



**NATIONAL ASSEMBLY COMMITTEE FOR SECTION 194 ENQUIRY**

**DRAFT TERMS OF REFERENCE IN RESPECT OF THE SECTION 194 ENQUIRY INTO  
THE REMOVAL OF THE PUBLIC PROTECTOR, ADV. B MKHWEBANE**

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## ABBREVIATIONS

NA National Assembly

PP Public Protector

### 1. BACKGROUND

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.<sup>1</sup>

Subsequently, the former Speaker of the NA, Ms. T Modise, acting in terms of NA Rule 129U, established an independent panel to conduct a preliminary assessment to determine whether, on the information available, there is prima facie evidence showing that the PP has committed misconduct and/or is incompetent.

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 NA as provided for in the NA Rules governing removal.<sup>2</sup> The report served before the NA on 16 March 2021 and the NA resolved to proceed with a section 194 enquiry.

Accordingly, the matter is now referred to the Committee for Section 194 Enquiry (“the Committee”) for a formal enquiry in terms of the NA Rules, to conduct an enquiry (“the Enquiry”) to remove a holder of a public office as envisaged in section 194 of the Constitution.<sup>3</sup>

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. Accordingly, the

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<sup>1</sup> The removal process is outlined in the recently adopted Rule 129R of the National Assembly Rules (“the NA Rules”).

<sup>2</sup> The report can be accessed at the following web address: [KMBT\\_C554e-20210224165225](https://www.parliament.gov.za/kmbt/C554e-20210224165225) ([parliament.gov.za](https://www.parliament.gov.za))

<sup>3</sup> See Assembly Rule 192Z (2)

Committee agrees to conduct the enquiry in accordance with the provisions of this terms of reference which is based on the principle of fairness. The Committee may vary or amend this terms of reference provided that the principle of fairness is upheld.

## **2. LEGAL FRAMEWORK**

Section 194 of the Constitution sets out the framework for the removal of the PP, the Auditor-General and members of commissions established in terms of Chapter 9 of the Constitution from office. 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 new Rules setting out the process for the removal of office-bearers in institutions supporting constitutional democracy. These institutions include the Office of the PP.

The portion of the NA Rules relating to the removal process are attached hereto for ease of reference. The proceedings of this Committee will be conducted in accordance with the above-provisions of the Constitution and the NA Rules.

### **3. OBJECTIVES OF THE ENQUIRY**

The objective of the Enquiry is to:

- a) assess the charges contained in the motion in order to determine whether the PP is incompetent and/or has misconducted herself; and
- b) report to the NA on its findings and recommendations.

### **4. FORMAT OF ENQUIRY**

The Enquiry is a constitutional process to establish, on the basis of evidence presented, whether the PP is incompetent and/or has misconducted herself. It is neither a judicial or quasi-judicial process, nor is it an adversarial process. The Enquiry is an inquisitorial process, informed by Parliament's constitutional oversight mandate, and the principle of fairness shall be paramount to the manner in which the Committee conducts the Enquiry.

The Committee will utilise the services of an external Evidence Leader to assist it subject to the provisions of paragraph 6. The Enquiry will be conducted in line with the following:

#### **4.1 Witnesses**

- a. The Committee will invite the persons identified by it as witnesses, to submit a sworn written statement and to thereafter appear before it (if determined necessary) to answer oral questions related to the subject-matter of the Enquiry.
- b. In the event that an invited witness refuses to submit a sworn statement and/or avail themselves as requested, the Committee may use its power of subpoena as provided for in the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 (Act No. 4 of 2004).
- c. All witnesses will be requested to submit their sworn written statement, including any supporting evidence, at least 7 days prior to the commencement of their

testimony, provided that the statement and any evidence is limited to the information contained in the motion.

- d. The Committee will furnish the PP with copies of all statements as received and a list of all witnesses it intends calling.

#### 4.2 Questions to witnesses

- a. The evidence leader will present the evidence of a witness to the Committee.
- b. All members will be given equal opportunity to pose any further questions to witnesses (irrespective of whether the member has voting rights). In the event that members are of the view that a certain witness be recalled for purposes of answering any further questions, it may do so by resolution. In the event that the Committee resolves to pose further questions, it will agree on whether such questions should be posed in writing or whether the identified witness will be invited to respond orally.

#### 4.3 Witnesses to appear under oath or affirmation

- a. All witnesses (whether attending voluntarily or not) will be requested to take an oath or affirmation in accordance with the provisions of NA Rule 168 read together with section 16 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 (Act No.4 of 2004).
- b. The oath will be administered by the Chairperson or any other person acting on the instructions of the Chairperson.
- c. All witnesses must be informed of the parameters of the Enquiry and instructed not to remark on or discuss any matter that is not related to the evidence contained in the Motion.

#### 4.4 Cross-examination and processing of evidence

- a. Whilst the Committee is not a judicial tribunal or court of law, it will permit the PP, or her representative, to cross-examine any witnesses, whether identified by the PP or by the Committee.

