BEFORE THE INDEPENDENT PANEL
APPOINTED IN TERMS OF RULE 129

In the matter between:

NATASHA MAZZONE MP Complainant

and

THE PUBLIC PROTECTOR Respondent

REPRESENTATIONS ON BEHALF OF
THE PUBLIC PROTECTOR

INTRODUCTION

1. These representations / submissions concern the fairly unchartered waters of the principles which ought properly to guide an independent panel ("the panel") appointed by the Speaker of the National Assembly ("the Speaker") in order to determine whether there is *prima facie* evidence to show that the Public Protector ("the Public Protector") may be found "*guilty as charged*".

2. Simply put, the task or duty of the panel is fourfold:

   2.1. to conduct a preliminary assessment;

   2.2. to make a determination;

   2.3. to compile a report; and

   2.4. to make recommendations, with reasons.

3. The primary purpose of these submissions or representations is to seek to persuade the panel that in its report, it should return a determination to the effect that, upon a holistic evaluation of the complaint motion, there is no *prima facie* evidence to show the alleged misconduct and/or incompetency on the part of the Public Protector and accordingly to recommend that the section 194 impeachment process be terminated and taken no further.

4. The accent we put on "holistic" is the epitome of the approach we adopt in these submissions. The panel may choose a narrow approach in terms of which it would only look at the literal words used to support the complaint and determine whether, if true, the words used in the motion would constitute a "*case to answer*". Alternatively, the panel may adopt a broader and more holistic approach, in terms of which it looks at the words used and the accusations made in the context of the relevant provisions of the South African Constitution, the pivotal requirements of fairness, the public interest and the legal context within which the alleged conduct took place, including the ongoing litigation in various civil and criminal courts. Needless to say, we commend the latter broader and holistic approach.

5. In our humble submission, it would be impossible, undesirable and even improper for the panel to make the requisite determination without taking into account the meaning of section 194 of the Constitution and other relevant provisions of Chapter 9 thereof, as well as the relevant provisions of the Bill of Rights and constitutional values. Against that background, a careful examination of the provisions of the new Rule 129 of the Rules of the National Assembly (which is, incidentally, itself the subject of a separate

comprehensive challenge to its constitutional validity, based on 12 separate grounds).

6. The preferred holistic approach is consistent with the provisions of Rule 129X(1)(c)(vii), which limit or define the parameters of the panel's assessment to "*the written and recorded information placed before it by members, or by the holder of a public office (in this case, the Public Protector), in terms of the rule (ie Rule 129)*" (emphasis added).

7. In terms of the rules, the nature of the information which the Public Protector and the members of the National Assembly are required or permitted to place before the panel is circumscribed only by the legal standard of relevance. When once the information supplied to the panel is relevant, then the panel must take it into account in its assessment and in making the consequential determination.

8. As to what is relevant, regard must be had to the applicable provisions of Rule 129, including:

8.1. Is the complaint motion before the panel proper, valid and "*in order*"?

8.2. Is the panel properly constituted, taking into account our constitutional dispensation?

8.3. Can the panel operate without regard to the requirements of Rule 129X(1)(a) that:

> "*The panel must be independent and subject only to the Constitution, the law and these rules, which it must apply impartially and without fear, favour or prejudice*";

8.4. Can the panel discharge its functions without completely applying the provisions of Rule 129X(1)(b) that:

> *"The panel must, within 30 days of its appointment, conduct and finalise a preliminary assessment relating to the motion proposing a section 194 inquiry to determine whether there is prima facie evidence to show that the holder of public office:*
>
> *(i) committed misconduct;*
> *(ii) is incapacitated; or*
> *(iii) is incompetent*" (emphasis added)

9. In a nutshell, the narrow approach would only focus on what is stated at paragraph 8.4 above, while the more appropriate holistic approach must consider all of 8.1 to 8.4, failing which the panel's mandate will not have been properly and rationally discharged.

10. For the avoidance of any doubt, it is readily conceded that the panel must generally proceed from the premise that, until they have been lawfully set aside by a court of law, the rules must be regarded as constitutionally valid *per se*. This however cannot prevent the panel, in the discharge of its mandate and prescribed duties and without necessarily duplicating or usurping the function of the courts, from making a holistic assessment, as advocated above, in order to make the requisite determination. In the event that in so doing, there may be a coincidence or overlap with some of the questions raised in the court papers, that would be an inevitable consequence of the fact that both forums are interpreting the same set of rules, albeit for different purposes.

11. Whether by design or inadvertently, for some inexplicable reason, the panel has seemingly not been furnished with the original motion of the Democratic Alliance ("the DA") which was submitted within 72 hours of the resolution approving the rules. It is impossible to understand the true genesis of the current process without having regard to that motion, its unlawful approval without giving the Public Protector a hearing, its public announcement in the media without even informing the Public Protector of its existence and the correspondence which was exchanged between the Public Protector and the Speaker before the motion was suddenly "withdrawn" only to be replaced on the same day with the present motion submitted on 21 February 2020. Accordingly, we annex hereto, marked "**BM1(a)**" to "**BM1(f)**", a bundle of the relevant documentation relevant to those issues.

12. With all the above in mind, we now proceed to deal with the broad topics or issues postulated at paragraph 8 above, on the basis that if the answer to any single one of the four broad questions framed there is in the negative, the panel must return a determination against the further continuation of the section 194 process which is underway.

QUESTION 1 : Is the motion in order?

13. Upon a proper interpretation of the rules, it will be obvious that the only trigger for the appointment and jurisdiction of the panel is the objective existence of a complaint motion which is "*in order*". Absent such a motion, the panel must not be appointed and if it is, it will lack jurisdiction to perform any duties.

14. The legal principles which underlie this topic will be illustrated by making reference to the requirements of a valid charge in the context of a criminal trial.

This illustration must obviously not be taken literally but *mutatis mutandis* by allowing for the necessary adjustments stemming from the differences between the present section 194 proceedings, which are more akin to disciplinary proceedings than criminal proceedings. However, certain principles and considerations of fairness clearly apply equally in both types of proceedings which are intended to have punitive consequences against a person or citizen. This much was authoritatively confirmed by the Supreme Court of Appeal, per Swain JA, in the case of *Coetzee*,[1] as follows:

> "*There is authority for the proposition that a charge sheet in a disciplinary enquiry does not have to be framed with the same particularity, or with all the formalities of a charge in a criminal trial. However, the better view is that although the same degree of formality is not required, the same degree of particularity of the factual information underlying the allegations made, is required to enable the accused to know what case he or she has to meet. This is particularly so where the disciplinary body has the power (as in the present case) to make findings with far-reaching consequences*" (emphasis added).

15. The simple principle is that if the charges (or the charge sheet) are indeed shown to be defective, then it can hardly be proper for the panel (or any adjudicative body charged with making a determination as to the existence of a *prima facie* case in respect of a punitive process) to ignore that fact and to give the go-ahead for the process to proceed further, regardless of such defects.

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[1] *Coetzee v Financial Planning Institute of South Africa* [2014] ZASCA 205 (unreported, SCA case No 1079/13, 28 November 2014; 2014 JDR 2356 (SCA) at paragraph [17]

16. As a matter of logic, the panel cannot determine the existence or non-existence of a *prima facie* case in the air but only by referencing or juxtaposing the evidence presented against the charges as framed. If the charges themselves are fatally defective, there can be no question of *prima facie* evidence to resuscitate them by breathing new life into them like the biblical Lazarus.

