these e-mails were not raised in the Notice, and first made an appearance in the Report without affording me an opportunity to address them before the Public Protector concluded her investigation.

The mere fact that what could be improperly obtained evidence has been used in the investigation is enough to vitiate the Report."

[129] In her answering affidavit, the Public Protector does not dispute that the e-mails were not disclosed and that the President was not afforded a hearing on them. She responded in these terms to the relevant allegations:

"It is telling that instead of denying the contents of the e-mail, the President complains about how I obtained the e-mails to which I refer. I receive many documents from anonymous whistle blowers. These e-mails were provided to my Office anonymously and in hard copies. It is for that reason that I have no metadata in respect thereof.

However, even if I knew the identities of whistle blowers, I have an obligation to protect them. What the President has to do is to take this Honourable Court and the country at large into his confidence and explain the contents of these e-mails. I deny that I obtained the e-mails unlawfully."

[130] While it may be true that the Public Protector had lawfully obtained the e-mails and was entitled to have regard to them during the investigation, she was under a legal duty to disclose them to the President and afford him the opportunity to counter them if he was able to do so or that he makes whatever representations he may have wished to make on the e-mails. It is a basic principle of our law that if a decision-maker is in possession of

information that is adverse to the person against whom a decision is imminent, that such information be disclosed to the person concerned and that he or she be given the opportunity to deal with that information. Our jurisprudence shows that a decision based on adverse information which was not disclosed to the affected person and in respect of which that person was not heard, is fatally defective and ought to be set aside.'

[131] Here the Public Protector based her crucial findings on the e-mails which were delivered by anonymous persons at her offices, without disclosing them to the President and affording him the opportunity to make representations. Notably, the authenticity of those e-mails was not established. In relying on them in the circumstances of this case, the Public Protector violated the audi principle and her findings, based on the e-mails, must be set aside.

(c) Compulsion

64. The Public Protector has wide powers of compulsion and may subpoena any person to give evidence under oath, or to produce any document, or to subject themselves to examination.⁹⁴ Non-compliance with a subpoena, without just cause, is a criminal offence.⁹⁵ The Public Protector also has powers of search and seizure, provided that an appropriate warrant has been issued by a competent court.⁹⁶ These are weighty and invasive powers afforded the Public Protector and should be exercised with great care, even though these remain subject to the courts and the judicial process.

(d) Conflict of Interest

65. No person may conduct or assist in an investigation '*in which he or she has any pecuniary interest or any other interest which might preclude him or her from performing his or her functions in a fair, unbiased and proper manner*', unless that person works in government, performs a public function or is subject to the Public

⁹⁴ Section 7(4) – (6) of the PP Act.

⁹⁵ Section 11(3) of the PP Act.

⁹⁶ Section 7A(1) – (2) of the PP Act.

Protector's jurisdiction, and has been requested by the Public Protector to assist with an investigation.⁹⁷

(e) Maintaining an open mind

66. In *Mail & Guardian*, the Supreme Court of Appeal confirmed that, generally, it is up to the Public Protector to determine what constitutes a proper investigation in the circumstances of a particular case. However, there is at least one feature that is 'universal and indispensable to an investigation of any kind': the investigation 'must have been conducted with an open and enquiring mind'.⁹⁸

67. Such a mind⁹⁹ –

is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first they do not then it asks questions and seeks out information until they do. It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry then it might progress to being a suspicious mind. And if the pieces still do not fit then it might progress to conviction that there is deceit. How it progresses will vary with the exigencies of the particular case. One question might lead to another, and that question to yet another, and so it might go on. But whatever the state of mind that is finally reached, it must always start out as one that is open and enquiring."

⁹⁷ Section 3(14) of the PP Act.

⁹⁸ *Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) ('*Mail & Guardian*') at para 21.

⁹⁹ *Mail & Guardian* at para 22.

