NATIONAL ASSEMBLY COMMITTEE
FOR SECTION 194 ENQUIRY

Draft Report in respect of the Committee's s 194 Enquiry into the removal of Adv Busisiwe Mkhwebane from the Office of Public Protector

[As adopted by the Committee on 11 August 2023]

ABBREVIATIONS

(i) General

Abbreviation	Definition
AA	Answering Affidavit
ACOO	Acting Chief Operations Officer
AFU	Asset Forfeiture Unit
A-G or AGSA	The Auditor-General of South Africa
AJSD	Administrative Justice and Service Delivery
April 2017 Vrede Draft	Revised draft of the Vrede Report prepared by Adv Cilliers in April 2017
Bankorp	Bankorp Ltd, acquired by ABSA Bank on 1 April 1992
BUSA	Business Unity South Africa
the beneficiaries	The Free State residents who were to benefit from the Vrede Dairy Project
CASAC	The Council for the Advancement of the South African Constitution
the CASAC application	Application brought by CASAC on 23 February 2018 to review and set aside the Vrede Report
CC	Constitutional Court
CEO	Chief Executive Officer
Chapter 9 Institutions	The State Institutions Supporting Constitutional Democracy as listed in Chapter 9 of the Constitution, and which includes the Public Protector
Charge	When used in the context of these proceedings in terms of s 194 of the Constitution: one of the grounds for averring the removal from office of the holder of a public office (see Rule 129R (2) of the NA Rules)
CI	Chief Investigator
CFO	Chief Financial Officer
CIEX	An outfit described in the Lifeboat Report as '*a covert UK based asset recovery agency headed by Mr Michael Oatley*'
CIEX Report	The report prepared by CIEX for the South African Government which is the subject matter of the Lifeboat report and central to the complaint lodged
Committee	The National Assembly Committee for s 194 Enquiry to consider motions in terms of s 194 of the Constitution
EEA Code	The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace
the Vrede Complainant	Dr Roy Jankielsohn, a DA member of the Free State Provincial Legislature who lodged complaints in respect of the Vrede Dairy Project

Abbreviation	Definition
the Vrede complaints	The three complaints lodged by Dr Roy Jankielsohn on 12 September 2013, 28 March 2014 and 10 May 2016, respectively
The Consolidated Review	A consolidated challenge to the Lifeboat Report brought by the Minister of Finance, the National Treasury, ABSA and the SARB
ANC	African National Congress
CRC	Parliament's Joint Constitutional Review Committee
CR17	Cyril Ramaphosa 2017 campaign for the position of President of the ANC ahead of the ANC's 2017 national elective conference
CRF	Cyril Ramaphosa Foundation
DA	Democratic Alliance
the DA application	Application brought by the DA on 20 February 2018
DAFF	Department of Agriculture, Forestry and Fisheries
Dashboard meeting	PPSA meetings held mainly between Adv Mkhwebane and the EM's
DSO	Directorate of Special Operations
EFF	Economic Freedom Fighters
EM	Executive Manager at the PPSA
Estina	Estina (Pty) Ltd
Enquiry	The enquiry by the NA to remove Adv Mkhwebane from the office of Public Protector in terms of s 194 of the Constitution
EO	Executive Officer
FA	Founding Affidavit
FIC	Financial Intelligence Centre
FS	Free State
FS Department	The Free State Department of Agriculture and Rural Development
FSCA	Financial Sector Conduct Authority
FSCA Report	The Public Protector's Report 46 of 2018/19 dated 28 March 2019 relating to allegations of maladministration, abuse of power and improper conduct by the former Executive Officer of the erstwhile Financial Services Board now referred to as the Financial Sector Conduct Authority
FSDC	Free State Development Corporation
GEMS	Government Employees Medical Scheme
GGI	The Good Governance and Integrity Unit, a branch within the PPSA
GuptaLeaks	A collection of hundreds of thousands of emails made public in mid-2017 revealing the Gupta family's seemingly corrupt business dealings with the state and politicians including dealings related to the Vrede Dairy Project.
the Hawks	Directorate for Priority Crime Investigation
HC	High Court

Abbreviation	Definition
HRIU	High Risk Investigations Unit
IASA	Institute for Accountability in Southern Africa
IGI	Inspector-General of Intelligence
IGI Report	A classified 2014 Report prepared by Faith Radebe, the then IGI
IPID	The Independent Police Investigative Directorate
Independent Panel / IP	The Independent Panel appointed by the Speaker to assess the Motion in accordance with NA Rules 129S –129U
IP Report	Report prepared by the Independent Panel dated 24 February 2021
the Justice PC	Parliament's Portfolio Committee on Justice and Correctional Services
July 2017 Draft	Further revised draft of the Vrede Report prepared by Adv Cilliers in July 2017
the Lifeboat Report	Adv Mkhwebane's final report in respect of IASA's complaint
Member(s)	A member or members of the Committee
MISS	Minimum Information Security Standards
NDPP	National Director of Public Prosecutions
Mohoma Mobung	The alleged '*Agri-BEE entity*', Mohoma Mobung Dairy Project (Pty) Ltd
Motion	The substantive motion dated 21 February 2020 to initiate an enquiry in terms of s 194(1) of the Constitution to remove Adv Mkhwebane from the office of Public Protector on grounds of misconduct and/or incompetence.
NA	The National Assembly
NA Rules	The Rules of the National Assembly, including the rules for the Removal of Office-Bearers in Institutions supporting Constitutional Democracy
NIA	National Intelligence Agency
the Nov 2014 draft report	the draft Vrede report include in the Vrede Rule- 53 record
NPA	National Prosecuting Authority
NRF	National Revenue Fund
NRG	National Research Group- a unit at SARS
NT	National Treasury
NT Report	National Treasury Report compiled after the NT during October 2013 commenced investigating the FS Department's contracts with Estina and this report was finalised around January 2014
OUTA	Organisation Undoing Tax Abuse
OUTA Report	Report prepared by OUTA in 2017 on the GuptaLeaks
Parliamentary Code	The Code of Ethical Conduct and Disclosure of Members' Interests for the National Assembly and Permanent Council Members

Abbreviation	Definition
PII	Provincial Investigations and Integration Unit of the PPSA
PP	Public Protector
PPSA	The Office of the Public Protector of South Africa
Rule-53 record	Refers to the record an organ of state must produce in respect of its decision-making process where such decision is challenged under Rule-53 of the Uniform Rules of Court (i.e., the rules that govern litigation in the superior courts)
the Samuel Draft	A revised draft of the Vrede Report prepared by Mr Samuel
S 7(9)	Refers to section 7(9) of the PPA which requires the Public Protector to give notice to any person, who during the course of an investigation, appears to be implicated therein to their detriment and to afford that person an opportunity to respond in connection therewith in any manner that may be expedient under the circumstances
SAPS	South African Police Service
SARB	South African Reserve Bank
SARB Provisional Report	Provisional report released by Adv Mkhwebane on 20 December 2016, titled '*Alleged failure by Government to recover funds borrowed to ABSA*'
SCA	The Supreme Court of Appeal
Secretary	The Secretary to Parliament
SIU	Special Investigations Unit
Speaker	The Speaker of the National Assembly
SPU	Special Projects Unit of SARS
SSA	State Security Agency
SSA SOB	State Security Agency Special Operations Branch
Think Tank	An internal grouping within the PPSA to discuss investigations and draft reports
Vrede Final Report	The PPSA undertook an investigation into the Vrede Project that spanned almost four and a half years and resulted in the production of a final report on 8 February 2018. (Report, No. 31 of 20187/2018 titled ''*Allegations* of *maladministration against the Free State Department of Agriculture – Vrede Integrated Dairy Project'* dated 8 February 2018)
Vrede Further Report (Vrede 2 Report)	The PPSA undertook a new investigation and released a further report on the Vrede Project on 21 December 2020
Vrede HC AA	Answering affidavit of Adv Mkhwebane in the Vrede HC
Vrede Project	The Vrede Dairy Project
Vrede Provisional Report	The November 2014 Vrede provisional report
Zondo Commission	Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State; August 2018 headed by Judge R Zondo

Abbreviation	Definition
Absa v PP	**Absa Bank Limited v Public Protector** [2018] 2 All SA 1 (GP)
Baloyi HC record	**Louisah Basani Baloyi v Public Protector and Others**, case no. 84053/19 in the Gauteng Division of the High Court, in Pretoria
Baloyi CC judgment	Judgment of the CC in **Louisah Basani Baloyi v Public Protector and Others** (CCT03/20) granted on 4 December 2020
CR17 HC	**President of the RSA and Another v PP and Others** (10 March 2020) GNP CR17
CR17 CC	**PP v President of RSA and others [2021] ZACC 19**
FSCA HC Judgment	**Financial Sector Authority and Another v Public Protector**, case no. 39589/19 (Gauteng Division, Pretoria)
GEMS SCA	**Government Employees Medical Scheme and Others v The Public Protector of the Republic of South Africa and Others** (1000/2019 and 31514/2018) ZASCA 111 (29 September 2020)
Nkandla judgment	**Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others** [2016] ZACC 11(CC)
PP v SARB	**Public Protector v South African Reserve Bank** 2019 (6) SA 253 (CC)
SARB v PP	**South African Reserve Bank v Public Protector** 2017 (6) SA 198 (GP)
SARS Subpoena HC	**Commissioner of the South African Revenue Service v Public Protector and Others** [2020] ZAGPPHC 33; 2020(4) SA 133 (GP) delivered on 23 March 2020
SARS Subpoena CC	**Public Protector v SARS** 2022 (1) SA 340 (CC)
SARS Unit HC Full Court	**Gordhan v Public Protector** (48521/19) [2020] ZAGPPHC 743 (7 December 2020)
Vrede Costs	**Democratic Alliance v Public Protector and a related matter** [2019] 4 All SA 79 (GP)
Vrede Merits	**Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector** (11311/2018; 13394/2018) [2019] 3 All SA 127 (GP); 2019 (7) BCLR 882 (GP) (20 May 2019)

(ii) Legislation

Abbreviation	Definition
Companies Act	Companies Act 71 of 2008
Constitution	The Constitution of the Republic of South Africa, 1996
Corrupt Activities Act	Prevention and Combating of Corrupt Activities Act 12 of 2004
EEA	Employment Equity Act 55 of 1998
EMEA	The Executive Members' Ethics Act 82 of 1998
Intelligence Oversight Act	Intelligence Oversight Act 40 of 1994
NSI Act	National Strategic Intelligence Act 39 of 1994
PAA	Public Audit Act 25 of 2004
PPA	The Public Protector Act 23 of 1994
PEPUDA	The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
POCA	The Prevention of Organised Crime Act 121 of 1998
PFMA	Public Finance Management Act 1 of 1999
PRECCA	The Prevention and Combating of Corrupt Activities Act 12 of 2004
Protected Disclosures Act	Protected Disclosures Act 26 of 2000
ROICA	Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002
SAPS Act	South African Police Service Act 68 of 1995
the SARB Act	South African Reserve Bank Act 90 of 1989
TAA	Tax Administration Act 28 of 2011

(iii) Persons mentioned in this Report

Name	Designation
Adv Cilliers	Adv Erika Cilliers, former Senior Investigator in the Free State Provincial Office of the PPSA
Adv Govender	Adv Jayashree Govender, Legal Advisor in the Office of the IGI
Adv Madonsela	Adv Thulisile Madonsela, Public Protector from 19 October 2009 to 14 October 2016

Name	Designation
Adv Mkhwebane	Adv Busisiwe Mkhwebane, appointed as the Public Protector from 15 October 2016 to date
Adv Mpofu SC	Adv Dali Mpofu, SC, legal representative of Adv Mkhwebane for purposes of the Enquiry
Adv Raedani	Adv Nditsheni Raedani, former Senior Investigator at the PPSA
Adv Sikhakhane, SC	Adv Muzi Sikhakhane, SC, tasked by SARS with drafting an Investigation Report into conduct of Mr Van Loggerenberg assisted by Adv Rajab - Budlender and Adv Ramano
Judge Kroon	Judge Frank Kroon, former chairperson of the SARS Advisory Board
Judge Potterill	Judge Sulet Potterill of the Gauteng High Court
Minister Gordhan	Mr Pravin Jamnadas Gordhan, member of the ANC and NA. Former Commissioner of SARS (November 1999 until May 2009); Former Minister of Finance (December 2015 to March 2017) and current Minister of Public Enterprises (February 2018 to date)
Mr Kekana	Mr Tebogo Kholofelo Kekana, former Senior Investigator at the PPSA
Mr Lebelo	Mr Luther Lebelo, Chief of Staff in the PPSA
Mr Magashule	Mr Elias Sekgobelo 'Ace' Magashule, former Premier of the Free State
Mr Malema	Mr Julius Malema, Commander in Chief of the EFF and member of the NA
Mr Manyike	Mr Keletso Manyike, former SARS employee
Ms Mogaladi	Ms Ponatshego Mogaladi, the PPSA's Executive Manager: Investigations
Mr Moyane	Mr Tom Moyane, former SARS Commissioner (September 2014 until suspended on 19 March 2018 and dismissed on 1 November 2018)
Mr Ndou	Mr Lufuno Reginald Ndou, former Executive Manager: Provincial Investigations and Integration at the PPSA
Mr Nemasisi	Mr Ntsumbedzeni Nemasisi: the PPSA's former Senior Manager: Legal Services
Mr Paul Ngobeni	Service provider who provided legal advice to Adv Mkhwebane on various matters
Mr Nyembe	Mr Sibusiso Nyembe, former special adviser of Adv Mkhwebane

Name	Designation
Mr Peega	Mr Mike Peega, former SARS employee
Mr Pillay	Mr Ivan Pillay, former SARS Deputy Commissioner
Mr Prasad	Estina's project manager in respect of Vrede
Mr Ravele	Mr Gene Ravele, former head of the SARS High Risk Investigative Unit
Mr Samuel	Mr Sphelo Hamilton Samuel, the PPSA's Provincial Representative for the Free State during the Vrede investigation
Mr Seanego	Mr Theo Seaneo of Seanego Inc. a firm of attorneys on the panel of PPSA attorneys and Adv Mkhwebane's attorneys of record in the Enquiry until 31 March 2023
Mr Shivambu	Mr Floyd Shivambu, Deputy President of the EFF and a member of the NA
Mr Thabethe	Mr Peter Thabethe, former Head of the Free State Department of Agriculture and Rural Development
Mr Tshiwalule	Mr Livhuwani Tshiwalule, former PPSA investigator working in the private office of the Public Protector (from 2014 until 31 December 2016)
Mr Tyelela	Mr Gumbi Tyelela, the PPSA's Acting Head: Corporate Services
Mr Van Loggerenberg	Mr Johann van Loggerenberg, former SARS employee
Mr Vasram	Mr Kamal Vasram, Director of Estina
Mr Zwane	Mr Mosebenzi Zwane, former Member of the Free State Executive Council for Agriculture, later national Minister of Mineral Resources
Ms Zulu-Sokoni	Ms Caroline Zulu-Sokoni, the Public Protector of the Republic of Zambia
Ms Dlamini	Ms Seipati Dlamini, former CFO of the Free State Department of Agriculture and Rural Development

A. BACKGROUND AND FRAMEWORK

(i) Overview

1. Section 181(1) of the Constitution establishes the Public Protector as one of the state institutions strengthening constitutional democracy in the Republic ('**Chapter 9 Institutions**').

2. In terms of s 181(2) to (5) of the Constitution, Chapter 9 Institutions are governed by the following principles:

   2.1. Independence subject only to the Constitution and the law;

   2.2. Impartiality and the exercise of their powers and performance of their functions without fear, favour or prejudice;

   2.3. Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness; and

   2.4. No person or organ of state may interfere with the functioning of these institutions.

3. Chapter 9 Institutions are accountable to the National Assembly ('**NA**') and must report on their activities and the performance of their functions at least once a year.

4. Section 194 of the Constitution regulates, *inter alia*, the removal of the Public Protector from office. It reads:

> '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.'

5. The Committee for s 194 Enquiry ('**the Committee**') is the '*committee of the National Assembly*' contemplated in s 194(1)(b) of the Constitution. It has prepared this draft report, which sets out the findings required by s 194(1)(b).[1]

6. The Committee unanimously elected Mr Qubudile Richard Dyantyi, MP as Chairperson ('**Chairperson**'). His chairmanship was upheld by the majority on two further occasions when the Committee dealt with recusal applications brought against him by Adv Mkhwebane.

7. The Committee exercises a constitutional function to conduct an enquiry to make a finding on misconduct and incompetence as alleged against Adv Mkhwebane and to report to the NA thereon. This entails a fact-finding exercise to establish the veracity of the charges contained in the Motion and whether those facts establish '*misconduct*' or '*incompetence*' as defined. The Committee must also discharge its function with reference to its constitutional purpose - providing the NA with sufficient information to determine whether the grounds as alleged have been established. It must comply with s 237 in ensuring that its constitutional obligations are performed diligently and without delay.

(ii) The initiation of the s 194 enquiry

8. A s 194 enquiry is initiated by way of a substantive motion from a member of the NA and '*must be limited to a clearly formulated and substantiated charge*' which *prima facie* shows that the holder of office committed misconduct, is incompetent or incapacitated. The charge must relate to an action performed or conduct ascribed to the holder of a public office in person and all evidence relied upon must be attached to the Motion.[2]

9. On 21 February 2020, Natasha Mazzone, MP – the Chief Whip of the Democratic Alliance ('**DA**') – submitted a motion, in terms of NA Rule 129R(1)(a)–(b), initiating a s 194 enquiry to determine whether Adv Mkhwebane is incompetent and/or has misconducted herself ('**the Motion**'). The Motion sets out various grounds of misconduct and incompetence and is accompanied by evidence in the form of judgments, affidavits and court records.[3]

[1] See Democratic Alliance and Another v Public Protector of South Africa and Others [2023] ZACC 25 (13 July 2023) at paras 147 – 149.
[2] NA Rule 129R(1)(a) and (c).
[3] A copy of the Motion is available on the Committee webpage at https://www.parliament.gov.za/storage/app/media/Links/2022/5-may/12-05-2022/Motion_Initiating_Enquiry_21_February_2020.pdf

10. The Motion contains four main charges. Charge 1 alleges misconduct in respect of a report involving the South African Reserve Bank ('**the SARB**') and ABSA Bank; charge 2 alleges misconduct in respect of the investigation and reporting of the Vrede Dairy Project ('**Vrede Project**'); charge 3 alleges incompetence in respect of both of those investigations, as well as a report in respect of the former Financial Services Board. Charge 4 is less straightforward:

    10.1. The first sub-charge (para 10) alleges misconduct in relation to the alleged intimidation, harassment and/or victimisation of staff at the office of the Public Protector South Africa ('**PPSA**')

    10.2. The second sub-charge (para 11) alleges misconduct and/or incompetence and contains four sub-charges relating broadly to *(i)* the management of internal capacity and resources in the PPSA; *(ii)* the prevention of fruitless and wasteful and/or unauthorised expenditure in legal costs; *(iii)* failure to conduct investigations independently and impartially and/or *(iv)* deliberately avoiding making findings against or directing remedial action against certain public officials while deliberately reaching conclusions of unlawful conduct and imposing far-reaching remedial action in respect of other officials.

11. The Speaker determined that the Motion was in order and referred it '*to an independent panel appointed by the Speaker for a preliminary assessment of the matter*'.[4]

12. The Independent Panel ('**IP**') comprised of retired Justice Nkabinde, Adv Ntsebeza SC and Adv De Waal SC, who were appointed following an invitation by the Speaker to political parties to nominate candidates to serve on the IP. The IP's function was to conduct and finalise a preliminary assessment of the Motion to determine whether there was *prima facie* evidence showing that Adv Mkhwebane had committed misconduct and/or was incompetent as alleged.[5] Its findings and recommendations were limited as it conducted a desktop exercise limited to the written evidence put before it by the member (as amplified) and submissions from Adv Mkhwebane. It held no oral hearings, nor conducted any independent investigation.

13. It submitted its report to the Speaker on 24 February 2021 ('**the IP Report**'), after providing Adv Mkhwebane with an opportunity to respond in writing to the allegations and allowing for the amplification of information before it.[6]

---

[4] NA Rule 129T(a).
[5] NA Rule 129X(1)(b).
[6] A copy of the IP Report can be accessed on the Committee webpage at https://www.parliament.gov.za/report-independent-panel-public-protector.

14. The IP Report concluded that there was *prima facie* evidence of:

    14.1. Incompetence in respect of the SARB; Vrede Dairy, CR17; GEMS; SARS Unit and Tshidi matters;[7] and

    14.2. Misconduct in respect of the SARB; Vrede Dairy, CR17; GEMS, the SARS Unit and Tshidi matters.[8]

15. Whilst the IP found that there was *prima facie* evidence of misconduct and incompetence, it did not make findings of *prima facie* evidence in respect of every sub-charge. It found *no prima facie* evidence in support of para 10 of Charge 4.

16. On 16 March 2021 the NA considered the recommendations of the IP and agreed to conduct an enquiry into Adv Mkhwebane's fitness to hold office on the grounds specified in the Motion ('**Enquiry**'). Accordingly, on 21 June 2021 the NA referred the Motion to the Committee.

(iii) The scope of the Enquiry

17. Adv Mkhwebane argues that the Committee was legally obliged to only consider those grounds of misconduct or incompetence in respect of which the IP concluded there was a *prima facie* case to answer.[9]

18. The Committee, acting on legal advice, rejected this argument given the distinct purposes and functions of the IP, on the one hand, and the Committee, on the other.

19. The Committee's function is to consider motions referred to it in order to determine the veracity of the charges alleged.[10] Its functions are not circumscribed or limited by the IP's recommendations, nor is it constrained to consider only the IP's report. It was the Motion in its entirety referred to the Committee by the NA.

[7] The IP found *prima facie* evidence of incompetence in respect of Charges 7.1.1, 7.1.2, 7.1.7, 7.2.1, 7.3.1, 11.4,11.3, 11.1 and 11.2 of the Motion

[8] The IP found *prima facie* evidence of misconduct in respect of Charges 1.1, 1.2.1.2, 1.1.5, 4.1, 4.3, 4.4, 4.2, 11.3 and 11.

[9] Part A of Adv Mkhwebane's Sworn Statement to the Committee dated 14 March 2023 ('**Part A Statement**') at paras 43 – 44; and Part B of Adv Mkhwebane's Statement to the Committee dated 27 March 2023 ('**Part B Statement**') at paras 17– 18. It was also raised during the opening statement on 11 July 2022 and it was subsequently raised in the first recusal application for the Chairperson.

[10] NA Rule 129AD.

20. By contrast, the IP's function was not to make findings of fact. Its processes were circumscribed. Its function can be described as determining whether the Motion was sufficiently well-supported to warrant a s 194 enquiry and to assist the NA to weed out frivolous, vexatious or unsubstantiated attempts to remove Chapter 9 office-bearers.[11]

21. The Constitutional Court ('**CC**') found that the IP does not exercise any final decision-making function and that such power rests with the NA. Thus –

> "The independent panel makes preliminary assessments and submits a report to the National Assembly, but the panel has no powers other than to submit a report. The National Assembly is at liberty to follow or ignore the independent panel's recommendations."[12] [emphasis added].

22. The IP Report also emphasised that:

> "It needs to be stressed from the outset that the Panel is not tasked to conduct a section 194 inquiry for the removal from office of the PP. The task, if it is so resolved, is for a committee of the NA."[13]

23. To allow the Enquiry to be narrowed would be to unlawfully diminish the constitutional power of the Committee and in effect delegate it to another body.[14] Accordingly, the Committee has considered and made findings on all the Charges in the Motion as it is constitutionally obliged to.

(iv) Legal framework: the Enquiry and the Committee's proceedings

(a) Rules of the National Assembly

24. On 3 December 2019, the NA adopted rules setting out the process for the removal of office bearers in Chapter 9 Institutions ('**Removal Rules**').

25. NA Rule 129AD sets out the powers and functions of the Committee and provides that the Committee:

25.1. must conduct an enquiry and establish the veracity of the charges and report to the NA;

[11] Speaker of the National Assembly v Public Protector and Others 2022 (3) SA 1 (CC) ('Speaker v PP') at para 84.
[12] **Speaker v PP** at para 74. See also paras 61 – 62.
[13] Para 5 of the IP Report.
[14] See Justice Alliance of South Africa v President of the Republic of South Africa and Others 2011 (5) SA 388 (CC) at paras 50 – 69.

25.2. must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe;

25.3. must afford the holder of the 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; and

25.4. has all the powers applicable to Parliamentary committees as provided for in the Constitution, applicable law and the Assembly Rules.

26. In terms of NA Rule 129AF:

26.1. the Committee must report its findings and recommendations, including the reasons for such findings and recommendations, to the NA for consideration and debate;

26.2. the NA must schedule the debate with due urgency, given its programme; and

26.3. if the report recommends removal, the question must be put to the NA directly for a vote and, if the question is supported by a 2/3 majority, the NA must convey the decision to the President.

(b) Terms of Reference

27. On 22 February 2022, the Committee adopted terms of reference setting out, *inter alia*, the background to its task; the format for proceedings, including the way in which it will receive evidence from witnesses; the appointment of an evidence leader and resources that will be availed to the Committee ('**TOR**').

28. The TOR emphasised that the process is inquisitorial in nature and the role of the evidence leader is to empower the Committee to perform its functions by presenting evidence and putting questions to Adv Mkhwebane and witnesses. The evidence leaders do not play a prosecutorial role and their involvement did not impede or limit the right of members to put questions to Adv Mkhwebane or any witness.

29. The TOR elaborated on the right of an office holder to be heard in their defence by providing that Adv Mkhwebane would be afforded the right to make opening and closing arguments; cross-examine witnesses; raise any matter related to the process, subject to the reasonable timeframes as imposed by the Chairperson; and be provided an opportunity to comment on the Committee's draft report before it adopts and tables same in the NA. Pursuant to the adoption of the TOR the Secretary

to Parliament procured the services of Adv Nazreen Bawa SC and Adv Ncumisa Mayosi of the Cape Bar to act as evidence leaders.

(c) Directives issued by the Chairperson

30. NA Rule 183 provides that '*any person, including counsel and attorneys, appearing before a committee must observe the directives and conform to the procedures determined by the chairperson of the Committee*'.

31. Given that the Enquiry was novel and that the Removal Rules are silent on the procedure to be followed in respect of the conduct of the hearings itself, the Chairperson invoked NA Rule 183 to set out directives in respect thereof. This was especially necessary given that the CC provided that a Chapter 9 Institution office bearer be fully represented and envisaged a process which may entail oral submissions, the calling of witnesses and cross examination by legal representatives.[15] Whilst Members of Parliament routinely conduct oversight, such oversight function does not ordinarily entail the involvement of legal representatives within the context of a structured enquiry.

32. On 14 July 2022, the Chairperson, after the evidence leaders collaborated with Adv Mkhwebane's legal representatives in respect thereof, issued written directives regulating the proceedings ('**the Initial Directives**'). It contemplated that the Chairperson may amend the Initial Directives from time to time and condone non-compliance with the Initial Directives. This was necessary, given that the process was novel, to cater for exigencies, not contemplated, that may arise. It bears noting that at inception Adv Mkhwebane requested and objected to the Initial Directives in its entirety, even though the evidence leaders had sought to have them crafted on a collaborative basis given that the process was novel.

33. Pursuant to the CC indicating that a legal representative cannot give evidence on behalf of a Chapter 9 Institution office bearer, and that said office bearer can be asked questions, even if not giving evidence at the time,[16] clause 5.9 of the Initial Directives sought to regulate the putting of questions to Adv Mkhwebane. It provided that she must immediately respond to questions posed orally or in writing even if she was not giving evidence at the time, unless she requested a reasonable amount of time in which to submit a response, which time would be determined by the Chairperson.

34. Clause 5.9 of the Initial Directives was invoked by members early in the hearings following the testimony of Mr Johann Van Loggerenberg. Adv Mkhwebane was sworn in for purposes of

[15] **Speaker v PP** at para 47.
[16] **Speaker v PP** at para 45.

answering questions related to Mr Van Loggerenberg's testimony but only answered one question after which she requested, on the advice of her legal representative, that all other questions be responded to in writing at a later date. She duly complied with the timeframe set for this purpose and provided written answers, but objected to the procedure on the basis that it is '*unheard*' of for a charged person to be made to answer questions under oath prior to all evidence against them having been led in full. This led to discussions in the Committee after which the Initial Directives were amended on 28 July 2022 ('**The Amended Directives of 28 July 2022**'). The Amended Directives of 28 July 2022 replaced the Initial Directives, which remain unchanged except in respect of clause 5.9 which was amended to provide that Adv Mkhwebane would only be expected to answer questions in respect of matters on which she would reasonably be assumed to have immediate and direct knowledge and all other questions were to be held over to when she gave evidence.

35. On 27 March 2023, clause 5.9 was amended again just prior to Adv Mkhwebane commencing her oral testimony ('**Addendum 1**'), this time for purposes of specifying that Adv Mkhwebane would be expected to orally answer all questions posed to her during her testimony, fully and satisfactorily and therefore no written and/or deferred responses would be permitted.

36. In June 2023, after the Enquiry faced numerous obstacles which impeded the conclusion of its work, the Chairperson recognised the need to revise the further order of proceedings, noting that it did not make sense to cling to directives which could, for reasons beyond the control of the Committee, not be followed fully and would have the unintended consequence of preventing the Committee from completing its work. At this stage, Adv Mkhwebane had completed oral evidence over a period of 6 days in respect of her Part A Statement. Oral evidence in respect of her Part B Statement had not commenced by the time hearings adjourned, due to issues related to legal fees, on 31 March 2023.

37. In a Committee meeting on 9 June 2023, more than 6 weeks after its last hearing date, the Chairperson proposed an alternative way forward in terms of which the remainder of the process would largely be dealt with in writing to allow for the process to be completed. The proposal was agreed to by the Committee and the Chairperson subsequently issued revised directives in the form of an '*Addendum 2 to the Amended Directives of 28 July 2023*' ('**Addendum 2**') on 15 June 2023. Adv Mkhwebane has maintained that the procedure as set out in Addendum 2 is unlawful and she could not comply therewith as she is not legally represented. Notwithstanding same, the Committee implemented the procedure for the reasons set out from para 127 below.

38. Pursuant to Addendum 2, Adv Mkhwebane:

38.1. was provided with an opportunity to submit any additional statements or evidence *(a)* in respect of her Part B Statement which had not been included in her oral evidence and *(b)* on presentations made by the evidence leaders to the Committee in respect of litigation covered in her Part A Statement to the extent she had not already addressed same. (Adv Mkhwebane did not submit any additional statement or evidence).

38.2. was provided with questions from members and evidence leaders in written form and could elect to answer them either orally or in writing.[17] (Written questions were duly provided but Adv Mkhwebane made no election as to how she would respond and provided no responses thereto);

38.3. was provided an opportunity to make a closing argument in writing or orally or a combination of both, either herself or via her legal representative, either live or recorded if availability on dates was an issue. (Adv Mkhwebane did not indicate any preference and did not make or submit a closing argument); and

38.4. is provided an opportunity to submit written comments on the Committee's draft report, for consideration by the Committee before adoption of the final report.

39. In addition, the evidence leaders were required to submit a summation of evidence for purposes of providing the Committee with a summary of all relevant evidence presented and facts established in relation to each charge. It was envisaged that such summations would include closing argument. In the absence of the latter, lengthy summations were provided aiming to capture all relevant evidence. The summation was intended to be an aid.

(d) <u>Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004</u>

40. In accordance with NA Rule 129AD (5) the Committee has all the powers bestowed on other committees of the NA. This includes any powers conferred by the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ('**the Powers Act**').

41. The Committee invoked s 14 of the Powers Act to summons three witnesses – Messrs Tebogo Kekana and Rodney Mataboge and Ms Bianca Mvuyana.

[17] Members and evidence leaders questions are available on the Committee webpage at https://www.parliament.gov.za/committee-section-194-enquiry

42. All witnesses who appeared before the Committee agreed to take an oath or affirmation before providing evidence. All witnesses were also made aware of their right to privilege, and the limitations thereto as provided for in NA Rule 168 read together with s 16 of the Powers Act.

(v) Grounds of removal

43. Section 194(1)(a) of the Constitution provides that the Public Protector – like other Chapter 9 Institution office-bearers – may only be removed on the ground of misconduct, incapacity or incompetence.

44. In comparison with s 177(1)(a) of the Constitution a judge may only be removed from office if there has been a determination that the judge '*suffers from an incapacity, is grossly incompetent or is guilty of* gross *misconduct.*' [Emphasis added.]

45. Unlike a judge, there is no requirement of '*gross*' in respect of a Chapter 9 Institution office-bearer. Such an office-bearer may therefore be removed even where only '*ordinary'* incompetence or misconduct is proved. To justify removal, it is sufficient that only one of the removal grounds be established.

46. The Constitution does not define misconduct or incompetence. However, those concepts have been defined in the Removal Rules and applied by the Committee.

47. The Rules define '*misconduct*' as –

> 'the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office'.

48. The Rules define '*incompetence*' as including –

> '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.'

49. These definitions have been understood purposively and with regard to the entrenched independence of Chapter 9 Institutions and the vital role they play in ensuring state accountability. Notwithstanding that the Constitution imposes a lower standard for removing a Chapter 9 Institution

office-bearer than it does for removing a judge, the Committee's view is that the threshold for removal is high. Findings of incompetence and misconduct have not lightly been accepted as having been established.

50. For example, the Supreme Court of Appeal ('**SCA**') recently considered a finding of misconduct against a Judge of the High Court (**'HC'**).[18] The majority noted that '*[w]hat is demanded of [judges] is something far above what is demanded of their fellow citizens*'. However, '*[w]hile the highest standards are expected of a judge, failure to meet those standards will not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function.*' The ultimate question for the SCA was '*whether the conduct encountered here is of such a kind as to render the [judge in question] incapable of performing the duties of his office.*'[19]

51. The Constitution itself imposes a lower standard for removing a Chapter 9 office-bearer than it does for removing a judge (by requiring only '*gross*' incompetence or misconduct for the latter). However, just as judicial independence is important, so too is the independence of Chapter 9 office-bearers. Accordingly, the Committee's view is that '*misconduct*' and '*incompetence*' should be understood as conduct that destroys confidence in the individual's ability to discharge the duties and functions of the particular constitutional office.

52. The definitions must further be understood in the context of what is to be expected from Adv Mkhwebane in the performance of her functions and exercise of her powers.

53. Section 182 of the Constitution sets out the Public Protector's functions.[20] It reads:

> '(1) The Public Protector has the power, as regulated by national legislation –
>
> (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
>
> (b) to report on that conduct; and
>
> (c) to take appropriate remedial action.

[18] Freedom Under Law v Judicial Service Commission and Another [2023] ZASCA 103 (22 June 2023) ('FUL v JSC').
[19] **FUL v JSC** at para 1.
[20] Part A Statement at para 80.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential."

54. The Public Protector Act, 1994 ('**PPA**') makes further provision for the Public Protector's powers and obligations.

55. Adv Mkhwebane's Part A Statement sets out various '*additional key mandate areas*', comprising maladministration, anti-corruption, the Executive Members' Ethics Act 82 of 1998 ('**EMEA**'), whistle-blowers, the Housing Consumers Protection Measures Act 95 of 1998, access-to-information disputes and oversight '*over 1000 organs of state and government agencies operating on all three spheres of government, as well as public institutions and bodies performing a public function.*'[21] In addition, she has powers under, the Prevention and Combating of Corrupt Activities Act 12 of 2004 (**'PRECCA').**

56. Section 193 of the Constitution deals with the appointment of Chapter 9 office-bearers. Subsection (1) reads:

'193(1) The Public Protector and the members of any Commission established by this Chapter must be women or men who –

(a) are South African citizens;

(b) are fit and proper persons to hold the particular office; and

(c) comply with any other requirements prescribed by national legislation.'

57. The notion of what would render an individual '*fit and proper*' to be Public Protector – considerations that would be relevant to whether such an individual is *unfit* to hold office – was traversed in the evidence of Mr Hassen Ebrahim and Ms Caroline Zulu-Sokoni, called by the evidence leaders and Adv Mkhwebane respectively as expert witnesses.

[21] Part A Statement at para 81.

58. Mr Ebrahim is a qualified attorney with decades of international experience in the constitution-making processes (including negotiating the South African Constitution and working as the CEO of the Constitutional Assembly).[22]

59. After canvassing the Constitution, statutes and case law, Mr Ebrahim proposed 47 standards of conduct that a Public Protector must adhere to,[23] in the discharge of their official obligations. He proposed that a Public Protector is legally obliged to:

59.1. respect the supremacy of the Constitution and the rule of law;

59.2. strengthen constitutional democracy;

59.3. focus on ensuring the discharge of public functions that is accountable, responsive and open;

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

59.5. be independent and impartial, and perform functions without fear, favour or prejudice;

59.6. be dignified and effective;

59.7. be dedicated and conscientious;

59.8. discharge her functions diligently and without delay;

59.9. exercise only those powers that are conferred by law;

59.10. not assume the powers or functions of any other public functionary or encroach on its integrity;

59.11. adhere to a high standard of professional ethics;

59.12. ensure the efficient, economic and effective use of resources;

59.13. ensure that services are provided fairly and without bias;

59.14. foster transparency;

59.15. be accessible;

59.16. cultivate good human-resource management and be capable of managing an office that comprises hundreds of personnel and numerous departments / units;

[22] His extensive CV includes details of serving in numerous government positions, being recognised by the United Nations as an expert in constitution-making and authoring or co-authoring several academic publications.

[23] The affidavit of Mr Ebrahim affidavit: para 100 accessible at 00206BB92E7C220909145236 (parliament.gov.za)

59.17. exercise appropriate and effective control over the Deputy Public Protector and the staff of the Public Protector's office;

59.18. delegate powers to the Deputy Public Protector to exercise;

59.19. be capable of undertaking and managing numerous investigations, and of understanding and applying the Constitution and the laws that regulate the public administration and affairs of State;

59.20. maintain an office that is accessible to members of the public;

59.21. discharge functions to ensure ethical and effective public administration generally;

59.22. monitor the performance of the executive, which includes investigating alleged maladministration; abuse of power; discourtesy; undue delay; improper or dishonest conduct; improper enrichment and improper or unlawful prejudice;

59.23. work to ensure that the public administration carries out its tasks without corruption or prejudice;

59.24. be the last defence for the public against bureaucratic oppression, corruption and malfeasance – in other words, to protect the public;

59.25. investigate complaints from members of the public in respect of State affairs or the public administration, report on the conduct complained of, and take appropriate remedial action;

59.26. decline to investigate conduct that occurred more than two years prior to the complaint, unless there are special circumstances that distinguish the complaint;

59.27. consider a range of options in addressing a complaint, including mediation or negotiation; advising the complainant regarding appropriate remedies; and reporting an offence or particular conduct to the appropriate authorities;

59.28. in determining appropriate remedial action, not order an organ of state to do something that is outside of its own powers;

59.29. make clear rather than vague determinations;

59.30. be objectively fit and proper to render the constitutional functions of office;

59.31. be appropriately experienced in the law, the administration of justice, public administration and/or the legislature;

59.32. be a person of stature and beyond reproach;

59.33. be suitably qualified;

59.34. be scrupulously honest and have absolute personal integrity;

59.35. disclose all material facts and evidence, and behave with utmost good faith, when litigating and dealing with the courts;

59.36. not exploit loopholes, or show disregard for the law, or mislead in any way, or make charges without supporting evidence;

59.37. ensure that all statements of the law are accurate, and not misconstrue the law;

59.38. be a good constitutional citizen;

59.39. be willing and capable of taking on sensitive investigations that might antagonise the powerful;

59.40. observe the requirements of procedural fairness and confidentiality during investigations and allow potentially affected persons a proper opportunity to make meaningful representations;

59.41. conduct investigations with an open and enquiring mind and follow wherever the evidence leads;

59.42. discover the truth and continue digging until the true picture emerges;

59.43. not extend investigations beyond the affairs of State, into the affairs of private parties;

59.44. not expand an investigation without lawful justification;

59.45. be cognisant of the serious consequences that can flow from an investigation;

59.46. inspire confidence in the integrity and completeness of investigations; and

59.47. account to the National Assembly.

60. During cross-examination, Adv Mkhwebane's legal representative sought to cast doubts on Mr Ebrahim's expertise and experience and the relevance thereof to the Committee's work. However, it was not established that any of the abovementioned principles were incorrect or inapplicable. Mr Ebrahim did concede that a Public Protector has the power to limit or extend the scope of an investigation, if there are reasonable and justifiable grounds for doing so.

61. Ms Zulu-Sokoni gave evidence based on her role as the Public Protector of the Republic of Zambia, and her experience in the African Ombudsman and Mediators' Association ('**AOMA**') and the International Ombudsman Institute. She conceded that she was not an expert on South African constitutional law or the process for removing a South African Public Protector. She explained that she '*would not be able to give, for example, the sort of evidence at the level that Mr Ebrahim gave because he has studied South African constitutional law, and he's able to give his opinion on the Constitution of South Africa and the constitutional processes of South Africa*'. However, she was confident that she could '*speak knowledgeably on matters of Ombudsmanship*' having served as an Ombudsman for 18 years. The Committee appreciates her contribution and notes her sentiments in respect of the binding model that applies to remedial decisions taken by the Public Protector and the impact thereof. As it turned out, Mr Ebrahim and Ms Zulu-Sokoni's evidence complemented each other.

62. Ms Zulu-Sokoni's evidence also covered the principles and standards that an Ombudsman should adhere to or uphold, as well as protections that an Ombudsman should be afforded. These are dealt with separately below and should be read with reference to AOMA's 2014 OR Tambo Declaration on the Minimum Standards for an Effective Ombudsman Institution ('**OR Tambo Declaration**') and the 2019 Principles for the Protection and Promotion of the Institution of the Ombudsman adopted in March 2019 ('**Venice Principles**'). Ms Zulu-Sokoni conceded that the OR Tambo Declaration and the Venice Principles are of persuasive value only and not binding on South Africa. She testified as follows:

62.1. To determine whether a Public Protector has committed misconduct or is incompetent, regard must be had to the office's standards and duties, including notions of what it means to be '*fit and proper*'.

62.2. The Public Protector should adhere to natural justice and procedural fairness.

62.3. The principles of natural justice and procedural fairness applies to investigations as well as the relationships of the Ombudsman and members of staff.

62.4. The Public Protector's office should '*be the example par excellence*' and lead all other institutions by example.

62.5. The Public Protector's office must exhibit the highest tenets of integrity, professionalism, transparency and accountability.

62.6. The Public Protector must act in a way that shows she is independent, so that people perceive her independence. It is '*non-negotiable*' for a Public Protector to be impartial.

62.7. The Public Protector must take responsibility for every report her office issues.

62.8. The Public Protector has a special responsibility to tell the truth to courts, and to file affidavits truthfully before the courts.

62.9. The Public Protector's reports should be honest, the evidence referred to in those reports should be complete and the reports should reflect an understanding of the law.

62.10. A Public Protector should have the legal acumen of a judge.

62.11. A Public Protector should not give the impression to members of the public that she has colluded or behaved improperly with a member of the executive.

62.12. While a Public Protector must have a high standard of ethics, transparency and lawfulness, she is a human being – '*there may be lapses here and there and that is the reason why the decisions of an Ombudsman can be subjected to judicial review*'.

62.13. When the Public Protector's decision is successfully taken on judicial review, '*it is the duty of the Ombudsman, to interrogate that judgment and ensure that they do not repeat the sorts of errors that were caused in that particular report*'. In this way, judicial review is '*a cleansing process*' and a '*quality-control process*'.

62.14. A Public Protector should not repeat the same mistakes once the error had been established in the courts. The Judiciary provides '*extra scrutiny*' and '*independent scrutiny*' on the reports of the Ombudsman.

62.15. It is damaging to an Ombudsman's reputation '*to have judgments coming out continuously on the same issue, especially on the same matter, the same error, the same mistake*'.

62.16. The Office of the Ombudsman should be above reproach.

63. Ms Zulu-Sokoni emphasised the protections that an Ombudsman should be afforded, and challenges faced. She noted the following:

63.1. International instruments emphasise the need to protect the independence of the Ombudsman as it investigates the very office which created and funds it. The OR Tambo Declaration states at 1.1 '*The independence and autonomy of these institutions must be guaranteed by the Constitution*'.

63.2. The Venice Principles refer to functional autonomy of the Ombudsman, meaning that the Ombudsman must not be charged concerning their constitutional, legislative or administrative functions.

63.3. The Ombudsman must be accorded the highest level of administrative and legal support to ensure that there is procedural fairness when any issue dealing with the institution is under the purview of any of the arms of government.

63.4. The office of the Ombudsman is inherently vulnerable as it investigates very powerful people.

63.5. The protection and promotion of human rights and fundamental freedoms must also be extended to the Ombudsman, deputies and their staff.

63.6. Procedural fairness requires that when a body is dealing with adverse court judgments against an Ombudsman, there must be equal attention given by that body to favourable judgments.

63.7. The legislature should assist an Ombudsman who is accountable to them and accord the appropriate protections if they are available.

63.8. Functional autonomy requires that there should be no interference in an Ombudsman's investigations by any arm of government or from any person.

63.9. At a minimum an Ombudsman must be equated to a judge.

63.10. The classical model where the Ombudsman's reports are mere recommendations (as opposed to binding recommendations like in South Africa), is the better and stronger model as it entrenches independence for the Ombudsman.

63.11. Principle 11 of the Venice Principles state: '*The Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law. These shall relate solely to the essential criteria of incapacity, inability to perform the functions of office, misbehaviour or misconduct, which shall be narrowly interpreted*'.

Interpreting any of these grounds too broadly would amount to '*encouraging people who are either shopping for the job or shopping to have an incumbent removed from office for personal reasons*. The purpose is therefore to discourage petty reasons being used to remove an incumbent from office.

63.12. Whether an incumbent who has a short amount of time in office left should be charged depends on the gravity of the charges against that Ombudsman.

63.13. An Ombudsman is not carrying out a personal duty. It compromises the independence and integrity of the Office for the Ombudsman to be asked to take personal responsibility for actions carried out in an official capacity.

63.14. Adverse cost orders should be borne by the respondent institution, and not the Public Protector personally. Where criminal charges arise out of the same set of circumstances or where a personal cost order has been granted, this can be regarded as '*victimisation'*.

63.15. An Ombudsman is a single person but has to shoulder the responsibility of an entire organisation. Personal costs forms part of judicial harassment and is totally unacceptable.

63.16. The time limit for submitting complaints to the Office of the Public Protector must not be read very narrowly, because there are always exceptions to that rule and the Public Protector has a lot of discretion.

63.17. Unlawful or retaliatory suspension is administrative or judicial harassment.

63.18. The binding decision model makes the Ombudsman amenable to review of their decisions by courts of law which has the effect of increasing litigation costs because people are more likely to challenge decisions that are binding than those that are merely recommendations.

63.19. It is very important that during an investigation an Ombudsman has the complete cooperation of the respondent institutions.

63.20. The Ombudsman is the only institution which the poor person can call upon. We '*shouldn't allow those poor people to lose heart and to lose faith in this institution that has been set up for them*'.

63.21. If a process in a particular country involved the refusal to call essential witnesses or relevant witnesses that are specifically mentioned in charges, thereby denying the accused person an opportunity to clear their names, that would not be in conformity with the fundamental principles of natural justice. A person's right firstly, to be properly represented, secondly, to properly defend themselves, should be respected and upheld in any constitutional democracy.

64. In **Public Protector v Mail & Guardian**, the SCA specifically addressed the nature of the Public Protector's duty to investigate complaints or suspicions of improper conduct and abuses of power in the public administration. The SCA held that, when the Public Protector investigates a matter,

she is obliged to be proactive, impartial and determined in her investigations and to retain '*an open and enquiring mind*'. The SCA explained:[24]

> 'The Public Protector must not only discover the truth but must also inspire confidence that the truth has been discovered. It is no less important for the public to be assured that there has been no malfeasance or impropriety in public life, if there has not been, as it is for malfeasance and impropriety to be exposed where it exists. There is no justification for saying to the public that it must simply accept that there has not been conduct of that kind only because evidence has not been advanced that proves the contrary. Before the Public Protector assures the public that there has not been such conduct, he or she must be sure that it has not occurred. And if corroboration is required before he or she can be sure then corroboration must necessarily be found. The function of the Public Protector is as much about public confidence that the truth has been discovered as it is about discovering the truth.'

65. The SCA described the importance for public confidence of the Public Protector's duty to be determined and proactive in her investigations.[25] The SCA said the following about the proper approach to an investigation:[26]

> 'That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious, but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first, they do not then it asks questions and seeks out information until they do. It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry, then it might progress to being a suspicious mind. And if the pieces still do not fit then it might progress to conviction that there is deceit.'

66. This means that, when the Public Protector investigates, she is not entitled to be passive, supine and static in her approach; to fail to address complaints or allegations without good cause; or to narrow the scope of investigations to the point that they do not meaningfully address the allegations and *prima facie* evidence of misconduct and impropriety in public affairs.

67. When the Public Protector receives complaints of impropriety or abuse of public office, she is obliged to use the powers vested in her – including her power to call for assistance from other organs of state, or to refer matters to other appropriate authorities – to ensure that:

[24] Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA) ('Mail & Guardian') at para 19.
[25] Mail & Guardian at para 19.
[26] Mail & Guardian at para 22.

67.1. the complaint is properly and effectively addressed, and where an investigation is required, it is conducted as comprehensively as possible to inspire public confidence that the truth has been discovered;

67.2. her reports are accurate, meaningful and reliable; and

67.3. she takes '*appropriate'* remedial action– meaning, as the CC held in Nkandla, '*nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case*'.[27]

68. As set out above, the definition of '*misconduct*' refers to two standards of fault: '*intention*' and '*gross negligence*'. This is addressed more fully in Mr Ebrahim's affidavit.

(vi) <u>Approach to the evidence</u>

69. Much of what is before the Committee emanates from judgments and the underlying pleadings. Adv Mkhwebane has thus already provided explanations under oath in these pleadings. Indeed, before the IP, Adv Mkhwebane pointed out that '*no useful purpose can be served by repeating them*' and that those explanations must be assumed to be incorporated by reference.

70. Similarly, the reports prepared by Adv Mkhwebane speak for themselves, save where they have been qualified or further clarified in pleadings. Unlike the position that prevailed before the IP, when this Committee dealt with the judgments referenced in the Motion it did so having regard to the fact that Adv Mkhwebane's appeals in relation to the merits of the judgments have all been unsuccessful. It is only in **<u>Public Protector v Commissioner for SARS</u>**[28] and in **<u>The Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others</u>**[29] in which the personal costs order made against Adv Mkhwebane were set aside. The applications for leave to appeal on the merits were not upheld. There is thus no longer any possibility of any of these judgments being disturbed by an appeal Court.

71. The Committee is not a court of law. Its function is not to re-conduct the investigations that Adv Mkhwebane undertook or to re-determine the litigious disputes that have already been determined by the courts. It has adopted an inquisitorial rather than an adversarial approach. The Committee has conducted a fact-finding exercise, to the best of its ability, in order to make a

[27] **<u>Mail & Guardian</u>** at para 68 and 71(e).
[28] 2022 (1) SA 340 (CC) (3 September 2021).
[29] 2020 (8) BCLR 916 (CC) (29 May 2020).

determination on the allegations of misconduct and incompetence and make a recommendation on whether Adv Mkhwebane should be removed from office. In this regard it has had to balance a number of considerations, including fairness to Adv Mkhwebane and its constitutional and legal obligation to conduct its work diligently and without delay and in a reasonable timeframe.

(vii) <u>The evidentiary value and relevance of court judgments and the rule in Hollington v Hawthorne</u>

72. As indicated earlier, the Motion substantially relies on several superior court judgments which have made adverse findings regarding the way Adv Mkhwebane has discharged her functions in particular investigations ('**the Judgments**'). Adv Mkhwebane raised before the IP the so called '*Hollington Rule*' in terms of which the judgment of a criminal court is inadmissible in subsequent civil proceedings as evidence of the truth of the earlier court's findings. In other words that the various judgments in support of the Motion would be of little value in the Committee's deliberations.

73. The Hollington Rule was also referred to before the Committee and Adv Mkhwebane's legal representative further submitted that the Committee cannot be bound by the Judgments as were that the case then, else there would be no need for an Enquiry saying, '*if that's the case, let's all go home because the Court has spoken'*.

74. The Committee agrees with the IP's finding that the Hollington Rule is only applicable in cases concerning the admissibility of evidence from criminal trials resulting in convictions in subsequent civil proceedings and the process conducted by the IP.

75. Similarly, the Committee is not a court of law, but a body comprising elected representatives that must discharge a function that is uniquely and constitutionally allocated to a committee of the NA.[30] The '*Hollington Rule*' applies in civil legal proceedings that post-date a criminal conviction, but the Committee's proceedings are not '*civil legal proceeding*' it is not faced with Adv Mkhwebane's criminal convictions. The Enquiry is a *sui generis* process.

76. Furthermore, the Committee notes that the judicial function (which is the exclusive domain of the judiciary as a separate arm of the State) includes determining facts and applying the law, in accordance with established principles. It encompasses '*independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the*

[30] **<u>Hlophe v Judicial Service Commission and Others</u>** [2022] ZAGPJHC 276 (5 May 2022) at para 154.

basis of a consideration of relevant information'.[31] It would therefore be sensible, and in accordance with the Constitution, for the Committee to have regard to the Judgments and the rationales contained therein. Put differently, the Committee would be hard-pressed to conclude that the Judgments constitute irrelevant opinions or have no bearing on the Committee's findings. Indeed, Adv Mkhwebane's legal representative too noted, *'Are the Court Judgements irrelevant? No, I am not saying they are irrelevant.'* He reminded the Committee of the importance of conducting its own assessment and this is precisely what the Committee has sought to do.

77. In addition, the Judiciary has a crucial role to play in controlling the exercise of power and upholding the Bill of Rights. It has discharged that crucial role by, among other things, handing down the Judgments, which are all concerned with whether the Adv Mkhwebane exercised her powers lawfully. It would be remiss of the Committee to ignore the Judgments and indeed the Committee, too, is bound by s 165 of the Constitution.