17. Subject to the qualifications mentioned above, reference will be broadly made to the relevant provisions of the Criminal Procedure Act relating to the charge (ie sections 80 to 104). Specific reliance will be placed on sections 83 and 85. Section 85 states in a nutshell that an accused person may object to a charge, even before pleading thereto, and that the prosecuting body may, in appropriate cases, be ordered to amend the charge, failing which the charge may be quashed upfront.

18. In this context, the task of the panel may be likened to the determination in terms of section 174 of the Criminal Procedure Act, whether or not a *prima facie* case has been made out and the trial ought therefore to proceed any further or be summarily terminated by discharging the accused. That principle is self-evidently rooted in fairness. The purpose of instituting the independent panel stage is clearly meant to serve as a similar mechanism to sift out undeserving cases and not to further waste the time, money and effort of all the parties on an obvious wild goose chase which is bound to fail.

19. The logical starting point in this analysis is Rule 129R(2), which provides that:

"*For the purposes of proceedings in terms of s 194(1), the term 'charge' must be understood as the grounds for averring the removal from office of the holder of a public office*" (emphasis added).

20. Secondly and crucially, it must be appreciated that the existence of a motion which is "*in order*" is the necessary trigger and jurisdictional prerequisite for:

20.1. the valid appointment of the panel; and

20.2. the referral by the Speaker of the motion to the panel.

21. That much is clear from the wording of Rule 129T, which provides that:

"*When the motion is in order, the Speaker must:*

(a) immediately refer the motion and supporting documentation provided by the member to an independent panel appointed by the Speaker for a preliminary assessment of the matter; and

(b) inform the Assembly and the President of such referral without delay." (emphasis added).

22. In turn, it will be clear that, in the present case, the initiation of the section 194 inquiry and, more specifically, the declaration of the "*in order*" decision of the Speaker was fatally defective in that, by her own admission or confession, she failed to make the prescribed assessment of the substantive validity of the motion and only confined herself to the question of form. This is a peremptory duty.

23. The Speaker, by her own admission, elevated form over substance and did so in spite of the clear provisions of Rule 129P that:

"*Any member of the Assembly may by way of a notice of a substantive motion in terms of Rule 124(6), initiate proceedings for a s 194 enquiry, provided that:*

(a) The motion must be limited to a clearly formulated and substantiated charge, on the grounds specified in s 194 of the Constitution, which must prima facie show that the holder of a public office:

(i) committed misconduct;
(ii) is incapacitated; or
(iii) is incompetent.

(b) …

(c) …

(d) The motion is consistent with the Constitution, the law and these rules" (emphasis added).

24. It can never be seriously suggested that the abovementioned duties of the Speaker in making the "*in order*" decision refer only to form. If anything, only the requirements of Rule 129R(b) and (c) relate to formalistic requirements. By way of contrast, the requirements of Rule 129(a) and (d) deal with matters of substantive law.

25. Despite the above and upon being requested by the Public Protector in her letter dated 28 January 2020 (see annexure "BM1(d)"), the Speaker made the frank admission that she had in fact not considered matters of substance. This admission or confession was made in the Speaker's signed letter dated 30 January 2020 (see annexure "BM1(e)"). Due to its importance, it is apposite to quote the relevant portion of the letter:

"*I therefore confirm that:*

(a) *the substantive motion complied with the form requirements in the rules;*

(b) *no decision has been made as to the required prima facie assessment, as the independent panel has yet to be established, after which the panel must conduct and finalise a preliminary assessment, which will include an invitation to the holder of the public office to comment on the substance of the motion*" (emphasis added)

26. To call the above articulation a blatant misreading of the applicable rules would be a gross understatement.

27. In view of the aforegoing indisputable and fatal defect, the jurisdictional requirement for the appointment of the panel and/or the referral of the motion to it was never met. The proper determination that the motion is "*in order*" is a *sine qua non* for a valid appointment of and a lawful referral of the motion to the panel.

28. Any determination by the panel that the Speaker and/or the National Assembly must nevertheless forge ahead with the enquiry, in spite of such a glaring omission and irregularity, will only serve to sanction a time-wasting exercise which is doomed to fail. It will only perpetuate the illegality and postpone the inevitable.

29. In any event, it is patent that what the drafters of the rules actually intended was that the first *prima facie* assessment must be conducted by the Speaker before making the "*in* order" determination and that the independent panel's assessment be the second external and independent assessment. The Speaker herself has subsequently conceded in the Part A court papers that

what was envisaged was a "*double-filtering mechanism*". It is unlawful for the panel to conduct the *prima facie* assessment as a forum of first instance, which is the case here. The "*double-filtering mechanism*" was clearly intended to ensure maximum fairness. (This is akin to the assessment of a *prima facie* case by the NPA, which must precede the assessment of a *prima facie* case by a magistrate or judge at the closure of the state's case in criminal proceedings.)

30. Such a double-filtering mechanism is hardly surprising in any multi-staged process such as that envisaged in the Constitution and the rules. Each stage is important and it ought to attract a separate right of hearing and the opportunity to make representations before an adverse decision is made. The Speaker failed in this regard. This is an incurable defect which will fatally taint this process until it is corrected by starting the process *de novo*, or simply aborting it at the earliest available opportunity, which is here and now.

31. The glib response by a public official making a discreet adverse finding against a person that the latter will "*get your audi later*" and from a separate entity, just cannot wash in the case of a multi-staged process such as the present.

32. On the above ground alone, the panel cannot conceivably give its go-ahead to the further conduct of the present enquiry, which is the product of such a gross deviation from the rules which form the foundation of the entire section 194 enquiry. The present motion was dealt with in the same way.

33. At the risk of repetition, it is a jurisdictional requirement that the motion be *"consistent with the Constitution, the law and these rules*". For the reasons advanced above, the present motion does not meet that standard.

The unlawful retrospective application of the rules

34. Arguably, the most glaring defect of the current process is that the Speaker, without justification, wrongly assumed that the rules could be applied with retrospective effect.

35. The alleged transgressions which form the subject matter of Charges 1 to 4 took place before the promulgation of the rules on 3 December 2019. As the first DA motion was submitted 72 hours later on 6 December 2019, the only transgressions which could have been properly raised would have had to be committed between the 3rd and the 6th of December 2020. Similarly, the second motion could only deal with transgressions committed between 3 December 2019 and 21 February 2020. In short, any conduct which took place before the rules were in place was legally out of bounds.

36. The legal rule or presumption against retrospectivity is a fundamental constitutional rule based on fairness and the rule of law, in short due process.

37. Legal instruments such as the present rules are presumed to only operate prospectively, unless the contrary is clearly stated or was intended .the presumption applies with equal force in respect of procedural rules. It has for example been recently and authoritatively affirmed in respect of the non-retrospectivity of the new Rule 32 of the Uniform Rules of Court.[2]

38. There is nothing in the present rules which evinces an intention by the drafters to deviate from the general rule against retrospectivity.

[2] See the recent judgment of the Full Court in *Raumix Aggregates v Richter Sound* 2020 (1) SA 623 (GJ) at paragraphs [7] to [9]

39. Incidentally, the failure of the Speaker to even realise this irregularity stems directly from two other fatal errors, namely:

39.1. her failure to assess the substantive validity of the motion (as discussed above); and

39.2. her egregious omission to inform the Public Protector of the motion and to afford her an opportunity to be heard before making the crucial "*in order*" decision. Had such an opportunity been granted, then the Public Protector would have pointed out this glaring defect in the charges. This may well have been the end of the matter. Instead, the Speaker saw it fit to inform the media and the public of the charges and only communicated them to the Public Protector subsequently. Not only is such conduct unfair but it offends against all motions of *ubuntu* and common decency.