(f) Ethical Standards

68. In *Executive Ethics Code*¹⁰⁰ the Constitutional Court said the following about the manner in which investigations must be conducted and reports produced:
- 68.1. The Public Protector **must not misconstrue the law** she is required to consider and/or apply and must not change the wording of the legislative instruments that bind the subjects of the investigation.¹⁰¹
- 68.2. The Public Protector may not create standards against which those being investigated are measured.¹⁰²
- 68.3. The Public Protector's constitutional investigation powers are '**limited to state affairs and affairs of the public administration**'.¹⁰³
- 68.4. The Public Protector should not expand an investigation without lawful justification.¹⁰⁴
- 68.5. There can be serious consequences for those who are investigated by, and considered in the reports of, the Public Protector. Accordingly, there is a duty to act fairly to such persons:¹⁰⁵

¹⁰⁰ *Public Protector and Others v President of the Republic of South Africa and Others* 2021 (6) SA 37 (CC), referred to as '**Executive Ethics Code**' because the decision concerned the Public Protector's investigation of the President's compliance with that Code.

¹⁰¹ *Executive Ethics Code* at paras 57 – 60.

¹⁰² *Executive Ethics Code* at para 61.

¹⁰³ *Executive Ethics Code* at paras 103 – 107.

¹⁰⁴ *Executive Ethics Code* at paras 65 and 93 – 96.

¹⁰⁵ *Executive Ethics Code* at paras 121 – 126. See also para 130: '*It is a basic principle of our law that if a decision-maker is in possession of information that is adverse to the person against whom a decision is imminent, that such information be disclosed to the person concerned and that he or she be given the opportunity to deal with that information. Our jurisprudence shows that a decision based on adverse information which was not disclosed to the affected person and in respect of which that person was not heard, is fatally defective and ought to be set aside.*'

'Whenever an individual is implicated during the course of an investigation, the Public Protector is obliged to afford such person an opportunity to respond to the implicating evidence, if the implication may be detrimental to that person or if a finding adverse to him or her is anticipated. The form or manner of the response depends on the circumstances of each case ... where it appears that a particular remedial action adverse to the affected person may be taken, the Public Protector should afford that person an opportunity to make representations on the contemplated remedial action... For a proper opportunity to be given, the Public Protector must sufficiently describe the remedial action in question to enable the affected person to make meaningful representations.'

- 68.6. The Public Protector should only draw conclusions that are supported by evidence.¹⁰⁶ *'[T]he objective of investigations by the Public Protector is to discover the truth. Where the investigation yields disparate pieces of evidence which do not fit into place, the Public Protector must continue digging until the true picture emerges.'*¹⁰⁷
- 68.7. Furthermore, the *'Constitution and relevant legislation require that the Public Protector must conduct proper investigations, rightly evaluate the evidence placed before her and make findings which are supported by established facts.'*¹⁰⁸
- 68.8. The Public Protector must not only discover the truth, but *'inspire public confidence that in each investigation, the truth has been discovered'*.¹⁰⁹
- 68.9. The Public Protector's task is not to investigate criminal offences – those must be taken up by the police service.¹¹⁰

¹⁰⁶ *Executive Ethics Code* at paras 71 – 72.

¹⁰⁷ *Executive Ethics Code* at para 76.

¹⁰⁸ *Executive Ethics Code* at para 111.

¹⁰⁹ *Executive Ethics Code* at para 77.

¹¹⁰ *Executive Ethics Code* at para 115.

- 68.10. When deciding on remedial action, the Public Protector cannot direct an organ of state to do something that is outside of its own powers and cannot issue vague directives.¹¹¹
69. The Public Protector may publish findings, must report to the National Assembly at least once every year, and must further submit a report to the National Assembly in respect of a particular investigation in prescribed circumstances (e.g. if it is in the public interest to do so or if required by the Speaker of the National Assembly).¹¹² Every report issued by the Public Protector must be open to the public, unless exceptional circumstances require confidentiality to be maintained.¹¹³ Any findings by the Public Protector must be made available to the complainant and any implicated person as soon as possible.¹¹⁴

(g) Conduct of Litigation

70. No member of the Public Protector's office is *'liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to Parliament or made known in terms of [the PP Act] or the Constitution.'*¹¹⁵
71. However, this exclusion of liability does not extend to personal liability for legal costs: the Constitutional Court has concluded that the Public Protector may be held personally liable for costs incurred during litigation if *'guilty of bad faith or gross negligence in conducting litigation and discharging [her] constitutional obligations'*.¹¹⁶ Such costs orders are an aspect of upholding and enforcing the

¹¹¹ *Executive Ethics Code* at paras 132 – 133.

¹¹² Section 8(1) – (2) of the PP Act.

¹¹³ Section 8(2A) of the PP Act.

¹¹⁴ Section 8(3) of the PP Act.

¹¹⁵ Section 5(3) of the PP Act.