- b. In the event that the PP wishes to call a witness, notice of same, together with a copy of sworn statement by the witness, must be provided to the Committee who will provide the PP with a date and time for the appearance. The Evidence Leader and members shall have the right to put any questions to any witness called by the PP, subject to any reasonable restrictions the Chairperson may impose.
- c. The Committee will determine the manner in which it will process evidence and the weight it will attach to evidence, and in doing so may—
  - i. consider any evidence that is relevant to its mandate;
  - ii. use its powers of subpoena to gather further evidence if it deems necessary.

#### 4.5 Legal Representation and Audi

- a. In terms of Rule 129AD (3), the Committee must afford the holder of a public office the right to be heard in their own defence and to be assisted by a legal practitioner or other expert of their choice.
- b. The legal practitioner or expert has the right to participate, in their capacity as representative of the PP, in the proceedings of the Committee, including making opening and closing statements, cross-examining witnesses and raising any matter related to the process, subject to any reasonable time restrictions the Chairperson may impose.
- c. Prior to the report of the Committee being adopted and tabled, the PP must be provided with a reasonable opportunity to make written representations on the findings and recommendations of the Committee in line with the *audi alteram partem* principle of natural justice.
- d. These representations must be considered by the Committee prior to the adoption of the report.

## 5 EVIDENCE LEADER

The Enquiry is inquisitorial in nature and the Evidence Leader does not act as a prosecutor. The role of the Evidence Leader is limited to presenting the evidence and putting questions to the PP or other witnesses with the aim of empowering the Committee to assess the merits of

the evidence in line with its mandate. The format for questioning (whether oral or by way of statement with a view to limiting issues in dispute) will be determined by the Evidence Leader in consultation with the Chairperson.

The use of an Evidence Leader will in no way limit or impede the right of members to put questions of substance or clarity to any witness in the exercise of Parliament's constitutional oversight function, as specifically reflected in section 194 of the Constitution.

## **6 PUBLIC PARTICIPATION AND TRANSPARENCY**

Section 59 of the Constitution creates an obligation on the NA to facilitate public involvement in its committee processes. Whilst the NA Rules do not dictate the manner in which public participation must be conducted, it is necessary that a reasonable opportunity is offered to members of the public and all interested parties to be informed of the work of the Committee and to have an adequate say.

Meetings of the Committee will accordingly be conducted in open and, whenever possible, broadcasted on Parliament TV and on its social media channels.

The Committee must determine the manner in which it will facilitate public participation, which may include one or more of the following:

- a. Invitation for written participation;
- b. oral submissions; and/or
- c. targeted invitations for written/oral submissions to persons who may be in a position to assist the Committee.

The purpose of public participation will not be to consider any personal views that members of the public may have with regard to the PP, but to call for evidence that may assist the Committee in fulfilling its mandate. As such, only submissions which relate to the charges in the Motion will be considered.

## **7 VENUE FOR MEETINGS**

Meetings will be held at a suitable Covid compliant venue within the Parliamentary precinct or any other suitable venue to be determined by the Chairperson. Where necessary, for purposes

of accommodating persons unable to travel to Cape Town or to physically attend meetings, hybrid virtual/physical meetings will be held.

## **8 TIME- FRAMES**

The Committee will prioritise the Enquiry in the programme of the NA. The Committee agrees to use its best endeavours to conclude the Enquiry within a reasonable time.

## **9 RESOURCES FOR PURPOSES OF THE OVERSIGHT ENQUIRY**

An external Evidence Leader, other experts as may be determined by the Committee and a dedicated team of officials, including committee secretaries and assistants, a researcher, content adviser and legal advisers, will support the Committee under the direction of the Chairperson.

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Adopted 22 February 2022



## Rules of the National Assembly applicable to the removal from office of a holder of a public office in a State Institution supporting Constitutional Democracy

### “Part 4: Removal from office of a holder of a public office in a State Institution Supporting Constitutional Democracy

#### Definitions

For the purposes of Part 4-

“**holder of a public office**” means a person appointed in terms of Chapter 9 of the Constitution;

“**incapacity**” includes—

- (a) a permanent or temporary condition that impairs a holder of a public office’s ability to perform his or her work; and
- (b) any legal impediment to employment;

“**incompetence**” in relation to a holder of a public office, includes a demonstrated and sustained lack of—

- (a) knowledge to carry out; and
- (b) ability or skill to perform,

his or her duties effectively and efficiently;

“**member of a commission**” means a member of a commission established under Chapter 9 of the Constitution;

“**misconduct**” means the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office; and

“**section 194 enquiry**” means an enquiry by the Assembly to remove a holder of a public office in terms of section 194 of the Constitution and these rules.