40. The process ought to be halted on these separate considerations. At best for the Speaker, the rules need to be amended to provide for retrospective application, if indeed that was the intention of the National Assembly when passing the resolution. However, as the rules currently stand, they do not disclose an offence in respect of conduct which predates their enactment. In such circumstances, there can be no *prima facie* case or evidence to support a conviction under section 194.

Double jeopardy and/or duplication of convictions

41. The charges based solely on various court judgments are defective in that they principally offend against the principle of double jeopardy, another

fundamental principle of fairness which is applicable to all punitive proceedings.

42. The judgments relied upon constitute clear evidence that the Public Protector has already been punished for the very same offences and/or transgressions alleged by the complainant, albeit by a different arm of the state. In the case of the *SARB / CIEX* matter, she was already punished twice, with punitive costs allocated personally to her.

43. Although admittedly said in a minority judgment, reference can still be made to the words of Mogoeng CJ in the *SARB / CIEX*[3] judgment, when he said:

> "*When a representative litigant is ordered to pay not only ordinary costs but also costs on an attorney and client scale from her own pocket, it amounts to an unmasked double punishment*" (emphasis added).

44. Significantly, the majority judgment concurred with the abovementioned characterisation of the Chief Justice. Justice Khampepe, writing for the majority, stated:

> "*An order for personal costs against a person acting in a representative capacity is in itself inherently punitive. The imposition of costs on an attorney and client scale is an additional punitive measure. This could, as pointed out in the first judgment, be viewed as 'double punishment'*"[4] (emphasis added).

45. The rhetorical question which arises is: Can it be constitutionally justifiable to visit the Public Protector with the further punishment of removal from office in

[3] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (GP) at paragraph [39]
[4] At paragraph [220]

addition to the double punishment already imposed and in relation to the very same offence(s)? We submit not.

46. This would in fact result in "triple jeopardy" in the present circumstances.

47. The National Assembly would then be exceeding its jurisdiction in that it would potentially be subjecting the Public Protector to a process intended to impose a sanction in addition to the punishment(s) already imposed. In total, the Public Protector would incur a double or triple punishment for the same offence. This is the very mischief which the rule of fairness, known as the double jeopardy rule, seeks to prevent.

48. As correctly stated by Ebrahim J in *S v Radebe*:[5]

> "*The rule against a duplication of convictions is a rule previously aimed at fairness. Its main aim and purpose is to avoid prejudice to an accused person in the form of double jeopardy, that is being convicted or punished twice for the same offence when in fact he or she only committed one offence*" (emphasis added).

49. In this regard, it ought to be borne in mind that the punitive effect of the order which was granted and irreversibly confirmed by the Constitutional Court will probably run into millions of rand given the volume of papers, the number of parties and different courts traversed. This would be higher than any potential criminal fine which could have been imposed and it would have the effect of potentially "*(ending) her career and, at best for her, drown her in debt*", in the words of the Chief Justice in his minority judgment.

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[5] *S v Radebe* 2006 (2) SACR 604 (O) at paragraph [5]

50. In also correctly using the analogy of criminal punishment to describe the punitive costs order, Mogoeng CJ also said:

> "*… when any cost order is made, especially of a double punitive nature like ordering a representative litigant to not only pay costs out of her own pocket on an ordinary scale but also on an attorney and client scale, several factors must be taken into account. They are the economic realities that apply at the time of awarding costs, the capacity or predictable incapacity to pay and <u>whether that order serves as constructive or corrective punishment</u> … or whether it is in effect an instrument of destruction or irreparable harm. That would explain why, using crime as a comparator, removing people's limbs or organs is never an option and the possibility of being released on parole exists even for murderers. … No costs order ought ever to be made regardless of its consequences or impracticability or the injustice and inequity it would yield. Courts are all about justice and equity*" (emphasis added).

51. It is respectfully submitted that the mere fact that such multiple (double or triple) punishments happen to emanate from different arms of the same state ought not to make any difference if the matter is viewed from the point of view and in favour of the individual bearer of constitutional right. The impact on her remains oppressive and excessively harsh and beyond the contemplation of the Constitution. At worst, this is a moot point which ought to be decided in *favorem libertatis* and by the application of *ubuntu* and modern progressive theories of punishment.

52. To compound the problem, on a closer examination of the charges and the evidence tendered, it will be observed that there is a duplication of charges. Firstly, the same conduct is used to justify more than one charge. Secondly, the same evidence is relied upon to support "different" charges. For example,

the evidence relied upon in support of Charges 1 and 2 is also listed in support of Charge 3. Further, the evidence used in support of Charges 1, 2 and 3 is listed in support of Charge 4. This is a conceptual nightmare which presents all sorts of problems regarding the fairness of the process in relation to the interconnectedness of the "evidence".

53. Thankfully and for the purposes of this section, it matters not whether one uses the language of double jeopardy or duplication of convictions. The underlying principle is the same, namely that it would be unfair to convict or punish a person twice for committing the same offence or misconduct. The result will be excessive punishment which may even exceed the jurisdiction of the second forum. This can be best illustrated by a mathematical presentation, as follows:

> If *x* represents the magnitude of the punishment already meted out to the Public Protector; and
> *y* is the maximum limit of the punishment which the National Assembly can impose (ie removal); and
> *C* represents a section 194 conviction by the National Assembly;
> Then whenever x is greater than *zero*, such a conviction will inevitably result in a punishment which is in excess of its jurisdiction; or
> $C = x + y$

54. In simpler terms, the cumulative or total punishment will invariably be excessive and more importantly it will fall outside the penal jurisdiction of the National Assembly. Such a process is fundamentally flawed *ab initio*.

55. Bearing the above in mind, it is respectfully submitted that upholding the objection based on double jeopardy or duplication by this esteemed panel will

serve the ends of justice and equity. It will prevent the possibility and inherent unfairness of, having brought the Public Protector into financial ruin, also taking away her career, income and livelihood. That double death sentence belongs to the jungle not the law according to *ubuntu* and other values based on humanism.

Prematurity (self-incrimination and pending civil and Constitutional Court proceedings)

56. Next, we deal with the all-encompassing topic of prematurity as a reason why the panel ought to recommend a termination, alternatively a temporary suspension of the process, based on considerations of law and fairness.

57. This ground is based on two separate major recent developments which have taken place during the extended period within which these representations were requested.

58. The first of these relates specifically to the first charge or Charge 1, which deals with allegations of misconduct in the *SARB / CIEX* matter.

59. As the panel must be aware, on 15 December 2020, the National Prosecuting Authority announced its decision to institute criminal charges of perjury against the Public Protector under case No CAS 436/08/2019 (Hillbrow). Her first appearance took place in the Pretoria Regional Court on 21 January 2021. The matter has been remanded to 25 March 2021.

60. The charges relate directly to the very same subject matter of Charge 1 and the evidence relied upon is exactly that listed in the motion of impeachment,

as can be observed from a copy of the charge sheet, which is annexed hereto marked "**BM2**".

61. This development automatically triggers the application of section 35(3) of the Constitution, read with section 203 of the Criminal Procedure Act, in terms of which the Public Protector intends to exercise her rights to silence and/or the privilege against self-incrimination.

62. Insofar as the Public Protector's further participation in the section 194 enquiry will certainly infringe upon her aforesaid constitutional rights and protections, it would be premature to recommend a further continuation of the said enquiry and it ought accordingly to be stayed until the finalisation of the criminal proceedings.