¹¹⁶ *SARB* at paras 147 – 148 and 162.

Constitution¹¹⁷ and constitute ‘*an essential, constitutionally infused mechanism to ensure that the Public Protector acts in good faith and in accordance with the law and the Constitution*’.¹¹⁸

72. The Public Protector should always act in good faith. Courts too should guard against ‘*[u]nwarranted costs orders against the Public Protector in her personal capacity in work-related litigation [as they] may have a chilling and deleterious effect on the exercise of her powers.*’¹¹⁹
73. When the Public Protector participates in litigation, the Public Protector:
- 73.1. is subject to heightened standards as a public official;
 - 73.2. must be accountable, must not mislead or obfuscate;
 - 73.3. must follow the proper procedures;
 - 73.4. must produce a ‘*full and complete record*’ of decision-making process in the event that one of the decisions is challenged in review proceedings;¹²⁰
 - 73.5. must ‘*be candid and place a full and fair account of the facts before a court*’ and must ‘*tread respectfully when dealing with rights*’.¹²¹
74. These standards flow from the Public Protector’s status as a constitutional citizen.¹²² The Constitution directly obliges the Public Protector, as an organ of

¹¹⁷ SARB at para 148.

¹¹⁸ SARB at para 157.

¹¹⁹ *Public Protector v Commissioner for the South African Revenue Service and Others* 2022 (1) SA 340 (CC) (**‘Public Protector v SARS’**) at paras 29 and 42 – 44.

¹²⁰ SARB at para 185.

¹²¹ SARB at paras 152 and 155.

¹²² *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) at paras 59 – 64.

state, to 'assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.'¹²³

(h) General higher standard than ordinary functionaries

75. Even outside of litigation, the Public Protector is subject to higher standards than ordinary persons and ordinary administrators. Thus, in the discharge of all functions, the Public Protector 'is subject to a higher duty and higher standards than ordinary administrators', such that any failure "to perform her functions properly and effectively is, therefore, a matter of grave constitutional importance'.¹²⁴ This is because –

*'The proper and effective performance of the functions of the [Public Protector] is of particular importance, given her constitutional mandate and the extraordinary powers that are vested in her office. When the [Public Protector] fails to discharge her mandate and duties, the strength of South Africa's constitutional democracy is inevitably compromised and the public is left without the assistance of their constitutionally created guardian. It means that vital constitutional check against abuses of public power is lost.'*¹²⁵

(i) Contempt

76. Section 9 of the PP Act establishes the offence of 'Contempt of Public Protector':

"(1) No person shall –

- (a) insult the Public Protector or the Deputy Public Protector;
- (b) in connection with an investigation do anything which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court.

¹²³ Section 165(4) of the Constitution.

¹²⁴ *Democratic Alliance v Public Protector* [2019] 3 All SA 127 (GP) at para 31.

¹²⁵ *Id* para 30.

(2) *Nothing contained in this Act shall prohibit the discussion in Parliament of a matter being investigated or which has been investigated in terms of this Act by the Public Protector.*"

77. Thus, although the Public Protector is not a court of law (and therefore not covered by the conventional rules of contempt of court), the PP Act has created the special offence of '*Contempt of the Public Protector*' to protect the dignity and efficacy of this constitutional office.
78. The legal framework thus grants the Public Protector wide powers to discharge essential constitutional functions, while at the same time requiring the Public Protector to observe various constitutional and legal norms, thus ensuring constitutional supremacy, compliance with the rule of law, and accountability in the exercise of public power.

F. PERSONNEL IN THE OFFICE OF THE PUBLIC PROTECTOR

79. In order to perform functions, the Public Protector is assisted by the Deputy Public Protector, a Chief Administrative Officer and staff, all of whom are '*subject to... her directions and control*'.¹²⁶ Ultimately, the Public Protector is accountable for the decisions taken, and albeit that the Public Protector is not the accounting officer, the latter answers to the Public Protector.
80. The Deputy Public Protector is not provided for in the Constitution but is created by the PP Act and is also appointed by the President, on the recommendation of the National Assembly.¹²⁷ The Deputy Public Protector has no independent functions and only exercises '*such powers as the Public Protector may delegate*'.¹²⁸ Hence if the Public Protector elects to delegate few or no functions to the Deputy, the latter could be entirely divorced from the core functions of that office and powerless to do anything. South Africa, in turn, would be paying for the services of

¹²⁶ Section 3(1) of the PP Act.