78. Moreover, the superior courts are the Republic's arbiters of legality. Where a court of law (and in most instances with reference to the Motion, the CC, either directly or in refusing leave to appeal) has determined a question of law, the Committee has no basis to depart from that determination.

79. Accordingly, the Judgments have been considered in a manner which: –

79.1. respects the role that the Constitution entrusts to the courts as the repository of judicial powers and the arbiters of legality, rather than ignoring such decisions;

79.2. does not attempt to re-litigate the various cases (some of which have been through multiple rounds of litigation) cited in the Motion;

79.3. allows Adv Mkhwebane an opportunity to demonstrate either why the Judgments were wrong or why, notwithstanding adverse findings, she is not culpable as alleged. In this regard the Committee notes that whilst a court is bound by the four corners of the review record before it, the Committee was able to engage witnesses and source evidence and bearing in mind that Adv Mkhwebane was afforded an opportunity to put evidence before the Court; and

79.4. allows the Committee to retain the exclusive power of making the determination required by s 194(1)(b) of the Constitution, viz determining whether the various allegations that are proved (with or without reference to the findings in the Judgments) constitute misconduct

[31] South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC) ('Heath') at para 34.

or incompetence within the meaning of s 194(1)(b) of the Constitution, and therefore constitute ground/s for removal from the office of Public Protector.

80. It must be emphasised that the above position is limited to the factual findings made by the courts. Regarding matters of law, the courts are the ultimate arbiters of legality, and this Committee is bound to follow their determinations.[32]

(viii) Not a comparative exercise

81. The Committee was not required to, nor did it, undertake a comparison between Adv Mkhwebane and her predecessors. That is not the task required by s 194 of the Constitution, nor is the determination as to whether there was misconduct or incompetence determinable by means of such a comparative exercise.

82. Adv Mkhwebane's legal team sought to draw a comparison in more than one instance with Adv Thulisile Madonsela. However, the Committee is not required to do a belated performance appraisal or to determine whether Adv Madonsela should have been removed from office. Instead, this Committee's function is to determine the facts relevant to the Motion in relation to Adv Mkhwebane only.

(ix) Public Participation

83. In compliance with s 59 of the Constitution the Committee afforded the public a reasonable opportunity to provide evidence that may assist it in fulfilling its mandate.

84. On 13 May 2022, an '*Invitation to the Public to Furnish Evidence to the Committee for Section 194 Enquiry – Enquiry into the Removal from Office of the Public Protector, Adv Busisiwe Mkhwebane (Call for Evidence)*' was published in two national, two regional and seven community newspapers in all 11 official languages, as well as broadcast on radio and on various Parliamentary social media platforms. The Public was invited to furnish written evidence in respect of issues arising from the Motion under oath or affirmation by no later than 3 June 2022. Assistance was offered should they require assistance in the making of a statement or the handing over of evidence.

[32] See Department of Transport and Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC) at para 147.

85. The Committee received 25 public submissions. The Deputy Speaker referred an additional submission to the Committee, marked as a protected disclosure and dated 13 December 2019, from Mr Kekana, a former employee of the PPSA. The submissions were shared with members via the uVimba online portal and were also loaded onto Dropbox.[33] The Committee heard evidence from Mr Van Loggerenberg and Mr Visvanathan Pillay, who had responded to the invitation. These submissions dealt directly with charges in the Motion. In addition, Mr Kekana was summonsed to appear before the Committee.

86. The balance of the submissions (except for a submission from Adv Paul Hoffman SC)[34] did not deal directly with the charges in the Motion but consisted of a mix of complaints against the PPSA relating to specific investigations or messages conveying support for Adv Mkhwebane.

87. In addition, the Committee received, from time to time, correspondence from the public and certain political parties relating to the way the proceedings were unfolding. These letters were responded to where necessary by either the Chairperson or referred to the Parliamentary Constitutional and Legal Services Office ('**CLSO**').

88. In furtherance of the NA's duty to facilitate public participation, no hearings or committee meetings were closed, bar two limited occasions. In the first instance, the Committee met in a closed session on 18 August 2022 to consider legal advice on the closing of a portion of the hearing relating to allegations of sexual harassment. The hearings however proceeded in open thereafter. On 22 February 2023, the Committee held a short, closed session to discuss threats received by an investigator whilst he was testifying. An update was provided after the session, following which proceedings and deliberations continued openly.

89. Meetings of the Committee and hearings were broadcast on Parliament's YouTube channel and occasionally on the DSTV Parliament channel 408 as well. All audio-visual recordings and pertinent records, including the Motion and supporting evidence, the panel report and witness statements were uploaded to the Committee webpage which was regularly updated.[35] All hearings were hybrid, but certain committee meetings were virtual. All meetings were quorate. Guests were welcomed to attend physical hearings.

---

[33] Dropbox is an online document repository where multiple users can upload and share records. The evidence leaders; Adv Mkhwebane and her legal representatives and Committee staff had access to the Dropbox which contained all records relating to the Enquiry.

[34] After consulting with Mr Tshiwalule, the evidence leaders determined that evidence from Adv Hoffman would not be necessary.

[35] The Committee webpage can be accessed at https://www.parliament.gov.za/committee-section-194-enquiry.

90. The Committee transcribed all hearings and transcripts have been made available to Adv Mkhwebane, the members and evidence leaders. In addition, the Parliamentary Monitoring Group – a Non-Governmental Organisation which aims to provide a type of Hansard for committee proceedings in Parliament – also published their own transcripts of hearings and summaries of committee meetings on their website. The Committee thanks them for their continued interest in the work of Parliament.

(x) Hearings

91. The Committee commenced hearings on 11 July 2022 and heard opening statements by the evidence leaders and Adv Mkhwebane's legal representatives respectively.

92. The Committee heard the oral evidence of 24 witnesses and 22 also submitted statements (Messrs Kekana and Mataboge who did not submit statements). In addition, Adv Mkhwebane gave oral evidence in respect of Part A of her two-part statement. The Committee heard orally from the following persons:

	Date of Appearance	**Name of witness**	**Additional Information**
1.	12 and 29 July 2022	Mr Hassen Ebrahim	Called by evidence leaders
2.	13; 14 and 15 July 2022	Mr Johann van Loggerenberg	Called by evidence leaders pursuant to response to call for public submissions
3.	18 and 19 July 2022	Mr Tebogo Kekana	Called by evidence leaders under summons with reference to a statement provided to the former Speaker.
4.	27; 28; 29 July and 1 August 2022	Mr Sphelo Samuel	Called by evidence leaders. Submitted supplementary statement in addition to statement provided to the former Speaker.
5.	2 August 2022	Mr Vussy Mahlangu	Called by evidence leaders
6.	3 August 2022	Mr Futana Tebele	Called by evidence leaders
7.	4 August 2022	Mr Baldwin Neshunzi	Called by evidence leaders
8.	5 August 2022	Mr Visvanathan Pillay	Called by evidence leaders pursuant to response to call for public submissions
9.	10 August 2022	Adv Livhuwani Tshiwalule	Called by evidence leaders
10.	11 August 2022	Adv Nditsheni Raedani	Called by evidence leaders
11.	17 August 2022	Mr Gumbi Tyelela	Called by evidence leaders
12.	18 August 2022	Mr Reginald Ndou	Called by evidence leaders
13.	24 and 25 August 2022	Ms Ponatshego Mogaladi	Called by evidence leaders
14.	26 August and 8 to 9 September 2022	Mr Muntu Sithole	Called by evidence leaders
15.	10 September 2022	Ms Nthoriseng Motsitsi	Called by evidence leaders
16.	10 and 13 September and 9 November 2022	Ms Nelisiwe Thejane	Called by evidence leaders

17.	1;2;10 and 11 November 2022	Mr Cornelius van der Merwe	Called by evidence leaders
18.	29 and 30 November 2022	Mr Freddie Nyathela	Called by Adv Mkhwebane
19.	1 December 2022	Mr Mulao Lamula	Called by Adv Mkhwebane
20.	30 and 31 January 2023	Ms Caroline Zulu-Sokoni	Called by Adv Mkhwebane
21.	1 February 2023	Mr Peter Seabi	Called by Adv Mkhwebane
22.	21 and 23 February and 1 and 2 March 2023	Mr Rodney Mataboge	Called by Committee. Originally on Adv Mkhwebane's witness list. Had to be summoned to complete testimony.
23.	27 and 28 February 2023	Ms Bianca Mvuyana	Summoned at request of Adv Mkhwebane
24.	6 and 7 March 2023	Professor Thuli Madonsela	Invited by Committee at request of Adv Mkhwebane
25.	15; 16; 28; 29; 30 and 31 March 2023	Adv B Mkhwebane	Submitted answers to Committee questions in terms of Initial Directives; submitted Part A and B Statements dealing with all the charges; oral evidence in respect of her Part A Statement.

(xi) Scope of evidence

93. In addition to oral evidence, the Committee was presented with documentary evidence. The documentary evidence initially provided in support of the Motion consisted mainly of the Judgments and underlying pleadings. This evidence automatically formed part of the record before the Committee.

94. In addition, the evidence leaders, Adv Mkhwebane and witnesses also put additional records before the Committee including correspondence; media articles; audio recordings; various reports; other judgments, affidavits from persons who did not testify and summaries of information.

B. PRELIMINARY AND INTERLOCUTARY ISSUES

95. Before considering the allegations in the Motion directly, it is necessary to briefly address several preliminary and interlocutory issues that arose during the proceedings.

96. From the onset of the Enquiry, Adv Mkhwebane has indicated that she is participating under protest but is eager for her version of events to be heard by the public. She has from inception maintained that the process has been inherently and irreparably unfair and biased, and the outcome predetermined. This was repeatedly raised. To this end the Committee has dealt with several procedural objections.

97. In addition, it would be remiss of the Committee not to indicate that it was faced with various obstacles which interrupted or affected its ability to carry out its work. The Committee has carried out its functions diligently despite what some members viewed as deliberate attempts by Adv Mkhwebane and/or her legal team to obstruct and/or delay the proceedings of the Committee and to undermine the authority and function of the Committee. However, this view was not shared by all members. The GOOD Party, EFF, UDM and ATM in particular raised concerns in respect of the fairness of the process on several occasions and Al-Jama-ah similarly raised concerns about the necessity of the process and the cost.

98. Events that led to delays in the Committee's proceedings include adjournment applications; two recusal and removal applications involving the Chairperson, Mileham MP and the '*lead*' evidence leader; the so called '*walk-out*' of Adv Mkhwebane's legal team; Adv Mkhwebane's illness requiring postponements; disputes in respect of the payment of Seanego Inc's legal fees; delays in scheduling witnesses or other witness related matters; adjournments granted for purposes of parallel litigation processes and unrelated litigation matters; the withdrawal of further legal funding; the withdrawal of Seanego Inc. and the failure and/or refusal to brief counsel since May 2023.

99. The Committee does not necessarily attribute every delay to Adv Mkhwebane, and regard must be had to the relevant correspondence to fully understand the context in which delays were occasioned and the procedural objections raised. To this end, the correspondence exchanged exceeded 120 letters. However, it remains a fact that the Committee faced enormous challenges in the completion of its work. It is the intention of the Committee, at a later stage, to hold a special meeting to reflect on challenges it faced, and report thereon as may be necessary.

100. The issues raised below relate to those matters identified by Adv Mkhwebane in her statements to the Committee. However, it must be noted that the bulk of these issues have been raised during proceedings and have been responded to in full. For purposes of brevity the points are summarised below, but regard should be had to all correspondence and transcripts to fully appreciate the decisions and or attitude of the Chairperson and/or Committee.

(i) <u>Political and racially motivated campaign</u>

101. Adv Mkhwebane contends in her Part A Statement that the s 194 process:

101.1. does not represent a genuine impeachment process but a politically motivated '*witch-hunt*';

101.2. is a political process as emphasised by the '*Speaker, Chairperson, the President and/or the DA co-operative*' in court pleadings and not a conventional legal process;

101.3. is a vanity '*special project*' of the DA aimed at scoring political points as the first party to have caused a head of a Chapter 9 Institution to face impeachment;

101.4. is a racially motivated campaign '*born out of the fear of real change which might actually benefit the poorest and most marginalised of society who are mainly black at the expense of those who benefit from the untransformed economic status quo, who are in the main white and the backbone of the DA constituency*'. In this regard, the DA is aided and abetted by the ANC which in turn is motivated by retaliation and revenge for the exposing of corruption and wrongdoing by powerful ANC leaders such as the President (with reference to the CR17 matter and Phala Phala) and Minister Gordhan (with reference to the so-called SARS Unit matter and the '*fake'* retirement of his friend, Mr Pillay); and

101.5. there is an '*unholy alliance*' between the DA and the ANC who will use their majority power to remove Adv Mkhwebane from office.

102. At the Committee meeting of 11 August 2023, one member raised the concern about a '*witch hunt*' against Adv Mkhwebane. However, other members did not agree, for the reasons set out below.

103. The drafters of the Constitution allocated the responsibility of making findings in respect of the removal of a Chapter 9 Institution office bearer to a Committee of the NA. Committees are an extension of the NA and are comprised of elected representatives who fulfil constitutional functions. There can therefore be no doubt that the s 194 process is uniquely allocated to members of the Legislature.

104. The CC has indicated that the charges against Adv Mkhwebane are sufficiently serious to warrant the initiation of the mechanisms of s 194 of the Constitution.[36] That puts paid to abovementioned conspiracy mongering and claims of *mala fides*.

105. The Committee is advised that s 34 of the Constitution, which guarantees persons the right to have a dispute, that can be resolved by application of law, decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum, does not find application in the current proceedings. It is a political process and not a judicial one. The Enquiry

[36] Democratic Alliance v Public Protector and Others; President of the Republic of South Africa v Public Protector and Others [2023] ZACC 25 at paras 97 to 100.

is not concerned with the adjudication of a dispute, nor it is a civil or criminal process. It is a fact-finding Enquiry to determine Adv Mkhwebane's fitness to hold office by the body to whom she is accountable in law.

106. Adv Mkhwebane's argument on the nature of the process fails to appreciate two fundamental tenets of the s 194 process – procedural fairness and rationality. Adv Mkhwebane could only be charged with misconduct and/or incompetence, and removed on such a basis, if the process for removal is procedurally fair and the findings support removal based on misconduct and/or incompetence as alleged. In other words, frivolous, vexatious or unsubstantiated findings based on purely political motives will not be sustained in a review proceeding. Thus, the Rule of Law itself provides protection.

107. The allegation that the Committee had a predetermined outcome is not supported by facts. The Committee conducted a lengthy and legally sound process which focussed on fact-finding in a manner that was fair to all – including Adv Mkhwebane, members and the public. The Committee called witnesses and was presented with evidence in addition to the Judgments, which contained serious adverse findings against Adv Mkhwebane, and the associated pleadings and evidentiary records. Had any such pre-determined outcome existed, the Committee would surely not have ploughed the time, financial and human resources into understanding the role of a Public Protector; the manner in which she investigated the matters which have led to adverse findings against her; and whether such conduct amounts to incompetence or misconduct as alleged.

108. The accusations made by Adv Mkhwebane have been there from inception – only the form and content changing. She has called the charges against her baseless and spurious. These accusations are unfortunate in that they detract from the especially important Constitutional task that the Committee has undertaken. Such accusations further fail to acknowledge that the Motion was substantive and the product of a series of serious adverse findings made by the judiciary in respect of Adv Mkhwebane's conduct in her role as Public Protector. It is absurd to suggest, considering the number of Judgments and the recommendation of the IP to conduct an Enquiry that Parliament ought to have rejected the Motion simply because the DA or any other party has, in Adv Mkhwebane's view, a political agenda. Therefore, whilst the Committee regrets that Adv Mkhwebane has viewed the s 194 process (and the work of the Committee) as a political '*witch-hunt*', the fact of the matter is that the Committee conducted a process that was credible and genuine.

109. It is not open to Adv Mkhwebane to complain that she must account for her time in office to members of the Legislature: that is a critical element of the constitutional scheme of checks and balances.

(ii) <u>Proceeding in Adv Mkhwebane's absence and in the absence of Adv Mkhwebane's legal representatives</u>

110. Adv Mkhwebane complains that the Committee proceeded in her absence, even when she was ill as well as in the absence of her legal representatives. These issues are canvassed more fully in correspondence and the Chairperson's two recusal responses as well as in the Chairperson's affidavit in the review proceedings.[37] The Committee notes the following:

(a) <u>Adv Mkhwebane's illness – 13 to 16 September 2022:</u>

111. On 12 September 2022, the Chairperson declined to grant Adv Mkhwebane's adjournment application in which she sought to have the hearings scheduled for 13 and 14 September 2022 postponed due to urgent court proceedings (brought by herself) related to the s 194 process. In making his decision the Chairperson had regard to the fact that the court application would only be heard on 16 September 2022 and the Committee hearing for 13 September would not entail a full day (the witness having been led already). In addition, Adv Mkhwebane's entire legal team of 3 counsel and 2 attorneys need not be present at every hearing, especially given that hearings were also virtual and recorded in full. He also offered, as a compromise, that the cross examination of the witness scheduled for 14 September could stand over thus allowing the legal team more time to prepare and balancing the need for the programme not to be unnecessarily extended.

112. After the postponement was refused, on the morning of 13 September 2022, Adv Mkhwebane's legal representative again raised the request for adjournment and indicated that he was not ready to proceed with the cross-examination of Ms Thejane. In addition, he noted that Adv Mkhwebane had taken ill but that her illness was not the reason for the adjournment application. No details of her illness were forthcoming at that point.

113. The Chairperson ruled that the members would proceed to question Ms Thejane and the evidence leaders would proceed with leading the direct evidence of Mr Van der Merwe the following day but

[37] Answering affidavit of the Chairperson in Case No.18882/2022 in the Western Cape High Court in the review application brought by Adv Mkhwebane in respect of the Chairperson's decision not to recuse himself in respect of her first recusal application.

that the cross-examination in respect of these witnesses would be deferred to 21 September 2022. He indicated further that Adv Mkhwebane's legal representatives were to advise the secretariat as to the nature of her illness.

114. Adv Mkhwebane's legal representatives objected to the ruling and left the online platform after which members concluded their questions to Ms Thejane. During this period the Chairperson received a copy of Adv Mkhwebane's sick certificate which he considered after the meeting adjourned. Upon learning that she was booked off ill for the period 13 – 16 September 2022, the Chairperson postponed the hearings, and the evidence of Mr Van der Merwe was not led the following day.

115. The continuation of members' questions on 13 September 2022, sought to balance the obligations of the Committee to conduct its process within a reasonable time with the duty of the Chairperson to the witness, who was already in attendance, members, evidence leaders and staff. Adv Mkhwebane does not have a right to intervene in the questions asked by Members and was not prejudiced in any way. The deferral of cross-examination afforded Adv Mkhwebane an additional opportunity to consult with her legal team in respect of any questions that may have arisen from the members' questions and to address this with the witness at a later stage. Furthermore, as indicated all meetings of the Committee are recorded and transcribed.

116. The rationale for the decision of the Chairperson and the context in which the above events unfolded are recorded in the Chairperson's response to Adv Mkhwebane's first recusal application in which she alleged bias on the part of the Chairperson for, *inter alia*, the incident summarised above. In any event, cross-examination of the witness subsequently ensued, and no prejudice could be complained of.

(b) <u>The so called 'walk-out' (27 October 2022):</u>

117. Following a failed application by Adv Mkhwebane for the recusal of the Chairperson and Mr Mileham, MP she submitted an adjournment application on the basis that she intended to urgently launch judicial review proceedings in respect thereof. Adv Mkhwebane sought an adjournment of the hearings pending the review application.

118. On 27 October 2022, Adv Mkhwebane's legal representative orally addressed the Committee on the adjournment application. The Committee was advised by the CLSO that in the absence of an interdict there was nothing in law which prevented it from continuing hearings pending the review

application. Accordingly, the Committee after deliberating on the matter, declined to grant the adjournment.

119. In what can only be described as a puzzling reaction to the decision of the Committee, Adv Mkhwebane's entire legal team (including her attorneys of record) left the hearings, leaving her behind citing that they are not able to take part further in '*illegal activities*' of the Committee and that '*anything beyond the point of the application, even breathing, after that point would be an endorsement of the illegal activities of the Committee*'. Adv Mkhwebane's legal representative indicated further that as far as the legal team was concerned this is '*as far as we can take it. And Good Luck. We will see you again maybe or maybe not*'.

120. Adv Mkhwebane indicated that she would need to inquire from her legal team if they were proceeding with the hearings or not, or if she would need to secure a new legal team. According to her she was under the impression that they will be moving ahead with the programme but did not discuss the way forward.

121. The Chairperson was forced to adjourn proceedings to allow Adv Mkhwebane to obtain clarity from the legal team. She returned to the Committee the following day, indicating emphatically that she had not terminated the brief of her legal team, nor had she restricted their mandate to only dealing with the adjournment application. Most members who participated in the ensuing deliberations felt strongly that the '*walk out*' was staged. The Chairperson agreed to postpone hearings for 3 days to allow Adv Mkhwebane to consult with her legal team and prepare for resumption of the hearings.

122. On 1 November 2022, Adv Mkhwebane appeared with her attorney of record but in the absence of counsel. Adv Mkhwebane indicated that counsel would only be available the following week on 7 November 2022 to proceed, notwithstanding that she had been expressly informed that hearings were scheduled to continue on 1 November 2022. In the circumstances, the Committee decided to continue with the evidence in chief of Mr Van der Merwe. Despite a request to be released from the sitting, the Chairperson ruled that Adv Mkhwebane had to remain present. Her attorney of record also remained.

123. Mr Van der Merwe's evidence continued the following day and Adv Mkhwebane's legal counsel remained absent until the next hearing date on 9 November 2022.

(c) Presentations by evidence leaders in April 2023:

124. Following the suspension of hearings, due to Adv Mkhwebane's lack of funding, the Chairperson ruled that the evidence leaders, in accordance with their mandate to assist the Committee in understanding the evidence before it, brief the Committee on evidence related to the CR17 and SARS Unit matters, being the two main matters on which Adv Mkhwebane had given oral evidence on at that time.

125. Adv Mkhwebane objected vehemently to this development on the basis that the evidence leaders were being allowed to make a '*closing argument*'.

126. The Chairperson rejected the request to stop the briefings on the basis that:

126.1. In taking the Committee through documentary evidence the evidence leaders had sought to point out where there were gaps and inconsistencies. They had made it clear on what matters questions would need to be put to Adv Mkhwebane and they sought to draw no conclusions.

126.2. The role of the evidence leaders is to assist the Committee in understanding the evidence so that it may reach a rational finding and recommendation. Their role is not adversarial, and the briefings were aimed at empowering the Committee to assess the merits of the evidence. Due to the temporary adjournment of the hearings, it was appropriate to utilise the time effectively in order to empower members for purposes of assessing the documentary evidence and posing relevant questions to Adv Mkhwebane.

126.3. There is nothing unfair or unreasonable and Adv Mkhwebane was placed in an advantageous position in that the evidence leaders pointed out with preciseness many of the questions they were of the view should be put to her during her oral evidence – thereby providing her with an opportunity to prepare her response.

(d) Continuation of proceedings post March 2023:

127. The cost associated with Adv Mkhwebane's appearance before the Committee has been borne by the PPSA which has also covered the cost of some of the related s 194 litigation. The PPSA has indicated that the funding of the legal costs has taken a strain on its budget. The Committee takes cognisance of this.

128. At the commencement of proceedings, Adv Mkhwebane's legal team consisted of her attorneys of record, Seanego Inc. (represented by 2 attorneys), Adv Dali Mpofu SC and two junior counsel – Adv Bright Shabalala and Adv Hangwi Matlhape. Adv Mpofu SC (supported by his junior counsel) acted, for purposes of NA Rule 129AD(3), as the legal practitioner chosen by Adv Mkhwebane for purposes of assisting her in the Enquiry.

129. It is necessary to briefly deal with the events that transpired from March 2023 up to the adoption of the draft report and how this impacted on the conduct of the work of the Committee post March 2023 and the decision to issue Addendum 2. This summary must be considered against the myriad of correspondence exchanged between Adv Mkhwebane and the Committee during this time, oral submissions made by Adv Mkhwebane and members deliberations in respect thereof.

130. On 1 March 2023, Adv Mkhwebane received notice from the Acting Public Protector, Adv Kholeka Gcaleka, that funds for the cost of her legal representation would not be availed after 31 March 2023. The correspondence reaffirmed the PPSA's position that it was not legally responsible to carry the costs of what it termed Adv Mkhwebane's '*personal interest in the post of Public Protector*' but that it had done so for purposes of supporting '*a fair and valid process before the section 194 Committee as far as its resources would allow, to commit to funding the reasonable costs of [Adv Mkhwebane's] defence*'.

131. Following the withdrawal of funds, the Committee was forced to adjourn, and the Chairperson took various steps to assist Adv Mkhwebane in securing additional funding. On 2 May 2023, the PPSA confirmed that it would avail a further limited amount of R4 million for purposes of concluding the Enquiry which was to be managed by Adv Mkhwebane and that no further funds would be availed. Adv Mkhwebane was advised by the Chairperson on the same day that hearings would resume on 8 May 2023 as this would be sufficient time for her to arrange for the return of her legal team.

132. Notwithstanding the provision of additional funds, Adv Mkhwebane raised various issues with the funding arrangement, such that, despite the passage of weeks and then months, she remained unrepresented by counsel (at least for purposes of the Committee's proceedings – her counsel was observed assisting her in Court proceedings and at a press briefing regarding the Committee's proceedings, despite her apparent inability to participate in the continuation of Committee proceedings), knowing that the issue of legal representation hampered the Committee's ability to hold further oral hearings given that she at all material times insisted on being represented by no less than 4 legal representatives each time.

133. Adv Mkhwebane informed the Committee on 8 May 2023 that she cannot brief Seanego Inc. directly and the PPSA must do so. A dispute ensued wherein the PPSA maintained that it was the responsibility of Adv Mkhwebane to brief Seanego Inc., i.e., give them instructions on what precisely to do. This having been the position that had prevailed up to that point with her erstwhile attorneys, Seanego Inc.

134. The Chairperson informed Adv Mkhwebane on 12 May 2023, that hearings would resume on 17 May 2023 so as to allow her time to instruct her attorneys, but on 15 May 2023 Seanego Inc. informed the Committee that it had not been involved in the Enquiry since 31 March 2023 and '*will not be involved going forward due to professional reasons*'. Seanego Inc. declined to share with the Committee what the professional reasons were and cited legal privilege, which Adv Mkhwebane, despite being requested, refused to waive. As such the Committee was not able to assist her, via the PPSA, to retain the services of Seanego Inc.

135. However, Adv Mkhwebane instead expressed her preference that Chaane Attorneys, who appear on the PPSA panel of attorneys, be appointed as her new attorneys of record. The Chairperson addressed correspondence to the CEO of the PPSA requesting that the appointment of Chaane Attorneys be facilitated so that hearings could resume. It must be noted that counsel may only accept a brief from an attorney. It was therefore necessary that new attorneys be appointed in order to brief Adv Mkhwebane's legal representative of choice, Adv Mpofu SC.[38]

136. On 23 May 2023, Chaane Attorneys were appointed as correspondent attorneys by the State Attorney (the PPSA having sought the assistance of the Solicitor-General (**'SG'**) to facilitate the outsourcing) thereby replacing Seanego Inc. as attorneys of record for purposes of the Enquiry.

137. Between 24 May and 2 June 2023, negotiations ensued in respect of the briefing of counsel. Whilst Chaane Attorneys appointment was initially subject to the use of one counsel, Adv Mpofu SC indicated he would only continue representing Adv Mkhwebane if the junior counsel were also briefed. Permission for same was granted, followed by another request from Adv Mkhwebane's counsel for an increase in their rates, which was also agreed to.

138. On 2 June 2023, following a meeting of the Committee, Adv Mkhwebane was advised that hearings would resume on 7 June 2023 as attorneys of record had now been secured for purposes of briefing her counsel. However, Chaane Attorneys informed the Committee that it could not brief counsel

[38] See Clause 27, '*Acceptance of briefs: the referral rule'* as contained in the '*Code of Conduct for all Legal Practitioners and Juristic Entities*' issued by the Legal Practice Council (Government Gazette, Notice 168 of 2019, 29 March 2019).

until such time as they had familiarised themselves with the record. Given the limited role of attorneys in the Enquiry, this was not acceptable, and it was so conveyed.

139. However, on 5 June 2023, Mr Chaane of Chaane Attorneys took ill, and a sick note was tendered indicating that he was booked off indefinitely. According to Chaane Attorneys, '*given the delicate stage and content*' of the matter no other attorney at the firm could replace him.

140. On 6 June 2023, the secretariat addressed concerns in respect of the delay in briefing counsel and the subsequent impact on the work of the Committee with the SG. In his response on even date, the SG expressed concern about the increase in counsel's fees and proposed, considering Mr Chaane's illness, that Chaane Attorneys be replaced, subject to approval of the PPSA, with the State Attorney, Pretoria, notwithstanding that the SG had previously raised the issue of a potential conflict of interest. The SG noted that this would result in a saving of R25 000 per day. On the same day Adv Mkhwebane also wrote personally to the Chairperson raising various objections, including the PPSA's insistence that she personally covers her legal costs incurred beyond the R4 million allocation.

141. On 7 June the Committee resumed, with a plan intended to ensure that the Committee hearings would be concluded fairly before the R 4 million would be depleted but once again Adv Mkhwebane appeared without legal representation, forcing the Chairperson to postpone the hearings yet again, this time to 9 June 2023. During the meeting, the Committee learned that the mandate of Chaane Attorneys had been terminated by the SG and replaced with the services of the State Attorney, Pretoria. Adv Mkhwebane vehemently objected to this, citing a patent conflict of interest notwithstanding that the Committee was in possession of correspondence from her in which she had in fact herself suggested the use of the State Attorney. The alleged conflict was motivated on the basis that the evidence leaders were briefed by the State Attorney, Cape Town.

142. On 9 June 2023, Adv Mkhwebane appeared before the Committee with the State Attorney, Pretoria to raise preliminary issues including the alleged patent conflict of interest. The Chairperson had been made aware the day prior by the secretariat, following its communications with the State Attorney, that this was to be the case. It had thus become clear that there was a deadlock and hearings would not be able to continue in the previous manner. It is to be noted that the Head of Office, State Attorney, Pretoria indicated to the Committee that given that Adv Mkhwebane had raised this conflict, the State Attorney would not act for Adv Mkhwebane directly.

143. Accordingly, the Chairperson proposed a new way forward (subsequently captured in Addendum 2). The Committee agreed to the proposal, despite Adv Mkhwebane's objections and

proceeded in terms thereof. To date Adv Mkhwebane has objected to the new procedure and the deadlines provided therein on the basis that she was not consulted in respect thereof; she is not legally represented, and the procedure is therefore unlawful and unenforceable.

144. In terms of the procedure in Addendum 2, Adv Mkhwebane would not give further oral evidence in respect of her Part B Statement, it being understood that the right to *audi* did not necessarily mean that she had to be provided with an opportunity to testify orally. This was so because she would refuse to testify orally without legal representation.

145. By proceeding only in writing, the Committee's work would not be obstructed or brought to a standstill by this intransigence. By then Adv Mkhwebane had already submitted her sworn statement to all the charges (in 2 parts) and had cross examined all witnesses. The revised procedure allowed her an election to answer questions from members and evidence leaders in writing or orally- thereby removing the pressure and stress associated with an oral hearing. She was also provided an opportunity to make an oral or written closing argument. It remained up to her to harness her legal representation given that funds were made available to pay them. This new procedure allowed for flexibility in that Adv Mkhwebane could be assisted by counsel notwithstanding availability issues as were alluded to thereby resulting in further delays. In this regard it had been indicated that Adv Mkhwebane had not even ascertained her counsel's availability –and they had already indicated that they had other briefs and commitments.

146. It happened that Mr Chaane recovered earlier than would have been expected given that the Committee was led to believe that his condition was very serious. At Adv Mkhwebane's request the mandate of Chaane Attorneys was reinstated by the State Attorney on 14 June 2023.

147. To date, Adv Mkhwebane had failed to cause counsel to be briefed on the merits. Chaane Attorneys maintained, since there reinstatement, that they are still familiarising themselves with the record. Chaane Attorneys have, however, insisted that the decision not to brief counsel lies with them and not with Adv Mkhwebane. She, *qua* client, appears not to have given them a different instruction and has maintained to date that she is not legally represented and accordingly has not met any of the due dates imposed by the Chairperson in terms of the revised procedure.

148. The proposition by Chaane Attorneys and/or Adv Mkhwebane that counsel could not be briefed is rejected. Counsel has the requisite knowledge and experience to more than fully represent and assist Adv Mkhwebane and would therefore not be reliant on Chaane Attorneys (or any attorneys of record) to the extent that they cannot be briefed until Chaane Attorneys have fully familiarised themselves with the entire record which Chaane has simply repeated to be in excess of 60 000 pages.

Chaane Attorneys was informed early on that the Dropbox included all reference documents and documents discovered for the sake of transparency, but which are not all germane or relevant to the Enquiry. In fact, many records are repeated because for example it may have formed part of the records before the IP but also loaded separately. In any event, apart from this, there is no legal obligation on Chaane Attorneys to be fully versed in the substance of the matter for purposes of briefing counsel under the circumstances, as this simply cannot be in the best interests of their client and is not necessary at this late stage. As such, whilst it is accepted that Chaane Attorneys could have familiarised themselves with salient documents, they rightly ought to be guided by counsel as to what is necessary, given how advanced the process was when they were appointed and the financial constraints under which their client was operating.

149. Chaane Attorneys and/or Adv Mkhwebane then caused further delays by seeking the permission of the State Attorney and/or the PPSA to do things in circumstances where such permission is not necessary and had not been previously sought. For example, for purposes of briefing counsel in relation to the second recusal application.

150. By the time the Committee deliberated on 28 and 30 July 2023, Chaane Attorneys had still not briefed counsel on the merits of the matter having corresponded with the Chairperson on 3 July 2023 indicating that it would take them no less than another month to familiarise themselves with the record and indicating further on 6 July 2023 that they would not again address the illegality of the new procedure or the unreasonableness of the deadlines while they were still familiarising themselves with the record. In the interim however, they briefed counsel on a limited basis to bring a second recusal application against the Chairperson.

151. As such, Adv Mkhwebane has not participated (save for submitting the second recusal application and appearing to raise issues related to legal representation and the Chairperson's recusal) in the Committee proceedings since 31 March 2023 due to her stance that she is not legally represented, despite additional funds having been made available and attorneys of record having been secured and there being in fact no real impediment to brief counsel.

152. On 3 August 2023, whilst the draft report was being prepared, the Committee received correspondence from Chaane Attorneys notifying it that it had withdrawn as Adv Mkhwebane's attorneys of record, as in their view, amongst other things, the Committee had not sincerely or honestly wished to afford Adv Mkhwebane proper, full and meaningful legal representation. On 7 August 2023, Adv Mkhwebane addressed correspondence to the Committee advising that she is without legal representation, reiterating that the State Attorney is conflicted and that she is in the

process of making arrangements to obtain a new attorney of record from the PPSA panel of attorneys.

153. The Chairperson responded to Adv Mkhwebane on 10 August 2023 indicating that new attorneys were likely to also request time to ostensibly familiarise themselves with the record, which by now Chaane Attorneys ought to have completed given that they indicated in the withdrawal letter that their familiarisation of the records had been ongoing. The result of utilising new attorneys would inevitably mean that the work of the Committee would become moot. The Chairperson urged Adv Mkhwebane to utilise the services of the State Attorney which was being offered to her at no cost so that counsel could be briefed for purposes of assisting her with formulating her written response to the draft report. On 11 August 2023, the Committee deliberated on the content of Adv Mkhwebane's letter and the withdrawal of Chaane Attorneys. The majority of the Committee felt strongly that its work needed to be concluded and that more than sufficient time and opportunity had been afforded to Adv Mkhwebane to secure her legal representation, yet she had repeatedly failed to do so.

154. The Committee is confident that it has not denied Adv Mkhwebane the opportunity to be legally represented, but to the contrary, has used its best endeavours to assist her to have access to her stated legal representatives of choice. The Committee had no choice but to proceed in a manner that balances Adv Mkhwebane's rights to a fair process with the Committee's Constitutional obligation to perform its duties diligently and without delay. Ultimately, if Adv Mkhwebane was determined to be represented by a silk and two junior counsel, in addition to attorneys and genuinely wished to participate in the Committee proceedings, it was her responsibility to attend to the management, proper and timeous briefing and payment of those professionals. Her failure to do so could not be allowed to derail the Committee's proceedings.

155. As such the Committee maintains that in the absence of the revised procedure, it would not have been able to complete its work which it would reasonably have to complete by no later than early August in order for it to be duly considered at a sitting of the NA. Its failure would have resulted in a situation where the question of Adv Mkhwebane's removal would become moot due to unreasonable (and seemingly self-created) delays and she would not have been held to account, notwithstanding the weight of evidence heard, the significant expenditure of public funds in the s 194 process and the public interest in the matter.

156. The Committee, which conducts an ultimate oversight exercise, is duty bound in law to complete its work as a failure to do so would invariably mean that the s194 process could not be completed.

The findings of the Committee, whether in favour of removal based on misconduct and/or incompetence or exoneration of the charges is irrelevant- the process must be completed regardless. Adv Mkhwebane had the benefit of her legal representative of choice assisted by four legal practitioners from commencement of hearings until 31 March 2023 at a cost of approximately 32 Million and was then afforded an additional R4 million for legal costs necessary to conclude the proceedings. This can never be reasonably construed as the Committee denying her the right to be represented. The right to unlimited State funded legal representation (if such a right existed in law) can never be divorced from the obligation of the State to procure services in a cost-effective manner and to conduct its Constitutional functions diligently and without delay.

(iii) <u>The recusal of Members and application for the removal of the evidence leaders</u>

157. Adv Mkhwebane submitted two recusal applications during the proceedings for the Chairperson, the first of which also sought the recusal of Mr Kevin Mileham, MP. In addition, she sought the removal of the evidence leaders. The applications are summarised in chronological order.

(a) <u>Recusal of the Chairperson and Mr Mileham, MP (September 2022)</u>

158. On 20 September 2022, Adv Mkhwebane lodged a written application seeking the recusal of the Chairperson and Mr Mileham, MP. The recusal application was amplified orally by her legal representative on 21 September 2023.

159. The recusal application against the Chairperson was based on 12 grounds. The alleged grounds included the unlawful extension of the scope of the Enquiry; the unilateral amendment and misapplication of the Directives; the refusal to subpoena President Cyril Ramaphosa; allegations of unduly favouring and colluding with the evidence leaders while adopting an impatient and oppositional stance towards Adv Mkhwebane and her legal representatives; conduct in HC litigation; rulings made by the Chairperson regarding cross examination and/or re-examination; rulings on relevance; previous utterances made by the Chairperson; the refusal to postpone the enquiry on 13 September 2022; rejection of requests that Committee members be consulted and public utterances.

160. In respect of Mr Mileham, MP it was contended that it is common knowledge that he is the spouse of Ms Natasha Mazzone, MP who initiated the Motion. In addition, he was alleged to have displayed a hostile and condescending attitude towards Adv Mpofu SC.

161. The Committee sought an external legal opinion from Adv Ismail Jamie SC and Adv Adiel Nacerodien. The legal opinion concluded that there was no basis for either the Chairperson or Mr Mileham, MP to recuse themselves.

162. The Chairperson provided a detailed written response to the recusal application in which he set out the reasons for his decision not to recuse himself from the Enquiry. His decision was premised on his belief that Adv Mkhwebane had failed to establish grounds on which it could be said that he was biased or that his conduct would give rise to an apprehension of bias.

163. Similarly, Mr Mileham decided not to recuse himself.

164. The majority of the Committee members supported both the Chairperson and Mr Mileham's decisions not to recuse themselves. However, objections were noted from the EFF, ATM and the UDM, who submitted their rejection of the legal opinion provided by Adv Jamie SC since they did not perceive him as independent due to him having previously acted for the DA. This objection was not raised by Adv Mkhwebane.

165. Adv Mkhwebane sought to review the decision of the Chairperson and Mr Mileham, MP not to recuse themselves in the Western Cape HC ('**WCHC'**). On 13 April 2023, the full bench delivered its judgment[39] dismissing the application, with costs, on the basis that the relief had been sought in medias res and was accordingly premature. It did not deal with the merits of the application.

166. Adv Mkhwebane was granted leave to appeal on 1 June 2023. At the time of adopting this report the appeal had not yet been set down for hearing.

(b) Application for the removal of the evidence leaders (November 2022):

167. On 22 November 2022, Adv Mkhwebane submitted a written application to the Committee for the removal and/or replacement of the evidence leaders. This followed a separate application the previous month from the UDM who unsuccessfully sought the removal of Adv Bawa SC based on alleged conduct in respect of unrelated litigation matters.

168. The removal application alleged that the evidence leaders had misconducted themselves in that they caused the names and fees of various black counsel to be displayed without warning to the affected counsel, without placing the information in its proper context and in a manner that was prejudicial

[39] Public Protector of South Africa v Chairperson: Section 194(1) Committee and Others (18882/2022) [2023] ZAWCHC 73; [2023] 2 All SA 818 (WCC.

to the privacy and dignity rights of those counsel and could therefore lead to professional harm. In addition, they were alleged to have '*cross-examined*' a witness they had called and prepared in an attempt to get him to testify against Adv Mkhwebane and had unethically fed information to Mr Samuel and his statement was therefore not his own. The latter allegation was repeated in respect of Ms Thejane.

169. The Committee, after consideration of legal advice, deliberated on the application and declined the request to remove and/or replace the evidence leaders having been satisfied that the evidence leaders had at all times acted professionally and within the scope of their mandate.

(c) 2nd Recusal Application against the Chairperson (July 2023):

170. Adv Mkhwebane lodged a second recusal application on 12 July 2023, seeking, inter alia, the Chairperson's recusal on the grounds of an allegation of bribery, corruption and extortion made against him by Adv Mkhwebane's husband, Mr Mandla Skosana and matters related thereto. As additional grounds, Adv Mkhwebane raised that the Committee and/or the Chairperson had proceeded with the Enquiry despite her lack of legal representation; the Chairperson had made disparaging remarks against her in the media; that the late Ms Tina Joemat-Pettersson's alleged meetings with Mr Skosana were sufficient grounds for the disqualification of the decision-making panel and/or the Chairperson and that Ms Pemmy Majodina (Chief Whip of the ANC) '*controls*' the Enquiry.

171. The Chairperson responded in writing to this application on 24 July 2023, providing detailed reasons for his refusal to recuse himself. The Chairperson categorically and vehemently denied that he had ever, in connection with the s 194 process or the Enquiry: bribed, sought to bribe or otherwise solicit a bribe, through Ms Joemat-Pettersson or any third party, from Adv Mkhwebane or any other person; sought to extort anything from any person or had subjected any person to pressure or threats to induce that person to do or refrain from doing, in return for a patrimonial or non-patrimonial advantage, or for any other reason whatsoever; received any personal or financial benefit or sought to receive such benefit or that he had any personal or financial interest in the outcome of the Enquiry; or acted in any manner that was unfair to Adv Mkhwebane. The Chairperson also dealt extensively with the issue of the Committee proceeding in the absence of Adv Mkhwebane's legal representation reiterating that she had not been denied any representation but had herself been the cause of same.

172. The Committee, having considered the response of the Chairperson, supported his decision not to recuse himself. It bears noting that despite request, Adv Mkhwebane refused to provide the Committee with the full recordings of the alleged meetings that ensued between her husband and the late Ms Joemat-Petterson, instead only disclosing snippets, the veracity of which has to date not been verified.

(iv) <u>The refusal to call Messrs Ramaphosa and Gordhan and Ms Mazzone</u>

173. Adv Mkhwebane objects to the Committee's refusal to call witnesses who she alleges are the '*architects and originators of the allegations in the charges, including President Cyril Ramaphosa, Minister Pravin Gordhan and Ms Natasha Mazzone'*. In respect of President Ramaphosa and Minister Gordhan she argues that they are key witnesses required for purposes of assisting the Committee with Charge 4 and the so called '*Rogue Unit*' matter.

174. The Directives included a procedure in terms of which Adv Mkhwebane could request the Committee, as a measure of last resort, to summon any person to appear before it to give evidence if that person had failed to voluntarily agree to testify at Adv Mkhwebane's request. In terms of Directive 5.4 such a request had to be in writing; indicate the subject matter on which the witness is to be questioned and provide reasons as to why the testimony was required for the proper performance of the Committee's functions.

175. On 8 August 2023 Adv Mkhwebane made a request under clause 5.3 of the Directives to summon the President after he indicated, via the office of the State Attorney, that he would not voluntarily avail himself. She indicated 4 areas on which she sought to put questions to the President including matter related to her suspension; the review of her CR17 Report; the position taken by the President in litigation that she '*should not be represented by the legal representatives of her choice therein*'; and accusations made by the President against her, '*including but not limited to accusations of criminal conduct in the form of perjury*' which if true could constitute impeachable conduct.

176. The Committee sought legal advice from the CLSO and obtained a written opinion on 15 August 2022. The opinion stressed that the power to summon was not an unfettered power and in light of the principle of legality, Parliament may only summon persons for the purpose of performing its constitutional and statutory obligations. The opinion noted further that the summonsing of an individual by a body that is not a court is extraordinary in nature and therefore to be exercised only when objectively necessary and where the evidence cannot be obtained by following a less invasive route.

177. The Committee further considered the response of the President that he would not avail himself as, amongst other things, the suspension matter was currently before the courts; Adv Mkhwebane seeks testimony on matters that relate to the findings of the courts and is misplaced in concluding that the Committee can engage in a process of relitigating or reconsidering the findings by the courts; the threshold of relevance has not been met; the President has not taken a position that the PP should not be represented by legal representatives of her choice; and the accusations against Adv Mkhwebane were made in affidavits deposed to by the President's attorney in the proceedings and not the President himself.

178. The Committee considered the legal advice and response of the President and resolved on 16 August 2022 not to grant Adv Mkhwebane's request, for want of relevance.

179. On 13 December 2022, on the eve of recess period, the Committee received a request to summons Minister Gordhan and Ms Mazzone both of whom refused to voluntarily appear before the Committee at the request of Adv Mkhwebane. Minister Gordhan, whose evidence was sought in relation to the SARS Unit Report, similarly contended that his evidence would not be relevant to determining the veracity of the charges; that his version on matters of the SARS Unit Report was already before the Committee in the form of sworn affidavits in the court pleadings; the Committee was not tasked with a reconsideration of the matter before the Court and the merits of the report were disposed of in the judicial review proceedings.

180. Ms Mazzone's evidence was sought for purposes of providing clarity in respect of certain '*ambiguities*' in the Motion (for example the meaning of legal fees in Charge 4) and matters relating to the '*genesis*' of the Motion. Ms Mazzone declined to appear on the basis that evidence on her subjective intention would be irrelevant and inadmissible.

181. On 24 January 2023, the Committee deliberated on the request to summons Minister Gordhan and Ms Mazzone and based on their responses, as well as the legal principles outlined in the legal opinion from the CLSO, declined to summons them.

182. However, the Committee, at its meeting on 24 January 2023, agreed to summons Adv Madonsela (who then agreed at the Committee's request to be appear without being summoned to respond to limited questions relevant to the Motion) and Ms Mvuyana at the request of Adv Mkhwebane.

183. The Committee maintains its view that the testimony of the President and Minister Gordhan was irrelevant to its Enquiry because it had in its possession the court affidavits from them and because the Committee did not seek to re-investigate or establish the merits of the investigations undertaken

by Adv Mkhwebane. The Committee has simply sought to establish whether she discharged her investigative and reporting responsibilities in a manner that sustains the charges of incompetence and/or misconduct as alleged.

184. Similarly, the Committee did not seek to hear from Messrs Jankielsohn, Magashule or Thabethe in respect of the Vrede investigation. Neither did it seek to hear from Adv Hoffman SC, Ms Ramos or Mr Kganyago in respect of the Lifeboat investigation. That is because the Committee is not tasked with repeating Adv Mkhwebane's investigations, or conducting the investigations she should have conducted. Instead, it is tasked with *(a)* assessing the evidence that was before Adv Mkhwebane at the time of the investigations, and determining whether that evidence could have supported the conclusions she reached and *(b)* hearing evidence on her investigation processes and assessing whether they met the applicable standards. In neither case is it necessary for the Committee to hear direct evidence from either the complainant or the subject of the complaint. It was therefore not necessary for the Committee to hear oral evidence from either President Ramaphosa or Minister Gordhan.

185. In respect of Ms Mazzone, MP her testimony was not necessary for the Committee to engage with or interpret the Motion. Whilst Adv Mkhwebane repeatedly placed a focus on Ms Mazzone as architect of the Motion, the Committee has treated the Motion as a Motion of the NA, it being duly adopted by the NA. It is trite that documents are interpreted objectively, not based on what their authors' later claim they meant to say. In any event, the Committee is satisfied that the Motion is sufficiently clear such that it does not require clarification by Ms Mazzone, MP.

(v) Refusal to recall Ms Baloyi and Messrs Pillay and van Loggerenberg

186. Adv Mkhwebane alleges that the refusal of the Committee to recall Ms Baloyi and Messrs Pillay and Van Loggerenberg amounts to an unreasonable and unfair deprivation of her right to refute evidence given by them.

187. Ms Baloyi testified on 22 August 2022. Despite being given more time than originally allocated, and more than the evidence leaders to cross examine her, Adv Mkhwebane's legal representative indicated that he had not finished his cross examination. The Chairperson responded that witnesses would not be recalled without an indication of what specific areas they still needed to be questioned on, being provided. On 20 September 2022, the Secretariat requested that Ms Baloyi return on the request of Adv Mkhwebane for purposes of further cross examination, but she indicated that she

was not in a position to return due to personal reasons and would respond to further questions in writing.

188. Mr Pillay testified in respect of para 11 of the Motion. He indicated prior to testifying that he could not avail himself at another date and would be available for that day only. Nevertheless, at the end of his allocated time, Adv Mkhwebane's legal representative indicated that he was not finished. Despite being requested to return, Mr Pillay similarly indicated he would only answer further questions in writing.

189. Mr Van Loggerenberg testified on 13; 14 and 15 July 2022 in respect of para 11 of the Motion. At the end of his cross-examination, Adv Mkhwebane's legal representative indicated that he reserved the right to recall the witness. Mr Van Loggerenberg was requested to return for further cross-examination but indicated via his attorneys that he had already testified for three days and was extensively cross-examined for the greater part of two days. According to him the cross-examination covered an extremely wide ambit; and was at times argumentative, irrelevant and repetitive. He also believed he had been subjected to gratuitously embarrassing and deliberately insulting questions and that his character had been impugned during cross-examination. Nonetheless, he indicated his willingness to respond in writing and under oath to any reasonable questions that may be directed to him.

190. Adv Mkhwebane has repeatedly been informed that should she wish to pose further questions to Ms Baloyi or Messrs Pillay and Van Loggerenberg she should submit same in writing. Alternatively, she could have submitted an application to summons them to appear orally clearly setting out the reasons for same which the Committee could then have considered. She has however failed to do so.

191. Under the Directives, the time to be permitted for questions of a witness was to be determined by the Chairperson. Save for one or two exceptions, Adv Mkhwebane was afforded more time than the evidence leaders to question witnesses, and time afforded was reasonable. Invariably, her legal representatives did not ensure that they completed their questioning during the requisite time. It was for Adv Mkhwebane to direct her legal representatives on what the most important areas of questioning were and ensure that the questions were focussed on such.

(vi) Time for Adv Mkhwebane to prepare her evidence

192. Adv Mkhwebane alleges that she was unfairly and unreasonably not provided with[40] sufficient time to prepare for '*the delivery of my [her] evidence in spite of new evidence and a court appearance taking place within 48 hours of my [her] testimony*'.

193. The Committee heard from its last witness, Adv Madonsela, on 6 and 7 March 2023. Her evidence had been scheduled to be heard on 1 March 2023, but Adv Mkhwebane refused to lead Adv Madonsela despite having requested her as a witness. Notwithstanding such refusal, the Chairperson extended an additional opportunity to Adv Mkhwebane to reconsider this stance, with the result that Adv Madonsela testified several days later than planned. At the same time, it had been the Chairperson's understanding for some weeks before this that a detailed and lengthy statement from Adv Mkhwebane was being prepared and that it was being done on an ongoing basis throughout the proceedings. In terms of the due dates, Adv Mkhwebane's statement was originally due on 7 March 2023, but given that Adv Madonsela's testimony had been delayed, the due date was extended to 9 March 2023 and the Chairperson indicated that if Adv Mkhwebane wished, she could submit her statement in two parts, with the first falling due on 9 March 2023 and the second on 14 March 2023.

194. Adv Mkhwebane subsequently requested a further extension to 20 March 2023 (and for her testimony to commence on 27 March instead of 15 March 2023) on the basis that the witness schedule had changed and she was preparing for a hearing in the WCHC on 13 March 2023. The Committee deliberated on the request but did not agree to reschedule Adv Mkhwebane's testimony to 27 March 2023. However, she was granted an extension to submit her statement in full on 14 March 2023. Between 8 and 15 March 2023, the Committee did not conduct any hearings to allow Adv Mkhwebane time to finalise her statement and prepare for oral testimony.

195. On 14 March 2023, Adv Mkhwebane submitted Part A of her two-part statement, notwithstanding that her statement was due in full. The Chairperson accepted that there may have been a *bona fide* error and extended the deadline for the second part to 24 March 2023. However, he indicated that her testimony would still commence in respect of her Part A Statement on 15 and 16 March 2023 as scheduled. Between 17 and 22 March, the Committee was not scheduled to sit, thereby allowing Adv Mkhwebane further preparation time. However, she tendered a sick certificate for the period 22 to 27 March 2023 and the hearings scheduled for 23 and 24 March had to be postponed.

[40] Para 16.5 of Part A Statement.

Adv Mkhwebane submitted her final part of her statement on 27 March 2023 but by 31 March 2023 had not commenced testimony in respect thereof.

196. The Committee notes that Adv Mkhwebane has been aware of the content of the Motion since December 2020 and had already responded to the IP on the content thereof. Furthermore, she was provided with an opportunity, prior to the hearings commencing, to make any submissions to the Committee, of which she did not avail herself. In addition, hearings had been dragged out for a period of approximately 10 months during which there were frequent pauses that would have allowed Adv Mkhwebane time to start considering and planning her response to the Committee. Lastly, she had at all material times been assisted by no fewer than five legal practitioners prior to submitting her statements to the Committee.