63. In this regard, it is worthy of emphasis that the privilege against self-incrimination is not confined to criminal proceedings and it applies in civil proceedings, as well as administrative or quasi-judicial hearings such as the present section 194 impeachment enquiry. The Constitutional Court, per Ackerman J, explained it as follows:[6]

> "*In South African law, the privilege is not limited to criminal or civil trial proceedings because … it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial or during the trial.*
>
> *The privilege has been described as one of the personal rights to refuse to disclose admissible evidence, the particular right in terms whereof 'a witness may refuse to answer a question where the answer may tend to expose him to a criminal charge' and is also available, for example, to a*

[6] *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC) at paragraph [96}

person called as a witness in inquest proceedings. With reference to the above-quoted passage from R v Camane, Thirion J observed in S v Khumalo that:

'(t)here is indeed even a greater need for protection of the accused against force self-incrimination before the trial than there is at the trial.'

Hoffman and Zeffert also point out that the privilege may be claimed in administrative or quasi-judicial hearings."

64. This argument ought to put paid to the ripeness of the section 194 enquiry, more particularly in relation to Charge 1. In relation to that charge and taking into account what has been said in the preceding section, the Public Protector will have been exposed to quadruple jeopardy at the end of it all, for the same single offence!

65. In respect of the right against self-incrimination in the analogous context of a section 174 application in criminal proceedings, the following words of Nugent AJA in *Lubaxa* are significant:

> "*The failure to discharge an accused in these circumstances, <u>if necessary mero motu</u>, is in my view a breach of the rights that area guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusi8vely upon (the assured person's) self-incriminatory evidence.*"[7]

66. Regarding the rest of the charges, it also needs to be taken into account that the judgment of the Western Cape High Court dismissing Part A of the ongoing application to declare the rules unconstitutional is now the subject of an ongoing appeal process in the Constitutional Court. The essence of the

[7] *S v Lubaxa* 2001 (2) SACR 703 SCA at paragraph [18]

relief sought is to suspend the section 194 enquiry pending the final declaration of unconstitutionality or otherwise. The relevant application for leave to appeal was duly delivered in December 2020 and the respondents have since delivered their answering affidavits. The directions of the Chief Justice are awaited shortly. In the meantime, it would be prejudicial and unfair to proceed as if the said application for interim relief does not exist. This is a factor which the panel is fully entitled to take into account in conducting its own assessment and making recommendations as to the way forward given the constitutional context.

67. In the totality, the current process is premature. Most certainly in respect of Charge 1, it cannot continue without violating the Public Protector's constitutional rights. Arguably, in respect of the remainder of the charges, the other aforestated considerations of fairness would militate against a continuation.

68. It is in any event doubtful if the charge sheet can be split up into separate parts, which are subjected to separate processes. It is either the entire section 194 enquiry is proceeded with or halted for lack of a *prima facie* case or evidence upon which the National Assembly may lawfully impeach.

69. Given the obvious symbiotic interconnectedness between all the charges, as referred to in paragraph 51 above in the context of duplication, if Charge 1 is incapable of present prosecution, then the entire charge sheet must fall. On a plain reading of the charge sheet, more specifically paragraphs 8.1 and 12.1 (read with 7.1 and 7.2) thereof, all the charges are interlinked and dependent on the same evidence. They therefore stand or fall together.

Summary in respect of the first question

70. It is respectfully submitted that on the basis of any one or more or all of the grounds advanced above, the panel ought to determine that there is no legal basis and/or *prima facie* evidence upon which a reasonable legislature may convict or remove the Public Protector at this stage or at all, as the case may be. She certainly cannot possibly be found guilty "*as charged*", ie on the basis of the charge sheet as it is currently articulated in annexure A of the motion.

71. The first question must therefore be answered in the negative. If so, there should be no need to proceed any further with the assessment. We however do so in the event that the panel holds otherwise.

QUESTION 2 : Is the panel in any event properly constituted?

72. Like any statutory body, organisation, board or committee which is a creature of statute or other governing instrument, its first order of business ought to be making a determination that it is properly constituted, failing which its decisions will be *ipso facto* null and void. Such an enquiry would normally extend to issues such as the quorum, stipulated frequency or meetings, and the like.

73. In one sense, it has already been demonstrated above that the panel was improperly or prematurely appointed and that the referral of the motion to it was also unwarranted at this stage. This has been articulated as a jurisdictional defect. In administrative law terms, lack of jurisdiction is synonymous with *ultra vires* or illegality.

74. Secondly and tied up with the ongoing litigation, one of the grounds of unconstitutionality is that the Speaker has no constitutional power to appoint a judge to perform a non-judicial task. The fact that this was purportedly done with the involvement of the Chief Justice is an aggravating factor as neither the Speaker nor the Chief Justice, individually or in combination, possess the requisite power to so appoint. It is trite law that no public functionary can exercise a power which is not specifically conferred upon them, either by the Constitution or valid legislation. The panel will be familiar with the well-known leading cases of *Pharmaceutical*[8] and *Fedsure*.[9]

75. For these reasons, it is respectfully submitted that the panel is not properly constituted, alternatively considerations of fairness in any event dictate that the determination of the Constitutional Court appeal (Part A) and the pending Full Court hearing in respect of Part B should preferably be decided before the legality or otherwise of the panel can be assumed.

76. The second question accordingly must also be answered in the negative. If so, the panel is enjoined to return a verdict to the effect that there is no *prima facie* basis for taking any further steps on the basis of these additional considerations on the grounds that, even if the charges were properly articulated, which is still denied, there is a sufficient degree of doubt in the collective mind of the panel regarding the propriety of its constitution.

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[8] *Pharmaceutical Society of SA v The President of the RSA* 2000 (2) SA 674 (CC)
[9] *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metro Council* 19999 (1) SA 374 (CC)

QUESTION 3 : Can the panel lawfully operate outside of the parameters imposed in Rule 129(1)(a)?

77. Assuming that the panel nevertheless determines that it is indeed properly constituted, it is respectfully submitted that the wording of Rule 129(1)(a) makes it abundantly clear that the panel must be:

(i) independent;

(ii) impartial; and

(iii) subject only to the Constitution, the law and these rules.

78. In this regard, it should be unnecessary to point out that, although it is appointed by the Speaker, the panel must exercise its powers in the public interest, independently, impartially and without fear, favour or prejudice. This is a burdensome task. For the record, we are confident that this panel is up to this task but we merely wish to highlight the scope of its operations in that regard, namely that the three criteria prescribed above give the panel a very wide discretion in the performance of its duties and that despite its parentage from the Speaker, it is not a panel of the Speaker but an independent panel representing the people and bound by the Constitution.

79. Regarding the important requirement that the panel should be subject to the Constitution, the law and these rules, we wish to highlight that the panel is therefore entitled to apply the constitutional values and principles, such as equality before the law, the rule of law (non-retrospectivity), rationality, fairness, human dignity and *ubuntu* in its consideration of the material placed before it. It will be a sad day if the panel interprets the ambit of its powers and discretion narrowly. It must be borne in mind that the panel is a creature of

rules without which no impeachment process can take place. All the parties agree that these rules are, with the necessary adjustments, a direct or indirect product of the judgment of the Constitutional Court in the so-called *EFF Impeachment* case,[10] in which Jafta J correctly pointed out that:

> "*Without rules defining the entire process, it is impossible to implement section 89 (of the Constitution)*"[11] (emphasis added).