#### Initiation of section 194 enquiry

##### 129R<sup>4</sup>. Initiation of Section 194 enquiry

- (1) 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 section 194(1) enquiry, provided that –
  - (a) the motion must be limited to a clearly formulated and substantiated charge on the grounds specified in section 194, which must *prima facie* show that

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<sup>4</sup> The numbering of the rules could follow Rule 129A-Q, which concern the removal of the President in terms of Section 89 of the Constitution. This would nevertheless be a temporary arrangement until the rules were re-printed, at which point both would be separate rules and be re-numbered accordingly.

the holder of a public office:

- (i) committed misconduct;
  - (ii) is incapacitated; or
  - (iii) is incompetent;
- (b) the charge must relate to an action performed or conduct ascribed to the holder of a public office in person;
  - (c) all evidence relied upon in support of the motion must be attached to the motion; and
  - (d) the motion is consistent with the Constitution, the law and these rules.
- (2) For purposes of proceedings in terms of section 194(1), the term “charge” must be understood as the grounds for averring the removal from office of the holder of a public office.

### **129S. Compliance with criteria**

Once a member has given notice of a motion to initiate proceedings in a section 194 enquiry, the Speaker may consult the member to ensure the motion is compliant with the criteria set out in this rule.

### **129T. Referral of motion**

When the motion is in order, the Speaker must –

- (a) immediately refer the motion, and any 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.

### **Independent panel to conduct preliminary assessment into Section 194 enquiry**

#### **129U. Establishment**

The Speaker must, when required, establish an independent panel to conduct any preliminary inquiry on a motion initiated in a section 194 enquiry.

#### **129V. Composition and Appointment**

- (1) The panel must consist of three fit and proper South African citizens, which may include a judge, and who collectively possess the necessary legal and other competencies and experience to conduct such an assessment.

- (2) The Speaker must appoint the panel after giving political parties represented in the Assembly a reasonable opportunity to put forward nominees for consideration for the panel, and after the Speaker has given due consideration to all persons so nominated.
- (3) If a judge is appointed to the panel, the Speaker must do so in consultation with the Chief Justice.

#### **129W. Chairperson**

The Speaker must appoint one of the panellists as chairperson of the panel.

#### **129X. Functions and powers of the panel**

- (1) The panel –
  - (a) 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;
  - (b) must, within 30 days of its appointment, conduct and finalise a preliminary assessment relating to the motion proposing a section 194 enquiry to determine whether there is *prima facie* evidence to show that the holder of a public office –
    - (i) committed misconduct;
    - (ii) is incapacitated; or
    - (iii) is incompetent; and
  - (c) in considering the matter –
    - (i) may, in its sole discretion, afford any member an opportunity to place relevant written or recorded information before it within a specific timeframe;
    - (ii) must without delay provide the holder of a public office with copies of all information available to the panel relating to the assessment;
    - (iii) must provide the holder of a public office with a reasonable opportunity to respond, in writing, to all relevant allegations against him or her;
    - (iv) must not hold oral hearings and must limit its assessment to the relevant written and recorded information placed before it by members, or by the holder of a public office, in terms of this rule; and
    - (v) must include in its report any recommendations, including the reasons for such recommendations, as well as any minority view of any panellist.
- (2) The panel may determine its own working arrangements strictly within the parameters of the procedures provided for in this rule.

#### **129Y. Quorum**

The panel may proceed with its business when the chairperson and one other panellist is present.

## **129Z. Consideration of panel recommendations**

- (1) Once the panel has made its recommendations the Speaker must schedule the recommendations for consideration by the Assembly, with due urgency, given the programme of the Assembly.
- (2) In the event the Assembly resolves that a section 194 enquiry be proceeded with, the matter must be referred to a committee for a formal enquiry.
- (3) The Speaker must inform the President of any action or decision emanating from the recommendations.

## **Committee for section 194 Enquiry**

### **129AA. Establishment**

There is a committee to consider motions initiated in terms of section 194 and referred to it.

### **129AB. Composition and Appointment**

- (1) The committee consists of the number of Assembly members that the Speaker may determine, subject to the provisions of Rule 154.
- (2) Notwithstanding Rule 155(2), the members of the committee must be appointed as and when necessary.

### **129AC. Chairperson**

The committee must elect one of its members as chairperson.

### **129AD. Functions and powers of the committee**

- (1) The committee must, when the Assembly has approved the recommendations of the independent panel in terms of Rule 129Z proceed to conduct an enquiry and establish the veracity of the charges and report to the Assembly thereon.
- (2) The committee must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe.
- (3) The committee must afford the holder of a public office the right to be heard in his or her own defence and to be assisted by a legal practitioner or other expert of his or her choice[, provided that the legal practitioner or other expert may not participate in the committee].
- (4) For the purposes of performing its functions, the committee has all the powers applicable to parliamentary committees as provided for in the Constitution, applicable law and these rules.

### **129AE. Decisions**

A question before the committee is decided when a quorum in terms of Rule 162(2) is present and there is agreement among the majority of the members present, provided that, when the committee reports, all views, including minority views, expressed in the committee must be included in its report.

### **129AF. Report to the National Assembly**

- (1) The report of the committee must contain findings and recommendations including the reasons for such findings and recommendations.
  - (2) The report must be scheduled for consideration and debate by the Assembly, with due urgency, given the programme of the Assembly.
  - (3) If the report recommends that the holder of a public office be removed from office, the question must be put to the Assembly directly for a vote in terms of the rules, and if the required majority of the members supports the question, the Assembly must convey the decision to the President.”
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