

## **EXPLANATORY NOTE:**

### **THE COMMITTEE FOR SECTION 194 ENQUIRY – ENQUIRY INTO THE REMOVAL OF THE PUBLIC PROTECTOR, ADV. B MKHWEBANE**

This note serves to briefly explain the legal basis that underpins the removal of office bearers in terms of Chapter 9 of the Constitution and the process that is currently underway in respect of the Enquiry into the removal of Adv. B Mkhwebane – the current Public Protector. All relevant documentation referred to herein can be found at the bottom of this page.

#### **A. Legal Framework in respect of the Removal of Office-Bearers in terms of Chapter 9 of the Constitution**

Section 194 of the Constitution sets out the framework for the removal from office of the Public Protector, the Auditor-General and members of commissions established in terms of Chapter 9 of the Constitution. It reads as follows:

##### ***Removal from office***

*194. (1) The Public Protector, the Auditor-General or a member of a Commission– established by this Chapter 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*
- (b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.*

On 3 December 2019, the National Assembly adopted Rules setting out the process for the removal of office-bearers in institutions supporting constitutional democracy. These institutions include the Office of the Public Protector. The rules form part of the Rules of the National Assembly and apply to the removal of any office-bearer in an institution supporting constitutional democracy. The relevant portion of the rules, hereafter referred to as the “Removal Rules” is attached as **Annexure “A”**.

Adv. Mkhwebane challenged the validity of the Removal Rules in the Western Cape High Court and then later on appeal in the Constitutional Court. The apex court found that the Removal Rules were constitutional except the proviso in Rule 129AD (3) which stated that the legal representative or other expert assisting the chapter 9 office bearer “may not participate in the committee.” To that end the legal representatives or other experts assisting a chapter 9 office bearer are now entitled to participate in the Committee for Section 194 Enquiry and this part of the Removal Rules no longer has any bearing on the process.

## **B. The Motion to Remove the Public Protector, Adv. B Mkhwebane**

On 21 February 2020, the Chief Whip of the Democratic Alliance, Ms Mazzone tabled a motion (“the Motion”) to initiate an enquiry, in terms of section 194 of the Constitution, for the removal of the Public Protector, Adv. Mkhwebane, on the grounds of alleged incompetence and/or misconduct. A copy of this motion (excluding the evidence submitted in support thereof) is attached as **Annexure “B”** hereto. The supporting evidence forms part of the Panel Report Record which is attached as **Annexure “C”** hereto. Pages 12 to 9236 of Annexure “C” contains all the evidence submitted by Hon. Mazzone in support of her motion.

Subsequently, the former Speaker of the National Assembly, Ms. T Modise acting in terms of Rule 129U of the Removal Rules, established an independent panel to conduct a preliminary assessment to determine whether, on the information available, there is prima facie evidence showing that the Public Protector has committed misconduct and/or is incompetent. The Panel was chaired by retired Justice of the Constitutional Court, Judge Nkabinde. Among other things, before reaching any conclusions the Panel considered representations from the Public Protector regarding the grounds of misconduct and incompetence set out in the Motion. The latter is also included in the documents provided as part of Annexure C

The Panel submitted its report on 24 February 2021 and recommended, for the reasons contained in its report, that the charges of incompetence and misconduct be referred to a

committee of the National Assembly as provided for in the Removal Rules. The Panel Report (see **Annexure “C”**) which includes everything it had regard to is 10 396 pages long and includes an index, the motion, the evidence in support of the motion, the written representations of the Public Protector to the Panel and additional evidence submitted by the Public Protector.

The report served before the National Assembly on 16 March 2021 and the Assembly resolved to proceed with a section 194 enquiry (see **Annexure “D”**).

### **C. REFERRAL TO THE COMMITTEE FOR SECTION 194 ENQUIRY**

Following the adoption of the report of the Independent Panel, the report was referred, in terms of the Removal Rules to the Committee for Section 194 Enquiry for a formal enquiry (“the Committee”).

NA Rule 129AD (2) states that the Committee must ensure that the Enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe. The Committee adopted a terms of reference (TOR) to set out the parameters of its enquiry. This TOR is attached as **Annexure “E”** and may be varied or amended provided that the principle of

fairness is upheld. In the event that the TOR is amended the amended version will be posted hereunder.

The Committee has appointed Adv Nazreen Bawa SC and Adv Ncumisa Mayosi as external evidence leaders to put the evidence before the Committee, relevant to the Motion.

#### **D. CALL FOR EVIDENCE**

The Committee has issued a public call for any evidence that may assist it in assessing the motion.

A copy of this call for evidence, together with the requisite requirements, is attached hereto as **Annexure "F"**.

#### **E. RELEVANT DOCUMENTATION**

**As per the explanation above the following documentation can be accessed by clicking the link below:**

**DOCUMENTATION CURRENTLY BEFORE THE COMMITTEE ON SECTION 194 ENQUIRY- ENQUIRY INTO THE REMOVAL OF THE PUBLIC PROTECTOR, ADV. B MKHWEBANE**

ANNEXURE	DOCUMENT	NOTE
"A"	<b>REMOVAL RULES</b>	These rules, which form part of the Rules of the National Assembly, govern the removal from office of a holder of public office in a State Institution Supporting Constitutional Democracy
"B"	<b>MOTION FOR REMOVAL</b>	Motion submitted by Hon. Mazzone on 21 February 2020. The evidence referred to therein can be found in Annexure "C" pages 12 to 9236.
"C"	<p><b>REPORT OF THE INDEPENDENT PANEL</b></p> <p><b>The Annexure "C" bundle includes:</b></p> <ol style="list-style-type: none"> <li>1. An index with pages 1A- 10396.</li> <li>2. The Motion for Removal</li> <li>3. The evidence filed in support of the Motion.</li> <li>4. The further documentation provided to the Independent Panel.</li> <li>5. The response of the Public Protector to the Independent Panel</li> <li>6. The report of the independent Panel.</li> </ol>	The Panel was established to assess whether there was <i>prima facie</i> evidence that the Public Protector misconducted herself and/or was incompetent as alleged in the Motion.

“D”	<b>MINUTES OF THE NATIONAL ASSEMBLY</b>	Resolution to adopt the Panel Report and refer the motion to the Committee for section 194 Enquiry to assess.
“E”	<b>TERMS OF REFERENCE OF THE COMMITTEE FOR SECTION 194 ENQUIRY</b>	This TOR sets out the parameters of the enquiry.
“F”	<b>CALL FOR EVIDENCE (available in all eleven official languages).</b>	Public call for evidence to assist the Committee to assess the motion. Closing date for: <ul style="list-style-type: none"> <li>1. <i>Notice of intention to submit evidence or request assistance with making a statement or handing over evidence: <b>23 May 2022</b></i></li> <li>2. <i>Submission of evidence- <b>12h00 on 3 June 2022</b></i></li> </ul>

**ANY FURTHER QUERIES CAN BE ADDRESSED TO THE COMMITTEE SECRETARY, MR THEMBINKOSI NGOMA VIA EMAIL AT [tngoma@parliament.gov.za](mailto:tngoma@parliament.gov.za) or Tel: 083 709 8407**