80. Jafta J went on to say, significantly, that:

> "*Without accepting that one of the listed grounds existed, the Assembly could not authorise the commencement of a process which could result in the removal of (the President) from office … If that motion had succeeded, it would not have constituted impeachment and removal of the President, as contemplated in s 89(1). Instead, it would have been an unconstitutional removal of the President from office and would have been liable to be set aside on review*"[12] (emphasis added).

81. The relevance of these dicta to the present exercise is that the panel ought properly to see its intended purpose and role as being to be a filter for preventing the (further) implementation of a process which does not constitute an impeachment process, as contemplated in section 194(1) and which will accordingly be "*liable to be set aside on review*".

82. The panel therefore has a wide discretion and a relatively free hand in the performance of its task, subject, of course, to the limits imposed by the text of the relevant rules. More specifically, the panel has no obligation to adopt the

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[10] *EFF v Speaker, National Assembly* 2018 (2) SA 57 (CC)
[11] *EFF v Speaker*, at paragraph [182]
[12] At paragraphs [205] and [206]

narrow approach in favour of the more appropriate holistic approach, as defined in the introduction section above. Neither can the panel justifiably give the go-ahead to the continuation of a process which is inherently and patently unfair, prejudicial, *ultra vires* and unconstitutional. That would be nothing short of an irrational exercise of its pivotal "gatekeeping" powers. Needless to say, this being a multi-staged process, such irrationality or illegality will necessarily have a domino effect on any subsequent stage and on what Jafta J referred to as "*the entire process*".

83. The third question should accordingly also be answered in the negative.

QUESTION 4 : Does the material listed, tendered and provided constitute *prima facie* evidence to show the commission of the offence(s) identified in the charge sheet?

84. In the unlikely event that, in spite of all the aforegoing, the panel is nevertheless inclined to adopt the narrow approach or, having adopted the broader approach, it rejects all the above contentions, it is respectfully submitted that the charges in any event do not disclose an impeachable offence, and the above fourth question also falls to be answered in the negative.

85. Sub-rule Rule 129R(2), quoted in paragraph 19 above, provides a basis for borrowing from the principle which governs criminal and/or disciplinary proceedings, where applicable, and with the necessary adjustments. At a minimum, the standard of fairness, which is advocated in the so-called *Jockey Club* cases, must be employed and the maximum, the criminal standards of fairness contained in section 35(3) of the Constitution, be used as points of

reference. Our law generally imposes certain duties upon the accuser in the pursuance of any process intended to have punitive consequences on the rights-bearing individual.

86. Before dealing *ad seriatim* with each charge, it is appropriate at this stage to raise a further pertinent impediments to any possible finding that there is *prima facie* evidence to show impeachable conduct, based on the exclusionary rules of the law of evidence on the one hand and the principle of separation of powers on the other, as well as the combined or cumulative effect of those two principles. The combined objection relates specifically to charges 1 to 3, which are solely premised on court findings or opinions to support the allegations of misconduct and/or incompetence, bearing in mind the interlinked articulation of all the charges, as previously pointed out.

Opinion evidence and the rule in *Hollington v Hewthorn*

87. Given the general rule that the judgment of a court is inadmissible in subsequent proceedings as evidence of the truth of its contents, it is doubtful whether the DA's sole reliance on court judgments constitutes admissible evidence, let alone *prima facie* evidence, in respect of the contemplated impeachment proceedings. If not, then this would be the final nail in the coffin for charges 1 to 3. The panel would therefore have no independent basis to determine that the requisite *prima facie* evidence exists.

88. In addition, the so-called rule derived from the English case of *Hollington v Hewthorn*,[13] in terms of which the findings of a prior court are inadmissible in

[13] [1943] KB 587 (CA); [1943] 2 All ER 35 (CA)

subsequent proceedings of a civil or non-criminal nature. The rule still forms part of South African law, albeit not without controversy.

89. The panel is enjoined to take these issues into account in assessing the "evidence" presented by the DA and in making its determination as to whether it meets the threshold of *prima facie* evidence specifically within the context of an impeachment enquiry.

90. In so doing, it is important to highlight the qualitative difference between findings made within a judicial context in order to determine liability for costs and proceedings aimed at the removal from office of a constitutional office bearer. While the punitive consequences may be comparable, the two processes are different.

91. It is therefore undesirable to expect the panel to sanction the DA's effort to transplant as "evidence" for an impeachment process the conclusions made by judges in a completely different type of exercise. To meet the standard of *prima facie* evidence in relation to a section 194 enquiry, more evidence and/or witnesses would need to be produced. More reliance on court judgments is woefully inadequate.

92. Additionally and more significantly, such direct reliance on court judgments, without more, also constitutes a blatant breach of the separation of powers principle. It is a transparent stratagem aimed at using findings made by the judiciary to impeach the Public Protector in terms of section 194 of the Constitution, full knowing that a section 194 process is the sole and exclusive terrain of the legislature in which the judicial arm of the state can play no role.

To clothe the findings of the judiciary as "evidence" cannot successfully mask this stark reality.

93. Once such "evidence" is suitably excluded, as it must be, then there will certainly be no remaining evidence, *prima facie* or otherwise, upon which such an enquiry may be further conducted.

The impermissible expansion of the definitions of the offences

94. Lastly and/or for the sake of completion in respect of the preliminary legal objections, it needs to be pointed out that the panel will have to inescapably consider the issue also raised in the pending litigation, namely that the National Assembly may have impermissibly exceeded its powers in expanding the definitions of the impeachable offences listed in section 194(1) of the Constitution.

95. In relation to "*misconduct*", this relates primarily to the introduction of the element of gross negligence.

96. More ominously and in respect of "*incapacity*", the objection goes to the introduction of "*temporary incapacity*" as an impeachable offence. There is no evidence to support the view that the drafters of the Constitution intended holders of such important offices to be removed due to temporary incapacity, such as hospitalisation for a broken limb, maternity leave and the like, without qualification as to the seriousness or duration thereof.

97. This issue need not necessarily be decided by the panel. However, the panel must be aware thereof since it cannot realistically be expected to discharge its function without referencing the evidence to the offences as defined. Doing

so in its own right cannot be mistaken for usurping the role of the court or pre-empting its ultimate finding in this regard.

98. At the minimum, this factor may be used to support the proposal that it would be prudent to await the outcome(s) of one or both pending processes of litigation referred to above. This would be justifiable on the basis of the analogous application of the equitable considerations which underlie and characterise the principle of fairness known as *lis pendens*.

Synopsis of legal points

99. To recap and before turning to representations based on the merits of the individual charges, the principal submission is that the panel ought to find in favour of the discontinuation of the current process, based, *inter alia*, upon the following 10 considerations which arise from the Constitution, the law and/or the rules themselves:

99.1. The validity of the charge;

99.2. The retrospectivity issue;

99.3. Double jeopardy and/or duplication of convictions;

99.4. Prematurity;

99.5. The jurisdiction of the panel;

99.6. The scope of the panel's mandate in terms of Rule 129;

99.7. Opinion evidence and the rule in *Hollington v Hewthorn*;

99.8. The rule against self-incrimination;

99.9. Separation of powers; and

99.10. The impermissible expansion of the definitions of offences.

100. However and in the event that the panel does not uphold some or all of the aforesaid grounds, attention will now be turned to dealing with the charges read together with the alleged evidence submitted in support thereof to demonstrate that they do not meet the requisite standard for disclosing at a *prima facie* level *"grounds for averring the removal from office of (the Public Protector)"*. In support of that broad submission, we now turn to an assessment of the individual charges and the evidence provided in support thereof.