(vii) Previous attempts to remove Adv Mkhwebane from office

197. Adv Mkhwebane contends that the DA has made repeated attempts to remove her from office.

198. In this regard the Committee notes simply that it was tasked to consider the Motion and any such previous attempts have no bearing on its proceedings. The Committee has not previously considered any motion to remove Adv Mkhwebane nor has it ever investigated or deliberated on any of the charges in the Motion.

199. The relevance of any previous attempts to remove Adv Mkhwebane is therefore unclear. In any event, it is noted that there is no impediment in law to any member bringing numerous motions for removal in respect of the same office-bearer.

(viii) Prejudgment by the Justice Portfolio Committee

200. Adv Mkhwebane alleges that she has been pre-judged by Parliament's Portfolio Committee on Justice and Correctional Services (**'Justice PC'**), of which the Chairperson is a member, when at a meeting during 2019 members delved extensively into the merits of then pending court proceedings and her reports and investigations.

201. To the extent that the Chairperson made comments in that meeting, it was dealt with in his response to the first recusal application.

202. Adv Mkhwebane has failed to distinguish between the s194 process and the ordinary oversight processes conducted by the Justice PC. Effective oversight requires that members of Parliament

robustly engage with entities which account to it – this includes criticising and questioning their conduct and indeed even making adverse remarks in respect of same when necessary. However, such oversight processes are separate and distinct from the process being undertaken by this Committee. It is irrational to suggest that Parliament's constitutionally entrenched function to conduct oversight must be curtailed or could ever have the effect of nullifying a later s194 t process.

(ix) <u>The removal rules were designed specifically for Adv Mkhwebane and were given illegal retrospective application</u>

203. Adv Mkhwebane alleges that the Removal Rules were designed specifically for her, and their retrospective application thereof is illegal.

204. The Committee notes that the Removal Rules were extensively tested in the CC and found to be lawful with the exception on the limitation to the right to legal representation which was then cured.

205. It is regrettable that Adv Mkhwebane continues to raise issues which have already been finally judicially adjudicated.

(x) <u>Double jeopardy</u>

206. Adv Mkhwebane argued that the Committee '*might be making itself guilty of double jeopardy*' in hearing testimony from Mr Kekana, because Mr Kekana had supplied a statement in Adv Mkhwebane's criminal prosecution for perjury, and that statement covered some of the same territory as his evidence before the Committee.

207. This objection to Mr Kekana's testimony was overruled because Adv Mkhwebane was wrong about the notion of '*double jeopardy*'.

208. The right not to be subject to double jeopardy is provided for in s 35(3)(m) of the Constitution: '*Every accused person has a right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted*'.

209. In the Committee's proceedings, Adv Mkhwebane has no risk of a criminal conviction, because the committee is not a court of law and cannot convict anyone of a crime. Adv Mkhwebane is not '*in jeopardy of conviction*' in the s 194 proceedings, so there can be no claim of double jeopardy

because a criminal court is likely to consider some of the same evidence that the s 194 Committee considers.

210. No court or other body can make a determination regarding whether Adv Mkhwebane has committed misconduct or demonstrated incompetence within the meaning of s 194 of the Constitution. Notwithstanding that the conduct in question may give rise to several consequences this too does not trigger double jeopardy. The SCA has found that '*a single act may give rise to more than one consequence*' and that there may be distinctions between criminal, civil, administrative and disciplinary proceedings.[41] Thus, for example, the same conduct may render an individual liable for an administrative penalty under one legislative regime and an appropriate punishment under the criminal justice system.

211. In the present case, Adv Mkhwebane is not at risk of, nor can there be any question of double jeopardy. To argue such would mean that Parliament would be constrained in exercising its constitutional functions simply because the conduct it wishes to exercise oversight over was also subject to a criminal process.

[41] Pather and Another v Financial Services Board and Others 2018 (1) SA 161 (SCA) at para 10.

C. ALLEGED MISCONDUCT IN RESPECT OF THE LIFEBOAT REPORT

212. Charge 1 of the Motion alleges that Adv Mkhwebane committed misconduct in respect of the Lifeboat Report (referred to as the *'South African Reserve Bank matter'* therein), the investigation that preceded it and the litigation that followed.

(i) General allegations by Adv Mkhwebane

213. Many of Adv Mkhwebane's explanations to the Committee rest on allegations of conspiracies, alleged persecution by the DA and/or the ANC, racial and gender persecution and a concerted effort by South Africa's '*untouchables*' (whoever they may be) to resist her efforts.

214. However, none of these claims are supported by any evidence. The Committee cannot engage further with such speculative and unsubstantiated claims.

215. All the Committee's findings as set out below are based on the evidence before it.

(ii) Background to the Lifeboat Report

216. The South African Reserve Bank ('**SARB**') had extended '*lifeboat finance*' (discussed below) to Bankorp Ltd in the late 1980s and early 1990s. Flowing from the lifeboat transactions, it was alleged that Bankorp had earned interest using the lifeboat funds, but never paid that interest over to the Government or the SARB, which parties therefore had a claim to the interest. A document known as the '**CIEX Report**', submitted to the Government in the 1990s, proposed that these allegedly outstanding funds should be recovered from Bankorp's successor, ABSA Bank Ltd ('**ABSA**').

217. On 10 November 2010 the Institute for Accountability in Southern Africa ('**IASA**') lodged a complaint with the PPSA that the Government failed to implement the CIEX Report. IASA's complaint was initially investigated by Adv Madonsela. When Adv Mkhwebane assumed office in October 2016, a draft report existed but had not yet been finalised or issued for comment. Adv Mkhwebane released a provisional report on 20 December 2016, entitled '*Alleged failure by Government to recover funds borrowed to ABSA*' ('**SARB Provisional Report**').

218. The SARB Provisional Report included the following conclusions:

218.1. Adv Mkhwebane had jurisdiction to investigate the complaint notwithstanding that the subject matter was older than two years. However, '*the Public Protector has no*

jurisdiction to investigate matters that took place before the coming into effect of the [PP Act] or the establishment of the Public Protector office in 1995.'

218.2. The Government and CIEX (a covert agency) concluded an agreement on 6 October 1997, in terms of which the latter would investigate '*apartheid corruption and misappropriation of state funds*'.

218.3. The Government and SARB had failed to process or implement the CIEX Report, in contravention of the Constitution and the Public Finance Management Act 1 of 1999 ('**the PFMA**').

218.4. Only the capital value of the loan to Bankorp (R1.5 billion) had been repaid. ABSA '*unduly benefited from the 16% interest which remains unpaid*'. No attempt was made by the Government to obtain repayment of the outstanding amounts from ABSA.

218.5. '[T]he monies and Government bonds belongs to the people of South Africa particularly taxpayers and were under the stewardship of National Treasury and SARB and that both the bonds and the monies with interest were never recovered. Failure to recover the interest on the capital loan amount to a loss to the public and Government but as well benefitted few individuals who are shareholders of Absa at the expense of the public'.

218.6. '[T]he conduct of Government and SARB prejudice the public of 16% interest accumulated over period of five years amounting to·R1 125 billion plus interest to which belongs to the public.'

218.7. The Government and SARB claimed that the '*systemic impact on the rand and the economy*' justified not recovering the accumulated interest from ABSA. However, they did not attempt to '*test the CIEX proposal that if recovered periodically, they would be no systemic impact*'.

219. Adv Mkhwebane indicated that she proposed imposing the following remedial action:

219.1. The National Treasury ('**NT**') and SARB had to ensure that their regulatory frameworks prevented a similar '*anomaly*' from occurring again.

219.2. The NT and SARB had to 'institute legal action against Absa in order to recover 16% interest accumulated over period of five years amounting to R1 125 billion plus interest'.

219.3. The President had to consider appointing a Commission of Inquiry to '*investigate alleged apartheid corruption as outlined in the Ciex report*', which should, if necessary, advise the Government on how to recover '*outstanding monies*'.

220. Parties who were offered an opportunity to make submissions in terms of s 7(9) of the PPA were afforded notice of, and an opportunity to make representations in respect of, the SARB Provisional Report (including the proposed remedial action).

221. Adv Mkhwebane published the final report on 19 June 2017 under the title '*Alleged failure to recover misappropriated funds*' ('**Lifeboat Report**'). The report contained the following findings and conclusions:

221.1. The Government had a responsibility to '*ensure that the CIEX report is processed through formal structures*'. Its failure to '*implement the CIEX report*' was improper because it failed to meet the requirement (imposed by s 195(1)(b) of the Constitution) of ensuring the efficient, economic and effective use of State resources. It was not in dispute that the Government had spent £600,000 on CIEX '*of which there was no value for money in the exercise*'; no evidence could be found that '*any action was taken specifically in pursuit of the CIEX report*'.

221.2. The Government's failure was inconsistent with the high standard of ethics required by s 195 of the Constitution, and with the obligation under s 231 of the Constitution to perform all constitutional obligations diligently and without delay, and with the Batho Pele principle requiring value for money. The Government's failure constituted '*improper conduct*' in terms of s 182(1) of the Constitution and '*maladministration*' under s 6 of the PPA.

221.3. Bankorp and/or ABSA '*unduly benefitted*' from interest on the R1,5 billion loan, which interest was '*an illegal gift in a guise of a loan*'. The Special Investigations Unit ('**SIU**') had investigated the matter and concluded that the financial assistance provided by the SARB was flawed and not authorised by the South African Reserve Bank Act 90 of 1989 ('**SARB Act**'). The lifeboat meant that '*the South African public were deprived of essential public funds that could have alleviated their socio economic conditions*'. In granting the financial aid, SARB failed to comply with s 10((1)(f) and (s) of the SARB Act.

221.4. SARB was not authorised *to make gifts to private banks* and should have taken *the greatest care* to protect against the loss of public funds. The financial assistance exposed SARB to

a deteriorating financial position that required '*an ever higher and increasingly risky level of assistance*'.

221.5. The Government and SARB failed to recover misappropriated public funds from Bankorp and/or ABSA after being advised to do so in the CIEX Report, and despite the opportunity for recovery being available. The allegation that this failure was improper was '*substantiated*': the '*illegal gift*' granted to Bankorp and/or ABSA amounted to R1,125,000,000, being the accumulated interest on the loan amount. The failure to recover the interest constituted '*improper conduct*' in terms of s 182(1) of the Constitution and '*maladministration*' under s 6 of the PPA. It also '*goes against the ethos laid in the preamble of the Constitution and section 195 of the Constitution in respect of redressing social injustices and promoting efficiency*', as well as the obligation on public functionaries to '*arrest reported irregularities*'.

221.6. It was '*common cause*' that no attempts were made to test the '*speculation*' that recovering the lifeboat would have resulted in '*systemic economic impact*'. The Government and SARB did not protect the public interest, and their decision not to recover '*seriously prejudiced the people of South Africa, in particular the poor who would have benefited through social development programs.*'

221.7. The SIU and the SARB-appointed Panel of Experts also failed to recover the misappropriated funds.

221.8. '[SARB] had a responsibility to apply public funding to the benefit of the South African economy and thereby its people. The nonrecovery of any repayment of the "**lifeboat**" was irregular and unjust. Consequently, [SARB] and the South African Government have a duty to recover public funds which were misappropriated.'

221.9. The Ministry of Finance failed to discharge its duties under s 37 of the SARB Act to enforce compliance with that Act.

222. The Lifeboat Report imposed remedial action that placed direct obligations on the SIU and the Justice PC. The SIU was directed to '*approach the President*' to '*re-open and amend*' certain proclamations in order to '*recover misappropriated funds unlawfully given to ABSA Bank in the amount of R1.125 billion*' and '*investigate alleged misappropriated public funds given to various institutions as mentioned in the CIEX report*'.

223. The Chairperson of the Justice PC was directed to '*initiate a process that will result in the amendment of s 224 of the Constitution, in pursuit of improving socio-economic conditions of the citizens of the Republic, by introducing a motion in terms of s 73(2) of the Constitution in the National Assembly and thereafter deal with the matter in terms of s 74 (5) and (6) of the Constitution*'. The Lifeboat Report then specified that '*Section 224 of the Constitution should thus read*':

> '224.(1) The primary object of the South African Reserve Bank is to promote balanced and sustainable economic growth in the Republic, while ensuring that the socio-economic well-being of the citizens are protected.
>
> (2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice., while ensuring that there must be regular consultation between the Bank and Parliament to achieve meaningful socio-economic transformation.'

224. SARB brought an urgent court application ('**Urgent Review**') which resulted in the aforementioned remedial action in respect of s 224 of the Constitution being set aside by the Pretoria HC (Murphy J) on 15 August 2017.[42] The Speaker and the Chairperson of the Justice PC, cited as second and third respondents respectively by SARB, supported the review application.

225. There was an additional consolidated challenge to the report brought by the Minister of Finance, the National Treasury, ABSA and SARB ('**Consolidated Review**'). On 16 February 2018 this resulted in a Full Court of the Pretoria HC (Pretorius, Mngqibisa-Thusi and Fourie JJ) setting aside other aspects of the remedial action, as well as imposing a personal costs order against Adv Mkhwebane.[43] The Full Court refused Adv Mkhwebane leave to appeal to the Supreme Court of Appeal ('**SCA**'). On 22 July 2019, the Constitutional Court ('**CC**') dismissed both Adv Mkhwebane's appeal and SARB's cross-appeal against the Full Court's decision (with a dissenting judgment by Mogoeng CJ, with whom Goliath AJ concurred).[44]

[42] South African Reserve Bank v Public Protector and Others 2017 (6) SA 198 (GP) ('**SARB v PP**').
[43] ABSA Bank Ltd and related matters v PP and Others [2018] 2 All SA 1 (GP) ('**ABSA v PP**').
[44] Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) ('**PP v SARB**').

(iii) Meeting with the Presidency

226. Paragraph 1.1.1 of the Motion alleges that, in the conduct of her investigation, Adv Mkhwebane met with the Presidency secretly, without disclosing the fact and import of the meeting in the Lifeboat Report, and without furnishing any transcripts of the meetings in the Rule-53 record.

(a) Did Adv Mkhwebane meet with the Presidency in conducting the investigation?

227. The evidence before the Committee confirms that, on at least one occasion (7 June 2017), Adv Mkhwebane met with the Presidency (not the President himself) in respect of the investigation. There was also an earlier meeting between Adv Mkhwebane and the President on 25 April 2017 (although Adv Mkhwebane contends that that meeting did not relate to the Lifeboat investigation).

(b) Were the 'fact and import' of the meeting with the Presidency undisclosed in the Lifeboat Report?

228. There is no reference to the meeting with Presidency officials held on 7 June 2017 under the heading '*Key sources of Information*' in the Lifeboat Report nor anywhere else in the Lifeboat Report. The Lifeboat Report therefore did not disclose the fact that Adv Mkhwebane met with the Presidency. In contrast, earlier interviews with former President Thabo Mbeki and his Director-General are disclosed.

229. Mr Kekana's uncontradicted oral evidence and Adv Mkhwebane's affidavits during the litigation confirm that the meeting of 7 June 2017 dealt with, at the very least, the remedial action that Adv Mkhwebane proposed imposing. In the answering affidavit Adv Mkhwebane filed during the Consolidated Review ('**SARB HC AA**'), she explained that her meeting with the Presidency informed her concerns about the remedial action proposed in the Provisional Report (in respect of appointing a Judicial Commission of Inquiry), which concerns ultimately informed her decision to impose new remedial action in respect of the SIU.

230. Given the importance of a meeting with the Presidency (as recognised by Mogoeng CJ in his dissenting judgment),[45] and the impact of the meeting on Adv Mkhwebane's decision to amend the remedial action, that meeting was clearly a '*Key Source of Information*' and should have been listed as such in the Lifeboat Report.

[45] PP v SARB at paras 61-63.

231. The Lifeboat Report does not identify any submissions from the Presidency or explain why the apparent concerns about recommending the appointment of a Judicial Commission resulted in the imposition of remedial action in respect of the SIU (despite acknowledging that, years earlier, the SIU had closed its investigation into the lifeboat without instituting recovery procedures). The Lifeboat Report therefore also did not disclose the '*import*' of the Presidency's submissions in relation to the SIU remedial action, as alleged in the Motion.

(c) Was the meeting with the Presidency secret?

232. The meeting with the Presidency of 7 June 2017 only occurred after the Provisional Report was issued, so the parties who received the Provisional Report would have been unaware of the meeting and the concerns it raised. As set out above, neither the meeting with the Presidency nor the issues raised at that meeting were disclosed in the Lifeboat Report.

233. At the meeting of 7 June 2017, Adv Mkhwebane discussed the new remedial action in respect of the SIU with the Presidency. It is not disputed that, prior to the publication of the Lifeboat Report, none of the other interested parties (other than possibly the SSA) was informed of this new remedial action or the role contemplated for the SIU.

234. Accordingly, the fact of the meeting with the Presidency and, more importantly, the contents of what was discussed and the manner in which that discussion affected the new remedial action contained in the Lifeboat Report, was kept secret – it was not disclosed to other parties with a direct and material interest in the investigation and the remedial action in question.

235. The meeting with the Presidency emerged in the review proceedings challenging the Lifeboat Report, when the SARB discovered '*notes of a meeting held on 7 June 2017 with the Presidency's legal advisers*' in the Rule-53 record.

236. On the issue of the secrecy of Adv Mkhwebane's meeting(s) with the Presidency, the Full Court found[46] that Adv Mkhwebane '*did not inform the reviewing parties*' about meeting with the Presidency, '*neither did she afford them an opportunity to meet with her and inform them of these meetings*.' The Full Court noted Adv Mkhwebane's argument that she had no malice or sinister purpose regarding her meeting with the Presidency, but concluded that '*[t]he question remains unanswered as to why she had acted in such a secretive manner*',[47]

[46] ABSA v PP at paras 93-94.
[47] ABSA v PP at para 116.

237. In an address to the Committee, Adv Mkhwebane's legal representative highlighted the fact that, in the CC, there was a minority judgment that '*held quite sharply views as in respect of the conclusions that was reached by the majority on the key issues… [including] whether it's important, the fact that there was a meeting with the Presidency. Is it something of significance or of no significance?*'

238. Adv Mkhwebane's legal representative emphasised that Mogoeng CJ concluded that Adv Mkhwebane did not conceal the meeting of 7 June 2017, even if she conflated it with the meeting of 25 April 2017. '*What matters is the content of the discussions and the acknowledgement that the meeting had a role to play in the final determination of the remedial action taken.*' Concluding that Adv Mkhwebane was '*totally secretive*' about the meeting of June 2017 '*could reasonably be misunderstood as being symptomatic of a desperation to find fault.*'[48]

239. Mogoeng CJ did not take issue with the fact that, as alleged in the Motion, the meeting of 7 June 2017 was not disclosed in the Lifeboat Report. Furthermore, he concluded that what mattered was whether Adv Mkhwebane acknowledged the role that her meeting with the Presidency played in finally determining the remedial action to be imposed. However, the meeting clearly discussed the new remedial action in respect of the SIU; interested parties were never informed of that fact or permitted to make representations. Furthermore, as set out in para 490 below, even under oath before the CC Adv Mkhwebane still maintained that she did not discuss <u>any</u> of the new remedial action with the Presidency. However, the evidence shows that she did discuss with SIU remedial action with the Presidency. Adv Mkhwebane now appears to concede to the Committee that she '*deserve[s] to be criticised*' for not timeously disclosing '*what was discussed and the effect of the meeting with the Presidency on the choice of the vehicle for investigation.*'

240. The majority of the CC held that Adv Mkhwebane's explanations are 'contradictory' and 'despite three successive explanations for the 7 June 2017 meeting with the Presidency, the Public Protector still has not come clean and frankly explained why the meeting was held.' [49] The majority found that, on the face of the evidence, it is 'clearly contradictory for the Public Protector to claim that the new remedial action was not discussed with the Presidency.' Ultimately, the majority found that Adv Mkhwebane's explanation of the meeting of 7 June 2017 with the Presidency 'was, and still is, woefully inadequate' and that her 'persistent contradictions, however, cannot simply be explained away on the basis of innocent mistakes.'

48 <u>PP v SARB</u> at para 58.
49 <u>PP v SARB</u> at paras 201-205.

241. The evidence before the Committee accords with the majority of the CC's conclusions that: the Lifeboat Report did not disclose that Adv Mkhwebane met with the Presidency, despite the fact that the report disclosed other meetings that had been held; and other interested parties were never informed of the meetings with the Presidency, or what was discussed at those meetings, or how those discussions influenced Adv Mkhwebane to alter the remedial action from what was contained in the Provisional Report.

242. Adv Mkhwebane maintained her secretive stance in her affidavits before the CC, long after the Lifeboat Report was published.

(d) Did Adv Mkhwebane fail to furnish a transcript of the meeting?

243. There is no dispute: a transcript of the meeting with the Presidency was not filed with the Rule-53 record when the Lifeboat Report was challenged in judicial review proceedings.

244. The CC noted that '[d]espite the general practice within the Public Protector's office of producing transcripts of all meetings conducted during an investigation, no transcripts of the Public Protector's meetings with the Presidency… have been furnished by the Public Protector.'[50]

245. Mr Tshiwalule testified that, at the time Adv Mkhwebane assumed office, the prevailing practice within the PPSA was for investigation interviews to be recorded and transcribed and for electronic and hard-copy versions of the transcriptions to be obtained. This practice was corroborated by other witnesses, including Mr Kekana.

246. In her replying affidavit before the CC ('**SARB CC RA**'), Adv Mkhwebane explained that '[r]ecordings of the meetings can be in different forms. In this instance, the only recordings of the meeting with the SSA and the Presidency were handwritten notes. These notes were disclosed in the Rule-53 record.'

247. On the issue of the transcripts of Adv Mkhwebane's meeting with the Presidency, her legal representative emphasised to the Committee that Mogoeng CJ concluded that Adv Mkhwebane had no legal obligation to record and transcribe her meetings with the Presidency. While she may have departed from her own practice and failed to explain the departure, Mogoeng CJ concluded that that should not justify '*exceptionally high personal costs against her.*'[51] Furthermore, Mogoeng CJ

50 PP v SARB at para 175.
51 PP v SARB at para 69.

opined that the meeting notes in the Rule- 53 record '*capture the essence of what a transcript or the minutes would have been reasonably expected to reflect*'.[52]

248. It is not clear on what objective evidence such conclusion could be reached given that handwritten note cannot be construed as a complete or fully comprehensible account of the meeting:

248.1. It contains various annotations regarding the SIU – it mentions '*proclamation*', '*amend to include*', 'speak to Mothibi (SIU)' and 'SIU must share proclamation with PP according to SIU Act'.

248.2. Regarding 'remedy', it records, among other things, that the 'SIU must ask Presidency' and that the 'SIU will / can also draft the proclamation', as well as a note to 'amend proclamation, include matters which did not come to light – include Nedbank, others.'

248.3. It contains no mention of the apparent concerns shared by the Presidency and Adv Mkhwebane regarding a recommendation to appoint a Judicial Commission of Inquiry, even though Adv Mkhwebane alleges that this issue was discussed at the meeting, which discussion led her to change the remedial action.

248.4. Under the heading 'state capture', there is a note saying, 'counsel refusing to sign confidentiality (counsel for Presidency)' followed by '= Judge have to make decision'.

249. The note is not clear, nor can it be construed as an accurate or fully comprehensible recording of the meeting with the Presidency held on 7 June 2017.

250. Mogoeng CJ's conclusion does not detract from the fact that Adv Mkhwebane did not cause the meeting to be recorded or its contents to be transcribed, and therefore did not furnish transcriptions of those meetings with the Rule-53 record. It also does not explain why Adv Mkhwebane departed '*from her own practice*' in respect of such audio recordings and transcriptions.

251. As the majority of the CC concluded[53] –

> The Public Protector either failed entirely to deal with the allegations that she was irresponsible and lacking in openness and transparency, or, when she did address them, offered contradictory or unclear explanations. She gave no explanation as to why there were no transcripts of the meetings with the Presidency… No explanation was provided for the meeting with the Presidency

[52] PP v SARB at para 68.
[53] PP v SARB at para 217.

on 7 June 2017. Instead, another meeting with the Presidency, held on 25 April 2017, was disclosed for the first time by the Public Protector in her answering affidavit in the HC.

252. In this Committee, Adv Mkhwebane did not advance a credible explanation for why, in a departure from the PPSA's prevailing practice, there were no audio recordings of her meeting with the Presidency and transcripts. Adv Mkhwebane holds high public office and is under a duty to discharge that office transparently and independently; failing to ensure that the standard PPSA practice of recording meetings – particularly for important meetings – is a serious omission on her part. As is evident from other evidence heard by the Committee, this is an omission that is repeated when Adv Mkhwebane meets with the State Security Minister on 15 February 2019; and in relation to the meeting with Mr Luther Lebelo.

(e) Conclusion

253. **The majority of the Committee is satisfied that the evidence establishes that** –

253.1. on at least one occasion, Adv Mkhwebane met with the Presidency during the investigation into the IASA complaint, to deal with the merits of the investigation;

253.2. this meeting and its import were not disclosed in the Lifeboat Report, despite the fact that other meetings were;

253.3. the meeting was secret and undisclosed, in that neither its occurrence nor the concerns it gave rise to were disclosed to discussed with other interested parties, nor were such interested parties permitted to make representations regarding those concerns;

253.4. Adv Mkhwebane maintained that secrecy during the investigation and even during the litigation, after the Lifeboat Report had been published; and

253.5. while the handwritten notes of the meeting with the Presidency were filed, no transcript of this meeting was furnished with the Rule-53 record because, in a departure from standard practice in the PPSA and for reasons that remain unclear, there was no audio recording of the meeting of 7 June 2017.

254. A minority of the Committee (one member) is of the view that the meeting was undisclosed, but not *'secret'*, because Adv Mkhwebane was accompanied by PPSA staff. A minority of the Committee (one member) indicated that the charge cannot be sustained because there were no

transcripts of the meeting for Adv Mkhwebane to file. For the reasons set out above, the rest of the Committee disagrees with these minority views.

(iv) Meeting with the State Security Agency

255. The Motion alleges that, in the conduct of her investigation, Adv Mkhwebane met with the SSA secretly, without disclosing the meeting or its import in the Lifeboat Report, and without furnishing any transcripts of the meetings with the Rule-53 record in the litigation that followed the publication of the report.

(a) Did Adv Mkhwebane meet with the SSA in conducting the investigation?

256. The Lifeboat Report records one meeting with '*the Department of State Security on 3 March 2017*'. In her SARB HC AA, Adv Mkhwebane admitted that, during the investigation, she and Mr Kekana attended a meeting with Minister Mahlobo (then the Minister responsible for the SSA) and officials of the SSA. This was reiterated in her SARB CC RA. The evidence before the Committee therefore indicates that Adv Mkhwebane met with the SSA in respect of the investigation before the Lifeboat Report was published.

257. The undisputed evidence of Mr Kekana before the Committee indicates that Adv Mkhwebane met with the SSA also on 3 May and 6 June 2017, respectively.

(b) Were the 'fact and import' of the meetings with the SSA undisclosed in the Lifeboat Report?

258. The subsequent meetings that took place on 3 May and 6 June 2017 with the SSA are not disclosed in the Lifeboat Report, as alleged in the Motion.

259. In her affidavit to the Committee, Adv Mkhwebane explains that she met with the SSA because it was the signatory to the CIEX agreement, and she needed to obtain the SSA's '*narrative*' on the issues surrounding the investigation that CIEX has done. This content – i.e. the '*narrative*' surrounding the circumstances leading up to, and following the submission of, the CIEX Report – appears in both the Provisional Report, which preceded any meetings with the SSA, and the Lifeboat Report.

260. Adv Mkhwebane also alleges that at least one of the SSA meetings provided her with expert economic advice which informed her remedial action in respect of the constitutional amendment.

This is not disclosed in the Lifeboat Report, which means that a substantial component of the import of the SSA meetings is not disclosed.

(c) Were the meetings secret?

261. As the SSA meetings occurred after the Provisional Report, and were not disclosed in the Lifeboat Report, no interested or implicated parties were apprised of the meetings and their import.

262. Accordingly, the meetings with the SSA and the content of what was discussed, and the new remedial action introduced as contained in the Lifeboat Report, was kept secret from other parties with a direct and material interest in the investigation and the report.

263. The Rule-53 record contained a file note of the meeting with the SSA on 3 May 2017, prepared by Mr Kekana. It is cryptic. It has what appears to be four headings: '*SSA – Background*'; '*Heath*'; '*Davis*'; and '*SARB*'. It also appears to be incomplete: under the '*SARB*' heading, it ends with the phrase '*institutional mechanism, how*' and then has no more content.

264. The Rule-53 record also contained a file note headed 'meeting with SSA – Economist' and dated 6 June 2017. It had several sub-headings: 'independence'; 'operations to be aligned with overall responsibility line with constitutional obligations'; 'if bought at loss'; 'recovery – Reserve Bank – Economic Run'; and 'would have taken over the bank had the laws been applied properly'. Considered on its own, this second note gives little insight as to what was discussed with the alleged SSA economist.

265. In SARB's founding affidavit in the consolidated review ('**SARB HC FA**'), SARB complained that Adv Mkhwebane had met with the Department of State Security after interested parties had submitted their comments on the Provisional Report. This appears to be a reference to the meeting of 3 March 2017 mentioned in the Lifeboat Report. In its supplementary founding affidavit ('**SARB HC SFA**') – filed after it received the Rule-53 record (including the abovementioned file notes) – SARB expressed its alarm at the discussion that Adv Mkhwebane appeared to have had with the SSA on 3 May 2017. The SARB did not flag the file note in respect of the meeting of 6 June 2017. However, it noted how difficult it was to develop a full picture of what had transpired during the investigation based on the Rule-53 record and called on Adv Mkhwebane to explain her meetings with the SSA (and the Presidency) in full.

266. During the Consolidated Review proceedings, Adv Mkhwebane explained that the meeting with the SSA was necessary because it was the successor to the signatory of the CIEX agreement: the PPSA

needed to confirm the agreement, the payment of CIEX, whether the CIEX Report had been partially or wholly implemented, and why the CIEX Report had not been implemented even though paid for. She gave no indication that the SSA had supplied any other input.

267. However, Adv Mkhwebane did not interview Mr Masetlha, being the SSA representative that Adv Madonsela had previously interviewed regarding the CIEX Report. It is unclear whether the persons she met with actually had personal knowledge of the CIEX context, bearing in mind that the relevant events had occurred in the 1990s.

268. Mr Kekana testified that he and Adv Mkhwebane met with the SSA on two occasions: 3 May 2017 and 6 June 2017. This is not disputed.

269. The first meeting was attended by Messrs David Mahlobo, James Ramabulane and Arthur Fraser. Before the formal meeting began, Adv Mkhwebane and Minister Mahlobo had an unrecorded discussion without any of the other attendees present. When the formal meeting started, Mr Kekana began taking notes, after which (according to Mr Kekana) Adv Mkhwebane instructed him not to take any notes or record the meeting. During cross-examination Mr Kekana's evidence was called into doubt, and it was put to him that Adv Mkhwebane never gave such an instruction. Mr Kekana did not concede the point.

270. The notes in the Rule-53 (see paras 263 and 264 above) record are Mr Kekana's notes.

271. Adv Mkhwebane later informed Mr Kekana via email that she had asked the SSA to provide input in respect of the Lifeboat Report, as well as an economist. (This email is not in the Rule-53 record.)

272. On 6 June 2017, Adv Mkhwebane and Mr Kekana again met with the SSA: Mr Ramabulane attended and was accompanied by Mr Mai Moodley (at some points during the Committee's proceedings referred to as '*Dr Moodley*'), who was introduced to Mr Kekana by Adv Mkhwebane as an economist who would assist with the recommended constitutional amendment to alter the SARB's mandate. At this meeting, Mr Moodley provided Mr Kekana with a single page that contained a draft of the proposed constitutional amendment, which Adv Mkhwebane instructed Mr Kekana to insert the recommendations into the Lifeboat Report, which was published approximately two weeks thereafter.

273. Although Mr Kekana's evidence about whether he was instructed to stop taking notes and not to record the meeting of 3 May 2017 was disputed, the rest of the abovementioned evidence is not. Adv Mkhwebane does not dispute either the meeting of 3 May or 6 June 2017, or the fact that the

SSA provided the wording for the proposed constitutional amendment, or that Mr Moodley was presented as an economist that would assist the PPSA. There is also no dispute that several other interested parties – including SARB, the NT and ABSA – were unaware of the constitutional amendment being considered.

274. It is clear that Mr Kekana's hand-written notes of the 6 June meeting (see para 264 above) were not a full or proper recordal of what was discussed. They certainly give no indication that the SSA supplied the wording of the constitutional amendment at this meeting.

275. Mr Kekana's oral evidence indicating that he was instructed not to record or take notes is consistent with what is contained in his affidavit of December 2019. It appears that that affidavit – provided to the Speaker as a protected disclosure – is the first time that the SSA's extensive involvement in formulating the remedial action in respect of the constitutional amendment is explained. It was lodged with the Speaker after the CC judgment was handed down.

276. Adv Mkhwebane denies that she instructed Mr Kekana not to record the meeting with the SSA. She argues that Mr Kekana's allegation is absurd, given that he actually did take written notes of the meeting, and those notes were part of the Rule-53 record. Mr Kekana's response during cross-examination was that, at the beginning of the meeting, Adv Mkhwebane had told him not to record the meeting on a device and then, when he started to take written notes, she also instructed him not to do so. It was put to Mr Kekana that he was altering his version from what had been set out in his affidavit, which Mr Kekana did not accept. On the contrary, Mr Kekana's version is consistent with the incomplete meeting note of 3 May 2017, which stops mid-sentence, indicative that the author was stopped from continuing to write. Mr Kekana's version is also consistent with the complete absence of audio recordings and transcripts of the SSA meetings. It is improbable that the meetings would not have had audio recordings unless Adv Mkhwebane issued an instruction to that effect, given that it was the PPSA's prevailing practice to have audio recordings of investigation meetings.

277. In her affidavit to the Committee Adv Mkhwebane alleged that the meeting of 3 May 2017 was not '*secret*': while she had met with Minister Mahlobo, this was not a '*secret meeting*', but '*a customary meet and greet meeting with him which lasted a few minutes*' before others joined.

278. However, this does not explain why the meeting was not disclosed in the Lifeboat Report or why the content of the discussion was not disclosed to other interested parties. More importantly, it does not address the rest of the 3 May meeting, or the 6 June meeting at all.

279. During an address to the Committee, Adv Mkhwebane's legal representative emphasised certain findings from the CC's minority judgment. He described Mogoeng CJ's findings as follows:

280. The SSA 'virtually initiated the investigation'. Meeting with the SSA was 'most appropriate', as the aim was to 'recover whatever the Reserve Bank had given away illegally'. Once the meeting was held, *'anything including the Bank's vulnerability could legitimately be discussed.*'

281. There was no basis for the conclusion that Adv Mkhwebane was secretive about the SSA meeting, when she voluntarily waived the classification of the record of her discussions with the SSA.

282. Adv Mkhwebane had no legal obligation to record and transcribe her meetings with the SSA. While she may have departed from her own practice and failed to explain the departure, that should not justify '*exceptionally high personal costs against her*.'

283. It should be noted that, factually, IASA's complaint initiated the investigation. The SSA did not initiate the investigation and may well have been implicated by IASA's complaint that more had not been done to implement the agreement that the SSA concluded.

284. There was no allegation that Adv Mkhwebane's discussion with the SSA was classified, if that was intended to refer to classification under the Minimum Information Security Standards, nor was any specific record referred to that had been classified.

285. It remains the case that although Adv Mkhwebane purported to explain the nature and purpose of her meetings with the SSA to the HC and the CC, she never disclosed that those meetings extended to the SSA providing economic input or the wording of the proposed constitutional amendment. Her affidavits before the courts created the impression that the meetings were limited to obtaining contextual information about the government's relationship with CIEX.

286. The extent of the SSA's involvement in the PPSA's investigation and the formulation of the remedial action contained in the Lifeboat Report –

    286.1. was not disclosed in the Lifeboat Report;

    286.2. was not appreciated by the litigants, the Full Court or the CC (all of whom only dealt with the May 2017 meeting and none of whom addressed the constitutional amendment supplied by Mr Moodley); and

286.3. appears only to have come to light in Mr Kekana's affidavit of 12 December 2019 (several months after the CC handed down its judgment). All indications are that neither the Full Court nor the CC was apprised of the June 2017 meeting with the SSA.

287. Furthermore, as dealt with below, all the meetings with the SSA did not have audio recordings, for reasons that Adv Mkhwebane still has not explained despite being called on by SARB in the litigation to do so. This supports the conclusion that there was an effort to keep the meetings hidden. The evidence therefore establishes that the meetings with the SSA were secret.

288. A minority of the Committee (one member) disagreed and took the view that while Adv Mkhwebane's meetings with the SSA were undisclosed, they were not secret because (a) Adv Mkhwebane was accompanied by other PPSA officials; and (b) those officials were not sworn to secrecy. The minority view in the Committee was that the secrecy or lack thereof was '*not legally relevant*' to the charge, because the meetings had not been disclosed as required in the Lifeboat Report.

(d) Did Adv Mkhwebane fail to furnish transcripts of the meetings?

289. There is no dispute that transcripts of the SSA meetings were not filed with the Rule-53 record when the Lifeboat Report was challenged in judicial review proceedings, and that no recordings were made.

290. In the CC RA Adv Mkhwebane explained that *'[t]he only recordings of the meeting with the SSA and the Presidency were handwritten notes. These notes were disclosed in the Rule-53 record.'* She further explained that *'the meeting with SSA and the Presidency was not electronically recorded, but manually in the form of the notes taken by the senior investigator who assisted me during the investigation of the matter in question.'*

291. The '*notes taken by the senior investigator*' were Mr Kekana's notes. The affidavit did not explain or address the inadequacy thereof.

292. The CC noted that *'[d]espite the general practice within the Public Protector's office of producing transcripts of all meetings conducted during an investigation, no transcripts of the Public Protector's meetings with the… State Security Agency have been furnished by the Public Protector.'*[54]

[54] PP v SARB at para 175.

293. Regarding the lack of transcripts and records, Adv Mkhwebane said the following to the Committee:

> 'Mr Kekana is correct that for every meeting we either take notes or record the meeting. However, my meeting with the Minister and the SSA team was not for the purposes of investigation at the time, as stated above, that since the information relating to CIEX went missing, the purpose of the meeting with the SSA was to get background information.'

294. This explanation, however, cannot be believed. Given Adv Mkhwebane's apparent reason being those records of the SSA meeting had gone missing, how could it then be reasonable or appropriate not to ensure that the information being supposedly re-obtained by the PPSA was then not reliably recorded? Given the content of the discussions at that meeting – even if one accepts Adv Mkhwebane's version that it only dealt with the CIEX context – it was obviously relevant to the investigation. Indeed, if the meeting with the SSA '*was not for purposes of investigation at the time*', there would have been no purpose in meeting and it would have been a waste of time.

295. Mr Kekana's notes of the meeting of 3 May 2017 indicate that '*SARB*', '*Heath*' and '*Davis*' were all discussed. Considered in context, the latter two must have referred to Judge Heath's announcement in respect of the SIU's investigation into the lifeboat and the Panel of Expert's investigation and report.

296. Given what occurred at the meeting of 6 June 2017, it could not credibly be argued that this meeting '*was not for the purposes of investigation at the time*'. The meeting therefore should have been properly recorded, which Adv Mkhwebane failed to ensure. Mr Kekana's handwritten notes cannot be said to provide a proper account of the meeting.

(e) Conclusion

297. **The majority of the Committee is satisfied that the evidence establishes that –**

297.1. on at least two occasions (3 May and 6 June 2017), Adv Mkhwebane met with the SSA during the course of the investigation, to deal with the merits of the investigation, neither of which was disclosed in the Lifeboat Report, despite an earlier meeting with the SSA having been disclosed;

297.2. the meeting of 6 June 2017 was also not disclosed by Adv Mkhwebane in her affidavits during the litigation, despite the fact that she was called upon to provide a full account of her engagements with the SSA, and despite the fact that she purported to inform the other

litigants and the courts of the nature and content of her engagement with the SSA, which indicates further non-disclosure; and

297.3. no transcripts of any of these meetings were furnished with the Rule- 53 record because, in a departure from standard practice in the PPSA and for totally unconvincing reasons, the meetings with the SSA were not electronically recorded, in addition Mr Kekana's notes of the hearing were so inadequate that they bear out his evidence that he was instructed not to take notes.

298. A minority of the Committee (one member) is of the view that the meetings were not secret because PPSA staff was present but that the lack of secrecy is irrelevant because the meetings were not disclosed when they should have been.

(v) <u>Broadening the investigation</u>

299. The Motion alleges that, in the conduct of her investigation, Adv Mkhwebane materially broadened the scope of the investigation in para 4.2.10 of the Lifeboat Report (as compared to the Provisional Report), without notice and any explanation to affected persons.

(a) <u>Did Adv Mkhwebane materially broaden the scope of the investigation?</u>

300. The Provisional Report described the scope of the PPSA's investigation as follows:

> '[T]he factual enquiry principle focused on whether the South African Government, National Treasury and South African Reserve Bank failed to recover public funds owed to Government by ABSA bank… The substantive scope of the investigation focused on compliance with the concluded contract between SARB and ABSA bank, laws and prescripts regarding a decision to not recover an alleged amount of R3,2 billion and Government bonds used as security in respect of loans made to ABSA bank, allegedly owed to the Government of the Republic of South Africa and SARB.' [Sic.]

301. The Lifeboat Report added the following para 4.2.10 (as mentioned in the Motion) to the scope of the investigation:

> 'The report in the circumstances seeks also to look into reform of the Republic's monetary system in order to realise government's commitment in improving socio economic inequalities in society and solicit an amendment to the Constitution in respect of the South African Reserve Bank to create inclusive economic benefits to the people of the Republic.'

302. Whilst the list of issues to be '*considered and investigated*' in the report did not change, the scope of the investigation certainly did: in the final report it included, for the first time, a constitutional amendment on the '*reform of the Republic's monetary system*'. The scope of the investigation was expanded to include the SARB's role and function, expanding issues under consideration to include the text of the Constitution and matters of pure policy. This was a substantial change.

303. The Full Court found that Adv Mkhwebane had '*without notice to the SARB or ABSA, decided substantially to change the focus and remedial action of her investigation.*'[55]

304. In her affidavit before the Committee, with reference to the final version of the Lifeboat Report, Adv Mkhwebane claimed that '*the issues that my predecessor Prof Madonsela initially investigated remained the same, however the proposed remedial action in the draft provisional report were indeed changed although not significantly.*'

305. The documentary evidence before the Committee does not support Adv Mkhwebane's claims. The proposed reforms already referred to were never investigated by Adv Madonsela and were never reflected in the Provisional Report.

306. The broadening was material. The Provisional Report considered a particular set of facts i.e. whether SARB and the Government had failed to recover public funds from ABSA and implement the CIEX Report. The Lifeboat Report, however, expanded the investigation into a systemic consideration of South Africa's monetary system and purported to explore a constitutional amendment that would fundamentally change the nature and function of the SARB.

307. In her HC AA, Adv Mkhwebane explained that her investigation concluded that '*the major motivation for the "lifeboat" was the fear of a "run on the banks", which could result in adverse financial impacts*' and that it '*is not evident that the socio-economic well-being of South Africans… featured in the assessment of whether or not the "lifeboat" ought to have been extended.*' Adv Mkhwebane further explained that she had '*resolved to conduct an investigation into the circumstances around the granting of loans to Bankorp*'.

308. Adv Mkhwebane expressly addressed her lack of jurisdiction '*in that the lifeboat transactions occurred from May 1985 to October 1995*', which pre-dated the establishment of the PPSA. Adv Mkhwebane founded her jurisdiction on the fact that, among other things, significant amounts of money were at stake, the parties involved in the transactions were still extant, South Africa

[55] Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) at para 85.

required '*full and frank disclosure*' in respect of apartheid '*crimes and atrocities*', and '*the office of the Public Protector was established as far back as 1993 and the illegal gift continued until 1995*'. The '*special circumstances*' that justified her jurisdiction included the '*manner in which the simulated agreements were entered into and public money made available to Bankorp Limited and later to ABSA contrary to the principles of assistance of last resort*'.

309. Adv Mkhwebane's investigation was not limited to whether the government had acted appropriately in response to the CIEX Report, but to events in the 1980s and early 1990s.

310. However, the Provisional Report that Adv Mkhwebane issued concluded that '*the Public Protector has no jurisdiction to investigate matters that took place before the coming into effect of the Public Protector Act or the establishment of the Public Protector office in 1995.*' It therefore did not make findings on, or issue remedial action in respect of, the circumstances in which the lifeboat assistance was provided to Bankorp and ABSA (although it recorded some allegations in respect thereof).

311. Expanding the investigation to include conduct preceding the PPSA, and to investigate remedial action in respect SARB's governing prescripts despite the fact that, at the time, the SARB was governed by different legislation and South Africa had a different constitutional framework, materially broadened the scope of the investigation.

312. In her affidavit to the Committee, Adv Mkhwebane argues that the Motion is '*inherently contradictory*', because she has been accused of widening the investigation into the IASA complaint, but also of narrowing the Vrede investigation.

313. This claim is without merit. The Motion is not contradictory: in one case, depending on the facts of the matter, it could be inappropriate, unfair, unreasonable and/or unlawful to broaden an investigation, while in another case it could equally be inappropriate, unfair, unreasonable and/or unlawful to narrow an investigation.

314. Ultimately, the evidence establishes that Adv Mkhwebane expanded the scope of the investigation from considering a particular set of facts regarding the implementation of the CIEX Report to a sweeping consideration of South Africa's monetary policy system and the associated constitutional architecture. It is inconceivable to contend that altering the Republic's fundamental law, with a view to changing the way in which the stability of the currency is protected, is anything other than material.

(b) Did Adv Mkhwebane fail to give notice of the broadened scope of the investigation?

315. The s 7(9) notice that Adv Mkhwebane issued with the Provisional Report noted that she had '*now concluded the investigation*' and was '*in a position to issue the final report*'. Recipients were invited to '*provide reasons why I should not issue this report as final report*'. Any recipient of the Provisional Report would therefore reasonably have understood the scope of the investigation to be as set out in the Provisional Report and would have reasonably been entitled to expect to be notified if that scope changed materially.

316. Mr Tshiwalule's uncontested evidence shows that, in December 2016, before the Provisional Report was issued, Adv Mkhwebane was already considering issues regarding SARB's mandate. However, nothing on the mandate featured in the Provisional Report, and it was not raised with SARB or any other parties to which s 7(9) notices were issued.

317. The issues arising from the expanded scope of the investigation were so substantive, so material, so sensitive and required so much input from third parties and experts that Adv Mkhwebane must have, or at least should reasonably have, appreciated the need to engage with interested parties thereon. However, other than in respect of the SSA and Mr Goodson, she did not consult with SARB, the Minister of Finance, the NT or Parliament on the issue.

318. The broadened scope of the investigation was discussed with the SSA. As evident from Mr Kekana's evidence (supported by documentation), the text of the constitutional amendment contained in the Lifeboat Report was actually provided by the SSA. Despite being subjected to lengthy and robust cross-examination, it was never suggested that Mr Kekana's evidence on this score was incorrect.

319. What is clear, however, is that certain parties (SARB, ABSA, the Minister of Finance, the NT and Parliament) were not given an opportunity to consider, or make representations on, the broadened scope of the investigation. Given what Adv Mkhwebane revealed of her discussions with the Presidency, it too may not have been consulted in relation hereto.

320. To the Committee, Adv Mkhwebane admits that it may be the case that, after revising the Provisional Report, '*it would have been a good idea to… recirculate it to the parties*'. She also admits that she failed to do so, because of her '*genuine belief there had already been adequate consultation or that the [changes] were not so substantial as to necessitate further delays*'.

321. Given that the Lifeboat Report proposed a new systemic consideration of South African money policy and constitutional regulation, it is unfathomable that it could be regarded as not being substantive. The enormity thereof and the repercussions thereof for SARB and the South African economy should have been readily apparent to Adv Mkhwebane.

322. Given the changes effected referred to in paras 302 – 311 above, it is unquestionable that SARB (as the constitutional custodian of monetary policy, independent from the executive), Parliament (as the constitutional custodian of the Republic's national legislative power, also independent from the executive) and the Minister of Finance (as the member of the national executive responsible for interactions with SARB) had a material interest in Adv Mkhwebane's decision to change the course of the investigation. However, they were not notified of this fundamental change, much less offered an opportunity to make representations.

323. In the HC, the only economist that Adv Mkhwebane claimed to have consulted in the process of the investigation was Mr Stephen Mitford Goodson. He was not a well-regarded economist who could be relied upon to give independent advice. The controversial nature of his views was well-known. At the very least, Adv Mkhwebane should have sought input from SARB.

324. In the wake of SARB's repeated warnings to the PPSA about the dangers that the Lifeboat Report could have on the monetary system generally, and the acceptance of the need to proceed cautiously (as evident from Mr Tshiwalule's testimony, and the length of time taken to conclude the investigation), this refusal to notify or engage represented a total failure of the statutory obligation to observe *audi alteram partem*.

325. In her affidavit before the Committee, Adv Mkhwebane argues, with reference to the Mail and Guardian case, that she was required to '*approach an investigation with an enquiring mind*' and that she could '*widen the scope by following further evidence which is not necessarily confined to the scope of the complaint.*' This principle is correct.

326. That response, however, fails to appreciate that the Public Protector is required to undertake her investigations in a fair and rational manner: fairness requires her to hear submissions from interested parties; rationality requires her to take properly informed decisions. In finalising the Lifeboat Report, she did neither.

327. Paragraph 1.1.2 of the Motion does not allege that Adv Mkhwebane was not entitled to extend the scope of her investigation. Instead, it alleges that, after the Provisional Report, she materially broadened the scope of the investigation, without giving notice to affected persons, and without

furnishing an explanation. Thus far the evidence has established that Adv Mkhwebane did indeed materially broaden the scope of the investigation, and failed to affected parties notice or an opportunity to make submissions in respect thereof.

(c) Did Adv Mkhwebane fail to furnish an explanation for her conduct?

328. Adv Mkhwebane argues that she was entitled to change the investigation from what her predecessor had focused on because, in comparison to Adv Madonsela, she is '*a different person and accordingly could have a different take on the issues.*' At the level of principle, this is correct: Adv Mkhwebane is duty-bound to bring an independent mind to bear on the issues in an investigation.

329. However, the Motion does not allege that Adv Mkhwebane departed from Adv Madonsela's stance. The Committee's task is not to compare one Public Protector with another. Instead, the Motion alleges that Adv Mkhwebane materially broadened the scope of the investigation from what was contained in the Provisional Report. As set out above, the objective evidence establishes that Adv Mkhwebane clearly did so.

330. During cross-examination, Adv Mkhwebane's legal representative claimed that Mr Tshiwalule's evidence showed that the allegation that she '*expanded this thing… is completely false*'. Mr Tshiwalule's testimony included the following:

330.1. The investigation was difficult and controversial because it involved powerful players. There were concerns about widespread economic consequences. However, he was determined that the PPSA should '*get to the bottom of things*', even though it needed to proceed very cautiously.

330.2. Former President Mbeki had cited the '*impact on the Rand*' as one of the reasons for the '*failure to collect the money owed in respect of what was known as apartheid corruption*'. Former Minister Manuel, as one of the reasons for non-recovery, had cited '*his mandate to protect the economy*'. These reasons were cited before Adv Mkhwebane took office. However, notwithstanding these reasons, Mr Tshiwalule and Adv Madonsela remained of the view that *'the money should've been recovered'* – they *'did not buy this story that it was economically dangerous to collect the money of our people'.*

330.3. Mr Tshiwalule accepted that the mandate of the NT '*broadly speaking, covers the Reserve Bank. The Reserve Bank falls on the monetary policy side but [former Minister Manuel*

was] talking about the role of the state, so to speak'. He later indicated that, on his understanding, the concerns about protecting the economy pertained to the policy objectives of the members of the national executive, as mentioned in para 5.4.3.2 of Adv Madonsela's final draft of the Provisional Report.

330.4. Both Judge Heath (as the Head of the SIU) and Judge Davis (as the Head of the Panel of Experts) had considered the lifeboat. Judge Davis issued a report, whereas Judge Heath only issued a statement. Both concluded that the lifeboat was irregular, but Judge Davis advised against recovery, while Judge Heath '*said the money was recoverable, although he also had made comments about the run on the Rand and all that*'.

331. After Mr Tshiwalule's abovementioned evidence, Adv Mkhwebane's legal representative indicated that her evidence would be that '*the connection between the mandate issues and the lifeboat issue, were not her invention but something that she found already… even demonstrated in the provisional report*'. In response, Mr Tshiwalule testified that, ultimately, Adv Mkhwebane had the final say over the contents of the Lifeboat Report, and she could amend what she needed to amend.

332. However, Adv Mkhwebane completely misconstrues the issues at hand. It may be accepted that former elected representatives and executive office-bearers, such as Messrs Mbeki and Manuel, cited the need to protect the South African economy as a reason for not litigating against ABSA. Protecting the South African economy is undoubtedly within the constitutional competence of members of the national executive.

333. SARB's constitutional mandate is separate from the national executive's. It is enshrined in, and guaranteed by, the Constitution. If Adv Mkhwebane was concerned about irregular conduct by SARB in respect of the lifeboat, that conduct would have taken place before the Constitution came into operation on 4 February 1997. Therefore, any concerns about that conduct need not have necessitated an amendment to South Africa's democratic Constitution, when – at the time of the supposed wrongdoing that Adv Mkhwebane wanted to remedy – SARB was subject to a different constitutional regime.

334. If Adv Mkhwebane was concerned about steps taken by former President Mbeki, former Minister Manuel and other members of the national executive to protect the South African economy, any remedial action should have focused on the national executive – not SARB, which is an institution separate from the national executive, with constitutionally guaranteed independence.

335. The attempt to conflate monetary policy – the responsibility of SARB – and fiscal and socio-economic policy – the preserve of the national executive – shows a failure on the part of Adv Mkhwebane to understand economic fundamentals and the constitutional architecture of the State.