¹²⁷ Section 2A(1) of the PP Act.

¹²⁸ Section 2A(6) of the PP Act.

a senior and executive functionary in respect of which it receives no or little value for money.

81. However, by operation of law, the Deputy Public Protector performs the functions of the Public Protector whenever the latter *'is, for any reason, unable to perform the functions of his or her office'*.¹²⁹ In this latter scenario the Deputy steps into the shoes of the Public Protector and performs the functions dealt with above.
82. The office of the Public Protector comprises the Public Protector, the Deputy Public Protector and staff members.¹³⁰ The members of the office are required to *'serve impartially and independently and perform his or her functions in good faith and without fear, favour, bias or prejudice'* and generally not to have any other forms of employment.¹³¹
83. Staff members may exercise those powers that are delegated to them by the Public Protector.¹³² The Chief Administrative Officer (CEO) is responsible for accounting for money received by or paid out of the Public Protector's office, and for keeping the necessary accounting and related records, *qua* accounting officer.¹³³
84. The Public Protector (after consulting the Minister of Finance) determines the *'remuneration, allowances and other employment benefits'*, as well as the terms of employment, for the Chief Administrative Officer and all staff members,¹³⁴ although the National Assembly may disapprove any such determination, which thereafter has no force.¹³⁵

¹²⁹ Section 2A(7) of the PP Act.

¹³⁰ Section 1 of the PP Act.

¹³¹ Section 3(13) of the PP Act.

¹³² Section 3(3) of the PP Act.

¹³³ Section 4(1)(a) of the PP Act.

¹³⁴ Section 3(9) and (10) of the PP Act.

¹³⁵ Section 3(11) of the PP Act.

G. THE REMOVAL OF THE PUBLIC PROTECTOR

(a) Legal Requirements

85. The Public Protector may be allowed to vacate office due to 'continued ill-health' or upon request, if the National Assembly accedes to the request.¹³⁶
86. The Public Protector may only be removed from office in accordance with section 194 of the Constitution, which reads:

'(1) The Public Protector... may be removed from office only on –

(a) the ground of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly; and

(c) the adoption by the Assembly of a resolution calling for that person's removal from office.

(2) A resolution of the National Assembly concerning the removal from office of –

(a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or

(b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President –

(a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

¹³⁶ Section 2(3) and (4) of the PP Act.

(b) *must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.*'

87. The Constitution therefore provides as follows:

87.1. The National Assembly is the effective decision-maker under section 194 of the Constitution. While the President is responsible for the act of removing the Public Protector from office, he may only do so if the National Assembly has called for the removal of the incumbent and must comply with the National Assembly's resolution if it does decide that the Public Protector should be removed.

87.2. The Public Protector may only be removed from office on one of three grounds: misconduct, incapacity or incompetence.¹³⁷ The Constitution does not define these grounds. This is a lower standard than what is imposed on the judiciary, as judges are removable only for gross misconduct – a material distinction between the removal of the Public Protector and a member of the judiciary.

87.3. The Public Protector may only be removed from office if (a) the Committee finds that she has committed misconduct or is incapacitated or incompetent and (b) following the Committee's finding, the National Assembly resolves that she must be removed. The National Assembly's resolution must be supported by '*at least two thirds of the members of the Assembly*', which is higher than the threshold required in respect of some other Chapter-9 office-bearers. The Public Protector may therefore only be removed from office by a super-majority of the lower house of Parliament.

88. The general role of the National Assembly was described as follows by the Constitutional Court:

¹³⁷ *Speaker v Public Protector* at para 7.

*'[T]he National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least remembered. It is the watchdog of state resources and, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the executive and state organs and ensure that constitutional and statutory obligations are properly executed.'*¹³⁸

89. **A particular individual's incumbency must be separated from the constitutional office:**¹³⁹

'Axiomatically, the Public Protector's office is more important than any incumbent. The impact of certain types of conduct that shake its operations at the foundations may outlive the terms of office of a number of incumbents... You weaken [the office], you weaken our constitutional democracy. Its potency, its attractiveness to those it must serve, its effectiveness to deliver on the constitutional mandate, must be preserved for posterity.'