101. In so doing, we shall deal separately with the cluster of related charges presented as Charges 1 to 3 on the one hand and the unique Charge 4.

CHARGES 1 TO 3 : Alleged misconduct and/or incompetence regarding the *SARB* and *Vrede Dairy* litigation

102. The majority of the preliminary objections or criticisms already dealt with relate principally to these charges.

103. To the extent that explanations have already been given under oath by the Public Protector in the pleadings, no useful purpose can be served by repeating them here. These must be assumed to be incorporated by reference. Similarly, the reports of the Public Protector speak for themselves, except to the extent that they may have been qualified or further clarified by her in the pleadings.

104. In short, all the allegations of misconduct and/or incompetence are disputed.

105. The further submissions contained hereunder are made in amplification of that broad denial.

Ad paragraph 1.1 of Annexure A to the Motion

106. Upon a close examination of the allegations contained herein, it will be observed that, if one casts aside the bare adjectives used, such as "*dismissive*", "*high-handed*" and/or "*biased*", the charges relate to an overall allegation that the Public Protector denied various parties their right to *audi alteram partem*. Regarding the allegations of bias, it must be pointed out that the Constitutional Court did not put the issue higher than a perception of bias.[14]

107. By no stretch of the imagination can such allegations, without more, support a charge of misconduct and/or incompetence.

108. Every single day, public officials, MECs, Ministers, the President, Premiers, Mayors, etc are found by courts to have denied one party or the other the right to *audi*. It has never been suggested that such conduct constitutes impeachable offences. Even magistrates and judges are often found wanting in this regard. Such cases do not then qualify as *prima facie* evidence for impeachment before Parliament or the Judicial Service Commission, as the case may be.

109. Incidentally, the law equates the office of the Public Protector to that of a judge and/or a judge of the SCA in relation to both her conditions of service, as well as protection against contempt. Reference is made to the provisions of section 9 of the Public Protector Act and the Public Protector Service Conditions, a copy of which is annexed hereto marked "**BM3**".

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[14] See *SARB* Constitutional Court judgement at paragraph [99]

110. In all comparable situations, the constitutional consequence for such reviewable conduct is invalidity and/or reversal but not removal from office. Were it so, then the wheels of the state would grind to a halt.

111. To regard such conduct as *prima facie* evidence for impeachment would constitute what the Honourable Chief Justice referred to as "*being symptomatic of a desperation to find fault*"[15] and "*a lot of nit-picking and exaggeration of what (the Public Protector's) conduct entails*".[16]

112. For the avoidance of any doubt and to remove any misunderstanding, it is readily acknowledged that the office of the Public Protector is not the same as judicial office. The only point being made is that in the eyes of the law, the two offices are comparable, more particularly in respect of not just conditions of service and benefits but also the extent to which their independence must be protected from the undue interference of the powerful. A careful philosophical distinction ought properly be conceptually made between the imperative of accountability, which is essential, and the ulterior motives of aggrieved parties motivated by vengeance, prejudice, political goals and ;the like.

113. In making its assessment as to the existence of a *prima facie* case or evidence, this esteemed panel will be fully entitled to take into account not only the views of the majority in the *SARB* judgment but also the explanations tendered by the Public Protector and the remarks of the minority judgment, albeit they admittedly did not prevail. That is not to say it may not find favour in the context of a section 194 enquiry.

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[15] *SARB* judgment (*supra*) at paragraph [58]
[16] At paragraph [102]

114. In predicting what may or may not happen in such an enquiry, it must be keenly appreciated that the findings of a court of law such as the Constitutional Court, as articulated by Honourable Khampepe J, are invariably influenced by curial or judicial norms and standards and protocols such as the *Plascon-Evans* rule and the rule that a court of appeal may not interfere with the decision of a lower court simply on the grounds that such a decision was wrong but only when a misdirection is alleged and proved. These considerations have no place in the envisaged section 194 process, which is a legislative rather than a judicial process. The call for a *holus bolus* transplantation of court judgments into the present section 194 enquiry, as the complainant would have it, must therefore be approached with extreme caution and the necessary dose of scepticism. Ultimately it must be rejected.

Ad paragraph 1.2 of Annexure A

115. Similarly, the conduct outlined herein in respect of failing to give full disclosure, misrepresentations and contradictory evidence, etc, these are commonplace criticisms routinely levelled by the courts against litigants. They do not form the basis for impeachment. The suggestion that they do must be rejected out of hand by the panel.

Ad paragraphs 2 and 3 of Annexure A

116. Regarding the alleged “evidence”, which is solely constituted of the Public Protector’s report, court judgments and the pleadings, and in addition to the remarks already made hereinabove, I wish to reiterate that such material cannot be used to support the existence of *prima facie* evidence to impeach.

117. It must be assumed that the said material constitutes the entire "evidence" intended to be relied upon by the complainant at the proposed enquiry.

Ad paragraph 4 of Annexure A (the *Vrede Dairy* matter)

118. The remarks made above at paragraph 110 of these representations, regarding reviewable conduct, apply with equal force hereto.

Ad paragraphs 5 and 6

119. The remarks made above at paragraph 115 of these representations apply with equal force hereto.

Ad paragraph 7 (Alleged incompetence in respect of the *SARB* and *Vrede* matters)

120. Apart from the regurgitation of the words of the judges and the duplication of charges and evidence, there is nothing contained in these paragraphs which constitutes *prima facie* evidence of incompetence, as envisaged in section 194 of the Constitution or even the disputed definition thereof contained in the rules.

Ad paragraph 8.1

121. The criticisms of the "evidence" referred to herein are contained hereinabove and need not be repeated.

Ad paragraphs 8.2, 8.3 and 9

122. There is miraculously simply no additional evidence tendered to support the allegations made at paragraphs 7.1 and 7.2 of the charge sheet. This is due

to the fact that these allegations amount to the unlawful splitting and/or duplication of charges, in that the same evidence is relied on as for Charges 1 and 2.

123. Regarding paragraph 7.3 and the *Financial Sector Conduct Authority* case,[17] it would seem that the alleged incompetence is solely hinged upon the fact that the Public Protector, upon obtaining legal advice, filed a notice to abide. This was motivated *inter alia* by her desire to expand on her report due to obtaining subsequent relevant information, as well as the subsequent discovery of information which had been wrongly concealed by one of the investigators. She therefore desired to do further investigations of the complaint in any event. It would have been wasteful and illogical to "defend" the report in such circumstances. For ease of reference, the self-explanatory memorandum which contains legal advice obtained from Adv Smith SC is annexed hereto marked "**BM4**". Although such advice was admittedly obtained after the notice of abide had been filed, it crucially confirmed the views of the Public Protector and her internal legal experts.

124. Litigants file notices to abide frequently and that act cannot, without more, constitute *prima facie* evidence of "incompetence" on their part. More would have to be alleged and/or produced.

125. The inferences which the complainant seeks to be drawn from the mere act of abiding, that the Public Protector therefore and "thereby":

[17] *Financial Sector Conduct Authority and Another v Public Protector*, Case no. 39589/19 (Gauteng Division, Pretoria), granted on 9 October 2020.

> "*conceded that irrationality, forensic weakness, misunderstanding and/or misapplication of legal principles is demonstrated in such report*" and "*demonstrated a failure to appreciate the Public Protector's heightened duty towards the court as a public litigant.*"

are baseless and do not even meet the most basic requirements of the cardinal rules of logic on which legal inferences can be made.