336. Mr Tshiwalule testified that, when Adv Madonsela left office in October 2016, the investigation into the complaint was complete and the drafting of the report was '*substantially done*' but there were still some aspects of the draft report that he had to attend to. Shortly after Adv Mkhwebane assumed office, he briefed her on the investigation and the working draft of the Provisional Report, which she considered and made changes to. On 7 December 2016, before the Provisional Report was issued, Adv Mkhwebane asked him to '*do some desktop research about operations of other country's Reserve bank, just short indications on state control*' [sic]. He considered the request bizarre, because nothing in the complaint required Adv Mkhwebane to consider the mandates of other central banks. Nevertheless, he looked into other jurisdictions, as directed. At the time he did not consider Adv Mkhwebane's request to be a serious issue because he was never instructed to revise the Provisional Report to include content on the mandates of other central banks.

337. Mr Tshiwalule accepted that ultimately SARB's mandate was brought into the Lifeboat Report, and he saw why Adv Mkhwebane may have asked him for the research. Nevertheless, even on reading the final Lifeboat Report, he did not understand how the issue of SARB's mandate related to the investigation. However, he accepted that additional evidence may have arisen after he left the PPSA that motivated Adv Mkhwebane to amend the remedial action.

338. During cross-examination, Adv Mkhwebane's legal representative stated that *'from the 31st of December [2016] and the release of the report, which was in June, there was indeed accumulation of new evidence which pointed in the direction of the remedial action'*.

339. However, it is evident that the monetary-policy framework and constitutional regulation of SARB generally was being contemplated by Adv Mkhwebane in early December 2016 already – hence her request to Mr Tshiwalule to undertake the requested research.

340. The Lifeboat Report concludes that SARB '*had an opportunity to recover but decided not to'* and that SARB's decision not to recover *'seriously prejudiced the people of South Africa, in particular the poor who would have benefited through social development programs.'* It seeks to draw a link between these conclusions and the notion that *'the status of the [SARB] as the lender of last resort has commercial benefits only in respect of the financial sector market… Leading authors advocating and promoting the ideology of state banks and nationalization of monetary currency*

believe that the notion of the lender of last resort's status that is inherent to central banks internationally would cease to exist if governments take sole power in creating money through the establishment of state banks'.

341. However, this line of reasoning could not have justified Adv Mkhwebane's conduct:

341.1. The Lifeboat Report contains no findings about SARB's existing primary function as enshrined in the Constitution, *viz* to '*protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.*' It draws no link between this function and problems that Adv Mkhwebane claimed to be concerned about. That being so, there was no rational basis for expanding the investigation to including changing the primary function.

341.2. SARB's function is to protect the value of the Rand and thereby to combat excessive inflation. That should be regarded as a pro-South-African, pro-poor mandate, given that South Africans suffer when inflation is high, and the poor suffer disproportionately.

341.3. The Public Protector is an independent constitutional entity. It is highly inappropriate to use it to '*advocate*' or '*promote*' a particular ideology.

341.4. Choosing how monetary policy is to be formulated and implemented is a policy matter outside Adv Mkhwebane's remit and expertise. Even if the Government's monetary policy requires or could benefit from change, this was not a matter to be determined by Adv Mkhwebane.

341.5. SARB's evidence that the reasoning is '*maverick and ill-informed*' and stems from an individual (Mr Goodson) who was found to have '*acted with a conflict of interests and in breaches of his fiduciary duties to the Reserve Bank*' is undisputed.

342. In her SARB HC AA, Adv Mkhwebane for the first-time expressed concern that SARB's mandate was '*narrowly stated*' and it '*was not evident that the socio-economic well-being of South Africans, including as regards the diversion of money that could have been used for job creation and other socio-economic objectives featured in the assessment of whether or not the "lifeboat" ought to have been extended.*' Furthermore, if '*left unchanged*', this '*narrowly stated mandate could continue to enable decisions to be taken that prejudice the socio-economic interests of ordinary South Africans*'.

343. Adv Mkhwebane set out no basis for concluding that SARB's mandate in the Constitution itself was somehow flawed. Furthermore, as SARB's Governor of SARB explained during the litigation, *'the SARB's constitutional mandate is not unusually narrow in that the Constitution gives the SARB every one of the powers that other central banks customarily exercise.'* This stood uncontradicted.

344. In her SARB HC AA, Adv Mkhwebane noted that the central banks of other countries, such as the USA and the UK, have '*multiple or broader mandates*' that include '*the promotion of full employment (job creation) and balanced economic growth, or other socio-economic objectives.*'

345. However, the choosing of a central bank's mandate constitutes economic policy beyond the jurisdiction of an unelected functionary who is not an elected representative or a member of the executive branch of government and who holds no mandate to make such decisions. The Lifeboat Report set out no record of evidence, or line of conclusions, that supported Adv Mkhwebane's belated attempt to claim that the '*failure to assess the other socio-economic objectives were enabled, and continued to be enabled, by the narrowly stated mandate of the SARB*'.

346. In the HC, Adv Mkhwebane contended that the financial assistance initially provided by SARB to Bankorp was *'supposedly authorised under the concept of lender of last resort, which is allegedly a function and role played by all Central Banks'*, but that SARB had not observed the *'ordinary requirements'* for a lender of last resort by requiring *'good collateral from Bankorp'*. She then set out various '*different expert views*' regarding the concept, and noted that –

> 'A common view seems to be that the lender of last resort function of central banks should not be used to subsidize errors of judgment, since this could give rise to moral hazard, which in tum leads to reckless lending, which reflects misallocation of resources by banking institutions.'

347. However, while the Lifeboat Report mentions SARB's role as the '*lender of last report*', it makes no reference to the SARB having failed to comply with the '*ordinary requirements*' of that role. Regarding collateral, the report records Dr Stals' evidence that '*in order for Bankorp to provide collateral to the loan, Bankorp was required to buy Government Stock Bonds with the amount of R1.5 billion*' and that those bonds '*were ceded to the South African Reserve Bank*'. The report later recorded that the evidence established that the government bonds '*were pledged as collateral to a loan that was granted by the [SARB]'*, and that the issue for determination was whether it was improper not to recover the interest earned on the loan amount.

348. The Lifeboat Report records that s 10(f) of the SARB Act allows the SARB to *'grant loans and advances against security. It then follows that the lifeboat was not a loan or an advance granted against security within the meaning of section 10(f) and was therefore unlawful.'*

349. Although the Lifeboat Report is far from clear, it appears that while Adv Mkhwebane accepted that the capital amount of the loan had been supported by collateral in respect of the pledged or ceded bonds, the interest that was made available to Bankorp and later ABSA was not secured in a similar fashion. However, the Lifeboat Report does not link this lack of security to SARB's role as a lender of last resort (or, indeed, to its current constitutional mandate). Instead, it finds that the lack of security rendered the lifeboat (i.e. the accrued interest of R1,125 billion) unlawful because it was unsecured.

350. If a response to that conclusion was required from Adv Mkhwebane, the only rational response – or at least the most robust such response – would have been to require SARB to comply with its governing statute going forward. Even the concern about a lack of security for the accrued interest could not have justified broadening the investigation to consider the general reform of the South African monetary system, which in any event was outside of Adv Mkhwebane's mandate.

351. Later in her SARB HC AA, Adv Mkhwebane argued that the cession of government bonds *'is not equivalent to putting up good collateral in the sense contemplated in the literature. The bonds which were held on behalf of Bankorp by SARB were not generated through Bankorp's own operations'*.

352. However, this concern about the nature of the collateral appears nowhere in the Lifeboat Report, and it is not apparent how Adv Mkhwebane would have acquired the knowledge or expertise during the investigation to determine whether the SARB had acquired '*good collateral*'. It must also be borne in mind that the secured debt – i.e., the capital loan of R1.5 billion – was repaid to the SARB.

353. It is not apparent how Adv Mkhwebane's concerns about the '*lender of last resort*' led to the expansion of the scope of the investigation; there is nothing to indicate that the constitutional amendment imposed by the Lifeboat Report would have jettisoned the notion of a lender of last resort or prohibited SARB from fulfilling that function.

354. In her affidavit to the Committee, Adv Mkhwebane asserted that she had the principal duty to identify the '*root cause*' of the complaint, which duty cannot be substituted by a court or the Committee, and that she '*had genuinely identified the root cause of the lifeboat saga as the SARB's obsession with the protection of the rand above all else which in turn was traceable to its current*

skewed mandate.' In respect of the '*various expert views*' that were '*obtained during the investigations*', Adv Mkhwebane continued as follows in her answering affidavit in the HC:

> 'On assessment it became apparent that the Reserve Bank could have been guided and/or informed by one of the views, as such the losing view could well have characterized the decision, to fund Bankorp negatively. So a further investigation was called for. This further investigation entails the sale of Bankorp, which was eventually acquired by ABSA.'

355. However, this '*obsession with the protection of the rand*' does not feature in the Lifeboat Report or in Adv Mkhwebane's SARB HC AA. Had this concern genuinely motivated Adv Mkhwebane to act as she did, no doubt it would have been explained at an earlier juncture. Instead, the overarching concern in the Lifeboat Report was that SARB acted unlawfully in not recovering the accrued interest from ABSA. As set out above, the high-water mark of a rational response to that conclusion would have been to direct SARB to act in accordance with the law in the future.

356. At the very least, Adv Mkhwebane had to have a rational basis for expanding the investigation to consider a constitutional mandate to change the fundamentals of South African monetary policy.[56] Neither the Lifeboat Report, nor Adv Mkhwebane's various subsequent affidavits, explain why the Constitution's requirement for SARB to act '*in the interest of balanced and sustainable economic growth*' was somehow '*skewed*'.

357. As set out in paras 515 – 529 below, the claim that the Lifeboat Report was informed by inputs from several expert economists is also not borne out by the evidence.

358. In her SARB HC AA, Adv Mkhwebane sought to justify the Lifeboat Report by noting that the '*ambit of the mandate of the SARB is, as it is, a matter of public debate.*' It must be noted that, during cross-examination, Mr Ebrahim conceded that '*[i]f the Public Protector wishes to make a submission, that there ought to be an amendment of the Constitution, she would be entitled just like anybody else in a country would be.*'

359. However, in her capacity as the Public Protector, Adv Mkhwebane was not an ordinary citizen participating in debates on public policy. Instead, she was a constitutional office-bearer with the power to impose binding remedial action. She was required to exercise that power prudently, rather than to use her report to ventilate controversial ideas without affording parties with a

[56] Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at para 75.

constitutionally recognised material interest an opportunity to make submissions. She failed to observe the requisite prudence.

(d) Conclusion

360. The evidence establishes that Adv Mkhwebane materially broadened the scope of the investigation from what had been contained in the Provisional Report to the content discussed in para 4.2.10 of the Lifeboat Report, and that she did so without giving notice to affected parties. Furthermore, she did not offer any credible explanation for the expanded scope in the Lifeboat Report, or any justification for why the evidence regarding the '*decision not to recover misappropriated funds*' (being the focal point of the investigation described in para 4.2.9 of the Lifeboat Report) necessitated the '*reform of the Republic's monetary system in order to realise government's commitment in improving socio-economic inequalities in society*' or '*an amendment to the Constitution in respect of the South African Reserve Bank to create inclusive economic benefits to the people of the Republic.*'

361. Even when Adv Mkhwebane belatedly attempted to justify the expanded scope of the investigation during the litigation, that attempt was not borne out by the evidence. Certainly, Adv Mkhwebane could never genuinely or reasonably have thought that amending the Constitution and reforming South Africa's monetary system did not warrant input from, among others, SARB, the Minister of Finance or Parliament.

(vi) Altering the remedial action

362. The Motion alleges that, in the conduct of her investigation, Adv Mkhwebane materially altered the remedial action from what was contained in the Provisional Report, on the instruction and/or advice of the Presidency and/or the SSA and made the change without giving affected persons notice or an opportunity to comment.

363. During an address to the Committee, Adv Mkhwebane's legal representative claimed that the '*main issue*' in respect of this charge is that '*the remedial action that the Public Protector issued, differ[s] substantially from that which Adv Madonsela issued*'.

364. This is not correct. The charge is that Adv Mkhwebane materially changed the remedial action from what had been set out in her own Provisional Report.

(a) Did Adv Mkhwebane materially alter the remedial action from what was contained in the Provisional Report?

365. In her HC AA, Adv Mkhwebane admitted that the remedial action was changed, but claimed that it was '*not significantly*' altered. The objective documentary evidence before the Committee reflects that this is not so. Instead, the remedial action imposed in the Lifeboat Report was vastly different. A comparison records that the alterations were material:

365.1. The Provisional Report directed the NT and SARB to take steps to ensure that the applicable systems, regulations and policies prevented the recurrence of something similar to the Bankorp / ABSA lifeboat. The Lifeboat Report included no such direction.

365.2. Both reports directed that steps should be taken to recover the interest that had accrued in ABSA's favour.

365.3. The Provisional Report directed the NT and SARB to institute legal action against ABSA to recover the accrued interest. The Lifeboat Report directed the SIU to take steps to recover R1,125,000,000 from ABSA.

365.4. The Provisional Report directed the President to consider whether it was necessary to appoint a Commission of Inquiry to investigate the apartheid corruption alleged in the CIEX Report. The Lifeboat Report directed the SIU to take steps to investigate '*alleged misappropriated public funds given to various institutions as mentioned in the CIEX report.*'

365.5. The Lifeboat Report directed that steps should be taken to amend SARB's mandate as set out in the Constitution, and prescribed how the Constitution should read after the amendment. The Provisional Report included no such stipulations.

366. In her affidavit to the Committee, Adv Mkhwebane argues that remedial action to '*investigate alleged apartheid corruption as outlined in the CIEX report*' was part of both the Provisional Report and the Lifeboat Report. Similarly, Adv Mkhwebane argued that '*ABSA paying back the misappropriated funds to the South African public purse was canvassed in the initial draft provisional report however, I only changed the recovery mode… While my predecessor had proposed that the matter be referred to a Commission of Enquiry, I recommended referral to the SIU.*'

367. The Lifeboat Report introduced the SIU as the investigating body, in effect re-opening an investigation that had been closed for many years. The Full Court concluded that this remedial action was unlawful.[57] The SIU had previously decided not to pursue litigation in respect of the lifeboat. The remedial action imposed by Adv Mkhwebane would have entailed revisiting that decision, and any investigation by the SIU is a serious matter. The insertion involving the SIU into the remedial action regime was indeed a material change.

368. In her affidavit to the Committee, Adv Mkhwebane admits that the remedial action in respect of the constitutional amendment was a '*significant change*'.

369. The economic consequences of Adv Mkhwebane's remedial action – as alleged by the Governor of SARB during the urgent HC litigation – was undisputed, including, *inter alia*, that the release of the report negatively affected the value of the Rand and business confidence, resulting in the sale of R1,300,000,000 in South African government bonds by non-resident investors and the sale of approximately R365,000,000 in banking-sector shares.

370. Adv Mkhwebane withdrew her opposition and consented to having the remedial action in respect of the constitutional amendment set aside, having conceded that it was unlawful.

371. In her affidavit before the Committee, Adv Mkhwebane argues that the '*true motive for the overreaction and pursuing the litigation so vigorously was to intimidate me and anyone who dared to speak out for the poor. The model I was proposing is consistent with vast majority of countries in the world and it is not in itself subversive or cause for alarm and panic.'*

372. This misses the point, given the undisputed negative economic effects. The '*true motive*' for the reaction can hardly have been to intimidate Adv Mkhwebane; there is no evidence that the various individual economic decisions comprising the individual sell-offs were coordinated, let alone for the purpose of trying to intimidate the Public Protector. More plausibly, the spectre of economic harm flowing from the consequences of Adv Mkhwebane's remedial action resulted in disinvestment. There was no evidence of any conspiracy to harm Adv Mkhwebane, but instead a rational response to her irrational, unlawful and ill-conceived remedial action.

373. In her affidavit before the Committee, Adv Mkhwebane argues that this remedial action '*caused a hullaballoo and attracted such negative litigation from ABSA and the SARB*'.

[57] ABSA v PP at paras 70 – 82.

374. However, the relief sought by SARB was necessary to avoid the implementation of what Adv Mkhwebane agreed was unlawful remedial action, and in circumstances where she did not dispute either the economic harm that had already been caused, or the further economic harm that could eventuate. As such, Adv Mkhwebane's submission to the Committee is inexplicable.

375. Even Mogoeng CJ (for the minority) agreed that Adv Mkhwebane '*got the law completely wrong by acting as if it was open to her to direct Parliament to amend the Constitution.*'[58]

(b) Was the alteration on the instruction and/or advice or the Presidency and/or the SSA?

The constitutional amendment

376. In her affidavit to the Committee, Adv Mkhwebane alleges that it is '*patently false*' that she altered the remedial action pertaining to the Reserve Bank mandate at the instruction of the Presidency and/or the SSA.

377. Mr Kekana's evidence included the following:

377.1. He was tasked with drafting the final Lifeboat Report. Adv Mkhwebane instructed him to '*find a way*' to include a recommendation that the Constitution could be amended '*to cater for the nationalisation*' of SARB. Mr Kekana was never informed '*what purpose or motive such a recommendation would serve*.' However, he did not follow the instruction because he did not believe that this recommendation was '*warranted*', and he found the recommendation to be '*bizarre*', because '*it [i.e. nationalising the SARB] was irrelevant to the investigation*.'

377.2. On 14 May 2017 Advocate Mkhwebane provided comments on the draft report, typing in capital letters the words '*AMEND THE CONSTITUTION TO CATER FOR STATE BANK PER GOODSON PROPOSAL*.' This was a reference to a proposal from Mr Goodson.

377.3. Though not agreeing that the recommendation was '*warranted or legally sound*', Mr Kekana, pursuant thereto, submitted a draft report, which included the recommendation that the SARB be nationalised.

[58] PP v SARB at para 65 (per Mogoeng CJ).

377.4. On 17 May 2017 he received an email from Adv Mkhwebane in which she stated that she had '*[a]sked SSA to provide input and economist*' in respect of amending the Constitution to allow for the nationalisation of the SARB. This email was omitted from the Rule-53 record, despite being in the investigation file which Mr Kekana handed to the Senior Manager: Legal Services at the time.

377.5. On 6 June 2017, Mr Kekana and Adv Mkhwebane attended the further meeting with Messrs Moodley and Ramabulane from the SSA. Mr Moodley was introduced by Adv Mkhwebane as an *'economist'* who would assist with the constitutional amendment recommendation in the Lifeboat Report. During cross-examination, Adv Mkhwebane's legal representative put to Mr Kekana that Mr Moodley had '*worked in the South African Reserve Bank space*' and had a Master's in Business Administration, and that one would '*expect somebody who's got a Master's in Business Administration to have some knowledge of economics*'.

377.6. During this meeting, Mr Moodley produced a single page which contained a draft of proposed recommendations that Adv Mkhwebane instructed Mr Kekana to insert into the final report. Under cross-examination Mr Kekana testified that the page did not in fact contain '*economic input*' into the report, but rather a '*draft amendment to the Constitution*', which stated as follows:

> 'It is recommended that the following sections in the Constitution, relating to the South African Reserve Bank be amended as follows, and that all corresponding legislation be duly amended:
>
> 224.(1) The primary object of the South African Reserve Bank is to promote balanced and sustainable economic growth in the Republic, while ensuring that the socio-economic well-being of the citizens are protected.
>
> (2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, while ensuring that but there must be regular consultation between the Bank and the Cabinet to achieve meaningful socio-economic transformation.'

378. The wording of the constitutional amendment imposed by the Lifeboat Report (set out in full in para 223 above) was an almost exact replica to the note of Mr Moodley. The only notable difference

is that in subsection (2) is that there be regular consultation with the Cabinet, which Adv Mkhwebane directed should be with Parliament.

379. Adv Mkhwebane does not dispute that the SSA supplied this document. She explains her motive as being well-intentioned '*to benefit all South Africans, especially the poor and marginalised*', but does not explain how preventing SARB from combatting excessive inflation by protecting the value of the Rand would help the poor and marginalised, most adversely and disproportionately affected by inflation.

380. During the cross-examination of Mr Kekana and Mr Cornelius van der Merwe (the PPSA's current Senior Manager: Legal Services who was, at all relevant times, the PPSA's Manager: Knowledge Management and Research), Adv Mkhwebane's legal representative asserted that Mr van der Merwe's research had informed Adv Mkhwebane's views on the remedial action contained in the Lifeboat Report, and that Mr van der Merwe had provided '*some constant input*' to the investigation. Mr Kekana had no knowledge thereof and had not received input from Mr Van der Merwe during the investigation. These claims, however, are not supported by the evidence.

381. Mr van der Merwe's evidence included the following:

381.1. On 14 December 2016, Adv Mkhwebane emailed him regarding various '*outstanding tasks*', including an update on the PPSA's proposal to amend the Constitution to cater for, among other things, '*full control of the central bank, section 223*' which would '*require benchmarking with other central banks*'. Mr van der Merwe did not know what she was referring to as the matter had never been discussed with him, sought clarity and awaited instructions.

381.2. Thereafter the PPSA's CEO asked Mr van der Merwe to prepare submissions for Parliament's Joint Constitutional Review Committee ('**the CRC**') to '*endorse*' a Private Member's Bill that sought to amend the constitutional provisions regulating SARB. The Bill was accompanied by draft legislation that contemplated wide-ranging changes to South Africa's financial system. Mr van der Merwe understood the instruction to endorse the Bill to come from Adv Mkhwebane.

381.3. In March 2017, Mr van der Merwe participated in a '*mini Think Tank*' in respect of the Lifeboat investigation and was required to make comments on an executive summary of the working draft of the report. He provided written comments. The executive summary document (which was all he was provided with) made no mention of the mandate of central

banks or amendments to the Constitution, and his comments therefore did not address such issues.

381.4. Prior to March 2017, Mr van der Merwe's only contributions to the Lifeboat investigation had been to accompany investigators to ABSA's offices in October 2016 (to translate Afrikaans documents) and to provide information on tax issues in February 2017 (based on issues raised by the group Black First Land First).

381.5. On 30 May 2017, Mr van der Merwe sent his draft of the PPSA's submission to the CRC to Mr Ntsumbedzeni Nemasisi (the PPSA's Senior Manager: Legal Services), noting that he had picked up '*some serious issues with the instructions provided*' (which issues included the fact that the supposed Private Member's Bill appeared to emanate from a political party linked to Mr Goodson – not knowing that Adv Mkhwebane had met with Mr Goodson).

381.6. To comply with Adv Mkhwebane's call to review the constitutional regulation of SARB, Mr van der Merwe had not followed Mr Goodson's proposal. Instead, he suggested enhancing oversight by and accountability to Parliament. He prepared draft correspondence to the CRC – dated 29 May 2017 – setting out this approach. The draft correspondence included the following submission:

> 'It is proposed that the Constitution and the Reserve Bank Act should be reviewed and revised within the precincts of sound, rational and appropriate institutional arrangements around fiscal policy, and fiscal policy management and Central Banking, for purposes of aligning the act with the Constitution in order that Parliament may exercise oversight over it.'

381.7. This correspondence was prepared for submission to the CRC. It had no link, as far as Mr van der Merwe was aware, to the Lifeboat Report. The draft CRC correspondence only contained one sentence regarding a constitutional amendment and advocated for more Parliamentary accountability – not for a change to SARB's mandate.

381.8. On 7 June 2017, Adv Mkhwebane acknowledged Mr van der Merwe's concerns and '*enquired whether [he] could propose how the Constitution could be amended to have a State Bank and Parliament oversee the State Bank.*' Mr van der Merwe then began comparative research on central banks and started drafting a paper. He understood that the paper was going to inform the PPSA's submission to the CRC and that it had nothing to

do with the Lifeboat Report. Nothing further was said about the abovementioned draft correspondence, which to his knowledge was never sent.

381.9. By 19 June 2017, Mr van der Merwe's draft research paper was still incomplete: it reflected the considerations in favour of '*a state or central bank*', but had not yet considered countervailing views or issues of feasibility, let alone settled on conclusions or recommendations. Mr van der Merwe conceded that, although the document was not complete, it did include a recommendation for the review of the Constitution and that, if the recommendation were accepted, it would entail a revision of the Constitution. He supported a review of '*the constitutional principles*' that could be accommodated in legislation or the Constitution itself – he did not yet have specific wording or specific amendments in mind, as it was a work in progress. He was still '*exploring the principles… against which the Constitution should be reviewed*', he could have '*changed it halfway*', and the document had not been submitted to Adv Mkhwebane '*as a formal document*'. This was accepted by Adv Mkhwebane.

381.10. The Lifeboat Report was released on 19 June 2017 and created a furore. On the next day, Mr van der Merwe sent his incomplete draft research paper to Mr Kekana, to see if there was anything in the draft that could '*ex post facto*' assist in supporting the stance taken in the Lifeboat Report. Before testifying Mr van der Merwe checked his emails '*copiously*' to confirm that he had not circulated his draft paper to anyone in the PPSA before the publication of the Lifeboat Report. Adv Mkhwebane accepted that Mr van der Merwe only sent the draft research paper to Mr Kekana the day after the release of the Lifeboat Report.

381.11. It would not have been possible for Mr van der Merwe's incomplete research paper to have informed the Lifeboat Report.

382. Ultimately, Mr van der Merwe's consistent evidence – which is borne out by the objective content of the documentary evidence – was that –

382.1. he was seriously concerned about the PPSA endorsing the proposals stemming from the Ubuntu Party and Mr Goodson;

382.2. in order to assist the PPSA in making submissions to the CRC, and in order to give effect to Adv Mkhwebane's directive that the PPSA should support amending the SARB's mandate, he suggested an alternative avenue to Mr Goodson's proposals which advocated

for more parliamentary oversight, but did not make any concrete proposals in the form of suggested text; and

382.3. he undertook research into central banks at Adv Mkhwebane's behest but did not do so in relation to the Lifeboat Report or any ongoing investigation, and only sent his incomplete working draft to anyone else in the PPSA after the Lifeboat Report was published.

383. Adv Mkhwebane was not able to contradict, or even establish doubt, in respect of Mr van der Merwe's evidence. Her claims – made for the first time to this Committee and noticeably absent from her affidavits in the litigation, as well as unsupported by the Rule-53 record – that his incomplete research paper informed the investigation and the Lifeboat Report must therefore be rejected. To the extent that Adv Mkhwebane seeks to claim that the draft correspondence of 29 May 2017 informed the Lifeboat Report even though it was prepared for the CRC, that need only be stated to be rejected: the content of the draft correspondence bears no substantive similarity to the Lifeboat Report at all.

384. During the cross-examination of Mr Kekana, it was put to him that Mr van der Merwe accompanied the PPSA investigators when they visited ABSA because '*he was doing some research and he was providing some constant input*'. However, this is not borne out by the evidence. Mr van der Merwe's uncontradicted evidence is that –

384.1. The ABSA visit happened in October 2016, whereas Adv Mkhwebane only asked him to start researching central banks in December 2016.

384.2. Even when Adv Mkhwebane tasked him with researching central banks, that was not related to the investigation of IASA's complaint, but for purposes of a submission to the CRC.

384.3. Mr Van der Merwe's input on drafts of the Lifeboat Report was limited, as indicated in para 381.3 above and did not relate to SARB's mandate or a constitutional amendment.

385. During the cross-examination of Mr Kekana, Adv Mkhwebane's legal representative went through some of the detail contained in Mr van der Merwe's research paper, and then explained that her evidence will be that the idea about altering SARB's mandate through a constitutional amendment '*came from the Public Protector assisted by Mr Goodson as well as some other internal work which was being done by the likes of Mr Van der Merwe and the Public Protector's Office.*' In her affidavit to the Committee, Adv Mkhwebane claimed that '*internal research conducted within PPSA*'

supported or corroborated her conclusion that '*the root cause of the lifeboat saga [was] the SARB's obsession with the protection of the rand above all else which in turn was traceable to its current skewed mandate*', explaining further:

> 'Mr Kekana in his evidence, tried to develop a theory that the whole issue of constitutional amendment simply came from the SSA ignoring the extensive work that had been done by my office on the issue of different economic models particularly in relation to the constitutional regimes of Reserve Banks in other countries as compared to South Africa. There were inputs on this issue that came from Mr van der Merwe who was the Public Protector Manager; Knowledge Management and Research, and that Mr Kekana had been interacting with him throughout the course of the investigation particularly on the economic model issue.'

386. The evidence shows that Adv Mkhwebane's claims to the Committee are untrue: There was no '*extensive work*' done by the PPSA on '*different economic models*' and alternative '*constitutional regimes*' that informed the Lifeboat Report. Mr van der Merwe's research was incomplete, and not available prior to the Lifeboat Report's release, nor disclosed to anyone. Mr Van der Merwe was also not '*interacting with [Mr Kekana] throughout the course of the investigation*', whether in respect of '*the economic model*' or otherwise, as indicated above.

387. It is regrettable that Adv Mkhwebane should have elected to put forward a demonstrably untrue version of events to the Committee, and to have done so under oath.

388. In her affidavit to the Committee, Adv Mkhwebane also explains that Mr Goodson's book entitled '*Inside the South African Reserve Bank; its origins and secrets exposed*' was '*used as a point of reference for the investigation*', and that she had a '*personal engagement with the author in Cape Town.*'

389. The meeting with Mr Goodson of 23 April 2017 is mentioned in the Lifeboat Report as one Adv Mkhwebane's '*key sources of information*'. The same list of '*key sources*' does not mention the book. It is not apparent from the Lifeboat Report itself how Mr Goodson's book influenced the content of the report.

390. But even if so, as set out in para 378 above, the evidence establishes that the substantive content of the proposed amendment of the Constitution was provided by the SSA and adopted almost word-for-word by Adv Mkhwebane.

391. During the cross-examination of Mr Kekana, it was put to him that the '*the amount of work done*' within the office of the PPSA, with reference to a comparative study of '*economic models*,

particularly in relation the Constitutional regimes of Reserve Banks in other countries' was '*not consistent*' with his '*theory that the whole issue of Constitutional amendment simply came from the SSA and not from the Public Protector*.'

392. Mr Kekana testified that, as far as his personal knowledge went, the idea for the '*Constitutional amendment*' '*always came from the PP*', and that the matter had been discussed with Mr Goodson. This was before the meeting with the SSA. Mr Kekana also explained that he did not receive any input regarding the investigation from Mr Ramabulane, to whom he sent the email and that after the note, there was no other input from the SSA.

393. Adv Mkhwebane's legal representative explained that her evidence is that –

> 'the idea came from the Public Protector assisted by Mr Goodson as well as some other internal work which was being done by the likes of Mr Van der Merwe and the Public Protector's Office. But for what for what it's worth, the Public Protector then… what she was really seeking from [the SSA] was to say, this is my idea, I want to make sure that it is articulated in such a way that it does not create any instability. And it was in that context that they were asked for input.'

394. This justification for seeking input from the SSA is so implausible that it must be disingenuous. Any reasonable person in Adv Mkhwebane's position who was concerned about the risk of her contemplated remedial action causing instability would have consulted, first and foremost, the constitutional repository of monetary policy: the SARB. She would also have consulted the Cabinet member that the Constitution recognises as having responsibility in respect of SARB: the Minister of Finance. If such a reasonable person had genuine concern about the impartiality of SARB and/or the Minister of Finance, she would have consulted independent experts in monetary policy, such as university academics. The SARB Governor and the Minister of Finance at the time of the PPSA's investigation were not the same persons that were in office when the CIEX agreement was concluded or even when the lifeboat facilities were granted.

395. There was no reason at all for Adv Mkhwebane to consult the SSA, let alone to take such significant direction from the institution: it is not an expert in legislative drafting, governance or monetary policy. As the Full Court stated, '*the Public Protector's mandate is to pursue maladministration and not to interfere with experts in other spheres of government*.'[59] It is not the task of intelligence operatives to give economic advice. Indeed, the Full Court found that Adv Mkhwebane's meeting with the SSA '*cannot be justified in any manner*.'[60]

---

59 ABSA v PP at para 22.
60 ABSA v PP at para 108.

396. The evidence therefore establishes that the remedial action in respect of the constitutional amendment was not the result of Mr van der Merwe's comparative research into central banks but was imposed by Adv Mkhwebane on the advice of the SSA. There was no evidence of any involvement on the part of the Presidency in relation hereto.

The remedial action in respect of the SIU

397. Mr Kekana testified that he attended the meeting with the Presidency on 7 June 2017, where Adv Mkhwebane indicated to Mr Kekana that '*the people from the Presidency were there to assist us with the remedial action relating to the SIU*'. Mr Kekana's evidence was that he '*didn't understand why the Presidency were assisting us with the remedial action relating to the SIU.*'

398. Despite Adv Mkhwebane's claims under oath to the contrary, she clearly discussed the SIU remedial action with the Presidency. Adv Mkhwebane's version is that it was her engagement with the Presidency which gave rise to concerns about directing the President to consider appointing a Judicial Commission of Inquiry, and those concerns resulted in her imposing the remedial action in respect of the SIU.

399. On the issue of Adv Mkhwebane's meeting(s) with the Presidency, her legal representative emphasised that Mogoeng CJ concluded that –

399.1. The President is of critical importance in matters of good governance. The President would have a role to play in the SIU's re-opening of investigations into the lifeboat and had a material interest in – and deserved to be consulted on – possible illegality by the SARB.

399.2. Furthermore, given that there were serious allegations of corruption and illegality, it was appropriate for the remedial action to facilitate '*credible closure via the medium of a thorough investigation, however old the subject matter of investigation might be.*'

400. The issue is not the consultation, but whether the remedial action was based on either the advice of instruction of the Presidency. Even Mogoeng CJ accepted that Adv Mkhwebane met with the Presidency to discuss the SIU. Furthermore, one of Adv Mkhwebane's versions is that her discussion with the Presidency regarding its concerns about a judicial commission of inquiry influenced her decision to impose the SIU remedial action.

401. The evidence before this Committee directly contradicts Adv Mkhwebane's evidence under oath to the CC that she '*did not discuss the final report/new remedial action with the Presidency*'. Instead,

the evidence indicates that she formulated the remedial action in respect of the SIU with the input of the Presidency.

(c) Not giving affected persons notice or an opportunity to comment

402. It is not disputed that interested parties – such as the SIU, SARB, the NT, the Minister of Finance, Parliament and ABSA – were not notified of, or afforded an opportunity to comment on, the amended remedial action.

403. As Adv Mkhwebane explains in her affidavit to this Committee:

> 'With the benefit of hindsight it may well be so that after making all the adjustments from the inputs received it would have been a good idea to revise the provisional report and recirculate it to the parties. My failure to do so did not stem from any ill-intent but from my genuine belief that there had already been adequate consultation or that the charges were not so substantial as to necessitate further delays in releasing this long-awaited report.'

404. It is apparent that Adv Mkhwebane failed to appreciate that, given the likely and entirely foreseeable adverse effects, the abovementioned parties were entitled to be given *audi* and be heard on substantially revised remedial action.

405. Adv Mkhwebane sought to rely on Mogoeng CJ's reasoning that if Adv Madonsela had proposed a Judicial Commission of Inquiry to investigate the matter, Adv Mkhwebane could not have been grossly negligent in concluding that the investigation should be done '*by a specialised prosecutions unit*' – that would '*be no more than a change of the vehicle for doing the exact same thing, based on a wrong understanding of the law*.'

406. However, as set out above, the parties had significant concerns about the lawfulness of involving the SIU, in particular, in any further investigation. These concerns required consideration by Adv Mkhwebane before she issued any remedial action on the subject. Furthermore, the Lifeboat Report required the SIU to take a series of steps to initiate various new investigations e.g. into Nedbank, Armscor etc. However, these parties were never given an opportunity to make representations to Adv Mkhwebane at all.

407. It is unquestionable, given the role and mandate of the SARB, that it had a direct interest in the remedial action, yet was given no notice thereof. The SARB had by then repeatedly warned about the dangers that the PPSA's report could have on the monetary system generally. The PPSA had accepted the need to proceed cautiously, as evident from Mr Tshiwalule's testimony, and the length

of time taken to conclude the investigation. In those circumstances, the lack of notice and *audi* to the SARB is inexplicable.

408. Various other findings of Mogoeng CJ were emphasised. The Chief Justice concluded as follows:[61]

> 'The Public Protector got the law completely wrong by acting as if it was open to her to direct Parliament to amend the Constitution and even in a specific way… How then is the gravity of the negligent conduct to be gauged in this connection? Is it with reference to the radical departure from the norm, the failure to appreciate the vital limits of her constitutional powers? Or with special regard to the deleterious effect of the proposed amendment?'

409. However, Mogoeng CJ concluded that the seriousness of Adv Mkhwebane's negligence was context-specific. The remedial action she imposed was *'a known or predictable non-starter in legal circles'*. So the SARB really had *'nothing to worry about'*: the remedial action was *'inconsequential'* and *'never posed any real, but only an imaginary, threat'*, because the remedial action *'was bound to be set aside with ease'* and ultimately Adv Mkhwebane did not even oppose the setting aside.[62]

410. In the Committee's view, a reasonable, responsible and diligent Public Protector would not have imposed '*predictable non-starter*' remedies emanating from an undisclosed source that he or she ought reasonably to have known was legally invalid. Such conduct would either amount to an abuse of office or highly prejudicial recklessness, which did not merely pose '*an imaginary threat*', but actually caused serious economic harm, which could have been exacerbated had the SARB not urgently taken steps to have it set aside.

411. By way of contrast, the majority of the CC concluded as follows:[63]

> 'The Reserve Bank, at the very least, is entitled to know why amending the Constitution's provisions around the powers of the Reserve Bank was only discussed with the Presidency and not with the Reserve Bank. The Reserve Bank is also entitled to an explanation why its vulnerability was discussed with the security arm of the state… The Public Protector's entire model of investigation was flawed. She was not honest about her engagement during the investigation. In addition, she failed to engage with the parties directly affected by her new remedial action before she published her final report. This type of conduct falls far short of the high standards required of her office.'

---

61 PP v SARB at para 64.
62 PP v SARB at para 65.
63 PP v SARB at paras 206-207.

Conclusion

412. The evidence therefore establishes that –

412.1. Adv Mkhwebane materially altered the remedial action in the Lifeboat Report, from what had been contained in the Provisional Report;

412.2. Adv Mkhwebane took advice from the Presidency in respect of the SIU remedial action, and advice from the SSA in respect of the constitutional amendment;

412.3. the input from the SSA was so significant that the wording it proposed for the constitutional amendment was adopted almost verbatim in the Lifeboat Report's remedial action; and

412.4. Adv Mkhwebane did not give interested and affected parties notice of the materially different remedial action, including SARB, the SIU, the NT and Parliament, let alone an opportunity to comment thereon.

(vii) <u>Failure to provide an opportunity to comment</u>

413. Paragraph 1.1.4 of the Motion alleges that, in the conduct of her investigation, Adv Mkhwebane failed to give affected persons, including the Speaker and SARB, notice and an opportunity to comment on the findings and remedial action she proposed taking, '*with consequences that were severely damaging not only to the economy but to the reputation of her own office*'. It is not in dispute that changes were made to the Provisional Report and to the remedy, but no further comments were sought. So, the issue is whether Adv Mkhwebane should have sought such input.

414. Section 7(9) of the PPA imposes a statutory obligation of procedural fairness on the Public Protector. In the main Adv Mkhwebane's explanation was that, in relation to remedial action, she had received legal advice that affected parties need not be given *audi* pursuant to s 7(9) of the PPA. In saying so, she completely ignored the common law.

415. Section 7(9) of the PPA reads:

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

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

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

416. Mr Tshiwalule testified that Adv Mkhwebane told him that the Provisional Report in its entirety should be sent to implicated parties for purposes of s 7(9) of the PPA; she signed the Provisional Report and it was duly circulated for parties' input in December 2016. The s 7(9) notice to the implicated parties, in addition to the Provisional Report, recorded that Adv Mkhwebane had '*now concluded the investigation*' and was '*in a position to issue the final report*'. It invited recipients to '*provide reasons why I should not issue this report as final report*'.

417. Anyone receiving the Provisional Report would therefore have been entitled to assume that the scope of the investigation, and the proposed remedial action, was as set out in the Provisional Report. However, as dealt with above, that assumption would have been erroneous, because both the scope of the investigation and the remedial action imposed in the Lifeboat Report differed dramatically from what had been contained in the Provisional Report.

418. In her affidavit to the Committee, Adv Mkhwebane claims that both she and Adv Madonsela had given the SARB a hearing. She also claims that '*[t]he issue of the "second audi" was not yet settled in our courts at that stage*', and that a legal opinion from Mr Nemasisi confirmed that '*no second audis were necessary*'.[64]

419. In the HC, the SARB alleged that the remedial action in respect of the SIU was procedurally unfair for numerous reasons, *inter alia* that: it had not been allowed to comment on the '*maverick and ill-informed*' views of Mr Goodson or the input from the SSA, or to explain that '*Mr Goodson's theories have been debunked by decades of literature on sound monetary policy*', and that he had been found to have breached his fiduciary duties to the SARB. Furthermore, it had not been permitted to address the unlawfulness of requiring the SIU to re-open the lifeboat investigation. In addition, other parties – such as Armscor and Nedbank – who were '*among the targets of the CIEX report*' and would be affected by the SIU remedial action, were not given a hearing.

[64] There are several references to advice from, in particular Mr Nemasisi, in this respect. Some are followed by Adv Mkhwebane, others not. .

420. Adv Mkhwebane provided the following response:

420.1. The Judicial Commission of Inquiry that had been mooted in the Provisional Report *'was intended for recovery and therefore there is no substantial difference between the SIU investigating and a commission… investigating and recovering'*.

420.2. ABSA and SARB were implicated by the findings in the Lifeboat Report, but those findings were the same as in the Provisional Report; because there was no amendment, there was no need for further submissions. ABSA and the SARB were '*not implicated on the remedial action, although they may be affected*'.

420.3. She admitted to interviewing Mr Goodson and did so because *'he was a former board member of the SARB Board and had inherent knowledge on the workings of the SARB.'*

421. The concern that Mr Goodson's views materially influenced the remedial action and his untrustworthiness as alleged by the SARB was not denied. It was simply not dealt with. (Some of these concerns had been raised earlier by Mr Van der Merwe).

422. Adv Mkhwebane's legal representative highlighted that Mogoeng CJ had reasoned that any reasonable person could have concluded that because the SARB '*had been consulted after the provisional report, a second consultation in relation to the same report was not necessary*'. This notwithstanding the conclusion that '*the Reserve Bank has a material interest in this lifeboat related process*' and that the remedy had materially changed.

423. However, the majority of the CC held that the fact that Adv Mkhwebane engaged with the Presidency and the SSA, without affording a similar opportunity to the reviewing parties '*cannot be an administrative oversight.*'[65]

424. Two issues arise: first, the recipients of the Provisional Report would have been oblivious to the '*new relief*' in the Lifeboat Report and second, some parties with a material interest in the Lifeboat Report's remedial action (such as the SIU, Parliament and the parties other than ABSA mentioned in the CIEX Report) were never even provided with the Provisional Report, but the remedy in the Lifeboat Report materially adversely affected them.

65 PP v SARB at para 100.

425. Given the differences between the two documents, even the opportunity to comment on the Provisional Report did not amount to a proper or adequate opportunity to comment on the Lifeboat Report, to meet the requirements of procedural fairness.[66]

426. In those circumstances, there can be no claim that affected persons were afforded anything close to procedural fairness in respect of the Lifeboat Report.

427. Moreover, the remedial action in para 7.1.1.2 of the Lifeboat Report was aimed at having the SIU '*investigate alleged misappropriated public funds given to various institutions as mentioned in the CIEX report*' and not only in relation to the lifeboat. The CIEX Report contained allegations of misappropriations in relation to, *inter alia*, Sanlam, Rembrandt, Aerospatiale, Daimler-Chrysler, Armscor and Nedbank. These were not investigated by the PPSA or considered in the Lifeboat Report or at all. These parties were not notified of the possibility of Adv Mkhwebane making findings that affected their interests or allowed an opportunity to make submissions.

428. Before the HC, Adv Mkhwebane argued the remedial action went no further than directing the SIU to request the President to authorise further investigation, and that the President could refuse.

429. However, the Lifeboat Report operated from the premise that it was necessary for the SIU to conduct that further investigation. Irrespective of its outcome, an investigation by the SIU is serious and invasive, and can have public and reputation-damaging consequences for the subject thereof.[67]

430. Any steps to initiate an SIU investigation should not be taken lightly or without adequate justification. However, Adv Mkhwebane appears to have had no basis other than CIEX's untested claims for directing the SIU to take steps in respect of the aforementioned entities. In the circumstances, this was an unjustifiable basis for the remedial action imposed, and her conduct was irrational and unfair.

(d) <u>Were there consequences that was severely damaging for the South African economy and the PPSA's reputation?</u>

431. In her SARB HC AA, Adv Mkhwebane explained that, while she did not have the final SIU Report prepared by Judge Heath regarding his investigation of the ABSA lifeboat, she had his media release. Adv Mkhwebane recorded Judge Heath's concern that seeking to recover the interest from

---

66 Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another 2005 (3) SA 156 (C) ('**Earthlife**') at paras 61-64.

67 See <u>ABSA v PP</u> at para 41.

ABSA '*would lead to uncertainty amongst local and international investors and depositors and result in a run on the banks*', and that this concern was the reason why the SIU did not '*pursue the claim for the illegal donation.*'

432. The undisputed evidence before the courts – some of which was referred to – establishes that the amendment of the remedial action as reflected in the Lifeboat Report had material adverse consequences for the economy and the South African public: the depreciation of the Rand, the risk of a credit-rating downgrade and large-scale disinvestment from South African government bonds and banking-sector shares.

433. In her affidavit to the Committee, Adv Mkhwebane claimed that it '*ought to have been obvious to anyone considering the remedial action, including "the market"'* that a parliamentary majority would have been required to pass the constitutional amendment.

434. However, this argument ignores Adv Mkhwebane's own concession in the HC: she conceded the SARB's urgent review because she admitted that she had issued binding remedial action that imposed mandatory obligations on Parliament in circumstances where the Lifeboat Report directed how the Constitution should read after the amendment had been effected. This was done without regard to Parliament's powers – or indeed without recognising the limits on her own powers. Adv Mkhwebane's speculation about what the market '*ought*' to have known or done is unsustainable in the face of the SARB's uncontradicted evidence of economic harm that actually occurred.

435. The Governor of the SARB expressed some of his concerns as follows in the litigation:

> 'The markets responded with dismay to the Public Protector's Report. The Rand tumbled; R1,3 billion worth of South African government bonds were sold by non-resident investors; and ratings agencies threatened further downgrades. It is not good enough for the Public Protector to now concede the merits and say that she consents to her remedial action being set aside, when her explanation for her conduct, instead of offering a retraction and apology, perpetuates the damage. The only explanation that the Public Protector has offered for her clearly unlawful conduct exposes her own lack of competency. She does not appreciate the ambit of the Reserve Bank's powers or the fact that it does no less than other central banks around the world.'

436. It is difficult to disagree with these sentiments, particularly in the light of Adv Mkhwebane's lack of competence or expertise to meddle in monetary policy and seeming inability to recognise that that is what she had done. It must be borne in mind that Adv Mkhwebane had been made alive to these concerns, both in the correspondence from the SARB warning of the possible '*systemic*

impacts' of her report (see para 452 below) and the statement by Judge Heath expressing concerns about a '*run of the banks*', yet nevertheless proceeded. The Lifeboat Report indicates that some of these concerns could have been mitigated by, for example, requiring ABSA to pay the amount owed '*in instalments… over an extended period of time*' and through the transfer of '*the equivalent value in its shares to the South African Government*'. But none of these mitigating factors were imposed as part of the remedial action or in the direction to the SIU – there was no stipulation or direction that require the SIU to account for the systemic concerns, or to consider implementing the mitigating factors, in implementing the Lifeboat Report.

437. There is no reason apparent from the evidence before the Committee or the Courts as to why Adv Mkhwebane would acknowledge that serious concerns arising from her remedial action could be mitigated in various ways, but then fail to include those mitigations in her remedial action.

438. That Adv Mkhwebane would proceed to issue a final report and impose binding remedial action, in circumstances where she failed to observe even the basic tenets of procedural fairness, where she had clearly exceeded the bounds of her expertise and institutional competence and where she caused such significant economic harm, would, it can be accepted, have damaged the reputation of the PPSA and would have encouraged members of the public to lose faith in the office.

439. As the CC recently concluded, Adv Mkhwebane's conduct in respect of the Lifeboat Report not only '*fell far short of the high standards required of her office*', but was also among the basket of occurrences that '*would undoubtedly cause grave public concern about the integrity of the Office of the Public Protector*'.[68]

440. The Committee has no evidence before it to contradict these conclusions.

(e) Conclusion

441. The evidence therefore establishes that –

441.1. Adv Mkhwebane materially altered the remedial action in the Lifeboat Report, from what had been contained in the Provisional Report;

441.2. Adv Mkhwebane took advice from the Presidency in respect of the SIU remedial action, and advice from the SSA in respect of the constitutional amendment;

[68] Democratic Alliance and Another v Public Protector of South Africa and Others [2023] ZACC 25 (13 July 2023) ('**DA v PP II**') at paras 97 – 100.

441.3. the input from the SSA was so significant that the wording it proposed for the constitutional amendment was adopted almost verbatim in the Lifeboat Report's remedial action;

441.4. Adv Mkhwebane failed in her duty to give interested and affected parties (including SARB, the SIU, the Minister of Finance, the NT, Parliament and ABSA) notice of the materially different remedial action or an opportunity to comment on the findings and remedial actions that Adv Mkhwebane contemplated making or imposing in the Lifeboat Report; and

441.5. the consequences of the Lifeboat Report were severely damaging to the South African economy and were also likely to damage the PPSA's reputation.

(viii) <u>The agreement with the South African Reserve Bank</u>

442. Paragraph 1.1.5 of the Motion alleges that Adv Mkhwebane failed to honour the agreement with the SARB that it would receive the Lifeboat Report five days before its release.

(a) <u>Was there an agreement with the SARB?</u>

443. In the urgent review, Murphy J concluded that Adv Mkhwebane *'failed to honour an agreement made with the Reserve Bank to make her final report available to the Reserve Bank five days before its release'*.[69]

444. However, in the Consolidated Review, SARB alleged that it asked the Public Protector *'to provide it with some advance warning in the event that she intended to publish a final report with similarly drastic and unwarranted remedial action'*, but that no such undertaking was given. Furthermore, it alleged that, on 7 April 2017, it followed up on its request for an undertaking, but that Adv Mkhwebane *'refused to give the undertaking'*. This was not disputed. So the SARB's ultimate case was not that there was an agreement, but that it had sought and not received an undertaking.

445. In her affidavit to the Committee, Adv Mkhwebane asserts that she has *'no recollection of entering into an agreement with the SARB to share the final report 5 days before its release'*.

69 <u>SARB v PP</u> at para 58.

(b) Conclusion

446. There is no evidence to show that Adv Mkhwebane ever concluded an agreement with the SARB to provide it with the Lifeboat Report five days before it was published. There can, accordingly, be no conclusion that Adv Mkhwebane '*failed to honour*' such an agreement.

(ix) Dealing with submissions from interested persons in the final report

447. Paragraph 1.1.6 of the Motion alleges that, in the Lifeboat Report, Adv Mkhwebane failed even to refer to, or discuss, the submissions made by the SARB or anyone else in response to the Provisional Report.

(a) The SARB's submissions

448. The SARB's submissions are part of the documentary evidence before the Committee.

449. In her SARB CC RA, Adv Mkhwebane confirmed that *'responses from the SARB and all other implicated parties were taken into account when finalising the investigation and report, hence the provisional remedial action contained in- paragraph 8.1 of the provisional report was removed in the final remedial action.'* In her affidavit to the Committee, Adv Mkhwebane explains that *'the inputs of SARB, National Treasury and ABSA were specifically taken into account and referred to at paragraphs 5.2.8, 5.2.20 and 5.2.25 of the [Lifeboat Report]'*. She indicated that it is unclear which part of the SARB's response has not been incorporated in the report.

450. From a consideration of the Lifeboat Report, it is apparent that most of the SARB's concerns are, in one way or another, referenced in the report.

451. Some of the SARB's submissions were not recorded in the Lifeboat Report, e.g. its submission that providing financial assistance to distressed banks was one of its core functions, and therefore the remedial action should not prevent the rendering of such assistance. The Lifeboat Report (unlike the Provisional Report) did not direct the SARB to ensure it had '*systems, regulations and policies… to prevent this anomaly in providing loans / lifeboat to banks in future*', hence it did not have to reference these submissions expressly.

452. In respect of the remaining SARB's submissions, it may be so that the Lifeboat Report did not adequately address them. For example, the SARB's concerns impact on the South African financial system are reflected in different portions of the Lifeboat Report, such as where it refers to a '*run of*

the banks' and the '*speculation*' about a '*systemic economic impact with regard to the recovery of the "**lifeboat**"*'. Another example is whether public funds had been illegally given to Bankorp and never recovered. The Lifeboat Report records that it was undisputed '*that failure to recover the "**lifeboat**" amounted to a loss by the public*' but also records the SARB's argument that there was no prejudice to the public because the 16% interest earned by Bankorp was never owed to the SARB.

453. **The evidence shows that, even if unsatisfactory, Adv Mkhwebane did indeed refer to and discuss most of the SARB's the concerns.**

(b) ABSA's submissions

454. ABSA's submissions are part of the documentary evidence before the Committee. **As is the case with the SARB's submissions, the Committee is satisfied that, even if ABSA's submissions may not have been addressed to ABSA's satisfaction, they are nevertheless addressed in the Lifeboat Report.**

(c) The submissions from the Minister of Finance and the NT

455. In her affidavit to the Committee, Adv Mkhwebane explains that, in response to input from the NT, she *'removed the remedial action previously proposed by my predecessor to the effect that there was a need to amend the Reserve Bank Act.'*

456. However, this remedial action was already excluded from the Provisional Report.

457. Some of the Minister's submissions are understandably not reflected in the Lifeboat Report, as they were no longer significant given the changes made to the Provisional Report. However, not all fall into this category.