90. The National Assembly has wide discretion in determining how to hold the Public Protector accountable and to scrutinise the acts of the Public Protector. The only constraint is the Constitution, and the laws that give effect thereto – the mechanics of ensuring accountability are within the National Assembly's discretion.¹⁴⁰
91. Exercising this discretion, the National Assembly adopted rules for the '*Removal from office of a holder of a public office in a State Institution Supporting Constitutional Democracy*' ('**the Removal Rules**') in 2019.

¹³⁸ *The 2016 case* at para 22.

¹³⁹ *Public Protector v SARS* at para 44.

¹⁴⁰ *The 2016 case* at para 93.

- 91.1. **'Incompetence'** is defined to include *'demonstrated and sustained lack of (a) knowledge to carry out, and (b) ability or skill to perform, his or her duties effectively or efficiently'*.
- 91.2. **'Misconduct'** is defined as the *'intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office'*.

(b) Jurisprudence

92. In *Speaker v Public Protector*, the Constitutional Court recently set out the following regarding **section 194 of the Constitution**:
- 92.1. Constitutional officers, who function to hold those in power accountable, must also be held accountable themselves.¹⁴¹
- 92.2. Removing an incumbent from the office of Public Protector must occur in accordance with the Removal Rules.¹⁴² Proceeding with the section-194 enquiry in terms of the (amended) Removal Rules, the Committee will be able to ensure the Public Protector's accountability, because her legal representative will not be able to give evidence on her behalf, and because the Committee may *'ask the office-bearer directly to respond to certain questions, even if she is not at that time giving evidence under oath'*¹⁴³ and is *'at liberty to cross-examine the office-bearer, and to request the office-bearer to directly respond to the questions posed'*.¹⁴⁴
- 92.3. The Constitutional Court dealt with various challenges to the Removal Rules, so as to bring finality to the matter and allow the Committee to

¹⁴¹ *Speaker v Public Protector* at para 1.

¹⁴² *Speaker v Public Protector* at para 10.

¹⁴³ *Speaker v Public Protector* at para 45.

¹⁴⁴ *Speaker v Public Protector* at para 47.

proceed with the section-194 enquiry.¹⁴⁵ In doing so it affirmed the Public Protector's right to legal assistance during the proceedings and considered and dismissed all of the other challenges to the Removal Rules.¹⁴⁶

92.4. Administering the process in accordance with section 194 of the Constitution is '*the means through which accountability and fidelity to the rule of law can be attained*'.¹⁴⁷ It is, furthermore, in the public interest for the section 194 process to be finalised without delay.¹⁴⁸

(c) Definition of Misconduct

92.5. The Removal Rules define the concept of '*misconduct*' with reference to '*gross negligence*' and '*intention*', which forms of fault are not prescribed by the Constitution. This, however, is entirely permissible, because the rules do not impermissibly broaden or narrow the constitutional concept of '*misconduct*'.¹⁴⁹ Furthermore, it is within the National Assembly's exclusive jurisdiction to determine what constitutes '*misconduct*' (and '*incompetence*').¹⁵⁰

92.6. The Removal Rules provide '*greater detail*' to guide members of the National Assembly, which is '*not only beneficial, but imperative, to ensure fairness and consistency in s 194 proceedings*'.¹⁵¹

93. In *Speaker v Public Protector* the Constitutional Court also noted that the processes for removing Chapter-9 office bearers are similar to those for removing

¹⁴⁵ *Speaker v Public Protector* at paras 70 – 73.

¹⁴⁶ *Speaker v Public Protector* at paras 74ff.

¹⁴⁷ *Speaker v Public Protector* at para 37.

¹⁴⁸ *Speaker v Public Protector* at paras 37 – 38.

¹⁴⁹ *Speaker v Public Protector* at para 99.

¹⁵⁰ *Speaker v Public Protector* at para 100.

¹⁵¹ *Speaker v Public Protector* at para 101.

the President of the Republic.¹⁵² The Constitutional Court had occasion to consider the latter process,¹⁵³ and, in that context, noted the following:

93.1. The constitutional provisions for removing the Head of State are '*tools for holding the President to account*.'¹⁵⁴

93.2. The President may be removed from office either through a motion of no confidence (which need only be supported by a simple majority) or through impeachment, which can only occur on one of the listed grounds (serious violation of the Constitution or the law; serious misconduct; or inability to perform functions) and must be supported by two thirds of the National Assembly.¹⁵⁵

93.3. Under the Constitution, only the National Assembly may remove the President from office.¹⁵⁶ The Constitution does not define the grounds of impeachment (including what constitutes '*serious misconduct*') and has left the detail of those definitions to the National Assembly. However, the Constitution's intent was not to leave the definitions up to individual members, else there would be '*divergent views on ... what amounts to serious misconduct*'.¹⁵⁷ Accordingly, there must be '*an institutional pre-determination*' of what constitutes '*serious misconduct*'.¹⁵⁸

94. In respect of '*misconduct*' as defined in the Removal Rules:

¹⁵² *Speaker v Public Protector* at paras 10 and 83.