126. Inferences can only be drawn from proven facts. In this case, the only proven fact is that the Public Protector filed a notice to abide. Everything else contained in paragraph 7.3 is pure and wild speculation and cannot constitute *prima facie* evidence to show anything, let alone the inference of impeachable conduct on the part of the Public Protector.

CHARGE 4 : MISCONDUCT / INCOMPETENCE IN RELATION TO INDIVIDUAL EMPLOYEES

127. This charge, which was clearly and opportunistically added to the second motion submitted in February 2020 in a stillborn attempt to overcome the deficiencies pointed out in the Public Protector's letter of demand dated 28 January 2020 (annexure "BM1(d)" above) is woefully deficient, both in respect of the details furnished with reference to the alleged conduct, as well as the alleged "evidence" tendered in support thereof.

Ad paragraph 10

128. Save for the case of Sphelo Samuel (which is dealt with separately below at paragraph 134), no basis is alleged for attributing the conduct referred to in this paragraph to the Public Protector:

128.1. *Inter alia*, it is not made clear whether direct or vicarious liability is relied upon and, if so, on what basis? As a matter of law, the Public Protector does not get involved in operational issues such as disciplinary action. Such is the sole preserve of the CEO as the accounting officer. There is no allegation that the Public Protector crossed these strict legal lines;

128.2. No dates or locations are provided as to when or where the alleged violations took place or how the Public Protector is personally linked thereto;

128.3. To the extent that the said victimisation was allegedly committed by the erstwhile CEO, it is not alleged that the Public Protector was made aware thereof, when and by whom;

128.4. To the extent that disciplinary action was allegedly taken "*unlawfully*" and on "*trumped-up charges*", no charge sheets have been furnished nor has the panel been favoured with the outcome(s) of such disciplinary proceedings.

129. Simply put, there is no evidence to support any finding of *prima facie* evidence in this regard.

Ad paragraph 11

130. Similarly, no details of date, place, amounts, names of individuals and/or examples have been furnished to the panel in support of these allegations.

131. They must accordingly be rejected as completely unsubstantiated or supported by <u>any</u> evidence.

132. Regarding the alleged mismanagement of resources, it has been widely reported that under the current Public Protector, the office has for the first time in 26 years received a clean audit from the Auditor-General. That is contrary and objective evidence of competence.

Ad paragraph 12.1

133. The evidence referred to herein bears no logical relevance or relationship to the alleged offences contained in Charge 4.

Ad paragraph 12.2

134. In respect of the affidavit of Mr Sphelo Samuel, its origins are at best unclear, and to date no opportunity has been given to the Public Protector by the Speaker to deal with the merits of the allegations contained therein.

135. The affidavit is an *ex post facto* contrivance which must have been solicited and prepared for the sole purpose of seeking to cure the defect related to retrospectivity once it was pointed out in the Public Protector's letter dated 28 January 2020 (annexure "BM1(d)") and the Part A application. This explains the simulated "withdrawal" of the first motion and simultaneous "replacement" thereof with the current motion. That the complainant had to resort to such disingenuous methods betrays the fact that it dawned on her that there was no credible and relevant *prima facie* evidence to sustain the motion. The timing of the affidavit is, at the barest minimum, extremely suspicious. The affidavit which was signed on 11 February strangely refers to events of 8 February 2020, which were reported on a day or two later. This shows that it was hastily drafted, either overnight or within a day or two thereafter. Within the space of

about a week thereafter, it had found its way into the DA's amended charge sheet. The facts speak for themselves.

136. The allegations are nothing short of the irrelevant rantings of a disgruntled employee, who has been convicted of the crime of assaulting a member of the public. In referring to complaints by other employees without any confirmatory affidavits, the allegations constitute inadmissible hearsay.

137. Even if the allegations contained therein were true, which is denied, they cannot constitute *prima facie* proof of impeachable misconduct and/or incompetence, as envisaged in section 194 of the Constitution.

138. The covering letter of Mr Samuel, also dated 11 February 2020, is addressed to the Speaker and it calls for an investigation. If the Speaker decided it necessary, she would have referred the complaint to the Portfolio Committee on Justice. She has to date not done so. It would be reasonable to assume or infer that the Speaker must have decided not to take any action due to the frivolity of the complaint. Otherwise, it would have long been processed by now as it was submitted exactly one year ago.

139. It is improper and irregular for Ms Mazzone to have simply attached the affidavit as part of her "evidence" in the section 194 process. Firstly, the complaint cannot be part of two parallel legal processes. Secondly, Mr Samuels' complaint cannot be "converted" into a section 194 motion by stealth. The rules make it clear that a section 194 complaint can only be instituted by a member of the National Assembly, which Mr Samuel is certainly not. Mr Samuel's remedies reside in the internal processes of the office of the Public Protector and the courts. He is, of course, also free, in his capacity as

a citizen, to approach the democratic Parliament, but no in respect of section 194.

140. In the totality, the affidavit of Mr Samuels does not add anything to the present process. It must be excluded for the reasons advanced. It is proverbially not worth the paper it is written on. In relation to section 194, it is totally irrelevant and inadmissible. For the sake of completion, it is hereby indicated and disclosed that Mr Baloyi has since been dismissed in December 2020 following an independent disciplinary process. It remains to be seen whether he will elect to exercise his rights in terms of the applicable labour legislation as he is entitled to do and whether he will succeed. For now, it must be accepted that the disciplinary charges were not "*trumped up*".

Ad paragraph 12.3

141. The pleadings in the Basani Baloyi matter cannot, by any stretch of the imagination, constitute *prima facie* evidence as required in that this matter is *sub judice* and as yet unresolved. The merits of the Basani Baloyi application have never even been adjudicated upon. In the High Court, that application was decided in favour of the basis of a preliminary point *in limine* regarding jurisdiction. The Constitutional Court has more recently reversed that judgment and the matter has been remitted to the High Court to hear the merits of the case *de novo*. For ease of reference, a copy of the Constitutional Court judgment is annexed hereto marked "**BM5**". The matter is awaiting a fresh set-down date in the High Court, as directed by the Constitutional Court.

Ad paragraph 12.4

142. The pleadings referred to herein and presented as "evidence" relate to the well-known and ongoing *BOSASA*[18] matter involving the President of South Africa.

143. They bear no logical relevance whatsoever to the charges referred to in Charge 4.

144. In any event and even if the matter was somehow relevant, which is still denied, the matter is *sub judice* in that the judgment of the Constitutional Court in respect thereof was reserved and is still pending. Incidentally, that Court will decide for the first time the question whether parties are entitled to additional *audi* in respect of remedial action in addition to the opportunity always given to them in terms of section 7(9), which has been the practice for the 26-year existence of the Public Protector's office.

Ad paragraph 12.5

145. The pleadings referred to herein and presented as "evidence" relate to the other well-known "*Rogue Unit*" matter involving allegations made against Minister Pravin Gordhan.

146. The matter bears no relevance whatsoever to the charges referred to in Charge 4.

147. Even if the matter were relevant, which is still denied, its outcome would operate in favour of the Public Protector in that, in respect of Part A thereof

[18] *President of the Republic of South Africa v The Public Protector*

and insofar as the High Court had fashionably mulcted the Public Protector with punitive costs on the basis of her alleged improper conduct, the Constitutional Court unanimously reversed that order on the basis that the High Court had committed a material misdirection. In so doing, Khampepe ADCJ had this to say:

> "*It cannot be gainsaid that personal costs orders are punitive in nature and a court must be satisfied that the conduct of a particular incumbent, in the execution of their duties or conduct in litigation, warrants the ordering of a personal costs order. This cannot be done in the abstract and the facts must plainly support a costs order of this nature … The High Court ordered costs against Ms Mkhwebane in her personal capacity without furnishing any reasons for that portion of the costs order … The traditional tests of bad faith or gross negligence, albeit with a constitutional flavour, were not satisfied*"[19] (emphasis added).