458. The Lifeboat Report does not reflect or discuss the Finance Minister's submissions regarding the national government's agreement with CIEX, including whether the agreement commenced, why it was terminated and the reasons why the Cabinet would not have acted on the CIEX Report. The Lifeboat Report expressly records that Adv Mkhwebane *'did not investigate reasons conceded by the Government of South Africa in terminating its agreement with CIEX Ltd.'* It does not engage with the Minister's submissions that the CIEX Report was no more than a *'collection of thoughts'* that could not have served before Cabinet and that the government did and, in fact, take steps to

address the content of the CIEX Report as *'an appropriate investigation by the SIU was proclaimed in terms of the applicable law.'*

459. However, given Adv Mkhwebane's conclusions in respect of the CIEX Report, her failure to engage with these submissions was a material omission.

460. The Minister's submissions dealt with the manner in which the SARB was regulated prior to the advent of democracy (when the lifeboat transactions took place), the changes brought about with the Constitution and some of the differences between the two regimes. The submissions argued that *'[i]n the context of the mandate to the National Executive, it is also patent that the Public Protector fails to consider the constitutionally mandated role of the National Treasury and that of the SARB, certainly in the period 1997 to 2002'*. The submissions also argued that Adv Mkhwebane had seriously misdirected herself in failing to take into account consideration the changed status of SARB and its accounting and reporting responsibilities under sections 223 to 225 of the Constitution.

461. Plainly, the Lifeboat Report should have engaged with these submissions raised by the Minister (and, as set out above, sought further submissions from all interested parties) – they go to the question of whether there was any link between the harm that Adv Mkhwebane identified (i.e. not recovering the interest from ABSA) and the remedial action she imposed as a solution (i.e. altering the SARB's constitutional mandate to remove its responsibility for currency stability). However, Adv Mkhwebane did not do so.

462. The Lifeboat Report also does not deal with the Minister's concerns regarding the extent to which the report undermines the government's institutional integrity and its ability to promote public confidence in the administration as a whole. It should have, given the extent to which its remedial action sought to reshape important branches of the State.

(d) Conclusion

463. The evidence therefore establishes that –

463.1. the Lifeboat Report does refer to, or discuss, the material submissions made by SARB and ABSA and, where their submissions were omitted, it does not appear that it would have been necessary to refer to them given, among other things, the changes made to the Provisional Report in the process of finalising the Lifeboat Report; and

463.2. although the Lifeboat Report refers to, or discusses, some of the submissions from the Minister of Finance and the NT, Adv Mkhwebane failed to engage with or even identify significant submissions, which resulted in the Lifeboat Report containing material omissions.

(x) Was Adv Mkhwebane 'dismissive, high-handed, biased and procedurally irrational and unfair' in the conduct of the investigation?

464. As stated above, the Full Court found that not allowing ABSA to make submissions on the significant changes in the final Lifeboat Report was '*a material omission that violates ABSA's right to procedural fairness and is also an indication of further one-sided conduct.*'[70] Furthermore, the Full Court found that changing the focus of the remedial action to '*amend the Constitution to deprive the Reserve Bank of its independent power to protect the value of the currency*' was an aspect that '*should have been discussed with the experts at the Reserve Bank.*' The Full Court concluded that '*it has been proven that the Public Protector is reasonably suspected of bias.*'[71]

465. The CC concluded that Adv Mkhwebane's *'entire model of investigation was flawed'* and that *'this type of conduct falls far short of the high standards required of her office.'*[72]

466. The evidence establishes that –

466.1. Adv Mkhwebane was unduly dismissive and high-handed of SARB, in that she failed to consult with the institution on the new remedial action in circumstances where she knew, or should reasonably have known, that SARB would have serious concerns about such remedial action, and in circumstances where there had been a number of inputs and points of public discussion that had emphasised the damage that a report dealing with the lifeboat transactions could cause to the country's economy and reputation;

466.2. Adv Mkhwebane adopted an irrational procedure in imposing remedial action in respect of the constitutional amendment, without hearing representations from SARB (as the constitutional custodian of monetary policy) and Parliament (as the sole custodian of the power to amend the Constitution);

---

70 ABSA v PP at para 87.

71 ABSA v PP at para 101.

72 despite having been afforded numerous opportunities to clarify what was discussed with the Presidency and why the meeting was not recorded in the Lifeboat Report, Adv Mkhwebane's account of the meeting remains contradictory, unconvincing and unclear; SARB v PP at para 207.

466.3. Adv Mkhwebane adopted an irrational procedure in imposing remedial action in respect of the SIU, without hearing representations regarding whether it would be valid for the SIU to discharge the contemplated function; and

466.4. Adv Mkhwebane was procedurally unfair in failing to afford interested parties notice of, and an opportunity to make submissions in respect of the expanded scope of the investigation and the new remedial action contained in the Lifeboat Report.

(xi) <u>Failure to account for meetings in litigation</u>

467. Paragraph 1.2.1.1 of the Motion alleges that, in the affidavits Adv Mkhwebane filed during the litigation regarding the Lifeboat Report, she '*failed to give a full, frank and honest account of meetings she had with the Presidency and the State Security Agency before she finalised the Report*'.

468. It has already been established that there is no full recording of these meetings.

(a) <u>The meeting(s) with the Presidency</u>

469. The President's response to the Provisional Report (dated 28 February 2017) dealt only with the proposed remedial action in respect of the Judicial Commission of Inquiry. The President recorded that appointing a Commission was his preserve, but he welcomed any facts or allegations from Adv Mkhwebane that could inform his discretionary decision on whether the issues in question required further investigation.

470. In SARB HC AA, Adv Mkhwebane explained that, at the President's request, she met with him on 25 April 2017 regarding his s 7(9) response and following that meeting, Adv Mkhwebane became concerned that the remedial action proposed in the Provisional Report could face difficulties because it sought to '*direct the President to establish a Judicial Commission*', and there were doubts about whether such a direction was valid.

471. The Provisional Report did not propose directing the President to establish a Judicial Commission. Instead, it merely proposed directing the President to <u>consider</u> whether it was necessary to appoint a Commission. That remedial action, framed as it was, could not infringe upon the President's discretion to appoint a Commission, and therefore could not be challenged for unlawfully usurping his authority. Furthermore, in his s 7(9) response to the Provisional Report, the President did not raise any concerns about Adv Mkhwebane's competence to require him to consider exercising his

discretion to appoint a Commission, but instead required information that could be taken into account when exercising his discretion. As such Adv Mkhwebane's concerns were misplaced.

472. The SARB alleged at a meeting '*on 7 June 2017 with the Presidency's legal advisors*', from notes discovered in the Rule-53 record, it is evident that Adv Mkhwebane discussed the remedial action in respect of the SIU, as well as '*State capture*'. The SARB also conveyed that it was not clear what exactly had been discussed with the Presidency – particularly whether the discussions only related to the SIU relief, or whether they included the amendment of the Constitution and the alteration of the SARB's mandate. It called upon Adv Mkhwebane to provide the full transcript of the meeting of 7 June 2017 or to explain why she had deviated from the PPSA's '*standard practice*' of recording investigation meetings. It also called on Adv Mkhwebane, in her answering affidavit, to explain her meetings with the Presidency (and the SSA) in full.

473. Adv Mkhwebane's HC AA was silent regarding the meeting of 7 June 2017, referring only to the meeting of 25 April 2017. In response to the SARB's allegations about 7 June 2017, Adv Mkhwebane stated that they '*are not relevant to this application as the remedial action aimed at the amendment of SARB's constitutional mandate has been set aside*' and that '*legal submissions will be made on my behalf in respect thereof.*' As set out in paras 228 – 242 above, the fact and import of the meeting with the Presidency was not disclosed in the Lifeboat Report, and the meeting was kept secret.

474. This was an inadequate response, given that Adv Mkhwebane had already omitted <u>any</u> mention of meetings with the Presidency from the Lifeboat Report and that the notes contained in the Rule-53 record were cryptic. The parties – and the court – therefore needed Adv Mkhwebane's assistance in deciphering their meaning. It was hence incumbent upon Adv Mkhwebane to disclose the entirety of the discussion with the Presidency, for the court to be able to make a holistic assessment of the propriety of the meeting and the fairness of Adv Mkhwebane's conduct.

475. Despite the express allegations by SARB, Adv Mkhwebane did not indicate if she discussed Mr Goodson's submissions or the proposal to amend the Constitution with the Presidency, nor inform the parties or the court as to what was discussed at the meeting with the Presidency. The affidavit also provided no clarity on 7 June 2017 meeting – it was simply not dealt with.

476. The Full Court concluded that, even after Adv Mkhwebane had set out her version of events, the June 2017 meeting remained '*veiled in obscurity*'.[73]

477. In Adv Mkhwebane's FA to the CC in in her direct access application, she described her meetings with the Presidency as follows:

477.1. The 25 April 2017 meeting was '*a meet and greet*', unrelated to the Lifeboat Report.

477.2. Her HC AA had mistakenly indicated that the meeting of 25 April 2017 was related to the investigation, which '*mistake was occasioned by the hurried manner in which the answering affidavit had to be prepared within the very tight timeframes*'. She '*had only a few days in which to prepare and file my answering affidavit in response to three separate consolidated judicial review applications*'.

477.3. At the meeting on 7 June 2017, she was accompanied by Messrs Nemasisi and Kekana. The meeting '*had nothing to do with the substance of the content of my Report*' (emphasis in original). The Presidency had requested the meeting '*in order to clarify their response*'.

478. SARB's application in the Consolidated Review was issued on 31 July 2017. Its SFA was signed on 12 September 2017. Adv Mkhwebane signed her AA on 24 November 2017: almost four months after the SARB's founding papers 484and almost two and a half months after its supplementary papers. Adv Mkhwebane was not given '*only a few days*' within which to prepare her affidavit; that is demonstrably false. There was no undue or unusual time pressure in preparing the answering affidavit: bearing in mind Adv Mkhwebane's intimate personal knowledge of the investigation, having to prepare her affidavit within the space of several months can hardly be described as being held to '*very tight timeframes*'. Even if the SARB's affidavits were provided to her late by her office, this factual information lay within her personal knowledge and she would have known the correct response to the allegations when she read the SARB's affidavits she had over a lengthy period.

479. In the SARB CC RA, Adv Mkhwebane explained that she faced difficulties in preparing her answering affidavit during the HC proceedings because several counsel withdrew, and she ultimately only appointed the senior counsel who settled her affidavit shortly before it was filed.

480. However, the questions about when and how many times Adv Mkhwebane met with the Presidency, and what she discussed with the President's officials, were not complex legal matters that required

[73] ABSA v PP at para 127.

senior counsel's advice to settle. They were simple matters of fact that fell within Adv Mkhwebane's personal knowledge. The number, chronology and content of the meetings had been squarely raised in the SARB's supplementary founding affidavit in September 2017, a few months after the meetings themselves had occurred. Accordingly, as from September 2017, Adv Mkhwebane and the PPSA officials should have been compiling and collating the relevant information and documentation. This would not have been adversely affected by the withdrawal of legal representatives and their subsequent replacement.

481. Adv Mkhwebane's explanation for supposedly confusing the April and June meetings is unreasonable and unconvincing.

482. Furthermore, if the meeting of 7 June 2017 was held to discuss and clarify the Presidency's submissions in response to the Provisional Report, it is difficult to believe that the meeting did not relate to the substance of the report: if Adv Mkhwebane took the s 7(9) process seriously, as she was required to, she would have remained open to any new evidentiary trails, and any new lines of enquiry, that the s 7(9) submissions gave rise to. If the Presidency called for a meeting to explain its s 7(9) submissions, it is doubtful that those submissions would not have been substantive.

483. For the first time in the litigation, Adv Mkhwebane explained to the CC why she had not disclosed her meeting with the Presidency in the Lifeboat Report:

> 'I did not disclose the meeting in the report because it is covered by the Presidency's response to the provisional report… which requested a meeting in order to clarify their response. That meeting occurred on 7 June 2017. That is where I indicated that there is a pending judicial review about state of capture, and I asked about the report of the SIU, which they did not have but clarified that if the proclamation is issued and there is no report, it remains valid. This was raised when I asked about the issuance of proclamations which is the sole preserve of the President. Hence I requested clarity on the process and not how to craft the remedial action."

484. In her SARB CC FA, Adv Mkhwebane explained that the 7 June 2017 meeting was '*not deliberative*' because it dealt with the Presidency's clarification of its s 7(9) response and the status of the SIU proclamation.

485. However, the Provisional Report had no remedial action in respect of the SIU. As set out in para 469 above, the President's response to the Provisional Report was limited to the issue of possibly appointing a Judicial Commission of Inquiry – it did not deal with the SIU. So, if the meeting of 7 June 2017 was about the Presidency clarifying its response to the Provisional Report, it does not explain why the attendees have discussed remedial action in respect of the SIU.

486. By 7 June 2017, the Lifeboat Report was less than two weeks away from being signed by Adv Mkhwebane. It is unlikely that, if she met with the Presidency to discuss the remedial action she intended imposing, she would have failed to mention that she no longer intended including a reference to a Judicial Commission and had instead resolved that the SIU should pursue enforcement.

487. The revised timeline set out in her SARB CC FA calls into question Adv Mkhwebane's claim that her concerns about a Judicial Commission arose after discussing the issue with the Presidency. Adv Mkhwebane maintained this version before the CC: even before the CC, Adv Mkhwebane alleged that, prior to 7 June 2017, she was still contemplating directing the President to consider appointing a Judicial Commission, but during the meeting held on that date, she developed concerns about whether to follow that course, and thereafter formulated the remedial action in respect of the SIU.

488. But documentary evidence establishes that, by the beginning of May 2017, Adv Mkhwebane had already decided to move away from a Judicial Commission and to impose remedial action on the SIU instead: on 4 May 2017 she directed Mr Kekana to prepare a letter '*to SIU head to request proclamation and report by Heath, also indicate that we will request the President to extend that proclamation to recover all those apartheid loot*'. The working draft of the report then in circulation in the PPSA shows that the remedial action set out in the Provisional Report had been jettisoned in favour of directions in respect of the SIU and the amendment of the Constitution.

489. Accordingly, if Adv Mkhwebane only met with the Presidency for the first time regarding the Lifeboat Report on 7 June 2017 as alleged in the CC, it could not have been that meeting that gave rise to her concerns about the Judicial Commission, because by then the working draft of the Lifeboat Report had already done away with the remedial action in respect of such Commission.

490. In the CC, the SARB alleged that Adv Mkhwebane had had two meetings with the Presidency, at which she discussed *inter alia* the new remedial action contained in the Lifeboat Report. In her CC RA, Adv Mkhwebane maintained that the April 2017 meeting had '*nothing to do with the CIEX investigation*' and the June 2017 meeting '*had nothing to do with the substance of the content of [her] report*'. She also stated that what was discussed on 7 June 2017 was clear from Mr Kekana's handwritten meeting notes. Adv Mkhwebane was also emphatic that she '*did not discuss the final report/new remedial action with the Presidency or anyone before the publication of the report*', which assertion she repeated on several occasions in her RA.

491. As explained in para 248.1 above, Mr Kekana's notes, however unclear, referred to remedial action in respect of the SIU – they include '*SIU – proclamation*' and '*SIU – reopen = amend to include*'.

492. During Mr Kekana's cross-examination, it was put to him that Adv Mkhwebane's meeting with the Presidency of 7 June 2017 *'only dealt with the issue of the SIU. In other words, the practicalities about the SIU proclamation that the Public Protector had in mind.'* Mr Kekana confirmed that *'the people from the Presidency were there to assist us with the remedial action relating to the SIU.'* Mr Kekana's notes reflected such discussions.

493. Adv Mkhwebane's reference under oath to Mr Kekana's handwritten notes, Mr Kekana's evidence, and Adv Mkhwebane's questioning of Mr Kekana, directly contradicts Adv Mkhwebane's evidence under oath to the CC that she '*did not discuss the final report/new remedial action with the Presidency*'. Given the timing of the meeting, her claim is also improbable.

494. Furthermore, Adv Mkhwebane's own founding affidavit in the CC made it clear that she did discuss at least some of the '*new*' remedial action with the Presidency i.e. in respect of the SIU. Her affidavits therefore contradict each other.

495. In her replying affidavit before the CC, Adv Mkhwebane repeated her denial that she discussed '*new remedial action*' with the Presidency but explained that she '*requested clarity on the process and <u>not</u> how to craft the remedial action.*' [Emphasis in original.]

496. However, what is clear is that, on her own version, Adv Mkhwebane discussed the new remedial action contained in the Lifeboat Report – which differed from the remedial action proposed in the Provisional Report – with the Presidency. This shows that the impression created by her affidavits – that she never discussed the SIU remedial action with the Presidency – was false.

497. The CC was critical of Adv Mkhwebane's explanations regarding the meetings with the Presidency.

498. It concluded that the meeting of 25 April 2017 was still '*shrouded in mystery*' and that Adv Mkhwebane's explanations were '*obscure*'. It rejected Adv Mkhwebane's argument that the meeting was held to discuss whether she had the power to direct the President to appoint a Judicial Commission, because that concern had already been addressed in the Provisional Report.[74] It also found that Adv Mkhwebane had failed to explain the meetings to the HC, despite it being pertinently

[74] Id para 189.

raised by other litigants, and her attempts to introduce new explanations on appeal were a '*little too late*'.[75]

499. In an address to the Committee, Adv Mkhwebane's legal representative emphasised certain findings from the CC's minority judgment. He described Mogoeng CJ as concluding that Adv Mkhwebane was not '*caught or found out*' for being deceitful or dishonest. Instead, she '*laid it bare herself*': she declassified her notes from her meeting with the SSA; if somewhat belatedly, she disclosed '*all the other information including the dates of the meetings, her contemporaneous notes of what was discussed and the effect of the meeting with the Presidency on the choice of the vehicle for investigation.*'

500. By way of contrast, the majority in the CC concluded that the new explanations that Adv Mkhwebane introduced on appeal regarding the various meetings were contradictory and failed to justify her conduct. For example, the CC found that Adv Mkhwebane's '*dogged insistence that the substance of her remedial action in the final report was not discussed with the Presidency is contradicted by her own confirmation that the handwritten notes of the meeting held on 7 June 2017 reflect what was discussed… The Public Protector's explanation of the meeting of 7 June 2017 with the Presidency was, and still is, woefully inadequate.'*[76]

501. The CC ultimately concluded that, in respect of the meetings with the Presidency, Adv Mkhwebane acted '*in bad faith and in a grossly unreasonable manner*':[77]

> 'The Public Protector's persistent contradictions, however, cannot simply be explained away on the basis of innocent mistakes. This is not a credible explanation. The Public Protector has not been candid about the meetings she had with the Presidency and the State Security Agency before she finalised the report. The Public Protector's conduct in the High Court warranted a de bonis propriis (personal) costs order against her because she acted in bad faith and in a grossly unreasonable manner.
>
> The Reserve Bank, this court and the public are entitled to know why the Public Protector discussed the new remedial action to amend the Constitution and the 1998 SIU Proclamation with the Presidency when she discussed it with no other affected party. The Reserve Bank, at the very least, is entitled to know why amending the Constitution's provisions around the powers of the Reserve Bank was only discussed with the Presidency and not with the Reserve Bank…

---

75 Id para191.
76 Id paras 203 – 204.
77 Id paras 205 – 207.

> The Public Protector's entire model of investigation was flawed. She was not honest about her engagement during the investigation. In addition, she failed to engage with the parties directly affected by her new remedial action before she published her final report. This type of conduct falls far short of the high standards required of her office.'

502. For the reasons set out above, the evidence before the Committee supports the CC majority's conclusion that Adv Mkhwebane failed to give a full, frank and honest account of her meetings with the Presidency: it is simply not credible for Adv Mkhwebane to have contended – as she did, repeatedly – that she never discussed at least some of the new remedial action contained in the Lifeboat Report with the Presidency.

(b) <u>The meetings with the SSA</u>

503. As addressed in paras 256 – 286 above, Adv Mkhwebane's HC AA was misleading in respect of the SSA in at least two respects:

503.1. It gave the impression that she had only one meeting, whereas there were three.

503.2. It indicated that she only met with the SSA to obtain context to the CIEX Report and was silent on the SSA's input on the Constitutional amendment, and that the wording thereof came directly from a document prepared by the SSA.

504. In her CC RA, Adv Mkhwebane stated that the '*purpose for my meeting with the Presidency and SSA were explained in my answering affidavit*' before the HC. That is not true. Her HC AA referred to one meeting only and did not fully reflect the import of the meetings.

505. In her CC RA she repeated that what was discussed at the meetings related to the final remedial action.

506. In her CC RA, Adv Mkhwebane denied that she had *'failed to explain the meetings in my answering affidavit'* before the HC, and instead claimed only to have *'made a simple error as regards the date of the meeting. That error has now been properly explained to this court with supporting evidence.'*

507. That, however, was not true. The SARB had raised serious issues regarding Adv Mkhwebane's discussions with the SSA, as well as the challenges posed by the lack of meeting transcripts. In the circumstances of the litigation, and as a public litigant, Adv Mkhwebane should have disclosed that her discussions went much further than discussing the SARB's vulnerability and included amending the SARB's mandate and changing the Constitution. But her affidavits filed in the litigation is silent in respect hereof.

508. Despite Adv Mkhwebane filing several affidavits in respect of the various challenges to the Lifeboat Report, she never disclosed that she had had more than one meeting with the SSA, that the discussions had ranged beyond the circumstances of the CIEX Report and the '*vulnerability*' of the SARB, or that the SSA had provided the wording for the constitutional amendment. Even the litigants and the CC, at the tail end of the litigation, seem to have been completely unaware of the nature and import of the meeting with Messrs Ramabulane and Moodley.

509. During cross-examination, Mr Kekana was questioned at length concerning a note taken during the meeting, which stated '*how are they [the Reserve Bank] vulnerable?*' Mr Kekana indicated that it was a '*question that I was asking myself, or a statement*.'

510. Adv Mkhwebane's legal representative intimated that Kekana's note was ultimately the reason for the courts concluding that the vulnerability of the Reserve Bank was discussed in a meeting with the SSA, which the CC found to be irregular. He insisted that '*the culmination of all this is [the finding that] that the Public Protector was biased and her model was flawed and she deserved to be mounted (sic) with personal costs.*'

511. This, however, is irrelevant to the charge under consideration: whatever was discussed about the SARB's vulnerability, and whatever was disclosed in that regard.

(c) Conclusion

512. The evidence establishes that, as alleged in the Motion, in her affidavits during the litigation in respect of the Lifeboat Report, Adv Mkhwebane failed to give a full, frank and honest account of her meetings with the SSA.

(xii) Reliance on economic experts

513. Paragraph 1.2.1.2 of the Motion alleges that, in the affidavits she filed during the litigation regarding the Lifeboat Report, Adv Mkhwebane misrepresented her reliance on evidence from economic experts when preparing the Lifeboat Report.

514. Paragraph 1.2.1.3 of the Motion alleges that, in the affidavits she filed during the litigation regarding the Lifeboat Report, Adv Mkhwebane '*provided contradictory, unintelligible and obfuscating accounts of her conduct of the investigation.*'

(a) Dr Mokoka and Mr Goodson

515. In her HC AA, Adv Mkhwebane claimed that, during the investigation, she received advice from several economic experts pertaining to the concept of a '*lender of last resort*', moral hazards in monetary and economic policy, reckless lending and the allocation of resources by banking institutions. She did not identify these experts.

516. Adv Mkhwebane explained that, after the litigation challenging the Lifeboat Report had been launched, she engaged an economist from the Wits University, Dr Tshepo Mokoka, to provide expert advice. It is not clear why Dr Mokoka's views were not sought during the investigation, particularly when Adv Mkhwebane decided to investigate the reform of South Africa's monetary system of her own volition, and in circumstances where she did not see fit to obtain input on the issue from the constitutional custodian of monetary policy.

517. The Full Court concluded that Adv Mkhwebane '*failed to make a full disclosure when she pretended, in her answering affidavit, that she was acting on advice received with regard to averments relating to economics prior to finalising her report.*'[78]

518. Adv Mkhwebane subsequently explained to the CC that she had not '*pretended*' to rely on Dr Mokoka's advice in the course of the investigation. Instead, she '*interviewed, amongst others, Mr Stephen Mitford Goodson, a well-known author and a former independent nonexecutive director of the South African Reserve bank.*' This is the only other individual that (in her affidavits in the litigation) Adv Mkhwebane claimed to have consulted '*on economics issues*'. Adv Mkhwebane clarified in her SARB CC RA that during the investigation she consulted Mr Goodson, and after the investigation she consulted Dr Mokoka.

519. Accordingly, on her own clarification to the CC, Adv Mkhwebane did not consult '*several*' expert economists during the investigation. She only consulted Mr Goodson.

520. Adv Mkhwebane made no attempt before the HC to qualify Mr Goodson as an economics expert, nor was there any allegation that Mr Goodson was one of the '*experts'* on whom she had relied on when preparing the Lifeboat Report. Instead, the express reason for interviewing Mr Goodson was stated to be his personal knowledge of the SARB's workings.

[78] ABSA v PP at para 128.

521. Why Adv Mkhwebane felt the need to consult Mr Goodson on SARB's working, rather than SARB itself, is not apparent.

522. During Mr Kekana's cross-examination, it was put to him that he could not '*dispute that Mr Goodson's input was also coming from the point of view of an economic expert or an expert on Central Banking at least.*'

523. However, the undisputed evidence is that Mr Goodson had maverick, ill-informed and unorthodox views on economics. Adv Mkhwebane has not provided any evidence to demonstrate his expertise in economics (having written a controversial book is no proof of such expertise). Even before the Lifeboat Report was released, Mr van der Merwe raised worrying concerns about Mr Goodson's reliability and affiliation to the Ubuntu political party, including that media reports indicated that he had left SARB '*under a cloud of controversy as a result of his support for the Nazi economy and Banking systems*'. The SARB's evidence that Mr Goodson's impartiality was doubtful was not disputed.

524. In the circumstances, it does not appear that Adv Mkhwebane could have reasonably believed in Mr Goodson's bona fides as an economics expert. The CC confirmed in this respect that '*Mr Goodson is not an economic expert and the Public Protector never sought to qualify him as one.*'[79] There is no evidence before the Committee to justify a departure from this conclusion.

(b) Dr Moodley

525. The evidence indicates that, in the process of preparing the final Lifeboat Report, Adv Mkhwebane indicated to Mr Kekana that she had '*[a]sked SSA to provide input and economist*' related to the recommendation to amend the Constitution. Adv Mkhwebane's legal representative informed the Committee that the second economist that she consulted during the investigation was Dr Moodley from the SSA, who had previously worked at the SARB.

526. This is totally inconsistent with what Adv Mkhwebane told the courts during the litigation: despite expressly explaining which economics experts she consulted during the investigation, she made no mention of Dr Moodley or an economist from the SSA. (Even though he was referred to as '*Mr Moodley*' on several occasions before the Committee, he was also sometimes referred to as '*Dr Moodley*'. His status as '*Dr*' is indicated on a curriculum vitae available on the internet.)

79 PP v SARB at para 211.

527. If it is true that Adv Mkhwebane relied on economic input from Dr Moodley during the investigation, then she misled the HC and the CC by omission, and so misrepresented the fact that she relied on an SSA employee in preparing the Lifeboat Report.

528. It is also doubtful that Adv Mkhwebane did, in fact, rely on Dr Moodley as an expert economist. Had that been the case, she would no doubt have said so in her affidavits: both because she had a duty to make full disclosure, and because it would have strengthened her case by supporting her claim to have consulted multiple experts. The belated attempt to cast Dr Moodley as one of the '*economic experts [consulted] during the investigation*' for the first time before this Committee is therefore questionable.

529. No evidence of Dr Moodley's expertise in economics is evident. The limited information available to the Committee indicates that his qualifications, experience and expertise lie in information technology. Whilst his Business Administration qualification was used in cross examination to bolster the claim that he could be construed as knowledgeable on economics, Dr Moodley's curriculum vitae does not cite any significant qualifications or expertise in economics. It was also suggested by Adv Mkhwebane's legal representative that, because he was previously employed at SARB, Dr Moodley had expertise in economics. However, his curriculum vitae reflects employment in the SARB's IT department and not in a capacity that would have resulted in him being an expert in economy or reserve banks.

(xiii) 'Contradictory, unintelligible and obfuscating accounts'

530. The majority of the CC held that Adv Mkhwebane *'either failed entirely to deal with the allegations that she was irresponsible and lacking in openness and transparency, or, when she did address them, offered contradictory or unclear explanations.'*[80]

531. The inadequacies of Adv Mkhwebane's accounts of her conduct are addressed above. The Committee is of the view that they are contradictory and obfuscating, but that it is not necessary to address this as a separate ground of misconduct.

(xiv) Did Adv Mkhwebane commit misconduct in respect of the Lifeboat Report?

532. Misconduct entails a failure to meet the standards of conduct expected of a holder of public office. Mr Ebrahim's undisputed evidence was that scrupulous honesty, transparency, fairness and

[80] SARB v PP at para 217.

independence are essential standards that are expected of the Public Protector. Ms Zulu-Sokoni gave similar evidence. It is not in dispute that these are among the applicable standards. Indeed, it would be surprising for anyone to claim that the Public Protector should be anything other than entirely truthful, transparent, independent and fair.

533. Further, an essential requirement of the rule of law is that every exercise of public power – including the power exercised by the Public Protector – must be rational, failing which it will be unconstitutional.[81]

534. It is evident that Adv Mkhwebane has failed to meet these essential standards.

535. In meeting with the Presidency and the SSA secretly, and then failing to give a full and proper account of those meetings when explaining her conduct under oath during the litigation in respect of the Lifeboat Report, Adv Mkhwebane failed to adhere to the standard of transparency.

536. In –

536.1. failing to invite and consider representations from various interested parties despite materially expanding the scope of the investigation and completely changing the remedial action to have much broader scope; and

536.2. failing to give interested and affected parties notice of, and an opportunity to make representations in respect of, the findings and remedial action contained in the Lifeboat Report;

Adv Mkhwebane acted unfairly.

537. In ignoring material submissions from the Minister of Finance (and in failing to call for further submissions from parties such as the SARB), Adv Mkhwebane acted irrationally.

538. In –

538.1. failing to give the courts an honest account of her meetings with the Presidency and the SSA; and

538.2. misrepresenting her reliance on economic "experts" during the litigation,

[81] Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at para 85. See also Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC) at paras 27 and 34.

Adv Mkhwebane acted dishonestly.

539. In –

539.1. allowing the SSA to play an outsized role in formulating the ultimate remedial action contained it the Lifeboat Report, in circumstances where she should have been investigating the SSA's role in respect of the CIEX Report, and where she did not afford any of the interested parties an opportunity to make submissions on that remedial action;

539.2. allowing the SSA to stipulate the wording of the constitutional amendment, in circumstances where there was no apparent reasonable basis for concluding that it had the necessary legislative expertise, economic expertise or impartiality to make that contribution; and

539.3. withholding the full extent of the role of the SSA in the investigation from other litigants, the HC and the CC – even though she purported to explain the SSA's role in her affidavits,

Adv Mkhwebane acted in a manner that called her independence and impartiality into question.

540. All indications are that Adv Mkhwebane acted intentionally and, indeed, deliberately: she decided and directed the manner in which the investigation was conducted and was therefore responsible for deciding who was and was not consulted, what was investigated and what remedial action was imposed. In a similar fashion, Adv Mkhwebane decided what was included in, and excluded from, the Lifeboat Report, and deposed to the affidavits in the litigation. She is an admitted advocate and should reasonably be expected to know that the contents of an affidavit should be true and correct and that, given her role, she is to assist the courts and give a full account that is truthful, open and transparent. All indications are that she exercised full agency in determining the contents of both the Lifeboat Report and her affidavits.

541. Unlike her response to the charges in respect of the Vrede Report, in respect of the Lifeboat Report Adv Mkhwebane does not claim that she did not direct the investigation and the report. The evidence before the Committee establishes that she was firmly in control of both. Indeed, her defence in respect of para 1.1.3 of the Motion is that the remedial action contained in the Lifeboat Report was her idea, inspired by her views on socio-economic issues in South Africa.

542. The Committee is therefore satisfied that, in acting as set out in paras 535 – 539 above, Adv Mkhwebane acted intentionally.

543. In any event, it is clear that, if Adv Mkhwebane did not act intentionally, she certainly acted recklessly and with gross negligence, in that it would have been clear to any reasonable person in her position that harm would flow from her conduct. Such a reasonable person would have taken steps to avoid the harm, but Adv Mkhwebane took no such steps, acting instead in reckless disregard of the consequences of her conduct, despite being made aware of the complexity and sensitivity of the subject matter at hand.

544. In this regard it is worth emphasising that any reasonable person in Adv Mkhwebane's position would have –

544.1. questioned whether the SSA had the legislative and economic expertise, competence and requisite impartiality to advise the PPSA on the constitutional amendment;

544.2. sought submissions from SARB, the Minister of Finance and Parliament, as well as someone with appropriate economic expertise, before contemplating directing the amendment of the Constitution in order to fundamentally alter the regulation and management of monetary policy in South Africa;

544.3. sought out, and engaged with submissions from interested parties on, the possible impact of the Lifeboat Report's remedial action on monetary policy, financial stability, the South African government and general issues of governance; and

544.4. been honest with the courts when explaining the investigation and the manner in which the Lifeboat Report was prepared.

545. Adv Mkhwebane did none of these things, and proceeded to issue the Lifeboat Report recklessly, in circumstances where she had been repeatedly warned of the dangers of such a course of action. Her conduct was therefore grossly negligent.

546. Furthermore, in acting so recklessly, in pursuing unlawful and economically harmful conduct, in failing to observe the basic elements of procedural fairness and transparency, in acting so far outside of her powers and in failing to observe scrupulous honesty in her submissions to the courts, Adv Mkhwebane acted in a manner that would have destroyed a reasonable member of the public's confidence in her ability to discharge her duties and functions.

547. **The Committee is therefore satisfied that Adv Mkhwebane committed misconduct in relation to the Lifeboat Report, its investigation and subsequent litigation.**

D. ALLEGED MISCONDUCT IN RESPECT OF THE VREDE REPORT

548. Paragraph 4 of the Motion alleges that Adv Mkhwebane committed misconduct in respect of the Vrede Report, the investigation that preceded it and the litigation that followed.

549. The Vrede Project was a collaboration between the Free State Department of Agriculture and Rural Development ('**the FS Department**') and a private company, Estina that was launched in 2013. The intention was for the two parties to establish and fund a dairy farming project in Vrede in the Free State, for the benefit of local residents ('**the beneficiaries**'). The beneficiaries would own 51% of the dairy operation in exchange for a State investment of R342 million, while Estina would own the remaining 49% in exchange for investing R228 million in the project. In turn Estina would partner with an Indian company, Paras, to support the Vrede Project.

550. On 12 June 2013 the National Treasury ('**the NT**') commissioned ENS Forensics (Pty) Ltd to investigate allegations of procurement irregularities in respect of the Vrede Project that had arisen in the media. This culminated in a report ('**the NT Report**') dated '*January 2013*'. That date must be an error, given that the investigation was only commissioned several months thereafter.[82] The NT Report was submitted to Mr Magashule on 24 February 2014 and to the PPSA in July 2014. It found that the Vrede Project had been plagued by a host of irregularities and recommended disciplinary action against the HOD, Mr Peter Thabethe, and the CFO, Ms Seipati Dlamini. It also recommended that –

> 'no further funds are invested in the project until all of the risk factors set out in this report are addressed. Ultimately the project should be re-assessed and the necessary due diligence should be completed to ensure that the project is viable. In its current form the project is not likely to yield value for money to the State.'

551. Following the NT's investigation, the FS Department cancelled its contract with Estina on 13 August 2014 and transferred management of the Vrede Project to the Free State Development Corporation ('**the FSDC**'). The FSDC found that the cow housing shed was inadequate; the processing plant built by Estina would require additional investment if it was to be viable; and that none of the beneficiaries purportedly identified were involved in the operations of the Vrede Project.

[82] The High Court concluded that the correct date of the report was probably January **2014**: Vrede Merits at para 14.

552. Dr Roy Jankielsohn, a DA member of the FS Provincial Legislature, ('**the Vrede Complainant**') lodged three complaints relating to the Vrede Project on 12 September 2013, 28 March 2014 and 10 May 2016 respectively ('**the Vrede Complaints'**).

553. The PPSA undertook an investigation into the Vrede Project that spanned almost four and a half years. Although the investigation commenced during Adv Madonsela's term, it was concluded during Adv Mkhwebane's tenure and resulted in a final report being issued on 8 February 2018 ('**the Vrede Report**'). The Vrede Report is the subject of Charge 2, para 4 of the Motion. The Vrede Report went through various drafts, which are referred to below based on the month and year in which they were produced.

554. On 15 February 2018, a week after Adv Mkhwebane issued the Vrede Report, the Directorate for Priority Crime Investigation ('**the Hawks**') served warrants of arrest on thirteen suspects relating to the Vrede Project, and arrested eight, including Mr Thabethe, Ms Dlamini (then the Chief of Staff in the Department of Mineral Resources (of which Mr Mosebenzi Zwane at that stage was Minister)), together with Gupta associates and family members.

555. In February 2018, the Vrede Report was challenged in judicial review proceedings, first by the DA and later by the Council for the Advancement of the South African Constitution ('**CASAC**'). Although she initially agreed to abide the HC's decision, Adv Mkhwebane later opposed both applications. The HC concluded that the Vrede Report was unlawful and unconstitutional; it declared the report invalid and set it aside.[83] The HC later issued a separate judgment requiring Adv Mkhwebane to pay a portion of the costs of the litigation in her personal capacity.[84]

556. The HC, the SCA and the CC all refused Adv Mkhwebane leave to appeal against the HC's decisions premised on the basis that there were no reasonable prospects of success.

557. On 6 March 2018 at a Justice PC meeting, Adv Mkhwebane faced criticism for shortcomings in the Vrede Report. Pursuant thereto, Adv Mkhwebane conducted a further investigation focusing on the Vrede Project's intended beneficiaries and political involvement in the Vrede Project – among the matters not covered in the Vrede Report. In addition, and pursuant to a fourth request from the Vrede Complainant (dated 17 June 2020) the issue of the contravention by politicians of the Prevention and Combating of Corrupt Activities Act 12 of 2004 ('**PRECCA**') was also included in the investigation. This resulted in a further report, which does not form part of the subject matter of

83 Democratic Alliance v Public Protector and a related matter [2019] 3 All SA 127 (GP) ('**Vrede Merits**').
84 Democratic Alliance v Public Protector and a related matter [2019] 4 All SA 79 (GP) ('**Vrede Costs**').

the Motion, dealing with these aspects being released on 21 December 2020 ('**the Vrede 2 Report**').

(i) General attack on witnesses

558. Adv Mkhwebane argues that the '*main witnesses relied upon by the Evidence Leaders* [in respect of the Vrede allegations] *in Messrs Kekana, Samuel and Raedani rank among the worst performing witnesses in the area of credibility.'*

559. Adv Mkhwebane has made various attempts to undermine the credibility of the three witnesses. However, as is evident from what is set out below, their evidence has only been relied upon where it has been adequately corroborated by documentary evidence and/or the testimony of other witnesses, or where it has been admitted by Adv Mkhwebane.

(ii) Narrowing the scope of the investigation

560. Paragraph 4.1 of the Motion alleges that, in the investigation and Vrede Report, Adv Mkhwebane narrowed the scope of the investigation required by the Vrede Complaints, and as commenced by Adv Madonsela, without providing a rational or proper explanation.

(a) The Vrede Complaints

561. Each of the three Vrede Complaints is acknowledged and referenced in the Vrede Report.

562. **The first Vrede Complaint** alleged that the local beneficiaries of the project would not receive shareholding in proportion to the Free State government's **('FS Government')** investment in the Vrede Project and requested the Public Protector to investigate to ensure '*an equitable share in this project for the local 100 beneficiaries*'. It also wanted the investigation to '*ensure transparency*' in the FS Government's multi-million Rand investment in a local dairy factory to be built by Estina and Paras (the private-sector partners).

563. **The second Vrede Complaint** reiterated the earlier concerns about the allocation of shares to beneficiaries and the disproportionate benefits derived by Estina. It itemised various instances of '*hugely inflated costs*' paid by the FS Government, including in respect of a bunker; a road; security gate and guard house; plants; a milking parlour; tools and equipment; administrative and professional fees; and cows. It also alleged non-compliance by Estina with '*environmental requirements*' and significant cattle deaths.

564. **The third Vrede Complaint** reiterated previous concerns. In addition, it raised concerns regarding: *(a)* non-compliance with procurement processes in appointing Estina; *(b)* misrepresentations by Estina regarding its partnership with Paras; *(c)* Estina's role as '*both a partner and implementing agent*', which saw it receive up to R183 million in respect of the project; *(d)* Estina having been allowed to '*abscond from the project without any accountability*'; *(e)* the role of Mahoma Mobung; *(f)* the sidelining of beneficiaries; and *(g)* '*various irregularities*' disclosed in a NT investigation, which had '*been ignored by the provincial government and the Premier*.'

(b) What was not investigated?

565. The Vrede Report sets out findings on whether –

565.1. the FS Department improperly concluded a public-private partnership ('**PPP**') and whether there had been non-compliance with procurement processes (as concluded by the NT);

565.2. the FS Department had failed to manage and monitor Estina's budget evaluation, expenditure controls and performance; and

565.3. goods and services were procured at inflated prices (although its conclusion was that it was '*difficult to determine*' this issue).

566. The Vrede Report recorded that six issues were not investigated: *(i)* the causes of cattle deaths; *(ii)* issues arising from the third Vrede Complaint; *(iii)* the value for money obtained by the FS Government; *(iv)* newspaper articles regarding the Gupta family's links to the project; *(v)* how money was spent by Estina; and *(vi)* '*the matter relating to beneficiaries who were intended to benefit from the project*'. The main body of the Vrede Report records that these issues were not investigated due to various specific reasons. In addition, the executive summary states that they were not investigated '*due to capacity and financial constraints'*.

567. Aside from these six issues, the Vrede Report also did not deal with the complaint about non-compliance with environmental prescripts. This is not however addressed in the section of the report that specifies the issues that were not investigated.

(c) General

568. Paragraph 4.1 of the Motion alleges that Adv Mkhwebane *'narrowed the scope of the investigation… as commenced by her predecessor, Adv Madonsela'*.

569. The fact that Adv Mkhwebane's predecessor took a particular view as to the issues that should be investigated could not be the decisive determinant as to the scope of the Vrede investigation in 2017 and 2018. Adv Mkhwebane, as the incumbent office-bearer, was required to act rationally and reach her own independent conclusions but with regard to the work already done.

(d) Cattle deaths

570. The second Vrede Complaint indicated that between 50 and 100 cattle may have died since being purchased and that some of the carcasses had been dumped in a water catchment area, which posed a health risk. The Vrede Report indicates that the deaths were not investigated because the photographs indicated that '*the deaths did not occur recently*' and because the '*Minister of Water Affairs intervened and issued instructions on the removal of the dead cows.*'

571. The Minister of Water Affairs' intervention may have indeed addressed the health risk. There is no evidence to prove or disprove the claim that the time lapse since the cattle deaths prevented the PPSA from further investigating. The reasons given for non-investigation were included in early drafts of the report by the provincial investigators, and do not appear to have arisen at the instance of Adv Mkhwebane.

572. In her answering affidavit before the HC in the Vrede litigation, Adv Mkhwebane explained that the causes of the cattle deaths required '*scientific proof*', which would have necessitated additional expenditure by the PPSA. There is nothing before the Committee to gainsay this claim.

573. There is, accordingly, no evidence to indicate that Adv Mkhwebane irrationally narrowed the Vrede investigation to exclude the cattle deaths.

(e) Issues arising from the third Vrede Complaint

574. The Vrede Report states that the issues arising from the third Vrede Complaint were not investigated as '*the issues pertaining to the investigation were already identified and an investigation was at an advance stage*' [*sic*]. This was reiterated in Adv Mkhwebane's Vrede HC AA in the subsequent litigation, where she stated that, by the time it was received on 10 May 2016, '*it was too late to include the allegations raised in the third complaint since the issues in the investigation had been identified from the main and second complaint and had already been investigated and provisionally reported on.*'

575. These justifications, however, cannot be accepted.

576. The third Vrede Complaint was lodged on 10 May 2016. At that stage, there was no provisional report that the Public Protector – whether Adv Mkhwebane or her predecessor – had approved. The provisional Vrede Report – i.e. the provisional report that set out the PPSA's preliminary findings for purposes of communicating the preliminary findings to interested parties – was only finalised almost a year later, in April 2017.

577. When the third Vrede Complaint was submitted, the documentary and oral evidence is clear that the investigation was still very much ongoing and was still with the Free State office, which had not yet completed its draft report for final submission to Head Office. After assuming office in October 2016, Adv Mkhwebane took an early interest in the matter, and participated in a Think Tank discussion on the investigation in December 2016. She was provided with a working draft of the Vrede Report in February 2017, and was informed that her predecessor had been unhappy with the investigation.

578. The Vrede site inspection only took place almost one year after the third Vrede Complaint was submitted, in April 2017. Important witnesses were only interviewed, and significant documentary evidence was only acquired, in April 2017. Adv Mkhwebane only issued the s 7(9) notices inviting affected parties to make submissions on 7 June 2017 (she stated under oath in the Vrede litigation, '*[s]ection 7(9) notices are part of an investigation*'). The parties only submitted their s 7(9) responses during July 2017. The provincial office's final draft of the report was only submitted to Head Office during September 2017. After that, further issues were investigated, the draft report was revised and the final Vrede Report was issued in February 2018, some 20 months after the third Vrede Complaint was submitted.

579. Accordingly, at the time the third Vrede Complaint was submitted, the investigation was not so advanced that the important issues raised, which merited consideration, could not be considered. The claim that the investigation was completed in 2015, or prior to receipt of the third Vrede Complaint, are unsustainable.

580. Adv Mkhwebane's justification is also implausible when compared to the Lifeboat investigation, where she significantly expanded the scope of the investigation after the Provisional Report was issued and parties submitted their s 7(9) responses. It would have been completely contradictory, during 2016 and 2017, for Adv Mkhwebane to have adopted the posture, in respect of the Vrede investigation, that the issues for investigation were finalised or concluded even before the s 7(9) notices were issued, such that the investigation could not consider further issues after receipt of the parties' s 7(9) responses.

581. Adv Mkhwebane has not explained why she adopted such different approaches to the Lifeboat and Vrede investigations respectively.

582. The Committee agrees with the following finding by the Vrede HC:[85]

> "The PP justified her decision not to investigate the third complaint that was lodged on 10 May 2016, because, she said, it was too late to do so. One must in this regards note that the final report was only issued in February 2018. It is inconceivable that, having regard to the dates, she could seriously contend that it was too late for her proper consideration."

583. In her Part B Statement, Adv Mkhwebane explains her response to the third Vrede Complaint as follows:

> "[T]he issues raised therein largely overlapped with the first and second complaints. The exception was the issue of the shareholding of the beneficiaries. This issue was left out because the investigation was at an advanced stage and the issue had not been incorporated in the 6 months preceding my occupation of office. This failure must be placed at the door or Mr Samuel and Prof Madonsela."

584. However, it is not true that the only issue from the third Vrede Complaint that had been excluded was '*the shareholding of the beneficiaries*'. The content of the Vrede Report reveals that the following issues raised were not investigated:

584.1. Estina's alleged misrepresentation about its partnership with Paras;

584.2. the benefits paid to Estina;

584.3. Estina's dual role as a partner and an implementing agent;

584.4. Estina being allowed to abandon its responsibilities in respect of the Vrede project;

584.5. the role of Mahoma Mobung; and

584.6. the sidelining of beneficiaries with a claim to 51% of the project.

585. Thus, while some issues raised in the third Vrede Complaint (such as procurement non-compliance) were addressed in the Vrede Report, several were not. These omitted issues were plainly material to the investigation, as they relate to the basis upon which the contracting party was appointed, the benefits received by that contracting party and the benefits from which the local beneficiaries were

[85] Vrede Merits at para 127.

excluded. They are also closely related to the concerns set out in the first and second Vrede Complaints, and so should have formed reasonable lines of inquiry for the PPSA to explore.

586. There is no evidence to indicate that Adv Mkhwebane directed that the issues raised in the third Vrede Complaint should be investigated by the PPSA separately or at a later stage.

587. In her answering affidavit in the Vrede review proceedings, Adv Mkhwebane claimed that several of the issues mentioned in para 584 above were, in fact, investigated by the PPSA under the rubric of '*Whether the Department improperly entered into a Public Private Partnership agreement for the implementation of the Vrede Dairy Project*'. However, her claim is demonstrably untrue: the discussion of the evidence in the Vrede Report does not contain any content that relates to Estina's misrepresentations or its alleged dual role, and the findings contain no conclusions about Mohoma Mobung. Furthermore, there was no independent investigation into the benefits to Estina and whether such benefits were derived at the cost of the State, taxpayers and the beneficiaries. Instead, the Vrede Report merely regurgitated some of the NT's findings as '*observations*'.

588. In the same affidavit, Adv Mkhwebane stated that Estina's misrepresentations were not investigated because Estina is a private company and therefore not within the Public Protector's jurisdiction. However, it was entirely within Adv Mkhwebane's competence to investigate whether the FS Department had concluded a valid agreement with Estina, whether such agreement was vitiated by fraudulent or other material misrepresentations and whether the FS Department had acted improperly to confer an unlawful advantage on Estina. Adv Mkhwebane's justification for not investigating is therefore unsustainable.

(f) Value for money

589. The first Vrede Complaint asked the Public Protector to investigate the significant public expenditure on infrastructure, machinery and cattle associated with the Vrede Project. The second Vrede Complaint requested the Public Protector to investigate several claims of '*hugely inflated costs*', as well as the extent to which Estina would contribute to the project and whether it was also benefitting from the supply of goods and services to the Vrede Project.

590. The Vrede Report records that the project's value for money was not investigated because it '*was investigated by National Treasury: Accountant General*'.

591. This justification, however, cannot be accepted. The Vrede Report addressed some issues that were covered by the NT Report, such as issues in respect of the alleged PPP. Therefore, an overlap

between the investigations was clearly not an obstacle for Adv Mkhwebane. The NT report contained useful information, including an economist's assessment and detailed information on over-charging, that could have been used as evidence or leads by Adv Mkhwebane in assessing the Vrede Complaints. The NT Report also identified documents and information that it had not been able to access. Adv Mkhwebane could have used her statutory powers of compulsion to overcome such access hurdles, and so unearth crucial evidence that was not available to the NT and so have gone further than the NT was able to, which would have assisted in ensuring accountability for the maladministration associated with the Vrede Project.

592. Although the Vrede Report states that issues regarding value for money were not investigated, that is not true. Earlier drafts of the report considered the claims of overcharging by analysing available documents and other evidence (such as photographs and input from experts) and reached conclusions that went beyond the NT Report's findings. The final version of the Vrede Report omitted these conclusions but retained some information on which the conclusions had been based.

593. Accordingly, various aspects of the value-for-money concern were investigated by the PPSA, yet Adv Mkhwebane ultimately excluded any firm conclusions on this issue from the Vrede Report.

594. The Vrede Report ultimately concluded that it *'was difficult for the Public Protector to make or draw an inference that prices of goods and services were inflated, due to the fact that there was no procurement process followed and the Public Protector could not test the markets to determine market value of goods and services procured without the necessary documents which proof the actual price for the goods and services procured.'* This, however, departs from the earlier statement in the Vrede Report that value for money was not investigated because of the NT's investigation. This internal contradiction is addressed in greater detail below.

595. The second Vrede Complaint listed nine items that were allegedly the subject of inflated prices. These items were fairly standard infrastructure, equipment, animals and fees. They were not addressed in any detail in the NT Report, and therefore merited closer consideration by Adv Mkhwebane. The PPSA was provided with information from the FS Department confirming all but one of the expenditure items set out in the second Vrede Complaint. At the very least, Adv Mkhwebane could have tested those items against reasonable estimations of quotes (some of which were set out in the second Vrede Complaint itself).

596. Furthermore, on 14 July 2017, in his s 7(9) submissions, Mr Magashule undertook that the FS Provincial Treasury would perform a '*value for money assessment*' in respect of the Vrede Project, to address '*the remaining issues*'. There is no reason why Adv Mkhwebane should not have

compelled him to comply with his own undertaking, and then analysed the assessment in its final report.

597. In addition, it was clear from the Premier's s 7(9) submission that the FS Government did not simply accept the NT Report or comply with its recommendations. Instead, it was waiting on the outcome of Adv Mkhwebane's investigation to determine what action, if any, to take in respect of the Vrede Project. Adv Mkhwebane has indicated that she was '*satisfied*' that this was an appropriate stance for Mr Magashule to take. It was therefore of utmost importance for the Vrede Report to include both findings and remedial action in respect of the issues pertaining to overcharging and value for money. Without those findings, there was a material risk that the FS Department and the FS Government would continue to leave the various concerns about economic prejudice unaddressed.

598. There was, accordingly, no justification for Adv Mkhwebane's general approach that excluded any meaningful findings on the value-for-money issues raised in the Vrede Complaints.

599. In her Part B Statement, Adv Mkhwebane states that '*[o]n the allegation that the prices of goods and services procured were inflated, the allegations were investigated*'. This appears to contradict the statement in the Vrede Report that issues of value for money were not investigated. However, the limited extent to which the PPSA investigated the price-inflation allegations is addressed in paras 953 – 976 below.

(g) Gupta emails

600. The three Vrede Complaints made no specific mention of the Gupta family or the so-called *GuptaLeaks* (although concerns about the Gupta family were mentioned in the NT Report).

601. The Vrede Report states that *'recent newspaper articles on the emails reported, relating to the Gupta family, that surfaced around June 2017, referring to the Project were noted but do not form part of the scope of this investigation.'* In her Vrede HC AA, Adv Mkhwebane explained that, by the time the GuptaLeaks came to the fore in June 2017, *'[t]he issues pertaining to the investigation had already been identified and the investigation was already complete.'*

602. However, the Vrede Judgment held that:[86]

> "The Premier's personal involvement in promoting the Project and the close association between the Premier (through his son, Tshepiso Magashule, who was employed by the Gupta family), and

[86] Vrede Merits at para 123.