¹⁵³ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) ('**the 2018 case**').

¹⁵⁴ *The 2018 case* at para 134.

¹⁵⁵ *The 2018 case* at paras 137 – 138.

¹⁵⁶ *The 2018 case* at para 173.

¹⁵⁷ *The 2018 case* at para 177.

¹⁵⁸ *The 2018 case* at para 178.

- 94.1. It is concerned with the standard of behaviour expected of the Public Protector. It should therefore be measured against the constitutional requirements, including the *'fit and proper'* standard.
- 94.2. The Public Protector must be found to have a degree of fault in the form of either intention or gross negligence.
- 94.3. Intention – often referred to by the Latin term *'dolus'* – generally includes both intention to achieve a particular result and consciousness that that result would be wrongful or unlawful.¹⁵⁹ It is concerned with what the individual in question subjectively foresaw.¹⁶⁰
- 94.4. Intention can take one of three forms:
- 94.4.1 *dolus directus*, where the individual directs his or her will at causing the consequence in question;
- 94.4.2 *dolus indirectus*, where the individual directs his or her will at causing something to happen, but knows that another consequence (the consequence complained of) will inevitably also arise; and
- 94.4.3 *dolus eventualis*, where the individual *'foresees the possibility of a consequence eventuating as a result of her conduct but reconciles herself with the fact and proceeds anyway'*.¹⁶¹
- 94.5. Unlike intention, *'negligence'* is assessed objectively, from the perspective of the reasonable person. It arises if –

¹⁵⁹ *Dantex Investment Holdings (Pty) Ltd v Brenner and Others* NNO 1989 (1) SA 390 (A) at 396C-H.

¹⁶⁰ *S v Dladla en Andere* 1980 (1) SA 1 (A).

¹⁶¹ *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) at para 37; *Du Bois Wille's Principles of South African Law* 9ed (Juta, Cape Town 2007) at 1129.

94.5.1 a reasonable person in the Public Protector's position would
(a) foresee the reasonable possibility of conduct having particular consequence and (b) take reasonable steps to guard against those consequences; but

94.5.2 the Public Protector failed to take such steps.¹⁶²

94.6. The Removal Rules do not merely require negligence to be shown, but 'gross' negligence. Generally, that 'connotes a particular attitude or state of mind characterised by an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences.

(d) Definition of Incompetence

95. 'Incompetence' as defined in the Removal Rules –

95.1. Is concerned with the duties of the Public Protector. It should therefore be measured against the duties of investigation, reporting, determining remedial action and management, as discussed above.

95.2. Is concerned with both a lack of knowledge and ability or skill to discharge the functions of the office. Although these are separate requirements, a proven lack of ability or skill may show a lack of knowledge. Due regard should be paid to the experience requirements set out in the PP Act (discussed above), which are indicative of the sort of knowledge and skill that a Public Protector should have. Due regard should also be had for the distinction between reasonable mistakes and more 'weighty errors' which, in the context of the Public Protector, may include changing the meaning of legal instruments she is required to apply and disregarding undisputed evidence.

¹⁶² *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430.

- 95.3. These must be both '*demonstrated*' and '*sustained*' i.e. must be proven or shown on reliable evidence, and consists of repeated conduct, or conduct that occurs over a period of time.
- 95.4. Must be measured against the Public Protector's duty to discharge functions '*effectively*' and '*efficiently*', which duty flows from, among other things, sections 195(1) and 237 of the Constitution.
- 95.5. The requirement of '*effectiveness*' requires the Public Protector's conduct to be measured against objectives: is the Public Protector achieving what the Constitution and the PP Act require her to achieve? The requirement of '*efficiency*' requires conduct to be measured against the extent of resources it required: have the resources of her office (time, personnel, money) been reasonably deployed to achieve the Public Protector's mandate? Both requirements necessitate a consideration of the outcomes of the Public Protector's conduct.
96. In *Executive Ethics Code*, the Constitutional Court alluded to the notion of '*incompetence*' in the context of the Public Protector's constitutional duties:¹⁶³