148. It is the height of irony that the complainant has made herself guilty of the very same conduct of which she accuses the Public Protector. In failing to disclose the Constitutional Court judgment and requiring the panel to rely on the overturned High Court judgment in case No 233/2019, she herself has committed an impeachable offence by her own (incorrect) standards. It is improbable that the complainant is not aware of the subsequent Constitutional Court judgment and yet no reference is made thereto in her latest letter dated 11 December 2020.[20]

[19] *Economic Freedom Fighters v Gordhan* 2020 (8) BCLR 916 (CC) at paragraphs [92] to [94]
[20] See bundle 1 (A-E) page 11A-11C

149. In any event, the merits of the matter are the subject of a very recent Full Court decision in respect of which an application for leave to appeal to the SCA has recently been lodged.

150. There is no discernible reason why the panel and the record must be burdened with the bulky documentation contained in Annexures 5, 6 and 7 of the charge sheet.

151. In relation to Charge 4, no *prima facie* evidence can conceivably be found to exist by this esteemed panel.

Purported further evidence

152. It has also been observed that included in the record is a letter from the complainant dated 11 December 2020 and annexures thereto, purportedly in terms of Rule 12(1)(c)(i) and in response to an undisclosed letter from the Secretary of the National Assembly dated 7 December 2020.

153. This material ought to be discarded on the preliminary ground that it is based on a misreading of the rule in that the further information envisaged therein cannot be relevant to the charges if it relates to separate events which only took place after the submission of the charge sheet.

154. Accordingly, any reference to new matters, such as the matter of *Commissioner for SARS* and the *GEMS* matter, ought to be excluded as totally irrelevant.

155. Insofar as the new material refers to judgments which do form part of the original charge sheet, nothing contained in the letter takes those matters any further than what has already been submitted herein in relation thereto.

156. In the unlikely event that the panel may still be inclined to entertain the "*evidence*" referred to in the said letter, the following brief submissions are made:

Ad paragraph 4 of the letter of 11 December 2020

157. These annexures do not add anything new in respect of the above discussion on the *Vrede Dairy* matter.

Ad paragraphs 5.1 and 5.2 of the letter

158. This matter is irrelevant to any of the conduct relied upon in the charge sheet.

159. In any event and to the knowledge of the complainant, the *BOSASA* matter was heard in the Constitutional Court in November 2020 and judgment is still reserved. It is disingenuous of the complainant not to disclose and to actively conceal this material fact from the panel.

160. Similarly, the High Court judgment in the matter of *Commissioner for SARS* presented by the complainant as "*Annexure 10A*" was reversed by the Constitutional Court in respect of the personal costs order. In so doing, the Constitutional Court significantly and unanimously made the following remarks:

160.1. "*There appears to be a developing trend of seeking personal costs orders in most of not all matters involving the Public Protector. Of these,*

a total of four, including this one, have reached us. … Out of the four applications that have landed here, it is only in one that this court has sanctioned a personal costs order (the SARB case)."

160.2. "… *courts must be wary not to fall into the trap of thinking that the Public Protector is fair game for automatic personal costs awards. Whether inadvertently or otherwise, the High Court judgments in the EFF v Gordhan (the Rogue Unit case) and in the instant matter are instances where the High Court fell into that trap.*"

160.3. "*Needless to say, as the Judiciary, we must not be guilty of contributing to the weakening of that office. You weaken it, 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.*"

160.4. "*I voice these words of caution because of the disturbing frequency and regularity of applications for, and awards of, personal costs against the Public Protector. What is particularly disturbing is that it is clear that the applications and awards are not always justified. That much is apparent from the fact that two out of three personal costs awards that have come before us, including this one, have been set aside. Crucially, these two typify the worst examples of personal costs orders. And in the fourth matter, where there was no personal costs order by the High Court but there was an insistence that this court should make such an award, we declined that invitation*."

(Emphasis added)

[See annexure "**BM6"** for a copy of the Constitutional Court Judgment]

161. These words, said in December 2020, represent the last and the latest word of the apex court on this sorry saga of the types of costs orders and remarks which form the backbone of the present motion before the panel. Accordingly, heed thereof ought to be taken.

Ad paragraphs 5.3 and 54.4

162. Annexures 10B and 11B have no relevance herein.

Ad paragraphs 5.8 and 5.9

163. Both of these matters, including Part B of the *Rogue Unit* matter, are the subjects of pending applications for leave to appeal in the High Court to the SCA. They cannot justifiably be relied on only based on the remarks of the first stance. They ought accordingly to be excluded on this basis alone and cannot possibly constitute *prima facie* proof of anything. In terms of section 18 of the Superior Courts Act, the operation of these judgments is, in any case, suspended.

164. In the totality, the extra material does not advance the case of the complainant. Neither does it enhance the quality of the purported *prima facie* evidence tendered. On the contrary, some of the material, disclosed and undisclosed, put a further question mark and dent on the entire evidential architecture of the proposed section 194 enquiry. The panel ought accordingly to frown upon the thinly veiled attempts to mislead it and will hopefully express itself thereon in making its recommendations.

CONCLUSION

165. These representations go into some detail because there will be no opportunity for their oral presentation. Although they are mainly attributable to the Public Protector personally, they are presented in the third person to accommodate the fact that they have been prepared with the assistance of her legal representatives.

166. In the totality of the submissions made hereinabove, there is no basis upon which it can be found that there is *prima facie* evidence to show cause for the removal of the Public Protector.

167. It is not the aim of these representations fully to traverse the defences available to the Public Protector. The aim is merely to demonstrate that there is no *prima facie* evidence on the table.

168. The vast majority of the objections raised hereinabove are inherent to the charges and/or purported evidence presented. The charges are accordingly incurable by way of any possible amendment.

169. In terms of section 85 of the Criminal Procedure Act, the analogous general rule was expressed as follows in *S v Nathaniel*:[21]

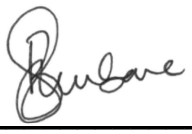
> "… *where a court sustains an objection to the charge sheet, the State must be given an opportunity for remedying such charge sheet. If, for some reason, the charge sheet is not capable of amendment or if particulars will not remedy the defect, the charge is quashed forthwith*" (emphasis added).

[21] *S v Nathaniel and Others* 1987 (2) SA 225 (SWA) at 228H

170. It is submitted that this matter falls in the category of inherent and incurable defects.

171. Whether the upholding of the objection(s) may be termed as quashing, a discharge or merely a finding that there is no *prima facie* evidence is a matter of semantics. The end result remains the same, namely that the process must not be allowed to go any further.

172. In the circumstances, the only competent determination that this esteemed panel can return must be that the requisite *prima* facie evidence is lacking. Such a determination would be consistent with the requirements of fairness and fulfil the very purpose of the introduction of the independent panel as an important filtering mechanism into the section 194 process for the purposes of preventing the perpetuation of an unjust, unwarranted and unfair and fatally flawed process, such as this one.



SIGNED BY ADVOCATE
BUSISIWE MKHWEBANE
AT PRETORIA
ON 27 JANUARY 2021