> the Gupta associates involved in Estina, was reported in the media from as early as 2013. Likewise, Mr Zwane's direct involvement in facilitating the Project, and the allegations of kickbacks from the Gupta family was a matter of public record."

603. This was not investigated at all. Mr Sithole's evidence was that drafts of the Vrede Report served before the Think Tank and Task Team on several occasions, and that the GuptaLeaks '*did come up*'. Adv Cilliers (one of the Free State investigators responsible for the Vrede investigation) was tasked with checking whether they had any bearing on the investigation and reported that there was none. This was clearly incorrect. Mr Sithole further testified that Adv Mkhwebane supported looking into the GuptaLeaks, but ultimately Adv Cilliers' view – that the emails were not relevant to the Vrede Complaints – prevailed.

604. In an email of 13 July 2017, Adv Mkhwebane referred to '*the hard documents submitted by Outa*'. This was a report prepared by the Organisation Undoing Tax Abuse ('**OUTA**'), submitted on 28 June 2017, which purported to set out '*compelling evidence*' including in respect of malfeasance in the Vrede project ('**the OUTA Report**'). Among other things, it relied on the GuptaLeaks emails, having engaged in a data mining exercise to extract information relevant to State Capture. The emails further allegedly illustrated that the Gupta family exercised control over the Vrede Project, millions of taxpayer Rands were pilfered, and that Messrs Thabethe, Zwane and Magashule may have been complicit in respect thereof.

605. In other words, the emails constituted *prima facie* evidence of fraud, corruption, theft and money laundering in relation to the Vrede Project, involving senior state officials. Having been provided with the information, Adv Mkhwebane would have known that Adv Cilliers' conclusion that there was no link between the GuptaLeaks and the Vrede investigation could not be sustained.

606. The Committee was provided with an affidavit from OUTA confirming that the OUTA Report was hand delivered to the PPSA. While this affidavit was not tested under oral evidence, the fact that the OUTA Report was in Adv Mkhwebane's possession is corroborated by the aforementioned email of 13 July 2017, sent by Adv Mkhwebane to the CEO, Mr Samuel and Adv Cilliers.

607. In the email, Adv Mkhwebane instructed that letters should be prepared for dispatch to the '*Premier, MEC and Minister Zwane*' regarding various allegations flowing from the GuptaLeaks. By then the s 7(9) notice had been issued. While Mr Ndou, who headed up the Vrede Task Team, accepted this as an indicator that Adv Mkhwebane had not wanted to exclude the GuptaLeaks, he testified that he never saw such letters. No such letters are included in the Rule-53 record. It is the practice of the PPSA that all correspondence to politicians be signed by the Public Protector.

608. There is accordingly no evidence before the Committee that Adv Mkhwebane ensured that this email instruction of 13 July 2017 was carried out. Nothing is said in Adv Mkhwebane's written statement to the Committee in relation hereto. There is also no response from any recipients in the Rule-53 record either. All indications are therefore that, while there may have been an initial intention to address the issue of the GuptaLeaks, this was, for reasons not apparent, later abandoned.

609. Mr Ndou's written and oral evidence was to the following effect: *(a)* the GuptaLeaks emails entered the public domain in mid-2017, while the Vrede investigation was ongoing; *(b)* some of the emails related to the Vrede Project*; (c)* some media articles alleged that money intended for the Vrede beneficiaries was diverted to foreign bank accounts; *(d)* it was not sufficient for the Vrede Report to state that the media articles and emails do not fall within the scope of the investigation – more cogent reasons were required for not exploring the avenues opened up by the GuptaLeaks; *(e)* the investigation could not have been confined to the Vrede Complaints, but had to follow wherever the investigation led it; and *(f)* by August 2017, the GuptaLeaks had not been addressed in the draft Vrede Report when Mr Ndou raised the GuptaLeaks at a meeting of the Think Tank, to which Adv Mkhwebane responded that there was nothing wrong with considering the emails, but Adv Cilliers indicated that she did not think that they needed to be addressed (because the Vrede Complainant was not concerned about them).

610. Mr Ndou further testified that he raised the GuptaLeaks with Adv Mkhwebane on several occasions (including via email in September 2017). Adv Mkhwebane did not respond to Mr Ndou's email of September 2017, but later indicated that the GuptaLeaks were not part of the investigation. Mr Ndou was also told by Messrs Tebele and Nemasisi that Adv Mkhwebane had previously told them that the PPSA would not be considering the GuptaLeaks. While this is hearsay evidence, the 'one liner' in the Vrede Report that the emails '*do not form part of the scope of this investigation*' support this view.

611. Mr Kekana's affidavit states that *'much of the evidence needed for the investigation'* was contained in the GuptaLeaks, but that Adv Mkhwebane had '*stated that the #GuptaLeaks were not to be used in the investigation or included in the report.*' During cross-examination it was put to Mr Kekana that Adv Mkhwebane had not prohibited reliance on the GuptaLeaks but had expressed caution about their authenticity. Mr Kekana stated that his only knowledge was that Mr Ndou had informed the investigators that *'the PP did not want us to follow the Guptaleaks'* and that he was never informed of the reasons for this. He maintained this version when questioned by members, and indicated that the instruction was relayed through Mr Ndou, not from Adv Mkhwebane personally.

612. It should be noted that Adv Mkhwebane is not entitled to reject evidence merely because it has not been fully authenticated or verified. The PPSA is an investigative institution and may, in appropriate circumstances, be required to take steps to authenticate or verify evidence that comes its way. As the SCA explained in the Mail & Guardian case:[87]

> "The fact that the source of information is not disclosed does not mean that the information is untrue. And the question whether or not it is true will usually be capable of being verified, even without resort to the undisclosed source. If it is reported by an undisclosed source that a document is in the possession of A, the Public Protector is quite capable of establishing whether it exists by asking A for the document, and if necessary by searching for it under a warrant… It is often in cases of the most important kind that there will be people who fear reprisals if their identities become known. It is precisely in cases of that kind that the arsenal of investigatory tools at the disposal of the Public Protector becomes particularly important. The Public Protector has no place summarily dismissing any information. His or her function is to weigh the importance or otherwise of the information and if appropriate to take steps that are necessary to determine its truth. I repeat that the Public Protector is an investigator and not a mere adjudicator of verified information that must be sought out and placed before him or her by others."

613. Like Mr Kekana, Adv Raedani only became involved in the Vrede investigation in the second half of 2017, once it was transferred from the Free State Provincial Office. His affidavit (supported by contemporaneous email correspondence) indicates that, on 16 November 2017, he and other Vrede investigators (Messrs Kekana and Sithole) were emailed by Mr Ndou, who raised the GuptaLeaks and noted that there were '*allegations that R84M was siphoned off to a Gupta offshore account and that the Gupta wedding in Sun City was paid for from funds in this project.*'

614. In his affidavit Adv Raedani stated that '*the PP was adamant that [the Guptaleaks emails] should not be included in the investigation.*' Adv Raedani testified that he learned of Adv Mkhwebane's stance from Mr Ndou and his manager at the time, Mr Mothupi – he never personally discussed the GuptaLeaks with Adv Mkhwebane. In response to members' questions, Adv Raedani indicated that, in his view, there was no basis for ignoring the GuptaLeaks because '*some of the emails dealt with this project specifically*'.

615. Mr Ndou's evidence (echoed by Mr Kekana and Adv Raedani) that the GuptaLeaks emails could have assisted the Vrede investigation, particularly in respect of funds paid to Estina, was not seriously disputed in cross examination. It may well be, had the OUTA Report been availed to Mr Ndou and the Vrede task team to analyse, in July 2017, it would not have created an undue delay in

[87] Mail & Guardian para 17.

the finalisation of the Vrede Report and would in fact have enabled the investigators to make headway on a core element of the Vrede Complaints, being how the funds were spent.

616. It therefore appears that, on the one hand Mr Ndou, Adv Raedani and Mr Kekana were of the view that the GuptaLeaks should be investigated, but that Adv Cilliers regarded them as outside the Vrede Complaints. However, during 2017, the investigation was transferred from Adv Cilliers and the Free State Provincial Office and allocated to the Vrede Task Team at the PPSA Head Office under Mr Ndou. Yet in her statement to the Committee, Adv Mkhwebane recorded that '*it was Adv Cilliers who took a decision not to include the Gupta leaks*'.

617. Even if Adv Cilliers had opted not to investigate the GuptaLeaks, Adv Mkhwebane was in possession of the OUTA Report and ought to have applied her own mind and reasonably to have consulted Mr Ndou, as well as the members of the dedicated Vrede Task Team (Adv Raedani and Mr Kekana) on the matter.

618. The buck stopped with Adv Mkhwebane, not with any of her investigators. She was aware of the evidentiary difficulties the investigation had encountered thus far in respect of information about Estina. She was aware that her senior staffers supported looking into the GuptaLeaks. She had both the OUTA report at her disposal, as well as her powers of compulsion under the PPA. She was the constitutional office-bearer, and ultimately a decision as serious as deciding whether to investigate the GuptaLeaks was hers to make. It is unacceptable that she should now try to lay the blame on a staff member.

619. The fact remains that, at least since mid-2013, articles had been published in the South African media alleging that the Gupta family had irregularly benefitted from the Vrede Project. The media articles alleged that the Vrede Project was mired in fraud, serious procurement irregularities and probably corruption. The articles indicated that information in the public domain '*strongly suggested*' that the Guptas and their allies in the FS Government – namely Messrs Zwane and Magashule – played key roles in spearheading the Vrede Project and pushing it through without following due processes. They also revealed the Gupta family's central role in the scheme, and that they were the primary beneficiaries.

620. Such media articles are what gave rise to the NT's investigation in 2013, a fact that was expressly addressed in the NT Report. There should have been no doubt in the PPSA, from the outset of its investigation, that, as early as 2013, there were serious concerns about the Gupta family's corrupt involvement in the Vrede Project. This is not to say that Adv Mkhwebane ought to have placed blind reliance on those media reports (as she appeared to do in relation to the *Sunday Times* articles

on the SARS Unit), but it reasonably should have raised concerns for further investigation. In any event, some four years later, it was hardly rational to deny that possible evidence of the Gupta family's involvement in the Vrede Project could be relevant to an investigation that was supposed to focus on whether the Vrede beneficiaries had been unfairly deprived and whether FS Government funds had been irregularly used.

621. This Committee is not seized with determining the veracity of the corruption allegations emanating from media reports. However, these reports, like the OUTA Report, at minimum provide *prima facie* evidence of corruption, looting and state capture in respect of the Vrede Project. The Committee's task – addressed below – is to determine whether the further investigation thereof by Adv Mkhwebane was necessary to get to the root of the Vrede Complaints that were before her.

622. Adv Mkhwebane's explanation was that by the time the GuptaLeaks came to the fore in June 2017, *'[t]he issues pertaining to the investigation had already been identified and the investigation was already complete*'. Further that *'there was also no direct complaint (in the complaints submitted in 2013 and 2014) relating to certain politicians and the Gupta family'* and that *'these allegations were already the subject matter of several investigations'* and also that *'all the media reports implicating the Premier of the Free State and the then MEC for Agriculture in that province in their relations with the Gupta family'* preceded her appointment as Public Protector or emerged after the investigation had already been completed.

623. Factually, this response is untrue: in June 2017, the PPSA issued the s 7(9) notices, and responses from the implicated parties, were only received in July. The investigation was therefore clearly ongoing.

624. The abovementioned response also differs notably from Adv Mkhwebane's approach to the Lifeboat Report, where she considered the investigation to still be ongoing, and considered new evidence, even after the s 7(9) notices were issued, and did not consider the fact that several previous investigations had already considered the same subject matter as an obstacle to her own investigation. The same can be said for the SARS Unit investigation.

625. Adv Mkhwebane also stated that the Public Protector *'is not compelled, on the basis of media publication, to investigate allegations on own initiative, especially under the current capacity and financial constraints the office is experiencing,'* and further that *'even if I have jurisdiction to investigate fraud, theft and money laundering, those would in any event been referred to the Hawks, as it is an appropriate statutory body to investigate such allegations.'*

626. This raises two material differences with the approach adopted in the CR17 investigation:

626.1. First, notwithstanding that the complaint itself made no mention of the funding of the CR17 Campaign, Adv Mkhwebane justified the investigation (albeit erroneously in this instance as she did not have the requisite jurisdiction) on the basis that she was honour-bound to investigate where evidence leads her. Yet, in respect of the GuptaLeaks, the approach adopted was that the investigation was already 'completed' or so far gone, it could not be included as part of the Vrede Report. The ambit of the latter was limited to mismanagement of funds and irregular procurement over which she did have jurisdiction.

626.2. Second, in CR17 the complaints did not mention the CR17 Campaign, yet it was investigated, as was money laundering. Yet in the Vrede investigation the GuptaLeaks, which did fall within the powers of a Public Protector to investigate, were deliberately left out, even though Adv Mkhwebane by then already had the OUTA Report in her possession.

627. Adv Mkhwebane's questioning of Mr Ndou also suggests that she did not cause the GuptaLeaks to be investigated because it would have been too resource-intensive and time-consuming to do so. This was not raised during litigation or mentioned in the Vrede Report. It also means that the decision was taken by her and not Adv Cilliers. It is also inconsistent with the fact that, as mentioned above, almost six months before the final Vrede Report was issued, she gave instructions for senior politicians to be asked to address numerous issues flowing from the GuptaLeaks emails, even after the issuing of the s 7(9) notices. Clearly, there were some aspects that Adv Mkhwebane considered to be both relevant and capable of being investigated by the PPSA.

628. If Adv Mkhwebane was concerned that investigating the GuptaLeaks would have been too resource-intensive and time-consuming, she could nevertheless have instructed Mr Ndou and his team to interrogate the OUTA Report and its annexures and determine whether they contained any helpful evidence. The OUTA Report contains sections devoted to the Vrede Project, which detail various emails and documents from the GuptaLeaks that, according to OUTA, establish malfeasance in respect of the Vrede Project, particularly on the part of Mr Zwane. Rather than trawling through thousands of GuptaLeaks, the OUTA Report would have provided investigators with a handy means of determining which documents and emails to focus on – they are itemised and annexed to the OUTA Report.

629. Adv Mkhwebane could have further engaged OUTA on the authenticity of the information. In so doing, the evidence could have been analysed and findings made. If not, the Vrede Report could

have indicated that the available evidence was considered but did not disclose any evidence of prejudice or irregularity or could not be verified or had to be further investigated. Either way, the available evidence would have been considered rather than ignored. Instead, Adv Mkhwebane excluded the GuptaLeaks and the OUTA Report in their entirety, only for them to later emerge in the Vrede 2 Report.

630. Mr Ndou's evidence was that he was never given a copy of the OUTA Report. Up until his testimony, he had not seen Adv Mkhwebane's email referencing the document. Thus, the PPSA's executive manager responsible for the Vrede investigation, who had raised concerns about the GuptaLeaks and what they might contain in respect of the Vrede Project, was never informed that the emails had been mined to identify evidence relevant to State Capture or that a report had been prepared – and lodged with the PPSA's office – dealing specifically with the Vrede Project. That is a glaring and unjustifiable omission and failure on the part of Adv Mkhwebane.

631. During her questioning of Mr Sithole, Adv Mkhwebane's legal representative indicated that it was not necessary for the PPSA to address the GuptaLeaks because '*they were to be dealt with in the Zondo commission*'. However, this reason is not contained in the Vrede Report, which states that the GuptaLeaks were excluded because '*they do not form part of the scope of this investigation*'. Had Adv Mkhwebane actually considered that the GuptaLeaks were relevant but were going to be addressed by the Zondo Commission, the Vrede Report would have said so – just as it expressly stated that concerns about Estina's spending were being dealt with by the Hawks.

632. Furthermore, that the Zondo Commission might consider the GuptaLeaks did not preclude Adv Mkhwebane from doing so. The Commission had different powers and objectives to the Public Protector. Most importantly, while remedial action emanating from the Public Protector has binding force and is aimed at securing administrative justice for affected individuals, any recommendations emanating from the Zondo Commission would be non-binding and offer no immediate relief to affected parties. It is also materially different to the approach with the SARS Unit investigation, where notwithstanding several reports and opinions, Adv Mkhwebane had no qualms conducting such investigation.

633. There was, accordingly, no adequate justification for excluding the GuptaLeaks from the scope of the Vrede investigation.

(h) How Estina spent the money

634. The first Vrede Complaint requested that FS Government expenditure be investigated, including the costs of assessments, fodder, infrastructure, machinery and cattle in respect of the Vrede Project, so as to ensure transparency. The second Vrede Complaint alleged that Estina was '*benefitting from the supply of goods and services from the contributions from the provincial government*' and was benefitting '*disproportionally at taxpayers' expense*', and that the FS Government had paid '*hugely inflated costs*' for various items in circumstances where it was '*not known who the suppliers, of the various goods and services are, and whether the suppliers, implementing agents, or officials are responsible for the inflated prices*.' Vrede Complaints expressed concern about the FS Government's R342 million investment in the Vrede Project.

635. The third Vrede Complaint detailed several further allegations about Estina: that it benefitted under the contract approved by the Premier's legal department, at the expense of taxpayers, the local beneficiaries and the State; that it had already received approximately R183 million for building dysfunctional dairy infrastructure and purchasing the cattle at inflated prices; and that Estina was '*allowed to abscond from the project without any accountability*'.

636. The Vrede Report records that '*How the money transferred to ESTINA were spent by ESTINA*' [*sic*] is one of the issues not investigated by the PPSA '*as the Directorate for Priority Crime is dealing with the issue.*' This was repeated by Adv Mkhwebane in the HC, where she also stated that Estina's abscondment from the Vrede Project was not dealt with because it was being addressed by the Hawks.

637. The Hawks is concerned with combatting and investigating crimes, not general issues of impropriety or prejudice in State affairs.[88] It is not concerned with ensuring administrative justice for members of the public and has no powers to make determinations on how to address maladministration that are binding on other organs of state. The SAPS and the Public Protector are fundamentally different institutions with fundamentally different objectives and constitutional and legal frameworks.

638. The Hawks, as a component of the criminal justice system, operates slower than the PPSA is supposed to. For example, while the Vrede Report was released in February 2018, the criminal process in respect of the Vrede Project only commenced in January 2023. In any prosecution, the

[88] Section 17D(1) and 17D(i) of the SAPS Act.

elements of a criminal offence must be proved by the State beyond reasonable doubt.[89] However, the Public Protector – which is concerned with administrative rather than criminal justice – does not have to meet that high burden of proof to determine remedial action. The Hawks is therefore not a substitute for the Public Protector.

639. Furthermore, in the SARS Unit matter, Adv Mkhwebane pursued an investigation into, among others, Mr Pillay, notwithstanding that he was then facing criminal charges and had invoked his constitutional right to remain silent. Adv Mkhwebane's approach to the Vrede matter was completely inconsistent with this approach.

640. While the SAPS Act expressly provides for the Hawks to investigate offences in Chapter 2 of the PRECCA,[90] the PPA also provides that the Public Protector is competent to investigate alleged offences under Chapter 2 of the PRECCA if they relate to public money.[91] So, the statutory framework expressly contemplates that the PPSA may investigate a complaint even if the Hawks has simultaneous jurisdiction. Furthermore, evidence unearthed by the Public Protector may assist in the criminal prosecution and may also provide some form of justice in the event that there is no criminal prosecution, or there are errors on the part of the Hawks or the prosecution service.

641. In the circumstances, the Hawks' ongoing investigation did not justify Adv Mkhwebane's decision to not address the concerns about maladministration raised in the Vrede Complaints.

642. In the HC, Adv Mkhwebane claimed that issues such as the movement of funds required forensic investigation, which would have been expensive. However, both the Lifeboat and CR17 investigations included tracing the movements of funds, and Adv Mkhwebane completed those investigations without any external forensic assistance. Although the investigations were fundamentally flawed and the (relevant portions of) the reports set aside, Adv Mkhwebane clearly did not consider an investigation into money movements to be beyond the PPSA's capacity. There is no reason that is apparent to the Committee why she should have adopted such a different stance in respect of the Vrede Project.

643. The flawed approach to the investigation started before Adv Mkhwebane's time, and some of the blame therefore must be laid at the door of the provincial investigators initially charged with

89 Matjhabeng Local Municipality v Eskom Holdings Ltd and Others 2018 (1) SA 1 (CC) at para 67.
90 Section 17D(1)(aA) of the SAPS Act, read with Helen Suzman Foundation v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC).
91 Section 6(4)(a)(iii) of the PPA.

responsibility for the Vrede matter. It is little wonder that Adv Madonsela returned the draft reports to the Free State office because of the investigators' failure to conduct a forensic investigation.

644. However, the Vrede matter as indicated above was drawn to Adv Mkhwebane's attention when she took office. The investigation was discussed during a Think Tank meeting at which she participated in December 2016. She was provided with a draft report in February 2017; she was informed at that point that her predecessor had been dissatisfied with the work done by the provincial investigators; in March 2017 she discussed the Vrede investigation with members of the Free State Provincial Legislature; she attended the site visit with the provincial investigators in April 2017; she considered draft s 7(9) notices in May 2017; and she signed the finalised s 7(9) notices in June 2017.

645. During this period, it would have been apparent to Adv Mkhwebane that, despite having the means to secure evidence relevant to the critical questions surrounding the payment of funds to, and utilisation of funds by, Estina, those means had not been utilised, which jeopardised her ability to consider a core element of the Vrede Complaints. Adv Mkhwebane should have directed that steps be taken to procure that evidence, including, if necessary, the exercise of the PPSA's statutory powers of compulsion, search and seizure. That could readily have been done during 2017, particularly bearing in mind that the final report was only published in February 2018.

646. In her Vrede HC CASAC AA, Adv Mkhwebane asserted that '*it cannot be disputed that monies were paid and used for purposes other than those for which they were intended.*' However, the Vrede Report contains no such conclusion in its findings, let alone appropriate remedial action. There is, for example, no direction that the FS Department should take steps to recover unlawful expenditure paid to Estina, or to initiate proceedings for breach of contract, or to blacklist Estina and its controlling minds.

(i) <u>The beneficiaries</u>

647. The first Vrede Complaint raised concerns that the beneficiaries were not receiving an equitable or proportionate share in the Vrede project, despite the FS Government's intended contribution of R342 million. The second Vrede Complaint reiterated these concerns and set out additional concerns about the implementation of the project with the obvious implication that the beneficiaries were being prejudiced by the improper diversion of public funds.

648. From inception, therefore, the Vrede investigation should have focused on what the beneficiaries were entitled to and whether those entitlements had been interfered with or diverted. The beneficiaries should have been the primary focus.

649. The third Vrede Complaint amplified the earlier allegations by expressly alleging that the contract concluded by the FS Department benefitted Estina at the expense of the beneficiaries, that Estina was not properly implementing the project (e.g. by building a dysfunctional processing plant) and that the beneficiaries had been sidelined and were actually just '*pawns used to justify the project*' who had received no information about, and had no involvement in, the project. This should have been of utmost concern, especially given the millions of public funds already spent.

650. The Vrede Complaints required the PPSA to determine *(a)* who the beneficiaries were; *(b)* what benefits they were supposed to receive; *(c)* whether they had received those benefits, or whether any steps had been taken to ensure that they received those benefits in due course; and *(d)* whether what had been intended for the beneficiaries had actually been diverted elsewhere.

651. It is undisputed that Adv Mkhwebane did not investigate the impact of the irregularities on the beneficiaries and did not initiate contact with them, and that the Vrede Report does not address their plight.

652. The Vrede Report states that the '*matter relating to beneficiaries who were intended to benefit from the project*' was not investigated by the PPSA '*due to lack of information.*' In the HC Adv Mkhwebane claimed that, while she may have had information relating to the beneficiaries' details, she was unable to investigate concerns in respect of them because she did not have information that would enable her to verify the accuracy of the beneficiary list she had, or to '*make an assessment of how each had been impacted / prejudiced by the project.*'

653. This, however, is contradicted by the evidence.

654. The NT Report recorded that it had received a list of beneficiaries from the FS Department but expressed concern about the manner in which they had been selected. It was recommended that the '*beneficiaries of the project should be clearly identified and vetted*'. The NT Report also recorded '*serious concerns about the manner in which the beneficiaries were identified*.' That red flag should have alerted the PPSA to the need for extra vigilance when considering the issue of the beneficiaries. Adv Mkhwebane should therefore have approached the NT to obtain the initial list of beneficiaries as formulated in 2013, and the FS Department to obtain the updated list. The documentation and information about the beneficiaries had been provided to the NT without any compulsion in 2013, so there is no reason to think that the FS Department would not have adopted a similar stance to the PPSA's investigators later on. In any event, even if there had been resistance, the PPSA could have used its powers of subpoena, and sought or obtained any further information from Estina's (former) functionaries, such as Messrs Vasram and Prasad.

655. The documentary evidence indicates that the PPSA had a list of the names of most of the beneficiaries, many of which were accompanied by copies of identity documents, contact numbers and physical addresses. The same list – on the letterhead of the Phumelela Local Municipality – includes the names and contact numbers of three members of the beneficiaries' '*Management Committee*': the Chairperson, the Secretary and the Treasurer.

656. So Adv Mkhwebane did, in fact, have sufficient information in its possession to identify and contact the beneficiaries. She also had access to the information necessary to verify the beneficiary list.

657. This is not mere supposition. In 2019, when the PPSA was reinvestigating the Vrede matter after the NA expressed concerns about the omissions from the first investigation, the PPSA used the beneficiary list it had always had and contacted numerous beneficiaries. The investigators were able to interview many of the beneficiaries and obtain written statements from others. The beneficiaries, in turn, were able to provide the PPSA investigators with information on what they had been promised, what agreements they had signed, which officials and politicians they had met with, the documents they had been required to submit, the election of a beneficiary committee, the fact that they had no involvement in the project to date and the fact that they had received no benefits. Utilising the PPSA's ordinary resources and investigation techniques, Adv Mkhwebane was able to make extensive findings in respect of the beneficiaries and to order appropriate remedial action.

658. All of this, however, was lost in the Vrede Report because, during 2017 and 2018, Adv Mkhwebane elected not to trace and engage with the beneficiaries.

659. Towards the end of 2017, Mr Mmusi Maimane, then the leader of the DA, had a meeting with Adv Mkhwebane, to which he brought some of the Vrede beneficiaries. They were concerned at the delay in finalising the investigation.

660. The beneficiaries' attendance at the meeting should have confirmed in Adv Mkhwebane's mind their central importance to the investigation and report. Their details – and the details of others – could have been obtained at that meeting. The evidence appears to indicate that Mr Maimane undertook to provide the PPSA with the beneficiaries' details and statements after the meeting (although this was disputed during the HC litigation).

661. Adv Mkhwebane seeks to blame Mr Maimane for the beneficiaries' exclusion from the Vrede Report, because he never submitted their statements to the PPSA after the meeting. However, even if he had given an undertaking to prepare and submit their statements, Adv Mkhwebane's approach constitutes a gross dereliction of her duties of office. The Public Protector should not outsource its

investigation functions to political parties. If third parties are able to provide useful information or relevant evidence, the PPSA may make use thereof. However, if necessary evidence is not forthcoming in this manner, that is no reason for Adv Mkhwebane to refuse to discharge her core function of investigating complaints of prejudicial conduct in the public sector, particularly when she has the statutory means of compelling the production of documentary evidence.[92] The beneficiaries had attended Adv Mkhwebane's office: if the statements were outstanding, she should simply have tracked them down and obtained their statements herself.

662. Mr Maimane would not have been submitting the statements in his own interest, but in the interest of a vulnerable and seemingly prejudiced group of individuals. When the statements were not forthcoming from his office, Adv Mkhwebane should have appreciated her duty to assist such individuals and exercised the basic function of her office by seeking to collect information about the beneficiaries and their circumstances, which was clearly a core element of the Vrede Complaints.

663. Instead, the documentary evidence indicates that once the DA made it clear that it would not be providing further information, Adv Mkhwebane did not direct that any further steps should be taken to acquire information from or about the beneficiaries, when it was obvious that such information was necessary.

664. The evidence of Mr Samuel (the Head of the PPSA in the Free State office, which conducted a significant portion of the investigation) was that the beneficiaries could have been engaged '*with reasonable ease*', given that the investigators had the beneficiary list. He also noted that his predecessor in the PPSA Free State office had, during the early stages of the investigation, interviewed a leader of the beneficiaries (who subsequently died).

665. Indeed, email correspondence from the time indicates that Mr Samuel's office enquired whether the beneficiaries should attend the 2017 site inspection to meet Adv Mkhwebane and the investigation team. However, through her personal assistant, Adv Mkhwebane indicated that the beneficiaries should not meet with the investigators at the site inspection. Adv Mkhwebane has not addressed this at all in her Part B Statement, instead being content to point out that Adv Madonsela and Mr Maimane did not do what they should have. However, the conduct of the former Public Protector and a political leader is irrelevant to determining the reasonableness and appropriateness of

[92] See Vrede Merits at para 91.

Adv Mkhwebane herself not engaging with the beneficiaries and her office expressly declining an opportunity to engage with them.

666. Mr Ndou was the PPSA Executive Manager who took charge of finalising the Vrede investigation when it was transferred from the FS Provincial Office to Head Office in 2017. In his affidavit he stated that, on 25 January 2018, his task team prepared a memorandum for Adv Mkhwebane which noted that '*the evidence in respect of the project's intended beneficiaries*' still needed to be considered. At that stage, he was still expecting the information from Mr Maimane. He clarified that, had there not been a '*push for the report to go out*' on 8 February 2018, the beneficiaries could have been identified and investigated. There is no dispute that that '*push*' came from Adv Mkhwebane.

667. Among the evidence before her, Adv Mkhwebane had a signed but undated '*Beneficiary Agreement*' concluded between the Department and a representative of the beneficiaries. This agreement set out various rights and duties of the beneficiaries, as well as details about the funding and management of the project. So Adv Mkhwebane did, in fact, have sufficient information to determine at least some of the beneficiaries' entitlements: capital funding, up to approved thresholds, to establish the farming operation; a business plan for the implementation of the project; the procurement of project assets, on their behalf, pursuant to a competitive procurement process; a claim to the ownership of the project assets upon completion of the project; the right to participate in the execution of the project; the right to monitor any '*mentor*' appointed to assist in the implementation of the project; and the right to earn revenue from the project.

668. Adv Mkhwebane could then have taken any number of basic steps to determine whether these entitlements were being recognised and respected, including: contacting the beneficiaries and their management committee to ascertain what had been done in recognition of their rights under the Beneficiary Agreement; contacting the Department and Estina to obtain the same information, and requiring documentary proof thereof.

669. When the beneficiaries were eventually traced during a subsequent investigation, they were able to provide information regarding these entitlements and – more pertinently – the extent to which they had been completely ignored in the implementation of the project up until 2018 (and even beyond). They were able to provide information on what they had been promised; which agreements they had signed; which officials and politicians they had engaged with, and what those engagements dealt with; the documentation they had had to submit; and the election of the beneficiary committee. The beneficiaries confirmed the lack of project benefits that had accrued to them.

670. The Vrede Report records that 'ESTINA was to ensure that the beneficiaries own 51% in the proposed AGRI-BEE company (Mohoma Mobung Dairy Project (Pty) Ltd) and the remaining 49% shares to belong to ESTINA'.

671. Adv Mkhwebane had Estina's 'Quarterly Progress Report' dated 30 September 2013, which indicated that its '*First Phase Obligations'* included a duty to *'Include / Identify beneficiaries in AGRIBEE Entity' and 'Setup AGRIBEE Entity and clarify roles of stakeholders'*. That same report had no content under the heading *'Include / Identify beneficiaries in AGRIBEE Entity'*, but noted that it had set up a private company to house the entity, that the Department had identified *'80 emerging Black Farmers to be the beneficiaries of the 51% shares' and that a shareholders'* agreement had been prepared.

672. All that was required to verify whether this obligation had been met was to scrutinise the company's securities register and determine whether shares had, in fact, been issued to the listed beneficiaries. If there was no such proof of shareholding, that would have indicated a failure to give effect to the beneficiaries' rights, and Adv Mkhwebane could have ordered appropriate remedial action.

673. None of those steps were taken: the beneficiaries were not interviewed; Messrs Vasram and Prasad were not interviewed (even though the latter had participated in the NT's investigation); Mr Thabethe and Ms Dlamini were not interviewed; shareholders' agreements, securities registers and management agreements were not considered or subpoenaed; no consideration at all seems to have been given to the role of the beneficiaries in implementing and executing the project to completion, as contemplated in the Beneficiary Agreement.

674. If nothing else, Adv Mkhwebane could have interviewed or subpoenaed departmental officials to determine whether they had identified the Vrede project's beneficiaries as recommended in the National Treasury report. If not, Adv Mkhwebane could have fashioned remedial action to oblige the Department to take the necessary steps.

675. Several PPSA investigators testified that investigating the beneficiaries *'was not an essential component of the investigation' because the complaint 'at its core… was about procurement irregularities and price inflation.'*

676. This notion, however, can be rejected out of hand. It is obvious from the Vrede Complaints themselves that the beneficiaries, and the prejudice they had suffered, were very much essential components of the Vrede Complaints. Furthermore, the manner in which the beneficiaries had been ill-used and deprived of their entitlements, at public expense, was a critical public-interest element

of this matter. It was certainly an aspect of the investigation where vulnerable members of society required Adv Mkhwebane to discharge her constitutional responsibilities in their favour.

677. During cross-examination, it was put to Adv Raedani (one of the PPSA investigators involved with the Vrede matter) that '*changes that were made [to the draft report] without [Adv Mkhwebane's] involvement should not, cannot be put on her plate*'. That, however, is only true up until the draft report in question reaches Adv Mkhwebane's desk: she is the constitutional office-bearer who holds ultimate responsibility for the discharge of her office's functions. Although she does not – and could not be expected to – perform each of her office's investigative tasks in each investigation herself, she does bear overall responsibility for ensuring that investigations address the issues raised in complaints and, if not, to direct her investigators on how to remedy their failures.

678. It can never be the case that Adv Mkhwebane can sign off on a report that she knows completely fails to address core issues raised by the complaint, and then blame her investigators for her office's failure to discharge its functions. Such a failure must be laid squarely at the door of the office-bearer herself.

679. Furthermore, the evidence establishes that Adv Mkhwebane was personally involved in the investigation: in the Think Tank meeting, in the site visit, in issuing the s 7(9) notice and in various meetings regarding the investigation and the draft report and ultimately in finalising the report. The evidence also establishes that, while various drafts of the report were circulated at the beginning of 2018, numerous changes were effect to the working draft on 8 February 2018, following Adv Mkhwebane's direct intervention in the report finalisation process. In this intervention, Adv Mkhwebane identified the issues she was not happy with and the changes she wanted made. In those circumstances, Adv Mkhwebane must bear full responsibility for the content of the Vrede Report as finally published.

680. The evidence of Mr Kekana (another PPSA investigator involved in the Vrede matter) was that, on 8 February 2018, Adv Mkhwebane instructed the investigation team and Mr Nemasisi to remove material information relating to the beneficiaries from the draft report. However, at that stage, there was very little information about the beneficiaries in the report, because their position had never been investigated. None of the draft reports substantively addressed their identities, rights or prejudice in any manner. At most, Adv Mkhwebane may have instructed the team to amend the draft to expressly stipulate that the report did not address the beneficiaries (as the Vrede Report ultimately did).

681. The evidence establishes that the rights of, and prejudice suffered by, the beneficiaries was a core component of the Vrede Complaints and should have been a core focal point for the investigation. It also establishes that Adv Mkhwebane either had access to all of the necessary information or had the means to acquire that information, in order to grant effective remedial action to the beneficiaries. Whatever flaws there may have been in the investigation prior to October 2016, after that, Adv Mkhwebane had sufficient time and resources to ensure that a proper investigation was undertaken and the issues regarding the beneficiaries attended to. Adv Mkhwebane's reasons for allowing the PPSA to completely exclude the beneficiaries from the investigation cannot be upheld or defended. Her conduct was a palpable failure of administrative justice. In the circumstances, the narrowing of the investigation was unjustifiable.

(j) Environmental issues

682. The second Vrede Complaint alleged that the requirements of environmental legislation had '*already been breached since complaints have been received of indiscriminate ploughing of natural fields and wetlands*'. This was expressly recorded in the Vrede Report.

683. The documentary evidence establishes that the draft report circulated by Mr Ndou in February 2018 addressed the question of environmental compliance over three pages and considered documentation from the FS Department, evidence about other investigations that had occurred and the provisions of environmental legislation and regulations. The draft concluded that the authorisations necessary to undertake the activities referred to in the Vrede Complaint had, in fact, been obtained.

684. On 7 February 2018, Mr Nemasisi raised a concern that the question of compliance with environmental legislation had not been adequately addressed. His comment on the draft report states that '*The fact that the incident was addressed by [the Department of Water Affairs] does not mean that there was compliance with the environmental legislation.*' Another comment states that the evidence of dumping dead cattle in close proximity to a stream indicates that '*there should be a finding on non-compliance with environmental prescripts.*'

685. However, the Vrede Report does not assess any of the evidence regarding alleged non-compliance with environmental legislation or set out any conclusions or findings in respect thereof. The report contains no explanation at all for this complete failure to deal with a distinct component of the investigation.

686. The absence is all the more glaring because the draft versions of the report circulated within the PPSA on 7 February 2018 contained a considered analysis of the Vrede Complaint and the evidence and set out seemingly rational conclusions. There is simply no explanation for Adv Mkhwebane's decision to completely excise an entire issue – including the associated analysis of evidence and findings – from the Vrede Report.

687. When the Vrede Report was taken on review, Adv Mkhwebane explained that the alleged environmental non-compliance was *'not listed as an issue in the final report because it was an unsubstantiated complaint and the complainant was requested to provide further information which he failed to do.'*

688. However, in the litigation it was indicated that there had been no further request for information received by the complainant in respect of the alleged non-compliance with environmental legislation. No such correspondence to the complainant, as alleged by Adv Mkhwebane, is included in the Rule-53 record. In any event the Vrede Complaint was clear: the complainant alleged that natural fields and wetlands had been ploughed in contravention of the environmental legislation. Adv Mkhwebane therefore had to determine what environmental approvals, if any, were required and whether they were obtained. This did not require further information from the complainant.

689. As is evident from the various drafts of the report in circulation before 8 February 2018, there clearly was sufficient content for the PPSA investigators to engage with and reach a conclusion. The fact that the conclusion did not align with the complainant's allegation was no reason to completely exclude it from the investigation or the report. If, after investigation, Adv Mkhwebane exonerates the subject of a complaint, or finds that a complaint is unsubstantiated, that does not mean a report is not required. Instead, it means that a report must be issued explaining the investigation process and why the complaint was not upheld.

690. By way of comparison, in the Vrede Report, Adv Mkhwebane ultimately concluded that the allegations of price inflation could not be substantiated. However, as required in order to demonstrate engagement with the issues raised by the Vrede Complaints, Adv Mkhwebane still included the information about price inflation in the Vrede Report, and then explained her conclusion (however flawed that may have been). Adv Mkhwebane ought to have adopted the same approach in respect of the allegations of environmental non-compliance, instead of giving the impression that the environmental issues were not considered by the PPSA at all.

(k) ‘Capacity and financial constraints’

691. In the version of the Vrede report that Mr Ndou circulated on 7 February 2018, only three issues were listed as not having been investigated: the cattle deaths, value for money and the GuptaLeaks. There was no statement that the issues were not investigated because of the PPSA’s resource constraints.

692. The Vrede Report as finally published by Adv Mkhwebane, a day later, adds three items to that list: issues arising from the third Vrede Complaint; Estina’s expenditure; and the beneficiaries. The main body of the Vrede Report gives specific reasons for why each issue was not investigated. These reasons have been addressed above. However, the executive summary to the report then adds that the six issues ‘*were not investigated due to capacity and financial constraints experience by the Office of the Public Protector*’ [*sic*].

693. This resource justification could not apply to the allegations of non-compliance with environmental legislation because, before Adv Mkhwebane finalised the Vrede Report, the investigation into those allegations had already been completed and the findings set out in the draft report. No additional time, financial or other resources would have to be spent to address the complaint.

694. The general resource justification does not accord with some of the explanations given in respect of the specific issues that were not investigated:

694.1. For example, the Vrede Report states that the GuptaLeaks were not investigated because they ‘*do not form part of the scope of this investigation*’. Mr Sithole’s affidavit states that the GuptaLeaks were not included in the Vrede Report because Adv Cilliers looked into the issue and ‘*reported back that there was no link between the investigation based on the complaint and the Guptaleaks*.’ In other words, the GuptaLeaks were excluded because Adv Mkhwebane considered them irrelevant to the complaint and the investigation. That has nothing to do with capacity and financial resources.

694.2. As another example, the Vrede Report records that the cattle deaths were not investigated because the deaths were not recent and the Minister of Water Affairs had already intervened. Again, those reasons have nothing to do with the PPSA’s resource constraints.

695. The consistent evidence of the investigators and executive manager associated with the Vrede investigation – Messrs Samuel, Ndou, Raedani and Kekana – is that, while the PPSA had always been subject to substantial budgetary constraints, those constraints were not particularly applicable

to, or influential on, the Vrede investigation. They never formed the view, or were informed by Adv Mkhwebane, that issues could not be investigated because of financial or capacity constraints. The evidence leaders were not able to unearth any minutes of investigation meetings which indicated that resource constraints were affecting the Vrede investigation. All indications are that, even though earlier drafts of the report had explained why certain issues were not investigated, the reference to those constraints was only inserted on the eve of the Vrede Report's publication. This supports the conclusion that the investigation had not, in fact, been hampered by finances or a lack of capacity.

696. The abovementioned individuals also testified that various avenues either could have been, or were, pursued without increasing costs e.g. the valuation experts that were consulted in respect of value-for-money issues provided their services free of charge, and information regarding the GuptaLeaks could be accessed from the amaBhungane website without payment.

697. Numerous experienced investigators – including Adv Cilliers, Adv Raedani and Messrs Samuel, Ndou, and Kekana – were working on the Vrede investigation after Adv Mkhwebane assumed office in October 2016. At any time during 2017 and the beginning of 2018 they could have undertaken the rudimentary investigation steps of conducting interviews, issuing subpoenas and assessing evidence in order to address material issues in the investigation, without expending significant or extraordinary PPSA resources.

698. The NT's investigation from 2013 was informed by, among other things, a detailed assessment of the project's value for money, undertaken by a senior economist. That assessment could have been accessed and utilised by the PPSA without incurring significant expenditure. The PPSA investigators could also have done basic investigation work such as obtaining quotes for the various goods and services as a point of comparison for what Estina actually delivered and charged the FS Department.

699. The investigation into the beneficiaries' entitlements and prejudice did not require the appointment of expensive external consultants. As is evident from the PPSA's re-investigation of some of the Vrede issues during 2018 – 2020, it was within the PPSA's ordinary capacity to investigate and making findings on concerns related to the beneficiaries. No expert was engaged.

700. The claim of financial constraints is also difficult to credit when, at the time the Vrede investigation was ongoing in 2017, Adv Mkhwebane engaged an economic expert to defend the Lifeboat Report during the litigation – even though that individual had had no involvement in the Lifeboat investigation. It is also during the same period that the services of Mr Paul Ngobeni is engaged.

701. Thus, although in some circumstances resource constraints may inhibit a public functionary from discharging its obligations,[93] the evidence establishes that the Vrede investigation was not particularly hobbled by financial constraints and that various material issues – including evidence from the GuptaLeaks pertaining to the Estina expenditure and evidence relating to the beneficiaries – could have been assessed without undue or unaffordable resource expenditure. There is, furthermore, no indication that significant expenditure – say, in the form, of expert consultants or private forensic investigators – was required to address any of the issues that Adv Mkhwebane did not investigate.

702. When the Vrede Report was taken on review, Adv Mkhwebane deposed to an affidavit to elaborate on the capacity and financial constraints, and how they impacted the Vrede investigation. She identified some aspects that '*required specialised expert services*', such as those of a forensic investigator. These aspects were: the cattle deaths; how Estina spent the money it received; how the beneficiaries benefited or lost out; and the fair market value of the goods and services. Adv Mkhwebane therefore did not contend, at that stage, that the PPSA's capacity and financial constraints played any role in her decision to exclude issues arising from the third Vrede Complaint or the GuptaLeaks from the investigation.

703. However, the Vrede HC concluded that Adv Mkhwebane did not set out the facts necessary to establish that a proper investigation could not be accomplished, particularly given the wealth of information available to her and the PPSA investigators.[94]

704. Furthermore, as set out above, it is clear that no external expertise was required to address the issues of Estina's utilisation of public funds, the issues regarding the beneficiaries or the fair value of the goods and services that the FS Department paid for. Instead, all that was required was for Adv Mkhwebane to direct her personnel to perform the elementary functions required of PPSA investigators.

705. In response to Members' questions, Mr Sithole testified that, by referencing '*capacity and financial constraints*' in the Vrede Report, Adv Mkhwebane was merely indicating that she was '*deferring the investigation*' to a later time. In her Part B Statement, Adv Mkhwebane says the following on this score:

---

93 See Vrede Merits at para 85 and Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) at para 88.

94 Vrede Merits at paras 88 – 90.

> "[T]here is no merit in the allegation that I gave a directly contradictory explanation under oath for my failure to investigate the politicians. The politicians were clearly investigated as stated above however, as I am empowered in terms of the Act to determine the conduct and procedure of the investigation combined with the financial constraints the Vrede investigation was carried out in two parts."

706. If this explanation is an attempt to indicate that Adv Mkhwebane always intended to investigate the politicians, but merely deferred the investigation, that is not a credible or sustainable explanation. Certainly, there is no indication that any of the investigators involved in the production of the Vrede Report were aware that, at the time it was being prepared, there would be a second investigation to address unanswered questions.

707. The Vrede Report does not state that the listed issues would be investigated at a later point in time. It indicates that, having completed the investigation, the PPSA elected not to investigate certain issues. The only reason that there was a second Vrede investigation was because of the Justice PC's intervention. Any attempt to claim that it was always intended that there would be a second investigation is an opportunistic attempt at rationalisation that cannot be accepted.

708. Furthermore, it would have been completely wasteful of resources – and of the beneficiaries' time – to issue an incomplete report and defer a material portion of the investigation, only to have the new investigation undertaken by a completely new team who could not make use of any of the institutional knowledge built up over the four years of the first investigation. Further, given the remedial action that the Premier was being instructed to implement, would be nonsensical if Adv Mkhwebane was still busy investigating him.

709. The Vrede HC concluded that, whatever resource constraints the PPSA may have faced, they could never have justified the '*inappropriate and ineffective investigation*' conducted by Adv Mkhwebane.[95] The Committee has heard no evidence that warrants a departure from this conclusion.

710. The defence that the six issues raised by the Vrede Complaints could not be investigated due to '*financial and capacity constraints*' is misleading and rejected.

---

95 Vrede Merits at para 95.

(l) Conclusion on narrowing the issues

711. In summary, the evidence establishes that Adv Mkhwebane unjustifiably narrowed the Vrede investigation to exclude *(a)* various significant issues arising from the third Vrede Complaint; *(b)* issues pertaining to the value for money received in respect of public expenditure on the Vrede project; *(c)* relevant and possibly material evidence arising from the GuptaLeaks; *(d)* consideration of the funds that flowed to Estina, and how those funds were applied; *(e)* the benefits that were due to, and diverted from, the local farmers and residents who were supposed to participate in, and eventually take ownership of, the Vrede project; and *(f)* the complaints about non-compliance with environmental legislation.

712. Adv Mkhwebane did so despite it being feasible and practical to investigate the above issues (even if only to a limited extent in some instances), and even though they were clearly germane to the Vrede Complaints, important to the prejudiced parties and of significant public interest. Her supposed reasons for narrowing the investigation are either contradicted by the evidence or inadequate when considered in the prevailing circumstances. The generic justification of '*financial and capacity constraints*' is contradicted by the Vrede Report itself, by the evidence of all of the investigators involved in the Vrede investigation and by the fact that the PPSA, using ordinary methods and internal resources, was entirely capable of investigating, and determining appropriate remedial action for, at least some of the excluded issues during the second Vrede investigation.

713. While the Public Protector has the power to investigate matters within her jurisdiction in the public interest, that is coupled with a duty to exercise the power.[96] If the Public Protector refuses to exercise her powers for arbitrary or unjustifiable reasons, that deprives members of the public of an essential element of constitutional protection against the abuse of public power.

714. As the SCA explained in the Mail & Guardian case:[97]

> 'There is no justification for saying to the public that it must simply accept that there has not been [malfeasance and impropriety], only because evidence has not been advanced that proves the contrary. Before the Public Protector assures the public that there has not been such conduct he or she must be sure that it has not occurred. And if corroboration is required before he or she can be sure then corroboration must necessarily be found. The function of the Public Protector is as much about public confidence that the truth has been discovered as it is about discovering the truth.'

96 See Vrede Merits at paras 97 – 109.
97 Para 19.

715. The final Vrede Report purported to address the first and second Vrede Complaints. Those complaints were focused on the money paid to Estina, how that money was used, and the prejudice suffered by the local beneficiaries for whom the entire project had – supposedly – been initiated. However, those are the very issues that Adv Mkhwebane allowed to be excluded from the PPSA's investigation and the Vrede Report by adopting a narrow approach to the issues. That narrow approach excluded the core of the first and second Vrede Complaints, and so fundamentally failed to provide the necessary assurance to the public that the malfeasance complained of either had not occurred or would be appropriately addressed through remedial action.

716. Instead, the Vrede Report focuses on technical issues, such as whether the Vrede Project constituted a PPP and whether the Department had monitoring mechanisms in place. No real regard was paid to the substantial issues of public interest i.e. the diversion of FS Government funds that were supposed to be used for an uplifting agricultural project for the benefit of the poor and the diversion of benefits from local residents. The Vrede Report reflects a colossal failure to respond to the most significant issues raised in the Vrede Complaints.

(iii) <u>Failing to address the third Vrede Complaint</u>

717. Paragraph 4.2 of the Motion alleges that, in the investigation and the Vrede Report, Adv Mkhwebane failed to investigate the third Vrede Complaint, without providing any rational or proper explanation.

718. Adv Mkhwebane has given various responses: she investigated the third Vrede Complaint, or portions thereof, under other headings in the Vrede Report; she did not investigate it because of *(a)* financial and resource constraints; *(b)* it was submitted too late, once the investigation was too far gone and the investigation was not completed, it was merely deferred. These responses are contradictory, and call into question the veracity of her justifications. There other flaws have been dealt with above.

719. During her cross-examination of Adv Raedani, Adv Mkhwebane's version was that all three Vrede Complaints were 'rolled into one' and that 'most of those complaints were addressing the same thing, that's why the team and her regarded them as one thing and assessed them as such.' So, it was argued, she did not, in fact, fail to consider the third Vrede Complaint. Evidence to this effect was elicited from Mr Sithole.

720. This justification is contradicted by the text of the Vrede Report, which states that '*issues emanating from the complaint sent on 10 May 2016 as the issues pertaining to the investigation were already identified and an investigation was at an advance stage' [sic] 'were not investigated'*. If Adv Mkhwebane had investigated the third Vrede Complaint, she would not have expressly stated otherwise.

721. There are some aspects of the third Vrede Complaint that were addressed in the Vrede Report, such as the complaint about procurement non-compliance. However, there are also various issues that the Vrede Report plainly did not make any findings on, including: *(1)* whether Estina misrepresented its partnership with Paras; *(2)* whether the benefits to Estina were '*at the cost of the state, taxpayers, and beneficiaries*'; *(3)* whether Estina's dual role as partner and implementing agent was irregular; *(4)* whether the processing plant it charged the Department for was dysfunctional; *(5)* whether taxpayers and beneficiaries were robbed of 49% of the interest in the project; *(6)* the circumstances in which '*Estina was allowed to abscond from the project without any accountability*'; *(7)* the regularity of Mahoma Mobung's involvement; and *(8)* whether beneficiaries were '*sidelined*' and '*used as pawns*'.

722. It therefore cannot be claimed that the Vrede Report investigated and made findings in respect of all or most of the issues raised in the third Vrede Complaint. Indeed, had Adv Mkhwebane investigated the issues regarding the beneficiaries, the Justice PC would not have required her to undertake a fresh investigation on that very issue.

723. During Adv Raedani's cross-examination Adv Mkhwebane's representative claimed that the NA called on the PPSA '*to investigate specific issues which had not been raised in the previous complaints*'.

724. That is not correct. In the course of the second Vrede investigation, the PPSA was required to address, among other things, '*possible prejudice suffered by the intended beneficiaries of the Vrede Dairy Project*'. As set out above, that issue was raised in all three Vrede Complaints. This was admitted by Adv Mkhwebane's legal representative later on in cross-examination: '*the issue of the beneficiaries… it was a crossover issue, because it was raised even in the first cluster of complaints but it was also part of the second investigation.*'

725. It should be noted that the Vrede 2 Report also failed to address various issues arising from the third Vrede Complaint, including items (1), (3), (4), (6) and (7) as set out in para 721 above. Adv Mkhwebane's other justifications for failing to address various issues in the third Vrede Complaint are addressed in paras 574 – 588 above.

726. The evidence shows that Adv Mkhwebane had no rational, justifiable or proper explanation for her failure to investigate various material issues raised in the third Vrede Complaint.

(iv) <u>The steps taken by Adv Mkhwebane in the investigation</u>

727. Paragraph 4.3 of the Motion alleges that the steps Adv Mkhwebane took in conducting the Vrede investigation were '*wholly inadequate considering the magnitude and importance of the complaints raised*', without providing a rational or proper explanation.

(a) <u>The magnitude and importance of the issues</u>

728. The Vrede Complaints alleged serious malfeasance involving the improper use of hundreds of millions of Rand in public funds, at the expense of, among others, a vulnerable group of individuals who had been promised, but deprived of, a vitally important economic opportunity. Long before Adv Mkhwebane assumed office, the PPSA had in its possession credible evidence pointing to serious and highly prejudicial irregularities, in the form of the NT Report. As the investigation progressed, its subject matter acquired a high profile, with extensive media coverage and a high degree of public interest.

729. It was therefore essential for Adv Mkhwebane to use every weapon in her substantial arsenal to determine the truth of the allegations in the Vrede Complaints including the truth of allegations of State Capture in respect of the Project, investigate the prejudice and irregularity in issue, and grant meaningful remedial action.