The Public Protector, like all of us, is fallible and mistakes are to be expected in the course of the exercise of her powers. But what is troubling in this matter is the series of weighty errors, some of which defy any characterisation of an innocent mistake. For example, giving the phrase 'wilfully misleading' the meaning of 'inadvertently misleading' for it to fit established facts. She disregarded uncontroverted evidence... The nature and number of errors committed by the Public Protector here call into question her capacity to appreciate what the law requires of her when she investigates complaint, arising from the violation of the Code. This is surprising because the Public Protector is, by definition, a highly qualified and experienced lawyer. As required by law, she has no less than 10 years' experience in the relevant field of law [emphasis added].

¹⁶³ *Executive Ethics Code* at paras 137 – 138.

97. The Supreme Court of Appeal has also indicated that a senior public functionary's failure to appreciate the correct legal position may constitute incompetence sufficient to warrant removal from office.¹⁶⁴
98. The abovementioned framework for removing the Public Protector is echoed in the Venice Principles, which provide:¹⁶⁵

'The Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of 'incapacity' or 'inability to perform the functions of office', 'misbehaviour' or 'misconduct', which shall be narrowly interpreted. The parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament – shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent and provided for by law.'

H. Conclusion on removal

99. Accordingly:
- 99.1. Removing the Public Protector from office is a very serious matter, not to be undertaken lightly at all. This is evident from, among other things, the significance of the role that the Public Protector plays in our constitutional democracy and the fact that such removal can only occur with, among other things, a supporting vote of at least two-thirds of the National Assembly. In the process of discharging its function, the Committee should have due regard for, among other things, the chilling effect that its decision may have on the effective exercise of the Public Protector's powers by incumbents to that office.

¹⁶⁴ *Jiba and Another v General Council of the Bar of South Africa and Another* 2019 (1) SA 130 (SCA) at para 18.

¹⁶⁵ Principle 11.

- 99.2. Engaging in a process in terms of section 194 of the Constitution is a critical means of ensuring accountability and the rule of law. It is in the public interest for the process to be final.
- 99.3. As pointed out in the matter of the Speaker, Members of Parliament are insulated from outside repercussions in discharging functions: they have substantial freedom of speech, as well as immunity from civil and criminal liability, as well as arrest or imprisonment. Their powers *'must primarily be exercised to promote only the people's interests and the institutional objectives of the Assembly'*. Furthermore, *'[w]here the interests of the political parties are inconsistent with the Assembly's objectives, members must exercise the Assembly's power for the achievement of the Assembly's objectives' and cannot frustrate those objectives in order to avoid harm to their political party.'*¹⁶⁶
- 99.4. Furthermore, Members of Parliament must subordinate their political interests, and the interests of their parties, to the *'institutional objectives'* of holding the Public Protector to account and, ultimately, ensuring that the South African public is served as contemplated by section 182 of the Constitution and the PP Act.
- 99.5. A particular individual should not be equated with the office of the Public Protector: section 194 of the Constitution is primarily concerned with protecting the office rather than a particular incumbent.
- 99.6. A Public Protector may only be removed from office on any one or more of the grounds of misconduct, incapacity or incompetence. Those concepts, while not defined in the Constitution, have been defined in the Removal Rules, pursuant to the National Assembly's exercise of its

¹⁶⁶ *The 2018 case* at paras 139, 141 and 144.

constitutional responsibility for holding Chapter-9 office-bearers accountable, as already referred to above.

99.7. The definitions in the Removal Rules must be applied accordingly. It is up to the Committee, at first instance, to determine whether the definitional requirements are met.

99.8. Individual members of the Committee may not determine their own definitions for what constitutes '*incompetence*' or '*misconduct*'. Instead, they must adhere to the '*institutional pre-determination*' of those concepts as set out in the Removal Rules.

I. CONCLUSION

100. In summary of what has been set out above, the Constitution, and the associated legislative framework, require the Public Protector to:

100.1. Respect the supremacy of the Constitution and the rule of law.

100.2. Strengthen constitutional democracy.

100.3. Focus on ensuring the discharge of public functions that is accountable, responsive and open.

100.4. Respect the separation of powers and the legitimate sphere of operation of each branch of government and in so doing respect the decisions of the Executive, Legislature and Judiciary.