(b) <u>Adv Mkhwebane's investigation steps</u>

730. When Adv Mkhwebane assumed office, the Vrede investigation had been ongoing for several years. A draft report had been prepared by the investigators from the Free State office but had been sent back by Adv Madonsela as she was unhappy with it. Adv Mkhwebane was apprised of the Vrede investigation shortly after assuming office. After her assumption of office, the following additional investigation steps were taken:

730.1. four additional documents were sourced: a list of employees at the Vrede Project; the milking records for the Vrede Dairy Farm from 1 April 2016 to 31 March 2017; the financial statements for the Vrede Dairy Farm from September 2014 to March 2017; and a company report on Vargafield (Pty) Ltd;

730.2. three interviews were held, with: the FS Department of Agriculture; the Manager of Studbrook, SA Holstein Breeders Association; and the CFO of the FSDC;

730.3. an inspection of the Vrede Dairy Farm was undertaken;

730.4. one website, that of the Company and Intellectual Property Commission, was consulted (to confirm details of the Mohoma Mobung company);

730.5. the s 7(9) notices were issued, and parties' submissions were received and considered;

730.6. a task team was appointed for the sole purpose of dealing with the Vrede investigation; and

730.7. various draft reports were prepared, circulated and revised, and various investigation meetings were held.

Removing an investigator because of her perceived political affiliation

731. Mr Kekana alleged that Adv Mkhwebane removed one of the provincial investigators from the investigation because of her affiliation with the DA. It was not disputed that Adv Mkhwebane expressed her concern to Mr Ndou that the investigator was '*doing the bidding*' of the DA.

732. However, there is no reliable evidence that Adv Mkhwebane removed the investigator. Instead, it appears that the task team was constituted at the PPSA Head Office in Gauteng to finalise the investigation, and the provincial investigator was not included because she was based in the Free State. It was not unusual for an executive manager at Head Office (such as Mr Ndou) to assume responsibility for the finalisation of an investigation. Furthermore, even after responsibility for the investigation was assumed by the task team, the provincial investigator remained involved in the process.

733. The allegation that Adv Mkhwebane removed an investigator from the investigation because of perceived political affiliation is therefore unsubstantiated.

Engaging with the beneficiaries

734. Adv Mkhwebane's failure to ensure that her investigators took basic steps to address the plight of the beneficiaries has been addressed above. This failure alone rendered the investigation steps taken by Adv Mkhwebane wholly inadequate, with no rational or proper explanation.

Findings against politicians

735. Based on the evidence before the Committee, it appears to be largely undisputed that:

735.1. Under Adv Madonsela's leadership, a draft Vrede report had been prepared in November 2014 ('**the November 2014 Draft**') which included no adverse findings against politicians. Adv Madonsela sent the draft back to the provincial investigators, because she was unhappy with its contents, and never finalised or issued a provisional Vrede report.

735.2. After Adv Mkhwebane assumed office, a revised version of the draft Vrede report was prepared by the provincial investigators in April 2017 ('**the April 2017 Draft**'), which included findings of maladministration against Mr Magashule and MEC Zwane for failing to discipline officials responsible for the irregularities in the Vrede Project. Adv Mkhwebane signed and issued the s 7(9) notices based on the April 2017 Draft.

735.3. Adv Mkhwebane was satisfied with the Premier's explanation (in his s 7(9) submissions) as to why he had not taken disciplinary action. Later iterations of the draft – including the final Vrede Report – omitted any adverse findings against any politicians at all, whether in respect of failing to take disciplinary action or otherwise.

736. The Committee heard various other allegations: that Mr Samuel had prepared a draft of the Vrede Report that had more extensive findings against politicians than those contained in the April 2017 Draft; that Adv Mkhwebane had issued an instruction to members of the investigating team that the Vrede Report should not include any adverse findings against politicians; and that Adv Mkhwebane had refused to allow subpoenas to be issued against politicians.

737. These allegations are denied by Adv Mkhwebane. They are insufficiently corroborated by any other evidence before the Committee, and therefore cannot be sustained. It must be acknowledged that it was only under Adv Mkhwebane that a draft of the Vrede Report containing adverse findings against politicians was prepared. However, it must also be acknowledged that Mr Ndou consistently

testified that Adv Mkhwebane indicated to him that she '*would personally be happy if there were no adverse findings in this report.*' While it was put to Mr Ndou that Adv Mkhwebane did not recall the discussion, it was not alleged that he was lying, or that the discussion had never happened. Adv Mkhwebane denied ever issuing an instruction to exclude findings against politicians, but she did not deny the broader allegation that she expressed a wish that the Vrede Report should not have any adverse findings at all.

738. Mr Ndou conceded – correctly – that the Vrede Report did, in fact, end up including some adverse findings. However, this must be balanced against the Vrede Report's near total failure to make any meaningful findings on many of the serious issues raised by the Vrede Complaints.

739. Mr Kekana's evidence was that, through Mr Ndou, he understood that Adv Mkhwebane had issued an instruction that the Vrede Report should not contain any adverse findings against any politician. Adv Mkhwebane denied having issued such an instruction. Mr Kekana testified that, once they were informed of Adv Mkhwebane's instruction, he and Adv Raedani removed the adverse findings against politicians. In response to Members' questions, Mr Kekana indicated that, in one of the drafts he saw, there were '*findings around political office bearers… that the political office bearers knew about the irregularities that were happening in the project.*' He also indicated that the investigators '*did remove anything that was negative towards the political office bearers.*'

740. The draft of the report circulated by Mr Ndou on 7 February 2018 had no findings against any politicians – those had been removed months earlier, likely by Adv Cilliers. During his oral evidence Mr Kekana could not specify which findings against politicians he removed; he admitted that he could not '*back [his claim] with any form of evidence*' and acknowledged that his memory was limited on this score.

741. However, the documentary evidence indicates that, after Mr Ndou circulated his draft, Mr Nemasisi circulated further revisions. Those included the following proposed remedial action:

> 'The Public Protector, in terms of section 6(4)(c)(i) of the Public Protector Act, refers the involvement of the Premier and the former MEC in this project to the Deputy Justice's State of Capture Commission of Inquiry. The commission's power may include the inquiry into how the amount paid into Estina were expended.'

742. This remedial action proposed by Mr Nemasisi against Messrs Magashule and Zwane did not survive the finalisation of the Vrede Report under Adv Mkhwebane's direction and did not form part of the remedial action that she ultimately imposed. In all probability, the above remedial action

is the finding against politicians that was removed while Adv Mkhwebane oversaw the finalisation of the report on 8 February 2018.

743. In her statement to the Committee, Adv Mkhwebane did not explain why she directed the referral to the Zondo Commission to be removed. It will be remembered that, at the time, Adv Mkhwebane's opinion was that interested parties did not need to be afforded an opportunity to make submissions in respect of remedial action, and this position was only changed after a 2021 court judgment on the issue.[98] So based on that rationale that this remedial action had not been included in the s 7(9) notices cannot have been her reason for excluding it from the final Vrede Report.

744. During cross-examination, it was put to Mr Ndou that none of the Vrede Complaints contained '*any allegations about the direct involvement of politicians. It was about maladministration in that the HOD and people like that…'*. In her statement to the Committee, Adv Mkhwebane argued that *'[t]he only issue implicating the Premier was his failure to take disciplinary action against the HOD.'*

745. This, however, is a mischaracterisation. The first Vrede Complaint spoke generally about '*Government*' and '*the Department*', without making any allegations against politicians or bureaucrats. The second Vrede Complaint similarly spoke about '*Provincial Government*' and '*the Free State government*'. The third Vrede Complaint specifically mentioned the Premier's legal department, the HOD and the CFO, as well as recommendations that were '*ignored by the provincial government and the Premier.*'

746. It should have been clear, from the outset, that a proper investigation of the Vrede Complaints required looking into both political and administrative functionaries. The third Vrede Complaint mentioned the Premier in at least two different capacities, and it should in any event have been clear that a project of this scale and profile could have entailed political involvement (as the evidence in the PPSA's possession in 2017 – including public statements by the implicated politicians – established).

747. Adv Mkhwebane's insistence that the only wrongdoing in which the Premier was implicated was the failure to discipline Mr Thabethe is contradicted by, among other things, the Vrede 2 Report. The second Vrede investigation did not deal with a fundamentally different complaint. Instead, Adv Mkhwebane was required to investigate – as she had been even during the first investigation – whether the intended beneficiaries of the Vrede Project had been unduly prejudiced. In addition,

98 Public Protector and Others v President of the Republic of South Africa and Others 2021 (6) SA 37 (CC).

Adv Mkhwebane was required to determine '*[w]hether there was any political involvement in the Vrede Dairy Project by the Free State Provincial Government EXCO*'.

748. The Vrede 2 Report, issued at the end of 2020, concluded that the Vrede Project was subject to political involvement and undue Gupta influence; that the politicians breached their constitutional obligation causing prejudice to the beneficiaries and that funds were improperly appropriated to Estina. All of these findings were based on evidence available to Adv Mkhwebane in 2017 and 2018 and were plainly material to the first three Vrede Complaints: not because they dealt with politicians, but because they dealt with the improper diversion of funds to Estina and the associated prejudice to the beneficiaries. These issues should have been thoroughly addressed in the Vrede Report.

749. Instead, a proper investigation by Adv Mkhwebane required parliamentary intervention after the Vrede Report was issued, and the beneficiaries were required to wait more than two and half more years to receive remedial action to address the injustices they had suffered. That is plainly unacceptable.

750. In her Part B Statement, Adv Mkhwebane states that the second Vrede investigation – conducted from 2018 – 2020 – '*has also not yielded any liability on the part of politicians*'. In the light of the findings against the politicians in the Vrede 2 Report summarised above, it is not clear how Adv Mkhwebane concludes that the politicians were liable for any of the irregularities in the Vrede Project.

751. Adv Mkhwebane also says the following in her affidavit to the Committee:

> 'Adv Cilliers who was the lead senior investigator in the Vrede matter had written several versions of the report and could not find any politicians linked to the investigation. Prof Madonsela herself testified that she thought and considered that politicians should be investigated but never went to interview them nor did she visit the site. It should further be noted that the initial complaint did not extend to the investigation of politicians, Mr Samuel in his testimony at this enquiry testified that Prof Madonsela sent the report back several times and instructed them to find the political link and still no politician was found to be linked to any irregularity. Prof Madonsela in her testimony at this enquiry also stated that I should have investigated the politicians based on allegations in the media.'

752. It is not true that none of the versions prepared by Adv Cilliers contained links to politicians. The April 2017 Draft contained an express finding of maladministration against Mr Magashule. It may be the case that Prof Madonsela never interviewed any politicians – but neither did Adv Mkhwebane

during the course of the first Vrede investigation. Adv Mkhwebane cannot point to mistakes by her predecessor to justify her continuation of, or failure to address, those mistakes nor is the Committee, as indicated previously, seized with a comparative exercise.

753. The incorrect notion that the first and second Vrede Complaints '*did not extend to the investigation of politicians*' has been addressed above.

754. Even if the investigations done by the Free State Office did not identify a link to politicians, that was because of the heavily flawed mode of investigation it adopted (including not interviewing pertinently relevant individuals and focusing on procurement non-compliance instead of material issues such as prejudice to the beneficiaries and the manner in which Estina used the public funds it received). The Vrede 2 Report clearly indicates that there was sufficient evidence that Adv Mkhwebane was able to access and evaluate to establish culpability on the part of various politicians. It was not mere media allegations that should have motivated Adv Mkhwebane to investigate the politicians – it was the information already on record (such as the public speeches in which Messrs Magashule and Zwane established strong ties to the project). In any event, Adv Mkhwebane's own evidence is that she was not averse to pursuing an investigation on the basis of media reports i.e. the reports on the GuptaLeaks.

755. Adv Mkhwebane's version is that she took an active interest in the Vrede matter within weeks of assuming office in October 2016. The evidence supports and shows she was actively involved in the investigation from early in 2017. Even if the evidence does not show that she prevented subpoenas from being issued, or issued instructions that certain findings could not be made, it also shows the extent to which she failed to ensure that obvious, basic and essential steps were taken, such as directing the investigators to interview beneficiaries, subpoena relevant persons (whether politicians, officials or private individuals) and scrutinise documentary evidence.

756. Adv Mkhwebane had more than a year to ensure that a proper investigation was done and appropriate remedial action issued. She is both responsible and accountable for the failure to do so, which includes the failure to conduct a meaningful interrogation of political responsibility for the derailing of the Vrede project, the improper diversion of public funds and the prejudice caused to the beneficiaries.

757. The evidence therefore establishes that, in respect of political responsibility for the Vrede project and the prejudice caused by the manner in which it was implemented, the steps taken by Adv Mkhwebane to investigate the issues were wholly inadequate and unjustified.

Finalising the investigation

758. Both during the HC litigation, and when accounting to the Justice PC during March 2018, Adv Mkhwebane claimed that the Vrede investigation was close to complete, or complete, in 2015.

759. However, at that stage the PPSA did not have various important documents (such as Vrede financial statements), had not interviewed persons with critical knowledge (such as certain provincial officials), had not undertaken the necessary follow-up interview with the association providing valuation/pricing information or conducted the site visit and had not received responses to the s 7(9) notices.

760. The evidence establishes that, in 2017, the Vrede investigation was still far from complete – even in respect of the limited issues that Adv Mkhwebane ultimately investigated: the evidence referred to in the preceding para had not yet been obtained, let alone analysed to determine whether new avenues should be explored. Mr Ndou testified that one of the issues that he had to deal with at the end of 2017 was to attempt to procure documentary evidence that the provincial investigators had not been able to source. He also testified that he formed the Vrede Task Team at the end of 2017 specifically because he did not have investigators in his branch and needed investigators to attend to Vrede.

761. The documentary evidence shows that, late in 2017, Adv Mkhwebane was still directing her investigators to obtain information from members of the national executive about an issue that was – or should have been – essential to the investigation i.e. how a project such as Vrede should have been run. Given that that information was still being pursued, and the associated analysis had not yet been undertaken, there can be no doubt that, in late 2017, the investigation was still very much ongoing.

762. Accordingly, in viewing the Vrede investigation as '*close to complete*' by 2015, Adv Mkhwebane fundamentally misconceived the investigation that was required, and so allowed a deeply flawed Vrede Report to be issued. For example, one of the justifications cited by Adv Mkhwebane for excluding both the third Vrede Complaint and the GuptaLeaks from the Vrede Report was because the information relevant to those issues only came to light in 2016 and mid-2017, when the investigation was already close to complete or complete. However, in truth the investigation was still very much underway and, considering the objective facts, there was no rational basis for excluding these important issues on the basis that they only arose after the investigation had been completed or substantially completed.

763. Mr Sithole testified that, by the time he became involved in the matter in the second half of 2017, the investigation had been completed, most of the investigation had taken place while Adv Madonsela was Public Protector, and he was focused on compiling the final version of the Vrede Report. However, he admitted to being one of the authors of the memorandum that was submitted to Adv Mkhwebane in respect of the Vrede investigation in January 2018 which indicated that some evidence still needed to be evaluated, and other evidence still needed to be obtained. Given that the PPSA was still in the process of obtaining evidence and was not aware of whether that evidence would require further avenues to be explored, Mr Sithole's evidence that the investigation was complete in 2017 cannot be believed.

764. The Vrede HC concluded that[99] –

> "The purpose of [the Public Protector's] specific power to investigate and report is to discover and expose evidence of corruption and prejudice, with a view to maintaining an effective public service and good governance. The purpose of her power to devise and implement remedial action is to remedy instances of corruption and prejudice, to ensure that those responsible are held accountable and that those affected obtain appropriate relief and to prevent re-occurrence of the same conduct."

765. In prematurely determining that the investigation was '*complete*' or '*close to complete*', despite the fact that various material issues had not been addressed, and further despite the fact that actual investigation work was still ongoing, Adv Mkhwebane failed to act in accordance with the purpose for which she was empowered to act. She palpably and irrationally failed to '*expose evidence of corruption and prejudice*' associated with the third Vrede Complaint and the GuptaLeaks. As the Vrede HC concluded, Adv Mkhwebane's failure '*to execute her constitutional duties in investigating and compiling a credible and comprehensive report points either to a blatant disregard to comply with her constitutional duties and obligations or a concerning lack of understanding of those duties and obligations.*'[100]

Conducting interviews and acquiring documents

766. Critical components of any investigation include obtaining and scrutinising documentary evidence and conducting interviews with persons with relevant knowledge (including implicated persons). These avenues allow information to be obtained and analysed, to determine whether there has been

99 Vrede Merits at para 151.
100 Vrede Merits at para 84.

improper or prejudicial conduct in the public administration or State affairs. These means of obtaining information are so important that the PPA allows Adv Mkhwebane to compel them by way of subpoena.

767. Adv Mkhwebane readily used these investigation methods in the Lifeboat, Pillay Pension, SARS Unit and CR17 investigations. However, the approaches in those investigations stands in stark contrast to how the Vrede investigation was handled.

768. In conducting the Vrede investigation, the PPSA considered 38 batches of documents, conducted six interviews (one of which was a re-interview), engaged in nine items of correspondence, conducted two inspections (one of which was unsuccessful because access to the Vrede site was denied) and consulted six websites. These are the '*key sources of information*' described in the Vrede Report.

769. The six interviews conducted were with a Manager in the HOD's office; the FSDC's Chief Executive for Corporate Services; a Manager from the SA Holstein Breeders' Association; the FSDC's CFO; and the FS Department's General Manager: District Services.

770. This list contains obvious and glaring omissions, including Ms Dlamini and Messrs Thabethe, Vasram, Prasad, Magashule and Zwane, apart from the beneficiaries. Based on their personal knowledge and documents at their disposal, these persons could have provided Adv Mkhwebane with outstanding information on the beneficiaries; the manner in which the Vrede Project had been developed and implemented; the respective roles of bureaucrats and political leaders; the FS Department's dealings with Estina; the return that the FS Department had received on its investment; Estina's expenditure and abscondment from the Vrede Project; the role of Mahoma Mobung; whether any public funds had been diverted to the Guptas; and compliance with environmental legislation.

771. The information from the abovementioned persons was clearly and objectively relevant to the investigation. As is borne out by the Vrede 2 Report, the information was also material, in that at least some of it (later) assisted the PPSA to reach various conclusions and to impose appropriate remedial action that were omitted from the Vrede Report. In all likelihood, had Adv Mkhwebane interviewed these persons, she would have been able to produce a report that addressed at least some of the core issues in the Vrede Complaints, instead of the misguided and completely inadequate Vrede Report.

772. Comparing the list of persons interviewed by the PPSA with the list of persons not interviewed raises immediate concerns. The Vrede investigation should in large part have focused on whether the FS Department's public funds had been misapplied or irregularly diverted. Why then interview the FSDC's CFO, but not the FS Department's CFO? Mr Thabethe had been identified as a critical role-player, and possible wrong doer, in the NT Report. Why only interview managers in his Department, but not the man himself? Representatives of Estina would have been able to answer important questions in respect of both the application of public funds and the manner in which the beneficiaries were treated. Why omit to interview anyone from Estina?

773. These omissions indicate the staggering inadequacy of the Vrede investigation process.

774. The necessity of conducting these interviews should have been obvious to any reasonable person in Adv Mkhwebane's position. However, the necessity of speaking to some of the abovementioned individuals was also expressly pointed out to her by Mr Nemasisi, who had been asked to quality assure a draft of the report. He wrote an email directly to Adv Mkhwebane, and stated the following:

> 'I am concerned that we did not interview the HOD, who is the accounting officer and Estina, as the implementing agent of the project under investigation. Estina can share some relevant information, especially on actual expenditure supported by invoices and proof of payment and the whereabouts of the balance of the money transferred into Estina…
>
> Was section 7(9) sent to the HOD and Estina? As they are the key people on the project and they are implicated, one way or another.
>
> All issues or documents raised above can be obtained and incorporated into a final report before the 22nd February 2018. There is a lot of public interest on this report and we need to ensure that we cover all the angles. [Sic.]'

775. Notwithstanding this express prompt from the PPSA's Senior Manager: Legal Services – accompanied by a realistic timeframe within which the outstanding information could be acquired and analysed – Adv Mkhwebane took no steps to ensure that the relevant persons were interviewed. She instead proceeded to finalise and issue a report that was so stripped down that it did not address any of the substantive issues raised by the Vrede Complaints.

776. In a similar vein, the PPSA failed to call for / subpoena and scrutinise documentation and information that was obviously relevant and material to the investigation. This includes:

776.1. Estina's financial records and bank account information, to determine what was paid to Estina by the FS Department, how those funds were applied and whether they were used

for purposes of the Vrede Project. During the litigation Adv Mkhwebane claimed that she was unable to access some documentation from Estina because it had '*closed shop*' and the PPSA was '*unable to secure the documents by way of subpoena or search and seizure.*' However, even if that had been the case, Adv Mkhwebane should still have been able to obtain documentation from the FS Department and the FSDC.

776.2. The FS Department's financial records, to determine how much money was paid in respect of the Vrede Project, to whom and for what purpose. By law, the FS Department's financial records could only be disposed of after between 5 – 15 years,[101] so all of the FS Department's relevant financial records (or at least usable copies thereof) should still have been extant.

776.3. The shareholder agreement, management agreement and other similar instruments, which would have indicated how the beneficiaries' involvement in the project was provided for. If no such agreements were concluded, that would have indicated a failure to protect beneficiaries' interests.

776.4. Updated beneficiary lists and associated information, which would both have indicated the steps taken by the FS Department and Estina to involve the beneficiaries and provided the investigators with an additional way of tracing the beneficiaries.

776.5. Documents that the HOD and the FS Department withheld from the NT investigation, such as one of the agreements concluded between the FS Department and Estina and documents relating to the India trip. This documentation could have shed light on, among other things, how public moneys that were supposed to benefit local farmers were actually used.

776.6. A further assessment of the market price of goods and services obtained for the Vrede Project, to the extent that same was needed over and above the information already obtained from the Breeders' Association. This additional assessment would have corroborated or disproved the allegations – and the PPSA's earlier conclusions – about price inflation.

776.7. The outcome of the FSDC's 2014 due-diligence investigation into the status of the Vrede Project, in order to determine some of the consequences of Estina absconding from its responsibilities (which investigation the FSDC had discussed with the PPSA).

[101] Regulation 17.2 of the Treasury Regulations.

777. Even if the accounting records of Estina and the FS Department were incomplete, bank statements via the Financial Intelligence Centre ('**the FIC**') could have been obtained. Adv Mkhwebane readily followed this avenue of investigation in the CR17 matter.

778. As was the case with the interviews, it would have been obvious to any reasonable person in Adv Mkhwebane's circumstances that the above documentation needed to be sought before the investigation could conclude. Mr Nemasisi's email (referred to in para 774 above) also expressly drew this concern to her attention:

> "From the records, it looks like not all the amount transferred to Estina were used on the project. We may need bank statements from Estina, so that we can verify all the expenditure on the project. If Estina refused, we can subpoena their bank to provide those bank statements."

779. Once again, however, Adv Mkhwebane took no steps to ensure that these documents were procured. Even though the final Vrede report records that the investigation was conducted '*in accordance with sections 6 and 7 of the Public Protector Act*', Adv Mkhwebane did not use any of the powers at her disposal to acquire relevant information. That was a material contributing factor to the significant deficiencies in the Vrede Report.

780. The Vrede HC concluded as follows:[102]

> "Interviewing and taking statements from the implicated officials and interviewing the journalist who had reported on the project, seems to me to be quite simple and could not have resulted in huge expenditure. The PP's failures to undertake these simple and cost effective measures are to put it lightly, of serious concern, as it may point to a concerning incomprehension of the nature and extent of her obligation towards the people of this country and her obligations in terms of the Constitution and the PP Act."

781. There is no evidence before the Committee warranting a departure from this conclusion.

782. Adv Mkhwebane's refusal to cause relevant persons to be interviewed and relevant documents to be assessed or, if necessary, subpoenaed was, in the circumstances, unreasonable and unjustified, and resulted in an investigation and a report that were wholly inadequate.

783. Before the Committee it was suggested that the interviews were not conducted and the documents were not sought because of '*enormous pressure*' from the DA to release the report. However, as Mr Ndou testified, that did not make sense, because – according to Adv Mkhwebane – the DA still

[102] Vrede Merits at para 94.

owed the PPSA information. There is also no evidence that Adv Mkhwebane was put under any pressure by the DA to release the Vrede Report in the week of 8 February 2018.

784. In any event, that is no reason to issue a report so deeply flawed that it does not address the core concerns raised in a complaint. It must further be borne in mind that Adv Mkhwebane was involved in the investigation for more than a year and had plenty of time to direct the investigators to do the necessary and analyse the results.

785. As the SCA explained in the Mail and Guardian case:[103]

> 'Promptitude by public functionaries is ordinarily meritorious, but not where that is at the cost of neglecting the task. The promptitude in this case is explained by the paucity of the investigation.'

786. Adv Mkhwebane should not have rushed to release the report, simply for the sake of being seen to issue a report, when the published product was so deficient that it did not provide any true administrative justice for any of the interested parties. This appears to place an emphasis on quantitative performance rather than qualitative performance.

787. The documentary evidence shows that Mr Nemasisi indicated to Adv Mkhwebane that, in his view, the various issues he flagged – including interviewing key persons and obtaining important documents – could be addressed in time to release the Vrede report before the end of February 2018. Mr Ndou's evidence, in response to Members' questions, was that some of the pressure to release the report could have been alleviated by, for example, corresponding with the complainant to explain the status of the investigation. He further stated that it was not the right decision to release the report on 8 February 2018 – it could have waited until certain issues had been addressed.

788. In the circumstances, the external pressure on the PPSA to release the Vrede report (if any) was not a rational or proper explanation for publishing such an entirely inadequate product.

789. Adv Mkhwebane's version is that, if there were any fundamental flaws during the first three years of the investigation under Adv Madonsela, there was '*nothing she could do to turn back the clock*'.

790. Of course, Adv Mkhwebane could not undo the investigation failures that occurred during her predecessor's tenure. But she had the full panoply of the Public Protector's powers to ensure that, between October 2016 and February 2018, a proper investigation was undertaken that addressed the Vrede Complaints, analysed relevant information, pursued reasonable avenues of enquiry and

[103] Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA) para 3.

resulted in appropriate remedial action to ensure accountability and administrative justice. Those powers, however, were either untouched or barely utilised.

791. By way of comparison, the fact that the Lifeboat investigation went on for years during Adv Madonsela's tenure did not prevent Adv Mkhwebane, within months of assuming office, from fundamentally altering the investigation, pursuing new lines of enquiry and imposing completely new remedial action. Adv Mkhwebane's claim that there was nothing that she could do to address the problems with the Vrede investigation therefore ring hollow.

Conclusion on the investigation steps

792. In summary, the evidence establishes that Adv Mkhwebane conducted and presided over an investigation that was wholly inadequate in the circumstances, in that –

792.1. she determined that the investigation was largely complete in 2015 when, even on the highly curtailed investigation that the PPSA did pursue, material information had not yet been obtained in 2015, let alone assessed;

792.2. it was, or should reasonably have been, apparent to Adv Mkhwebane when she assumed office in October 2016 that almost all of the issues raised by the Vrede Complaints had not yet been investigated, yet she took no steps to causes those issues to be investigated;

792.3. she allowed the PPSA investigators to avoid scrutinising the role that politicians had played in the conceptualisation and implementation of the Vrede Project, and the deployment of the associated public funds, when the Vrede Complaints clearly called for their conduct to be scrutinised and the evidence in the PPSA's possession indicated that, at the very least, further attention should be paid to the politicians' role in the project (and not just in failing to take disciplinary action against errant officials when the project was derailed);

792.4. despite several opportunities to do so, she failed to engage with the beneficiaries, or to direct her investigators to do so, in a manner that allowed the information in their personal knowledge to come to the fore; and

792.5. she failed to cause the PPSA to engage with critical witnesses and documentation, or to subpoena them in the case of resistance, even though they possessed or contained important evidence.

(v) <u>Altering the remedial action</u>

793. Paragraph 4.4 of the Motion alleges that Adv Mkhwebane materially altered the remedial action contained in the provisional Vrede report prepared by Adv Madonsela, without a rational or proper explanation.

794. A '*provisional report*' in the PPSA is a preliminary report that is prepared based on an initial investigation, signed off by the Public Protector and used as the basis for preparing s 7(9) notices i.e. notices informing affected parties of the findings that the Public Protector is contemplating making. A '*provisional report*' therefore sets out preliminary conclusions that the Public Protector is prepared to reach without necessarily having heard – or fully heard – from interested or implicated parties.

795. The consistent evidence before the Committee (including the evidence of Adv Madonsela herself) is that Adv Madonsela never approved or issued a provisional report in respect of the Vrede investigation. Instead, all indications are that she rejected the last draft that she was sent by the provincial investigators, on the basis that it did not reflect a '*forensic investigation*'. It is also evident that the s 7(9) notices that were sent to implicated parties were prepared based on the April 2017 Draft – a draft of the Vrede Report prepared after Adv Madonsela left office.

796. The evidence therefore indicates that Adv Madonsela never finalised a '*provisional report*' in respect of Vrede. It bears noting that the Vrede HC and the litigants before Court reached a contrary conclusion as a direct result of Adv Mkhwebane's misleading representations in her court papers.

797. The documentary evidence shows that Adv Mkhwebane made material changes to the remedial action just before the Vrede Report was published, removing various actions recommended by Messrs Ndou and Nemasisi, including: ensuring that the NT's recommendations as contained in the NT Report were implemented; improving the Department's procurement systems; referring the matter to the Auditor-General to audit the Vrede project; notifying the National Prosecuting Authority ('**NPA**') and the Hawks to '*investigate, prosecute and recover any amounts due to the state*'; appointing an independent audit firm to conduct an investigation and determine whether any funds could be recovered; instituting criminal proceedings against Mr Thabethe for financial misconduct; and referring the involvement of Messrs Magashule and Zwane in the Vrede project to the Zondo Commission.

798. However, that conduct does not fall within para 4.4 of the Motion, as it does not relate to alterations to the remedial action prepared by Adv Madonsela.

799. There is, accordingly, no evidence to prove that Adv Mkhwebane misconducted herself as alleged in para 4.4 of the Motion.

(vi) Contradictory explanations under oath

800. Paragraph 4.5 of the Motion alleges that Adv Mkhwebane '*gave directly contradictory explanations of her failure to investigate*' in '*statements made under oath*' in the litigation challenging the Vrede Report.

801. This charge is limited to contradictory explanations given under oath. It therefore does not include contradictions between, for example, the Vrede Report and affidavits during the subsequent litigation.

802. In the review proceedings that impugned the Vrede Report, Adv Mkhwebane initially elected not to oppose the application. A Rule-53 record of the process was filed, together with a brief affidavit by Adv Mkhwebane setting out some additional reasons for why capacity and financial constraints prevented her office from investigating certain issues. This affidavit has been discussed in paras 702 – 710 above.

803. Later on, the PPSA changed tack and opposed the review application in full. On 15 June 2018 Adv Mkhwebane deposed to an answering affidavit where she stated that she had utilised her statutory '*opt-out option not to investigate even those complaints that fall within her jurisdiction.*' In para 9 of the same affidavit, Adv Mkhwebane indicated that she had decided '*to defer the investigation of some of the conduct complained of due to financial constraints.*'

804. As set out above, the evidence establishes that the claim that some issues were deferred for investigation at a later stage cannot be sustained and amounts to an opportunistic *ex post facto* rationalisation. The Vrede Report is clear: it was issued at the conclusion of the investigation; it set out the issues that had been investigated and those that had not; and it gave no indication at all that the issues that had not been investigated would be revisited in future.

805. Section 2 of the Vrede Report sets out '*The Complaint*' and summarises all three of the Vrede Complaints. It does not indicate that the report will only deal with some aspects of the Vrede Complaints and that other aspects will be held over and dealt with in a later report. Similarly, para (viii) of the Vrede Report's executive summary lists the issues that '*were not investigated*' and provides reasons for the exclusion. All of the reasons indicate that Adv Mkhwebane's decision not

to investigate was final, and none suggest that this decision would be revisited, or that an additional investigation would take place, in the future.

806. Paragraph 7 of Adv Mkhwebane's affidavit communicated this position: Adv Mkhwebane had decided not to investigate some aspects of the Vrede Complaints even though they fell within her jurisdiction. A reasonable person reading para 7 of her affidavit would have concluded that Adv Mkhwebane had not postponed or delayed the investigation but had made a decision '*not to investigate*' the issues listed in the Vrede Report. This is borne out by the fact that – as pointed out during the litigation – Adv Mkhwebane repeatedly stated that the Vrede investigation had been completed by early 2017 (or even on occasion represented as 2015). If the PPSA's investigation had already been completed in 2017, there would be no need for it to investigate further issues after the publication of the Vrede Report.

807. To then claim, in the same affidavit, that some issues were in fact '*deferred*' for investigation is contradictory, because that indicates that the PPSA would investigate the issues that had been excluded from the Vrede Report – notwithstanding the clear language of the Vrede Report and para 7 of the answering affidavit. The confusing impact of this contradiction is compounded by Adv Mkhwebane's failure to explain which issues had been '*deferred*' and which issues had been completely excluded from investigation.

808. The Vrede 2 Report was only produced because of the Justice PC's concerns about the inadequacies of the initial investigation. The Vrede 2 Report did not address several of the issues that were not investigated in the Vrede Report, including cattle deaths, environmental non-compliance and issues arising from the third Vrede Complaint.

809. In the Vrede HC judgment dealing with the review of the Vrede Report, Judge Tolmay said the following:[104]

> "The PP in addition stated in her affidavit that she exercised her discretion to 'opt out' and not to investigate. Her suggestion in the answering affidavit that she deferred the investigation stood in direct contradiction with her statement that she decided to 'opt out'."

810. In Adv Mkhwebane's affidavits before the SCA and the CC there is no mention of some issues being deferred for later investigation.

[104] Vrede Merits at para 96.

811. In her Vrede CASAC HC AA Adv Mkhwebane claimed that '*I did not decline to investigate any compliant lodged with my office*'. This is directly contradicted by the Vrede Report, which states that among the issues not investigated were the '*issues emanating from the complaint sent on 10 May 2016*' (i.e. the third Vrede Complaint). More importantly for present purposes, it is also contradicted by the allegation discussed in para 806 above i.e. the statement under oath that Adv Mkhwebane had decided not to investigate some issues. This contradiction exacerbated the confusion created by Adv Mkhwebane's conflicting statements about whether she had decided that the PPSA would not investigate some issues, or whether she had decided to defer the investigation of those issues to a later point in time.

812. The evidence therefore establishes that Adv Mkhwebane gave the Vrede HC contradictory explanations under oath for her failure to investigate various issues that were excluded from the Vrede investigation.

(vii) <u>Conclusion on misconduct in the Vrede matter</u>

813. The numerous flaws in the Vrede investigation set out above do not merely represent areas in which Adv Mkhwebane could have used alternative means or followed a different route to achieve the same end. Rather, they represent a broad failure to ensure that even basic steps were taken and a complete omission to ensure that the core issues raised by the Vrede Complaints were addressed and, more fundamentally, that the interested and aggrieved parties received administrative justice.

814. It must be acknowledged that the Vrede investigation commenced before Adv Mkhwebane took office; she cannot be held responsible for what happened before she became the Public Protector. However, after assuming office Adv Mkhwebane had more than a year to rectify the many flaws in the investigation. Despite numerous opportunities to do so, she undertook none of the basic and essential rectification steps.

815. As Adv Mkhwebane's legal representative explained while questioning Mr Tshiwalule, Adv Mkhwebane had a duty to satisfy herself as to what was contained in the report – that '*what must be retained must be retained, what must be discarded must be discarded because it was now her responsibility.*' It cannot be that, in respect of the Lifeboat Report Adv Mkhwebane adopted the approach that she cannot be held to conclusions reached by Adv Madonsela but had to properly and independently apply her mind to the case (which is correct), yet in the Vrede investigation Adv Mkhwebane should then seek to lay the blame for a deeply inadequate Vrede Report at the

doorstep of Adv Madonsela, when she had the time and resources to address the various inadequacies herself.

816. Her justification for proceeding to publish the Vrede Report, despite its manifest inadequacies, is entirely insufficient: pressure from political parties and external persons did not justify the production of a report that failed to address the substance of any of the Vrede Complaints raised and therefore failed in its core objective of ensuring administrative justice and addressing prejudice in public affairs. Moreover, any Public Protector should be aware being so influenced in the conduct of her work.

817. Ultimately, it took the intervention of the Justice PC, a further delay of more than two years, and the expenditure of additional scarce PPSA resources to ensure that a proper investigation was conducted in respect of the beneficiaries and the politicians. Even then, however, significant features of the Vrede Complaints – such as the compliance with environmental legislation and the conduct of Estina – remained completely unaddressed. That represents a gross failure of Adv Mkhwebane's constitutional and statutory mandate and falls far short of the standards expected of a holder of public office and, in particular, the Public Protector.

818. The undisputed evidence of both Ms Zulu-Sokoni and Mr Ebrahim was that honesty and independence, are essential standards that are expected of the Public Protector.

819. Adv Mkhwebane placed much emphasis on the standards of office set out in the Mail & Guardian case. For present purposes, it suffices to quote the following:[105]

> "The Public Protector must not only discover the truth, but must also inspire confidence that the truth has been discovered. It is no less important for the public to be assured that there has been no malfeasance or impropriety in public life, if there has not been, as it is for malfeasance and impropriety to be exposed where it exists. There is no justification for saying to the public that it must simply accept that there has not been conduct of that kind, only because evidence has not been advanced that proves the contrary. Before the Public Protector assures the public that there has not been such conduct he or she must be sure that it has not occurred. And if corroboration is required before he or she can be sure then corroboration must necessarily be found. The function of the Public Protector is as much about public confidence that the truth has been discovered as it is about discovering the truth…
>
> I think there is nonetheless at least one feature of an investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind – which is that the

[105] Mail & Guardian at paras 19 – 22.

> investigation must have been conducted with an open and enquiring mind. An investigation that is not conducted with an open and enquiring mind is no investigation at all. That is the benchmark against which I have assessed the investigation in this case.
>
> I think that it is necessary to say something about what I mean by an open and enquiring mind. That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first they do not then it asks questions and seeks out information until they do. It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry then it might progress to being a suspicious mind. And if the pieces still do not fit then it might progress to conviction that there is deceit. How it progresses will vary with the exigencies of the particular case. One question might lead to another, and that question to yet another, and so it might go on. But whatever the state of mind that is finally reached, it must always start out as one that is open and enquiring."

820. Adv Mkhwebane has also emphasised the CC's Nkandla decision. There, among other things, Mogoeng CJ (for a unanimous court) found that, for the Public Protector to grant '*appropriate*' remedial action as required by 182(1)(c) of the Constitution, the remedial action must be '*nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption in a particular case*'.[106]

821. It is evident that Adv Mkhwebane has failed to meet these essential standards.

822. In irrationally –

822.1. allowing the scope of the investigation to be narrowed such that it excluded many of the critical issues raised by the Vrede Complaints;

822.2. failing to ensure that basic steps (such as interviewing witnesses, calling for documents and exercising the statutory subpoena power) were taken to collect obviously relevant information;

822.3. false representing that the investigation was closed several years before it was actually concluded;

822.4. excluding relevant evidence and analyses from the final Vrede Report, and failing to engage with evidence in the PPSA's possession; and

[106] Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC) at para 71(e).

822.5. failing to allow or direct her investigative team to follow up on objectively relevant leads,

Adv Mkhwebane failed to maintain the '*open and enquiring mind*' required of the Public Protector.

823. In irrationally failing to cause politicians and possible links to the Guptas to be investigated, Adv Mkhwebane acted in a manner that called her independence and impartiality into question.

824. In failing to make findings in respect of most of the core issues raised by the three Vrede Complaints, Adv Mkhwebane failed to inspire confidence in the public that the truth had been found.

825. In granting remedial action that failed, among other things, to protect the position and interests of the beneficiaries, hold implicated politicians to account and provide effective relief in respect of money that Estina had spent, Adv Mkhwebane completely failed to grant remedial action that was '*effective, suitable, proper or fitting*'.

826. In giving contradictory and implausible statements under oath, Adv Mkhwebane failed to observe the standard of honesty and act in accordance with the heightened duty owed to the court.

827. The evidence indicates that Adv Mkhwebane acted intentionally and deliberately: she took an early interest in the investigation, participated in investigation meetings, signed off on the s 7(9) notices before they were issued, regularly engaged with the investigators, attended the site visit and gave extensive direction to the Vrede Task Team on how the draft report should be reworked before it was published. As with the Lifeboat Report, Adv Mkhwebane was – after she assumed office – responsible for deciding who was interviewed (and who was not), which documents were subpoenaed (and which were not), which issues were investigated (and which were omitted) and the content of the remedial action ultimately imposed. Despite Adv Mkhwebane's attempts to blame Adv Madonsela and Mr Samuel for the investigation's shortcomings, all indications are that she was fully in control for a period of more than a year between assuming office and issuing the Vrede Report, during which time she could have taken numerous simple steps to address those shortcomings. She did not do so.

828. The Committee is therefore satisfied that, in acting as set out in paras 822 –826 above, Adv Mkhwebane acted intentionally.

829. In any event, it is clear that, if Adv Mkhwebane did not act intentionally, she certainly acted recklessly and with gross negligence. The deep and serious flaws with the investigation and the Vrede Report would have been obvious to any reasonable person in her position, which reasonable

person would have taken numerous elementary steps to address those flaws before publishing such an inadequate report. Adv Mkhwebane took none of those steps, in reckless disregard on the consequences of her conduct – including the obvious adverse consequences for the beneficiaries and the constitutional imperative of accountability.

830. On almost every front, the Vrede Report was an abysmal failure: it did not address the issues raised by the Vrede Complaints, but instead focused on technicalities; it ignored relevant evidence; it demonstrated a failure by Adv Mkhwebane to have her investigators discharge their basic functions; it left senior politicians who were guilty of malfeasance without any accountability for their conduct; its silence on critical issues exonerated where it should have condemned; and most of all it left the already marginalised beneficiaries with no relief for the undeniable prejudice they had already suffered. Adv Mkhwebane therefore acted in a manner that would have destroyed a reasonable member of the public's confidence in her ability to discharge her duties and functions.

831. **The Committee is accordingly satisfied that Adv Mkhwebane committed misconduct in relation to the Vrede Report, its investigation and subsequent litigation.**

E. CHARGE 3 - ALLEGED INCOMPETENCE

(i) Alleged incompetence in respect of the Lifeboat Report

832. Paragraph 7.1 of the Motion alleges various grounds of incompetence against Adv Mkhwebane in respect of the Lifeboat Report, the investigation that preceded it and the subsequent litigation.

833. Paragraphs 7.1.2 – 7.1.6 of the Motion are covered by the Committee's assessment of Adv Mkhwebane's misconduct as set out above. They are accordingly not addressed below.

(a) Overreach

834. The Motion alleges that Adv Mkhwebane, by imposing the remedial action in respect of the constitutional amendment –

834.1. grossly overreached and exceeded the bounds of her authority; and

834.2. unlawfully trenched on Parliament's exclusive authority; and

834.3. unlawfully trenched on the national executive's authority to determine socio-economic policy;

834.4. and conceded the unlawfulness of her conduct during the review proceedings.

Did Adv Mkhwebane impose remedial action in respect of the constitutional amendment?

835. In the Lifeboat Report, the remedial action prescribed by Adv Mkhwebane in respect of s 224 of the Constitution has been set out in para 223 above.

836. There can be no dispute that, as alleged in the Motion, Adv Mkhwebane directed the Chairperson of the Justice PC to initiate a process that will result in the amendment of s 224 of the Constitution, and stipulated how s 224 should read after the amendment, which amendment would have altered the SARB's '*primary objective*' from protecting the value of the Rand to promoting '*balanced and sustainable economic growth in the Republic, while ensuring that the socio-economic well-being of the citizens are protected*' [*sic*].

Did Adv Mkhwebane concede the unlawfulness during the litigation?

837. In the urgent litigation initiated by the SARB to challenge that remedial action, Adv Mkhwebane argued that her intention was for Parliament to '*consider*' '*a possible review and broadening of the SARB mandate*' in order to avoid '*prejudicial decisions by the SARB underpinned by the narrowness of its mandate.*' In her view, '*there may have been good reason to advocate for a reconsideration of the SARB mandate*'.

838. Nevertheless, Adv Mkhwebane conceded that the remedial action she had prescribed could not stand, because it '*conveyed a mandatory remedial action that the parties affected had to implement*'. She expressly conceded that the remedial action '*trenches on the powers of Parliament*', because only Parliament has the authority to amend the Constitution, which authority must be exercised at its own discretion. Adv Mkhwebane accordingly agreed that her remedial action in respect of s 224 of the Constitution should be set aside and tendered the costs of the application.

839. By her own concession under oath, therefore, Adv Mkhwebane acted unlawfully in exceeding the bounds of her authority, and infringing Parliament's authority.

840. However, Adv Mkhwebane's answering affidavit in the urgent review contains no concession that her remedial action also infringed the national executive's authority to determine socio-economic policy.

Did Adv Mkhwebane infringe the national executive's authority?

841. Under the Constitution, determining economic policy, facilitating economic growth and protecting South Africa's socio-economic well-being are matters that fall within the national executive's responsibility.[107]

842. The constitutional amendment mooted by Adv Mkhwebane would have placed responsibility for the promotion of '*balanced and sustainable economic growth*' and '*the socio-economic well-being of the citizens*' in the hands of the SARB, which would have continued to operate independently of the national executive and would have been obliged to consult with Parliament rather than the Minister of Finance regarding the discharge of its functions. That would have empowered an organ of state with constitutionally entrenched independence to assume significant responsibility for social and economic matters that fall within the preserve of the national executive, without allowing the national executive any form of control, and in circumstances where the national executive would have been stripped of its right to regular consultation with the SARB.

843. Those are significant inroads into the powers and responsibilities of the national executive.

844. Although Adv Mkhwebane may not have conceded the point, the evidence establishes that the remedial action she imposed through the Lifeboat Report also substantially and unlawfully trenched upon the national executive's responsibility and authority for determining socio-economic policy.

845. Adv Mkhwebane conceded that she had no power to dictate to Parliament how to exercise its original legislative powers. In a similar vein (although not conceded), she had no power to deprive the national executive of the responsibility for social and economic matters that the Constitution confers on it, or to direct the establishment of a new and independent organ of state responsible for matters that fall exclusively within the ambit of the executive branch of government.

Conclusion

846. The evidence therefore establishes that, in imposing the remedial action contained in the Lifeboat Report, Adv Mkhwebane –

---

[107] See, for example, International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC) at paras 90 – 102; Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC) at para 57; National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) at para 67.

846.1. unlawfully trenched on Parliament's exclusive legislative authority; and

846.2. unlawfully trenched on the national executive's authority to determine socio-economic policy; and

846.3. in so doing, grossly overreached and exceeded the bounds of her authority; and

846.4. conceded the unlawfulness of her conduct in para 846.1 above.

(b) 'Irrationality, forensic weakness, incoherence, confusion and misunderstanding'

847. Para 7.1.7 of the Motion alleges that, in her investigation and report in respect of the IASA complaint, and in the subsequent litigation, Adv Mkhwebane '*demonstrated irrationality, forensic weakness, incoherence, confusion and misunderstanding of the applicable contractual, constitutional and administrative law principles*'.

848. In her affidavit to the Committee, Adv Mkhwebane argues that, on this score, the Motion is '*vague and meritless, and no evidence was led in support thereof.*'

849. However, the Provisional Report, the Lifeboat Report and the Rule-53 record in respect of the PPSA's investigation into the IASA complaint are all before the Committee. Similarly, the various judgments by the HC and the CC, as well as affidavits that informed those judgments, are also before the Committee. As evident from what is set out below, all of that information provides sufficient evidence to allow the Committee to evaluate whether Adv Mkhwebane has, at least in some instances, demonstrated irrationality or the other transgressions alleged in the Motion.

850. To the Committee, Adv Mkhwebane claimed while Mr Kekana testified that the Provisional Report had not been 'quality assured prior to it being leaked to the Public', in fact 'Mr Kekana was ultimately responsible for the provisional report and its quality assurance. The email evidence confirms my constant appeals to conduct quality assurance.'

851. This, however, is not true: the evidence establishes that Mr Kekana was not involved with the preparation of the Provisional Report, and only became involved when Mr Tshiwalule left the PPSA. Mr Tshiwalule's uncontradicted evidence is that he remained the responsible investigator under Adv Mkhwebane when the Provisional Report was published on 20 December 2016.

852. It is, furthermore, unfortunate that Adv Mkhwebane should have sought to pass the buck in this way. Mr Kekana was not the Public Protector. He was therefore not '*ultimately responsible*' for the

Provisional Report or the quality of its contents. That responsibility fell squarely on Adv Mkhwebane, who signed off on the Provisional Report before it was issued. Her failure to appreciate this demonstrates a lack of understanding of the requirements of office.

Jurisdiction

853. The Lifeboat Report concludes that '*the Public Protector has no jurisdiction to investigate matters that took place before the coming into effect of the Public Protector Act or the establishment of the Public Protector office in 1995'*.

854. However, the Lifeboat Report contains various findings about the lifeboat that the SARB granted to Bankorp and ABSA in the 1980s and early 1990s. Its remedial action is largely focused on dealing with the perceived wrongdoing that occurred in respect of the lifeboat i.e. SARB's conduct in extending the facilities to, and concluding the transactions with, Bankorp and ABSA.

855. The Lifeboat Report is therefore internally contradictory: it establishes that the PPSA has jurisdiction because the investigation and report will not consider events before 1995, but then focuses its findings and remedial action on events that occurred before 1995. That fundamental contradiction is irrational and incoherent.

The remedial action was not rationally related to Adv Mkhwebane's concerns

856. During the litigation regarding the Lifeboat Report, Adv Mkhwebane explained to the HC that one of the findings in the report was that '*the South African public was prejudiced by the conduct of the South African Government and the SARB, as the amount that was not recovered belonged to the people of South Africa and the funds could have been utilised to benefit the broader South African society*'. Adv Mkhwebane then explained that she had imposed the remedial action in respect of changing the Constitution '*to ensure that prejudice to ordinary South Africans of the kind established in this investigation does not happen in the future.*'

857. However, the remedial action did not change the mandate of '*the South African Government*' – only of the SARB. It is therefore not clear how the anticipated constitutional amendment would have prevented the South African Government from repeating its failure to recover the interest from ABSA.

858. Furthermore, the constitutional amendment mooted by Adv Mkhwebane would have established the SARB's '*primary object*' as promoting '*balanced and sustainable economic growth*', while also '*ensuring that the socio-economic well-being of the citizens are protected*' [*sic*]. At present, the Constitution provides that the SARB's mandate is to protect the value of the Rand '*in the interest of balanced and sustainable economic growth*'. In both instances, the SARB is obliged to act in the public interest. It is therefore not clear how the anticipated constitutional amendment would have prevented the Government or the SARB from repeating its failure to recover the interest from ABSA.

859. Mr Tshiwalule testified that the '*remedial action should always be… confined to the evidence that has been provided and the complaint.*' The IASA complaint did not arise because of the manner in which the SARB's powers have been crafted, and there was no '*systemic investigation*' to address a general problem. Instead, '*there was a specific issue that needed to be dealt with and we ought to have confined ourself to the specific issue.*'

860. Mr Tshiwalule did not concede that Adv Mkhwebane's alteration of the remedial action from what was contained in the Provisional Report was justified. Instead, he clearly testified that, after December 2016, he was no longer involved in the investigation, and that he was not privy to all of the additional evidence that was collected before publishing the Lifeboat Report. So, he could offer no proper analysis of whether Adv Mkhwebane was justified. He admitted that if further relevant and sufficient evidence had been collected after his departure, it might have justified going beyond the IASA complaint; but he was clear that he did not know what additional evidence had come to light, and whether it was sufficient in the circumstances.

861. The questioning of Mr Tshiwalule suggests a view that Adv Mkhwebane had merely suggested that Parliament consider a motion about the SARB's mandate. This view was clearly expressed in Adv Mkhwebane's affidavit to the Committee, where she claimed that the '*remedial action was never intended to be prescriptive of the outcome of the proposed process. That would have been illogical and unimplementable.*'

862. Adv Mkhwebane also emphasised the evidence of Ms Sokoni, the Public Protector of Zambia, that 'in many jurisdictions the ombudsman has the authority to recommend for the amendment of the Constitution and/or legislation.'

863. However, during the litigation proceedings Adv Mkhwebane conceded under oath that her remedial action was unlawful because it '*conveyed a mandatory remedial action*', because she had no power to '*undermine other provisions of the Constitution*' and because '*the power to amend the*

Constitution is exercised at the discretion of Parliament and not under dictation by any other body. To this extent, the remedial action in paragraph 7.2 of the [Lifeboat Report] trenches on the powers of Parliament.'

864. It is therefore unclear why Adv Mkhwebane would now want to revisit the merits of this issue before the Committee, or how she could do so when her concession before the HC was under oath.

865. In her affidavit to the Committee, Adv Mkhwebane claims that she '*never claimed to have the powers and the authority to amend the Constitution and my remedial action was never intended to impose an amendment. I have always known this obvious fact.'* Furthermore, there is no reason why her '*very wide'* powers should not include the power to propose a constitutional amendment, but Adv Mkhwebane had '*envisaged'* that the amendment would '*be done through the elected representatives of the people (Parliament)'*.

866. However, Adv Mkhwebane knew that, following the CC's Nkandla judgment, her remedial could be binding if imposed as such. She also conceded under oath that she had imposed '*mandatory remedial action that the parties affected had to implement or to have reviewed and set aside by a Court.*'

867. Adv Mkhwebane therefore seems to have been oblivious to the '*obvious fact*' that her remedial action was unlawful when she issued the Lifeboat Report.

868. It is also worrying – given the immense powers of her office – that Adv Mkhwebane should have been unable to distinguish between mandatory language directing a particular outcome (such as that contained in the Lifeboat Report) and language that merely suggested consideration of a particular course of action (such as was reflected in para 8.3.1 of the Provisional Report).

869. In the HC litigation, Adv Mkhwebane argued that it was '*within the Public Protector's power to <u>recommend</u> to Parliament to consider a review of the constitutional mandate of the SARB… such a recommendation would have flowed from the issues investigated and the findings made'* (emphasis in original). This was after she emphasised, among other things, that she had the power to undertake investigations on her own initiative.