100.5. Be independent and impartial, and perform functions without fear, favour or prejudice.

100.6. Be dignified and effective.

100.7. Be dedicated and conscientious.

100.8. Discharge her functions diligently and without delay.

- 100.9. Exercise only those powers that are conferred by law.
- 100.10. Not assume the powers or functions of any other public functionary or encroach on its integrity.
- 100.11. Adhere to a high standard of professional ethics.
- 100.12. Ensure the efficient, economic and effective use of resources.
- 100.13. Ensure that services are provided fairly and without bias.
- 100.14. Foster transparency.
- 100.15. Be accessible.
- 100.16. Cultivate good human-resource management and be capable of managing an office that comprises hundreds of personnel and numerous departments / units.
- 100.17. Exercise appropriate and effective control over the Deputy Public Protector and the staff of the Public Protector's office.
- 100.18. Delegate powers to the Deputy Public Protector to exercise.
- 100.19. Be capable of undertaking and managing numerous investigations, and of understanding and applying the Constitution and the laws that regulate the public administration and affairs of State.
- 100.20. Maintain an office that is accessible to members of the public.
- 100.21. Discharge functions so as to ensure ethical and effective public administration generally.
- 100.22. Monitor the performance of the executive, which includes investigating alleged maladministration, abuse of power, discourtesy, undue delay, improper or dishonest conduct, improper enrichment and improper or unlawful prejudice.

- 100.23. Work to ensure that the public administration carries out its tasks without corruption or prejudice.
- 100.24. Be the last defence for the public against bureaucratic oppression, corruption and malfeasance – in other words, to protect the public.
- 100.25. Investigate complaints from members of the public in respect of State affairs or the public administration, report on the conduct complained of, and take appropriate remedial action.
- 100.26. Decline to investigate conduct that occurred more than two years prior to the complaint, unless there are special circumstances that distinguish the complaint.
- 100.27. Consider a range of options in addressing a complaint, including mediation or negotiation; advising the complainant regarding appropriate remedies; and reporting an offence or particular conduct to the appropriate authorities.
- 100.28. In determining appropriate remedial action, not order an organ of state to do something that is outside of its own powers.
- 100.29. Make clear rather than vague determinations,
- 100.30. Be objectively fit and proper to render the constitutional functions of office.
- 100.31. Be appropriately experienced in the law, the administration of justice, public administration and/or the legislature.
- 100.32. Be a person of stature and beyond reproach.
- 100.33. Be suitably qualified.
- 100.34. Be scrupulously honest and have absolute personal integrity.

- 100.35. Disclose all material facts and evidence, and behave with utmost good faith, when litigating and dealing with the courts.
 - 100.36. Not exploit loopholes, or show disregard for the law, or mislead in any way, or make charges without supporting evidence.
 - 100.37. Ensure that all statements of the law are accurate, and not misconstrue the law.
 - 100.38. Be a good constitutional citizen.
 - 100.39. Be willing and capable of taking on sensitive investigations that might antagonise the powerful.
 - 100.40. Observe the requirements of procedural fairness and confidentiality during investigations and allow potentially affected persons a proper opportunity to make meaningful representations.
 - 100.41. Conduct investigations with an open and enquiring mind and follow wherever the evidence leads.
 - 100.42. Discover the truth and continue digging until the true picture emerges.
 - 100.43. Not extend investigations beyond the affairs of State, into the affairs of private parties.
 - 100.44. Not expand an investigation without lawful justification.
 - 100.45. Be cognisant of the serious consequences that can flow from an investigation.
 - 100.46. Inspire confidence in the integrity and completeness of investigations; and
 - 100.47. Account to the National Assembly.
101. The aforestated principles overlap considerably both in impact and meaning and clearly sets a very high bar for the watchdog created for purposes of oversight. At

first glance it may seem an almost impossible standard to meet the aforestated in as a collective and that may well be so. What requires an assessment in any enquiry could well not only be compliance with the foregoing but the extent to which there exists a failure to comply with one or more of the foregoing and the extent to which any Public Protector falls blatantly short of what is required so much so that it constitutes misconduct, incompetence or incapacity meriting removal.

H Ebrahim

4 July 2022

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