870. However, what Adv Mkhwebane has singularly failed to explain is how her decision to expand the investigation to consider changing monetary-policy regulation and the Constitution – which is a very serious course of action – flows from her findings. Her conclusion on the facts was that, in extending the lifeboat, the SARB acted unlawfully. The solution, therefore, should have been to

direct the SARB to act within the law. Instead, Adv Mkhwebane changed the investigation to direct Parliament to change the law and, in so doing, to alter the essentials of the Republic's monetary policy governance. She did so without the Lifeboat Report setting out any explained or demonstrable relationship between the problems that had been identified or proven during her investigation and the solution she imposed on, among others, the SARB and Parliament.

871. The Lifeboat Report does not conclude that, at the time of the lifeboat transactions, the SARB's mandate facilitated those transactions. That calls into question why Adv Mkhwebane ever saw fit to direct that the SARB's mandate should be amended.

872. The Lifeboat Report does not establish any link between the SARB's constitutional responsibility for monetary policy and its conduct in providing support to Bankorp and ABSA. It does not establish any link between the SARB's constitutional duty to protect the value of the Rand, and its conduct in not recovering the interest earned on the government bonds. Accordingly, even assuming that Adv Mkhwebane was right about the unlawfulness of the SARB's conduct, there was no rational basis for her to direct the amendment of the South African constitutional architecture in respect of monetary policy.

Adv Mkhwebane failed to address the question of recoverability in a rational manner

873. The Lifeboat Report records the following:

> 'ABSA Bank submitted that the South African Reserve Bank assistance consisted of a loan which was provided to Bankorp (interest on this loan was 1 % per annum, which amount was paid), that loan was immediately used to purchase Government Stock Bonds from the South African Reserve Bank, and the yield on those bonds (16% per annum) less the 1% interest on the loan would be only be used to set-off certain bad debts owed by customers to Bankorp Limited. The Public Protector made an inspection in loco of the said bad debts depicting the financial state of affairs of Bankorp Limited.'

874. However, a debt does not have a physical location. It is therefore not clear how any debts could have been the subject of '*an inspection in* loco'.

875. Both the Provisional Report and the Lifeboat Report proceeded on the assumption that, in 2017, legal action could be instituted to recover R1.125 billion that ABSA was alleged never to have paid to the SARB during the 1990s.

876. Under s 11 of the Prescription Act 68 of 1969, a debt to the State prescribes after 15 years if it '*arises out of an advance or loan of money*', and otherwise prescribes after three years. Once the prescription period has run its course, s 10(1) of the Prescription Act provides that the debt is '*extinguished*'. That means, among other things, that, once the prescription period has run, a court cannot compel payment of the debt in question.

877. By the time the Lifeboat Report was issued in 2017, more than 17 years had passed since ABSA had repaid the capital loan amount but not paid over the interest earned on the government bonds.

878. The s 7(9) submissions from ABSA pertinently raised the issue of prescription and explained why, even if there were a claim to recover the interest earned on the government bonds (which was denied), that claim had already prescribed.

879. The Provisional Report did not deal substantively with the question of whether any legal claim to recover the interest had prescribed, despite the Prescription Act being mentioned as one of the '*Key Sources of Information*'.

880. Mr Tshiwalule's evidence was that while Adv Madonsela had been clear that any monetary claim against ABSA had prescribed and any remedial action '*could not include any recovery of funds*', he was '*entirely convinced that the debt was recoverable*'. Mr Tshiwalule therefore prepared a draft of the Provisional Report for Adv Mkhwebane that would '*test the waters*' to see whether any of the implicated parties raised the prescription issue themselves. In contrast with Adv Madonsela, and in agreement with his own opinion, '*Adv Mkhwebane was determined that it was important to look at the recovery of the money and it was her position that found expression in the preliminary report that went out in December.*' Mr Tshiwalule advised Adv Mkhwebane that, in his view, there was '*no real impact in taking a chance*' by asserting that the accrued interest was recoverable, because the Provisional Report was not a final report.

881. The Lifeboat Report notes ABSA's claim that the amount proposed to be recovered had prescribed, but then records that the PPSA was persuaded by thinking in a South African Law Reform Commission discussion paper such that '*it would not be equitable and just to exclude a claim based on prescription as it would deprive society in the improvement of living standards. Prescription must embrace societal needs, especially of those who are impoverished or economically disadvantaged. To exclude societal needs on the basis of prescription would be unreasonable.*'

882. However, the paper in question was a discussion document that was expressly qualified by its authors as a preliminary document that did not set out any final views because, among other things,

it still had to be subject to a participation process. Furthermore, the discussion paper did no more than set out potential recommendations for legislative reform: it did not amend, and could never have been interpreted as amending, legislation regarding prescription. Even in its draft recommendations, the Law Reform Commission did not propose abolishing or amending the period for recovering loan-based debts to the State, but expressly recommended that '*different prescription periods as provided in section 11 [of the Prescription Act] be retained*'.

883. Adv Mkhwebane's reliance on the Law Reform Commission's draft proposals for legislative reform as a basis for departing from the existing legislation on prescription was therefore seriously misplaced. No authority other than Parliament could have rewritten the Prescription Act, and no authority other than a court of law could have provided a binding interpretation of the Prescription Act. The Law Reform Commission's discussion paper was, quite obviously, neither a legislative act by Parliament nor a binding interpretive act by a judicial authority. It should therefore have formed no basis at all for any conclusion that the requirements of the Prescription Act could be departed from.

884. Before the HC, Adv Mkhwebane adopted a different stance. She argued that the issue of prescription was '*premature*' because it is a '*defence that is available to the litigant during civil proceedings for the recovery of a debt*'. The prescription issue could be raised during the recovery proceedings, and decided by the trial court '*then, having regard to all the factual circumstances. The SIU investigation may well find additional facts not unearthed in our investigation which could have a material bearing on the issue of prescription.*' Furthermore, the '*issue of prescription can only arise when the [SIU] investigation reveals who is liable for the re-payment of the public funds unlawfully given to ABSA.*'

885. However, the SARB was the party who negotiated the various transactions with Bankorp and ABSA and was fully aware of all goings on at the time they occurred. It therefore cannot have been ignorant of any material fact in such a way as to delay the running the prescription. Furthermore, on Adv Mkhwebane's own version under oath:

885.1. Judge Heath (then the Head of the SIU) had released a summary of his findings into the ABSA lifeboat on 1 November 1999, which included that the amount of R1,125,000,000 was unauthorised and could be challenged in civil proceedings.

885.2. SARB appointed the Davis Panel (i.e. the panel of experts), which concluded on 26 February 2002 that the SARB had acted outside of its statutory powers.

886. Even on Adv Mkhwebane's version, the SARB, the SIU and the Government could not have claimed ignorance about the ABSA/Bankorp transactions, and any possible claims arising therefrom. Accordingly, by the time that Adv Mkhwebane released the Lifeboat Report, any claim by SARB, the SIU or the Government in respect of the ABSA lifeboat would have prescribed.

887. If a debt has been extinguished through prescription, its recovery cannot be legally compelled by a judicial tribunal. Directing the SIU to take steps to compel recovery of the lifeboat would therefore have been pointless and a waste of resources.

888. Adv Mkhwebane's treatment of the prescription issue was, in the circumstances, irrational and showed a fundamental misunderstanding of the applicable legal principles.

Conclusion

889. The evidence therefore establishes that in numerous significant instances, Adv Mkhwebane displayed irrationality and a serious and worrying misunderstanding of fundamental legal concepts.

(c) Failure to understand constitutional duties of impartiality and acting without fear, favour or prejudice

890. The Motion alleges that, in the investigation, the Lifeboat Report and the ensuing litigation, Adv Mkhwebane showed that she did not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice.

891. Adv Mkhwebane appears to have brought her own personal ideological slant to the issues in the Lifeboat Report, which is not in line with her constitutional duties of independence and impartiality. The concerns regarding Adv Mkhwebane's lack of independence during the investigation, intentional or reckless causation of serious economic harm and failure to act fairly in respect of the SARB, the Minister of Finance, Parliament, ABSA and other parties with a serious interest in the Lifeboat Report have been addressed above, in the context of the misconduct allegations.

(d) Failure to appreciate duty towards the court

892. Para 7.1.9 of the Motion alleges that Adv Mkhwebane demonstrated her failure to appreciate the Public Protector's heightened duty towards the court as a public litigant.

893. The CC found that Adv Mkhwebane had failed to include certain documents in the Rule-53 record she filed, including documentation pertaining to a '*previously undisclosed meeting with the*

Presidency'.[108] It concluded that her '*failure to include these documents in the record… stands in stark contrast to her heightened obligation as a public official to assist the reviewing court*'[109] and reasoned as follows:[110]

> 'The Public Protector was, however, required to produce a full and complete record of the proceedings under review in terms of rule 53 of the Uniform Rules of Court. This included 'every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially.' An essential purpose of this obligation is to enable a court to perform its constitutionally entrenched review function. This gives effect to the rights of the parties under s 34 of the Constitution to have justiciable disputes decided in fair public hearings with all the issues being ventilated. It also safeguards parties' ability to enforce their rights under s 33 of the Constitution to administrative action that is lawful, reasonable and procedurally fair. The record was essential to enable the reviewing applicants to understand what occurred during the investigation that led to the impugned remedial action and to equip the court to ensure the proper administration of justice in the case.
>
> The record that was produced by the Public Protector was thrown together, with no discernible order or index, and excluded important documents. The Public Protector is wrong when she claims that she 'filed the entire record'. She did not. She omitted pertinent documents from the record, some of which were only put up for the first time as annexes to her answering affidavit in the High Court, and others, which were disclosed for the first time in this court.'

894. The Committee has not heard any evidence to justify a departure from these conclusions.

895. In her affidavit to the Committee, Adv Mkhwebane claimed that, '*generally and understandably*', she did 'not get involved in the compilation of the records in terms of Rule-53', which is the practice followed by *'all executive authorities such as Ministers, MEC's and the like.'* Adv Mkhwebane further argued that Mr Kekana *'had a free hand and sole responsibility in the compilation of the Rule 53 record'*.

896. However, Adv Mkhwebane's argument is unconvincing, for a number of reasons:

896.1. Mr Kekana was a relative late-comer to the investigation, and only stepped in following Mr Tshiwalule's departure. He did not assist Adv Mkhwebane in investigating the matter, revising the working draft and issuing the Provisional Report during or prior to December 2016. He had no personal knowledge of material portions of the investigation and report-

108 PP v SARB at para 184.
109 Id para 187.
110 Id paras 185 – 186.

writing process. It would therefore have been irresponsible of Adv Mkhwebane to give him a completely '*free hand*' in preparing the record.

896.2. Adv Mkhwebane was not merely an executive authority signing off on the final version of a document in which she had had little or no role in preparing. Instead, the evidence before the Committee – including her own evidence – shows that Adv Mkhwebane was integrally involved in the investigation and the preparation of the Final Report, and in changing the scope of the investigation and the remedial action. Accordingly, her personal knowledge would have allowed her to assess the list of documentation that her office proposed filing as the record, to determine whether there had been any omissions. For example:

896.2.1. Adv Mkhwebane claims that the Final Report was informed by Adv van der Merwe's research. If that were true, she would readily have been able to identify which research documents she had considered and directed that they be included in the Rule-53 record. However, no such documents were filed.

896.2.2. Adv Mkhwebane directed that the SSA's input should be included in the Final Report. However, documentation in this regard was omitted from the Rule-53 record. Adv Mkhwebane would easily have been able to identify that such documentation should be included.

896.3. Mr Kekana's evidence was that Adv Mkhwebane gave him express directions about what should be omitted from the Rule-53 record.

896.4. Whether Adv Mkhwebane involved herself in the compilation of the Rule-53 record or not, she stated, under oath, that she had filed the entire record. That statement can only have been reasonable and honest if Adv Mkhwebane had satisfied herself that the full record had, in fact, been filed.

897. The flaws and omissions in the Rule-53 record are part and parcel of Adv Mkhwebane's failure to make full and proper disclosure in respect of the investigation. That issue has been dealt with in the context of the misconduct charges.

(e) The Constitutional Court's findings

898. In her affidavit to the Committee, Adv Mkhwebane noted that the majority of the CC concluded that her conduct '*warranted a personal cost order*', but asked the Committee to consider '*important observations*' from Mogoeng CJ's minority judgment:

898.1. The findings of dishonesty against her were '*irreconcilable*' with her disclosures about her reliance on Dr Mokoka's views. Similarly, Adv Mkhwebane's '*declassification*' of her SSA meeting notes and her '*somewhat belated disclosure of all the other information*' shows that she had not been dishonest or deceitful.

898.2. Adv Mkhwebane had not been '*caught or found out*', but '*laid it bare*' herself; she had not '*shredded or concealed*' documentation, as a '*dishonest conspirator*' would have.

898.3. Her errors had been '*blown out of proportion*', whereas the case required all the facts to be examined in a detached and fair manner. A court should not '*read a lot more into or out of what is before it to arrive at a conclusion*'; it also cannot disregard favourable points because a particular litigant has made errors.

898.4. The SARB cannot *'effortlessly ride on waves of suspicion or unsubstantiated conclusions'*.

898.5. The claims that Adv Mkhwebane had been partial and acted in bad faith '*lacked substance*'.

898.6. Attorney-client costs should not be awarded personally because a decision-maker acted '*unwisely or in a manner that smacks of poor judgment*'.

899. Ultimately, the majority of the CC concluded as follows:[111]

> 'Regard must be had to the higher standard of conduct expected from public officials, and the number of falsehoods that have been put forward by the Public Protector in the course of the litigation. This conduct included the numerous 'misstatements', like misrepresenting, under oath, her reliance on evidence of economic experts in drawing up the report, failing to provide a complete record, ordered and indexed, so that the contents thereof could be determined, failing to disclose material meetings and then obfuscating the reasons for them and the reasons why they had not been previously disclosed, and generally failing to provide the court with a frank and candid account of her conduct in preparing the report.'

900. There is no evidence before the Committee that would warrant a departure from the majority's conclusions.

[111] PP v SARB at para 237.

901. Some of the claims that Adv Mkhwebane has asserted before the Committee are demonstrably untrue, such as the attempt to pretend that Mr van der Merwe's incomplete research ever informed the Lifeboat Report or the investigation process.

902. There is still no explanation as to why Adv Mkhwebane relied on someone as maverick, ill-informed, unorthodox and partial as Mr Goodson. Although the position in respect of Dr Mokoka has been clarified, Adv Mkhwebane has for the first time sought to introduce Dr Moodley as the second expert in economics with whom she consulted in preparing the report. However, there has been no effort to establish his qualifications or expertise, in circumstance where the evidence indicates that his experience is in IT rather than economics; and there has been no explanation at all as to why the HC, the CC and the other litigants were never informed about the role of Dr Moodley and the SSA in providing Adv Mkhwebane with economic advice.

903. The explanations regarding Adv Mkhwebane's meetings with the SSA and the Presidency remain unclear, incomplete and obfuscatory: the Committee, like the Full Court and the CC, still has no credible explanation as to why the meetings were not recorded in the Lifeboat Report or explained during the litigation, or why such contradictory versions of the meetings have been put forward.

904. Even after months of evidence before the Committee, and numerous opportunities for clarification, the various explanations advanced by Adv Mkhwebane and her legal representative remain incoherent, unconvincing and contradictory.

905. **The Committee is satisfied that these issues have been adequately addressed in its findings regarding misconduct. It is therefore not necessary for them to be considered again in the context of incompetence.**

(ii) Alleged incompetence in respect of the Vrede Report

906. Paragraph 7.2 of the Motion alleges various grounds of incompetence against Adv Mkhwebane in respect of the Vrede Report, the investigation that preceded it and the subsequent litigation.

(a) Conducting a lawful and meaningful investigation: general

907. Paragraph 7.2.1 of the Motion alleges that Adv Mkhwebane demonstrated a failure to conduct a lawful and meaningful investigation and failed to grant appropriate remedial action.

908. The former is borne out by the findings above: issues that required investigation were not investigated at all, and the few issues that were investigated did not result in administrative justice for those prejudiced by the conduct complained of. Adv Mkhwebane's failure to conduct a proper investigation included *(a)*the failure to address any issues in respect of the beneficiaries; *(b)* the complete omission into compliance with environmental legislation; *(c)* the failure to address aspects of the third complaint; and *(d)* the absence of interrogation of the responsibility of politicians and others.

909. The Vrede HC found that many of the failings discussed above – including the failure to consider material issues and to investigate the beneficiaries' circumstances – amounted to the unconstitutional and unlawful exercise of public power. This was upheld by the SCA and CC. No evidence has been led, and no arguments have been submitted, that justify a departure from these findings. In fact, in some instances, the evidence before the Committee shows that the flaws in the investigation were more glaring than may have been perceived by the courts, as documents omitted from the Rule-53 record served before the Committee.

910. The abovementioned failures by Adv Mkhwebane are covered by the Committee's assessment of Adv Mkhwebane's misconduct.

(b) Conducting a lawful and meaningful investigation: holding a separate meeting with Mr Magashule

911. Mr Samuel alleged that, during the investigation, Adv Mkhwebane met with Mr Magashule alone, while he and the PPSA CEO waited outside Mr Magashule's office. He claimed it was unusual for it not to be recorded. He later conceded that there was nothing untoward about the meeting, and that, on his understanding, the meeting was not actually related to the Vrede investigation.

912. Adv Mkhwebane's version is that her meeting with Mr Magashule was a '*meet and greet*' that did not last much longer than 10 minutes, '*did not concern any investigation*' and was merely '*part of [her] stakeholder outreach and nothing more than the 'tea' meeting which my predecessor testified to having held with Mr Magashule in her own office.*' There is no evidence to contradict this version, or that anything untoward was discussed between Adv Mkhwebane and Mr Magashule.

913. The evidence therefore does not establish that Adv Mkhwebane acted unlawfully, or did not conduct a meaningful investigation, in holding a private and unrecorded meeting with Mr Magashule while the PPSA was in the process of conducting the Vrede investigation.

(c) Granting appropriate remedial action

914. S 182(1)(c) of the Constitution empowers the Public Protector to take '*appropriate remedial action*', which means (as referred to in para 67.3 above) that the remedial action must be '*nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption in a particular case*'.

The beneficiaries

915. The beneficiaries were at the centre of the three Vrede complaints and should have been a focal point for Adv Mkhwebane's investigation. Although Adv Mkhwebane elected not to investigate their circumstances, the evidence in her possession – including the NT Report, the information about the status of the project and the lack of any documentation indicating that the beneficiaries were not involved in, nor benefitting from, the Vrede Project – indicated to the PPSA that there was a significant likelihood that the beneficiaries had been, and were continuing to be, prejudiced in a project that millions of rands of public funds had been directed ostensibly for their very benefit.

916. Because of Adv Mkhwebane's approval of the exclusion of the beneficiaries from the PPSA's investigation, the Vrede Report contained no remedial action to protect their interests: the Department was not required to formalise or update the beneficiary list; no party was directed to take steps to ensure the beneficiaries' participation in the project and the entity incorporated to operate the project; no steps were taken to direct the recovery of any funds that should have been applied for the benefit of the beneficiaries, or to direct an appropriate investigation into the diversion of those funds; the FS Department was not required to report back on its progress in protecting the beneficiaries' interests, to ensure accountability; the FS Department was not required to commence and continue communication with the beneficiaries regarding the project, to ensure that they

remained updated, or to apologise for the prejudice they had suffered to date; and there was no referral of the matter to other organs of state – such as law-enforcement agencies – to determine if, for example, criminal justice was required to redress the prejudice suffered by the beneficiaries.

917. These omissions represented a material failure to grant appropriate remedial action to those most in need of administrative justice in the circumstances of this case.

Disciplinary action

918. The Vrede Report directed the Premier to '*initiate and institute disciplinary action against all implicated officials involved in the Vrede Dairy Farm project*'. The HC criticised Adv Mkhwebane for removing the specific direction to act against Mr Thabethe, because it gave Mr Magashule '*the discretion to determine who the "implicated officials" were*', in circumstances where he had already indicated his view that there was no basis for disciplining Mr Thabethe.[112]

919. However, Adv Mkhwebane's explanation is that she wanted to ensure that the disciplinary action was not limited to persons she happened to mention but covered everyone implicated in wrongdoing.

920. There is no doubt from the Vrede Report that Mr Thabethe was, indeed, an '*implicated official*' – he was identified has having contravened procurement processes, improperly paying funds to Estina even after the NT raised its concerns and failing to invoke the FS Department's contractual rights to exercise control over the Vrede Project. This was the case even under the NT Report, yet the Premier did not take steps pursuant to that report and maintained in his s 7(9) response that Mr Thabethe had not done anything wrong. Knowing this and knowing that notwithstanding the NT Report further funds had been paid to Estina, Adv Mkhwebane nonetheless left it to the Premier's discretion whether or not to take steps against Mr Thabethe. Whilst arguably Mr Magashule could not have been able to lawfully determine who constituted an '*implicated official*' without including Mr Thabethe in the list, the HC's criticism of the formulation of the remedial action had merit. This is especially so given the approach adopted in the SARS Unit case and Adv Mkhwebane's oral evidence that it is the accounting officer to be held to account.

[112] Vrede Merits at para 116.

The money paid to Estina

921. The money paid to Estina, the extent to which Estina had unduly benefitted from the Vrede Project and the extent to which public funds had been improperly diverted or wastefully spent were central to the complaints. Yet no remedial action in respect of these issues was issued. Given the evidence, at the very least the accounting officer should have been held to account. The Vrede Report justifies this failure on the basis that the issues either had been addressed by the NT or were being dealt with by the Hawks. However, as set out above, these justifications were completely inadequate and, in some senses, simply incorrect.

922. The Vrede Report contains no remedial action directing, for example, that: a proper forensic investigation should be undertaken to determine how public funds were spent by Estina; steps should be taken to recover funds unlawfully paid to Estina, particularly after the NT issued its serious warning in 2014 to halt further payments (the Vrede Report records that, even after the NT's recommendation, a further, R143.9 million was paid); legal proceedings to be initiated to sue Estina and its successors/controlling minds for the harm suffered by the Department and/or the beneficiaries, or to have them prohibited from conducting business with the South African government.

923. This can be contrasted with the Lifeboat Report, where Adv Mkhwebane imposed remedial action aimed at –

923.1. having the SIU take steps to recover the accrued interest, even though the SIU had already investigated it and declined to initiate recovery proceedings;

923.2. initiating further investigations into other persons mentioned in the CIEX Report, even though there was no fair or credible basis for the SIU to do so.

924. In his s 7(9) response Mr Magashule indicated, inter alia, that his government would perform a '*value for money assessment*'. However, the Vrede Report's remedial action did not impose any obligation on the Premier to complete this assessment, or to report the conclusions to the PPSA. This must be contrasted with the '*monitoring relief*' Adv Mkhwebane sought to invoke in both the SARS Unit and CR17 reports. Instead, the Vrede Report only obliged him to conduct '*a reconciliation of the number of cows initially procured and found during April 2017 as per his undertaking in the response to section 7(9) notice*'. While the Premier had also given this cow-reconciliation undertaking, his undertaking in respect of the value-for-money assessment was far

more significant – both in terms of relevance to the complaint and in respect of the ability to allow further substantive steps to be taken to remedy the irregularities in the project. The omission makes no sense.

925. In the light of the complaints, and Adv Mkhwebane's own admission in the Vrede litigation that '*it cannot be disputed that monies were paid and used for purposes other than those for which they were intended*', the Vrede Report's failure to prescribe remedial action that substantively addressed the issues of moneys paid to Estina and lack of value obtained by the government was material.

Further audits

926. In the November 2014 Draft the PPSA proposed directing the AGSA to '*[c]omission a forensic and due diligence audit with a view to verify all the transfers and expenditure of public money in respect of the Vrede Dairy Integrated Project… in order to determine whether or not value for money was received by the State.'* Presumably directed to unearth the expenditure details that had eluded the PPSA, and to ensure corrective action is taken, where funds were diverted or improperly spent.

927. In the version of the report that Mr Ndou circulated on 7 February 2018, he included the following proposed remedial action:

> 'The Public Protector refers the matter to the Auditor General in terms of section 6(4)(c)(ii) of the Public Protector Act to audit the Integrated Vrede Dairy Project of the Free State Department of Agriculture and Rural Development.'

928. The finalised Vrede Report on 8 February 2018, it did not include any relief in respect of the AGSA.

929. In the Vrede HC AA, Adv Mkhwebane explained that she removed the remedial action in respect of the AGSA because that institution '*does not do forensic and due diligence investigations*' and further because the PPSA does not assign functions to the AGSA. This disregarded that s 188(1)(a) of the Constitution provides that the AGSA is responsible for, *inter alia*, auditing and reporting on the financial management of provincial departments. The Public Audit Act 25 of 2004 sets out additional AGSA functions. To this end, it empowers the AGSA to '*provide audit related services*', '*perform an appropriate audit… to determine whether appropriate and adequate measures have been implemented to ensure that resources are procured economically and utilised efficiently and effectively*', '*carry out an appropriate investigation or special audit… if the Auditor-General considers it to be in the public interest or upon the receipt of a complaint or request*', '*co-operate with persons, institutions and associations, nationally and internationally*' and '*in the public*

interest, report on any matter within the functions of the Auditor-General and submit such a report to the relevant legislature and to any other organ of state with a direct interest in the matter'.

930. These constitutional and statutory powers are wide enough to encompass the '*forensic and due diligence audit*' contemplated in the November 2014 Draft. It is not apparent why Adv Mkhwebane thought such an audit to be outside of the AGSA's purview. However, she clearly erred.

931. Furthermore, s 6(4)(c)(ii) of the PPA provides that the Public Protector may '*during or after an investigation… refer any matter which has a bearing on an investigation, to the appropriate public body or authority*'. It is therefore not apparent why the PPSA could not have referred the Vrede matter to the AGSA to take further action pursuant to its constitutional and statutory powers. Contrary to Adv Mkhwebane's argument, it would not have amounted to impermissibly '*assigning*' the AGSA functions, thereby infringing its functional autonomy. Instead, such a referral would have been the cooperation between organs of state provided for in the PPA.

932. On 7 February 2018, after Mr Ndou circulated his final draft Vrede report, Mr Nemasisi circulated further revisions. Draft reports were circulated to Mr Nemasisi, as the Senior Manager: Legal Services, as a quality-assurance mechanism. His task was to assess the rationality of the draft and identify any shortcomings that needed to be addressed before the draft was finalised and published.

933. Mr Nemasisi's revisions included remedial action that the Premier appoint an '*independent audit firm to conduct an investigation to determine whether… the amount of irregular expenditure resulted in any losses or damages suffered by the Department; or the amount of irregular expenditure is recoverable from the persons liable in law' [sic]*. Mr Nemasisi also recommended that the Premier be directed to immediately implement para 7.1.3 of the NT Report i.e. the recommendation from 2014 that the Vrede Project be halted until it was '*re-assessed and the necessary due diligence should be completed to ensure that the project is viable'*.

934. This too would have uncovered expenditure information that had eluded the PPSA and would have been material to facilitating the State's recovery of money, irregularly spent. It would have dovetailed with a remedy compelling the Premier to undertake a full value-for-money assessment, thereby establishing an objective analysis of how public funds had been spent on the Vrede Project and how best to take the project forward. This was important given the Vrede Report's stated conclusion that it could not reach a conclusion on price inflation because the PPSA lacked sufficient information.

935. Adv Mkhwebane removed any directions to conduct a further investigation into the funds paid to Estina, whether by the AGSA or by an independent firm, or any proper assessment of the project's viability and value for money, and so prevented the realisation of justice for critical components of the complaints. This was a material omission.

936. Adv Mkhwebane explained that, by the time the report was issued, the Hawks and the AFU were already attending to the recovery of irregular expenditure. But criminal-justice agencies are not an appropriate substitute for the administrative justice that can be ordered by the PPSA that would have required the FS Department, quite appropriately, to take responsibility and immediate action, instead of sitting back and waiting for other organs of state to address the situation. Any resultant independent audit or investigation would only have assisted the Hawks and the AFU. Moreover, given the vagaries of criminal proceedings it provided no certainty of an outcome. It bears noting that in the SARS Unit matter despite criminal proceedings pending remedies were issued.

Referral to the Hawks

937. In his draft of 7 February 2018, Mr Ndou also recommended the following remedial action:

> 'The Public Protector, in terms of section 6(4)(c)(i) of the Public Protector Act, brings to the notice of the Prosecuting Authority and the Directorate for Priority Crime Investigation those matters identified in this report where it appears crimes have been committed, to investigate, prosecute and recover any amounts due to the state.'

938. In addition, Mr Nemasisi included an express recordal to money laundering. This remedial action would have drawn the authorities' attention to the evidence unearthed by the PPSA investigation and also have facilitated the granting of relief that the PPSA could not provide i.e. criminal justice.

939. However, Adv Mkhwebane caused the proposed remedial action to be removed from the final Vrede Report. The importance of the referral to the Hawks is evident from the Vrede 2 Report where, after being required to redo certain portions of the Vrede investigation, Adv Mkhwebane ultimately referred the outcome of its investigation to the Hawks to determine whether '*any acts of impropriety herein amount to acts of a criminal conduct… and if so, pursue criminal investigations against the perpetrators*' [*sic*]. If it served a valid purpose to refer the Vrede 2 Report to the Hawks in December 2020, it would also have served a valid purpose to refer the Vrede Report to the Hawks in February 2018. Indeed, the latter recommendation may have seen criminal justice be achieved sooner.

940. The Vrede Report's omission of a referral to the Hawks where the PPSA had concluded procurement irregularities and a questionable payment in excess of R143 million – was therefore material.

Referral to the Zondo Commission

941. Mr Nemasisi also put forward the following remedial action:

> 'The Public Protector, in terms of section 6(4)(c)(i) of the Public Protector Act, refers the involvement of the Premier and the former MEC in this project to the Deputy Justice's State of Capture Commission of Inquiry. The commission's power may include the inquiry into how the amount paid into Estina were expended. [Sic.]'

942. Mr Nemasisi therefore expressly recommended that the involvement of senior politicians be referred to the Zondo Commission, which could interrogate issues that the PPSA had failed to such as how the funds paid to Estina were actually spent. As set out above, Adv Mkhwebane's failure to ensure appropriate remedial action in respect of politicians was serious and unjustified, all the more so in the face of the express recommendation by the PPSA's Head of Legal Services charged with the task of scrutinising the Vrede Report to ensure that it meets the standards of rationality.

Conclusion on granting appropriate remedial action

943. **The Committee is accordingly satisfied that, in several material respects, Adv Mkhwebane demonstrated a failure to grant appropriate remedial action.** Given that she was duty-bound to ensure remedial action that addressed the issues raised by the complaints and the prejudice revealed during the investigation, as well as any other concerns of irregular or prejudicial conduct, Adv Mkhwebane's failures were, aside from being irrational, also unlawful.

(d) Coming to the aid of the vulnerable and the marginalised

944. Paragraph 7.2.2 of the Motion alleges that Adv Mkhwebane demonstrated a failure to appreciate her legal duty to come to the aid of the vulnerable and marginalised members of society, being the intended Vrede beneficiaries.

945. In the Vrede Report Adv Mkhwebane did indeed demonstrate such a failure, to the prejudice of the beneficiaries. This issue has been dealt with above, in the context of the misconduct charges, particularly in paras 647 – 681 above.

(e) Failure to appreciate the inadequacy of the investigation

946. Paragraph 7.2.3 of the Motion alleges that Adv Mkhwebane failed to appreciate that her investigation was wholly inadequate, grossly negligent and/or failed to appreciate her constitutional duty to conduct a lawful meaningful investigation, as she sought to defend her failure to investigate in the litigation.

947. This has been dealt with in paras 560 – 792 above. The flaws were so stark and substantial that they should have been obvious to any reasonable person in Adv Mkhwebane's position. Indeed, it is difficult to conceive of Adv Mkhwebane herself believing that the Vrede Report was a rational and appropriate response to the complaints and the information that came to light during the investigation.

948. In her Vrede AA in both HC applications Adv Mkhwebane advanced a full-throated defence of the Vrede Report. This again arises in the context of Charge 4 as applications for leave to appeal to the SCA and the CC were both dismissed without a hearing for lack of reasonable prospects of success.

949. The evidence demonstrates that Adv Mkhwebane repeatedly sought to defend her failure to investigate the various issues arising from the Vrede complaints, after having received advice from Mr Nemasisi that there were no prospects of success (as elaborated upon under Charge 4) and was repeatedly rebuffed by the courts, demonstrating her failure to appreciate the inadequacy and gross negligence of her investigation, as well as her failure to appreciate her constitutional duty to conduct a lawful and meaningful investigation.

(f) 'Legal ineptitude' in respect of the remedial action

950. Paragraph 7.2.4 of the Motion alleges that Adv Mkhwebane demonstrated '*legal ineptitude*' in her inability to comprehend and accept the inappropriateness of the Vrede Report's remedial action.

951. This issue has been addressed in paras (c) above para 943, in the context of other incompetence charges.

(g) 'Irrationality, forensic weakness, incoherence, confusion and misunderstanding'

952. The Motion does not identify how Adv Mkhwebane is alleged to have demonstrated '*irrationality, forensic weakness, incoherence, confusion and misunderstanding of constitutional and administrative law principles'*. However, various instances are apparent from the findings of the HC and can be tested against the evidence before the Committee. Various issues of forensic weakness – i.e. the failure to conduct a thorough, open-minded investigation informed by appropriate expertise and best practice – have been addressed above. Various issues of irrationality – such as a producing a report that does not respond to the core of any of the complaints that gave rise to the investigation in the first place – have also been addressed above and dealt with below.

Irrationality and incoherence: value for money

953. The Vrede Report records that the project's value for money was not investigated because it '*was investigated by National Treasury: Accountant General*'. As addressed above, this justification was inadequate and incorrect. It also records that Adv Mkhwebane could not make conclusive findings on the value-for-money issues because of insufficient evidence. The two versions are inconsistent.

954. The justification is also inadequate and incorrect. As Mr Nemasisi pointed out to Adv Mkhwebane on 7 February 2018, the issue of value for money had been investigated by PPSA personnel and, at that stage, the working draft of the report reached conclusions that value for money had not been achieved, and there had been overcharging, as set out in the section of the report dealing with '*inflated prices and the fact that the project has been halted.*' It being so that earlier drafts of the Vrede Report had included specific adverse findings in respect of the inflated prices.

955. The April 2017 Draft concluded as follows:

> 'The independent evidence submitted indicates that the prices of the milking equipment, the gate and guard house and the cows were considerably higher than the current market prices. The evidence further confirms that the Accounting Officer of the Department had no measures in place to ensure proper procurement procedures in acquiring assets for the Project. This amounts to gross negligence and maladministration.'

956. The draft circulated by Mr Ndou on 7 February 2018 found that the allegations of price inflation in respect of construction, processing equipment, procurement of cows and administration costs was

'*substantiated*', and also that '*the prices of the milking equipment, the gate and the guardhouse and the cows were considerably higher than the then prevailing and current market prices.*'

957. These conclusions were based on various sources of evidence: records of expenditure from the FS Department, including financial statements and invoices; market price estimates from an independent operator in the market; the site inspection; photographs; and explanations from various persons.

958. One telling example is the '*entrance gate and guard house*'. The gate consisted of a 13-metre long wall and a 17-metre long gate. The guard house measured 9 m^2. The April 2017 Report, and the draft circulated by Mr Ndou on 7 February 2018, included the following the picture of the gate:

959. Both documents included the following picture of the guard house:

960. The FS Department indicated that it had paid R2.6 million for the construction of these two structures. Even without a market assessment or a comparison of quotes, it is obvious that R2.6 million was a vast overpayment. During cross-examination Mr Ndou testified that the PPSA's various price assessments may not have been '*scientific*' or '*optimally covered*' but did entail comparing the invoices showing what had been charged against what was actually built or supplied and doing broad assessments of value. He was clear that no one who saw what Estina had constructed and would have concluded that '*it merits what was charged.*' Nothing before the Committee suggests that Mr Ndou's evidence was incorrect.

961. Mr Magashule's s 7(9) response stated that *'a Guesthouse, which was procured in the town of Vrede to accommodate individuals responsible for the implementation of the project, is included in the amount of R2,6 million. It was necessary to buy this property, given the fact that there were no facilities in existence on the land in question at the commencement of the project.'*

962. This was not accepted by the PPSA investigators. Neither should it have been; in reporting on construction costs for a guard house and a gate, the FS Department would not reasonably (and should not lawfully) have included the cost price of acquiring unrelated immovable property. Even assuming that the FS Department was obliged to house its service providers (which is a big assumption), given the necessary duration of the construction of the project, it would have been unnecessary for the FS Department to acquire ownership of a guest house at the cost of millions, when a nearby property could simply have been rented at much lower cost. Mr Magashule's explanation was not supported by any documentation, and he provided no evidence in respect of the supposed purchase. Even the limited evidence available to Adv Mkhwebane clearly indicated significant over-charging in respect of the gate and guard house.

963. Another telling example is in respect of the cows. The Vrede Report records that the FS Department submitted that it spent R6,212,000 on 351 dairy cows. Adv Mkhwebane had information about the market prices of such cows, obtained from a breeding association, indicating that the same number of cows should have cost no more than R3,374,000. Adv Mkhwebane also had invoices in respect of cows, and indications that not all of the suppliers were well-known registered breeders.

964. This justified the conclusions reached in the various drafts that preceded the Vrede Report that the FS Department had significantly overpaid for the cows – by more than 84%.

965. As set out above, the NT Report also set out numerous concerns – informed by an expert senior economist's assessment – indicating that, in various respects, the Vrede Project was risky, the costs were very high and there was a '*good probability that the state will not receive value for money on*

the project in its current state'. Adv Mkhwebane has not provided any rational explanation for why these concerns were ignored in, or excluded from, the Vrede Report – particularly when the Vrede Report expressly approves, and associates the PPSA with, the NT's conclusions in respect of procurement non-compliance.

966. It is difficult to square Adv Mkhwebane's decision to reject or ignore the NT Report's findings and the financial, photographic and other evidence in the Vrede investigation, with her willingness to accept and rely on unauthenticated emails in the CR17 investigation and an unauthenticated IGI Report in the SARS Unit investigation and her ipse dixit that she was entitled to rely on the IGI report in making her findings given where it originated from.

967. In her Vrede HC AA, Adv Mkhwebane explained that it was not necessary for the PPSA to '*make further investigations*' regarding the value for money obtained by the Government, given the findings and recommendations contained in the NT Report. However, as explained above, there were numerous price-inflation issues that the NT had not considered in respect of which the PPSA had evidence to make findings. Nine items were referred to in the second complaint including infrastructure, equipment, animals and fees. The FS Department confirmed the purchase of all but one of the expenditure items set out in the second complaint. The NT Report was, accordingly, no reason for Adv Mkhwebane to refuse to investigate issues of value for money.

968. It was also important for Adv Mkhwebane to reach her own conclusions in respect of value for money: first, there was significant public interest in whether funds had been unlawfully diverted or improperly spent; second, significant time had passed since the NT Report and it was necessary to determine whether appropriate steps was taken in response thereto; and third, unlike the NT, Adv Mkhwebane would have been able to issue binding remedial action to which has already been referred.

969. Contrary to the April 2017 Draft, and the drafts circulated by Messrs Ndou and Nemasisi on 7 February 2018, the Vrede Report incorporating Adv Mkhwebane's changes made no adverse findings in respect of value for money but gave three reasons for concluding that the allegations of overcharging were '*difficult to determine*'. Each of those reasons is without merit.

970. The first cited reason is that Estina had not followed '*public procurement processes when procuring the services of the service providers*'. However, as a private company, Estina would never have followed, or been required to follow, a public procurement process. That does not mean that it could never be ascertained whether Estina overcharged the FS Department. Adv Mkhwebane knew the goods and services that had been provided and knew what the FS Department's records indicated

had been paid therefor (at least in respect of some of the line items). Adv Mkhwebane had market-related quotes, or the ability to obtain such quotes, for the goods and services in question. The notion of a private company following a public procurement process was irrelevant to Adv Mkhwebane's ability to determine whether the FS Department had received good value for the items procured. The lack of a public procurement process certainly did not stop the NT from reaching firm conclusions on the issue of value for money.

971. The second cited reason is that Adv Mkhwebane was '*unable to conduct a comprehensive investigation in order to determine the fair market value for good and services procured*' [*sic*]. This is not true. As set out above, it was entirely within the PPSA's resources and capabilities to determine the '*fair market value*' for the goods and services in question and compare that value against what the Department had actually paid. An independent expert was not needed and in any event the PPSA was even able to obtain expert evidence for free. Furthermore, as set out in paras 691 – 710 above, Adv Mkhwebane's claim that '*financial and capacity constraints*' prevented her from investigating the issues of value for money and overcharging is not borne out by the evidence and cannot be sustained.

972. Third, is that Adv Mkhwebane '*was not provided with all the invoices and proof of payments for the goods and services procured by Estina on behalf of the Department.*' This, again, is irrelevant: Adv Mkhwebane knew what the FS Department paid for at least some of the goods and services, and was able to determine fair, market-related prices to determine whether value for money had been achieved. What Estina may have been charged by its own service providers, and what premium it may have applied to those costs before passing them on to the FS Department, was not material to the inquiry that Adv Mkhwebane had to undertake.

973. The HC concluded that '*[t]he lack of invoices and proof of payments furnished by the Department were also not a satisfactory explanation. The PP should have exercised her statutory powers to obtain the necessary financial records from the Department and Estina to determine what was paid for, to whom, and what amounts were paid.*'[113] It also noted that '*[i]t seems that the PP chose to simply ignore the information supplied to her and then blamed financial constraints for her failure to execute this simple task.*'[114]

974. There is nothing before the Committee to warrant departing from these conclusions.

[113] Vrede Merits at para 83.
[114] Vrede Merits at para 79.

975. The various drafts of the Vrede Report that were in circulation on or before 7 February 2018 indicate that the PPSA was entirely capable of assessing at least some of the claims of overcharging – which had already been itemised in some detail in the complaints. Even if not scientific, the assessments in those draft reports were reasonable and appropriate in the circumstances, in order to ensure administrative justice. Adv Mkhwebane's last-minute decision to exclude those assessments, and effectively ignore the documentary evidence from the FS Department, the assessments and conclusions set out in the NT Report (which were informed by an economist's assessment), the independent expert evidence from the Breeders' Association and the photographic and other evidence regarding what had actually been constructed on the site, was irrational.

976. That irrationality was material, because it prevented Adv Mkhwebane from issuing remedial action in respect of what had always been a core component of the complaints i.e. the claims of overcharging and undue profiteering at the expense of the public and the beneficiaries.

(h) Failure to appreciate duty towards the court

977. Paragraph 7.2.6 of the Motion alleges that Adv Mkhwebane demonstrated her failure to appreciate her heightened duty towards the court as a public litigant.

978. In essence, this is a duty of full and helpful disclosure. The CC has explained that the Public Protector is required to '*observe the highest standards conduct in litigation*', and to be '*accountable, responsive and open*' during litigation, which means that she must display full candour before the courts.[115]

979. The extent to which Adv Mkhwebane gave contradictory and unsustainable explanations to the HC in respect of her failure to investigate certain matters has already been addressed, including at paras 800 – 812 above.

980. In her answering affidavit, Adv Mkhwebane stated that *'[t]hroughout the investigation, the initial complaint was limited largely to financial mismanagement and irregular procurement processes.'*

981. However, as apparent from the complaints, this was not true. The first makes no mention of '*irregular procurement processes*'. The second established no basis for focusing only on financial mismanagement and procurement compliance.

[115] PP v SARB at paras 155 – 156.

982. Whilst it is so that the PPSA, prior to Adv Mkhwebane's assumption of office, and Adv Mkhwebane as from October 2016, focused on these narrow issues, that approach did not arise from the first or the second complaints and could not be sustained once the GuptaLeaks became known.

983. In her Vrede HC AA, Adv Mkhwebane claims that at a meeting in December 2017, Mr Maimane agreed to obtain beneficiary statements. She did not disclose that the Free State Office had requested an engagement with the beneficiaries during the site visit in April 2017, but her own office had expressly instructed that the beneficiaries should not be invited. Adv Mkhwebane also did not disclose that, with the information already on file, she was fully capable of engaging with the beneficiaries – as is evident from the investigation that resulted in the Vrede 2 Report. Rather, the impressions sought to be created is that the failure to acquire information from the beneficiaries was largely or wholly attributable to Mr Maimane and/or the DA, which was not the case.

984. Further, in the Vrede HC, Judge Tolmay was misled to believe that Adv Madonsela had prepared the November 2014 Draft, and following submissions, undertook a comparison between the '*provisional report*' of November 2014 and the Vrede Report.[116]

985. In her affidavit setting out her reasons for the Vrede Report, Adv Mkhwebane stated that she had considered the application to set her report aside and confirmed that she had filed the record in respect of the report as contemplated by Rule-53 of the Uniform Rules of Court. The index to the record describes the November 2014 Draft as a provisional report. Adv Mkhwebane's Vrede HC AA stated that Adv Madonsela had completed a draft provisional report and referred to it as a draft that '*had been completed by my predecessor*'. Her affidavit contains various additional allegations indicating that Adv Madonsela had signed off on the November 2014 Draft – including its identification of issues for investigation and its proposed remedial action.

986. However, Adv Madonsela never signed off on a provisional Vrede report: up until the day she left office, she was of the view that the investigation had been inadequate and lacked the necessary forensic rigour. Furthermore, the documentary evidence establishes that this fact was expressly drawn to Adv Mkhwebane's attention at the beginning of 2017.

987. The impression created by Adv Mkhwebane was that Adv Madonsela had signed off on this draft as an appropriate preliminary report to deal with the Vrede complaints was incorrect and

[116] Vrede merits para 41.

misleading. This was perpetuated in her founding affidavit in the application for leave to appeal to the CC.

988. When an applicant challenges an organ of state's decision under Rule-53, the organ of state must then produce the record of her decision-making process. This is known as the '*Rule-53-record*', and it is important because it allows the litigants – and the court – to see precisely how the impugned decision was made and what steps the process entailed. The CC has determined that, when preparing a Rule-53 record, the Public Protector must include '*every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially*'.[117] Given that this arose in the Lifeboat litigation it was known to Adv Mkhwebane or should have been reasonably known. Hence, she took responsibility under affidavit – quite rightly – for the contents of the Rule-53 record. Yet it contained only one draft of the Vrede Report: the November 2014 Draft, on which Adv Madonsela's name occurred, and not the numerous other drafts that had been prepared during the investigation, where her name was appended, including –

988.1. The April 2017 Draft, which contained express adverse findings against senior politicians and had been utilised as the basis for the s 7(9) notices.

988.2. The drafts circulated by Messrs Ndou and Nemasisi on 7 February 2018, which contained adverse findings in respect of the claims of overcharging, set out various concerns about gaps in the investigation and the report and proposed remedial action against the politicians.

988.3. The various drafts prepared by Adv Raedani and Mr Kekana, which incorporated the changes that Adv Mkhwebane had directed them to make.

989. The Rule-53 record also excluded the photographic evidence discussed in paras 958– 960 above, which was damning (at least in respect of the overcharging allegations regarding the gate and the guard house) and Mr Nemasisi's email correspondence to Adv Mkhwebane, which elaborated on his concerns about the investigation and the report. It bears noting that the filing of incomplete Rule-53 records had been raised pertinently in the context of the Lifeboat litigation as the failure to do so was pointed out. It is perpetuated in the Vrede matter and again in the SARS Unit and CR17 matters.

[117] Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) at para 185.

990. These omissions in the Vrede matters resulted in a failure to provide a full and proper picture of the investigation and report-production process, and further resulted in the other litigants – and the court – remaining ignorant of various significant issues that had arisen within the PPSA. For example:

990.1. The HC was concerned with the Vrede Report's finding that the allegations of price inflation were '*difficult to determine*', concluding that Adv Mkhwebane '*should have exercised her statutory powers to obtain the necessary financial records from the Department and Estina to determine what was paid for, to whom, and what amounts were paid.*'[118] The fact that several investigators were of the opinion that there was sufficient evidence to make findings on the overcharging allegations (including financial records, photographs and input from experts), and that such evidence and findings were included in various versions of the working draft for months before being removed by Adv Mkhwebane on the day of the report's publication, could well have been relevant to the HC's reasoning. This is particularly so given that some of the evidence was not reflected in the November 2014 Draft.

990.2. The HC was concerned with Adv Mkhwebane's conclusion that there was no need to investigate the Free State's political leaders.[119] The fact that, even after receipt of the politicians' s 7(9) responses, at least one PPSA staffer thought that Messrs Magashule and Zwane should be referred to the Zondo Commission, and that this remedial action was removed by Adv Mkhwebane on the day of the report's publication, could well have been relevant to the HC's reasoning.

991. Mr Sithole's evidence was that he and the investigation team had to take responsibility for the failure to file the draft reports with the Rule-53 record. However, Adv Mkhwebane was the deponent to the affidavit stating that the full Rule-53 record had been filed and should therefore have been at pains to ensure that her statement was accurate. Furthermore, Adv Mkhwebane had personal knowledge of the various drafts, and was intimately acquainted with the drafts that were circulated on 7 February 2018 and altered on 8 February 2018. It would therefore not have been unreasonable to expect her to apply that personal knowledge when approving the contents of the Rule-53 record. Certainly, she would have personally been aware that there were more draft reports than the November 2014 Draft, and that it was important for the Rule-53 record to include, at the very least the April 2017 Draft, as that had been the basis upon which the s 7(9) notices were formulated.

118 Vrede Merits at para 83.
119 Id paras 121 – 123.

992. In her Vrede HC AA, Adv Mkhwebane stated that 'there was nothing in the main complaint, second complaint or the Provisional Report which implicated the Premier.' (The 'Provisional Report' being the November 2014 Draft.) Adv Mkhwebane later expressly stated that *'I… deny specifically that the complainant's complaints included the involvement of the politicians, Premier and MEC.'*

993. It is correct that the November 2014 Draft did not contain findings of wrongdoing against Mr Magashule. However, Adv Madonsela was never satisfied with the draft Vrede reports and set it back. The misrepresentation to the Vrede HC that Adv Madonsela had signed off on the November 2014 Draft may have led the HC to believe that she approved of a report that did not contain adverse findings against the Premier. Furthermore, the true provisional report – i.e. the draft that was used to prepare the s 7(9) notices that were issues (the April 2017 Draft) – actually did contain an adverse finding against Mr Magashule, *viz* that he was guilty of maladministration. This fact, however, was never drawn to the HC's attention: the April 2017 Draft was not included in the Rule-53 record or dealt with in any detail in Adv Mkhwebane's answering affidavits.

994. Furthermore, only referring to the first and second Vrede Complaints did not provide the HC with the full picture. Adv Mkhwebane should have explained to the HC that the third Vrede Complaint contained express allegations against the Premier, *viz* that the Estina contract was approved by his office and that he had ignored the NT's recommendations. As discussed in paras 745 – 746 above, even the first two complaints clearly implicated the Free State's political leadership and whether or not the political leaders or the administrators were actually involved in the malfeasance would only be determined by an investigation.

995. This fuller picture was apparent to the HC from the Vrede Report itself (which sets out the third complaint) and from the Rule-53 record (which contains the third complaint). Nevertheless, it should not have been omitted from Adv Mkhwebane's explanation under oath regarding the allegations that had been levelled against the politicians.

996. In addition, as set out above, in his proposed revision of 7 February 2018 – which Adv Mkhwebane considered and then rejected – Mr Nemasisi expressly recommended that '*the involvement of the Premier and the former MEC in this project*' be referred to the Zondo Commission. This, too, appears never to have been drawn to the HC's attention – either in Adv Mkhwebane's affidavit or in the Rule-53 record.

997. In her Vrede HC AA, Adv Mkhwebane stated that in October 2016 and March 2017, both the '*Provisional Report*' and the investigation had been completed.

998. It is not true that, by either date, the investigation had been completed: as set out in paras 759 – 761 above, important documents still had to be obtained, and material witnesses interviewed (even on the limited basis on which the investigation proceeded) after March 2017.

999. On Adv Mkhwebane's version, she allowed consideration to be given to looking into the Guptaleaks, and it was only on Adv Cilliers' insistence that they were not pursued. The Think Tank meeting at which Adv Cilliers was mandated to look into the Guptaleaks was held on 14 August 2017. So, the PPSA's investigation could not have been completed before that.

1000. As set out above, the true Provisional Report – i.e. the one on which the s 7(9) notices were based – was only completed in April 2017.

1001. In her statement to the Committee, Adv Mkhwebane admitted that the Vrede Task Team was established to '*fast track and finalise the investigation and the report.*' This task team was only established in the second half of 2017, meaning that, on her own version, the Vrede investigation was not yet complete by mid-2017.

1002. The impression sought to be created was that, by the time Adv Mkhwebane became involved, the investigation was already so far progressed that there was little she could do, and all that remained was for her to supervise the finalisation of the report. This, however, was not true as reflected in paras 783 – 791 above: Adv Mkhwebane had ample opportunity to rectify the defects in the investigation.

1003. For example, in her Vrede HC AA, Adv Mkhwebane said the following:

> On the DA's own version, all the media reports implicating the Premier of the Free State and the then MEC for Agriculture in that province in their relations with the Gupta family either precede my appointment as Public Protector or <u>emerged after the investigation had already been completed</u>. [Emphasis added.]

1004. However, on Adv Mkhwebane's own version, consideration was given to the GuptaLeaks and Adv Mkhwebane allowed them to be omitted from the investigation. When the Guptaleaks emerged, the investigation was still ongoing and, in fact, some investigators (such as Mr Ndou) were pressing for them to be investigated. So, the implication of the abovementioned excerpt – that the Guptaleaks could not be considered because the investigation had already closed by the time they became available – was fundamentally misleading, contrived and incorrect.

1005. It also appears to be premised on a some misconception that because some media articles arose before her appointment as Public Protector it could not be taken into account.

1006. In her Vrede HC AA, Adv Mkhwebane explained that she '*[b]ecame aware of the matter during the roadshow in the Free State:* ***16-17 Mach 2017***'. Presumably she intended to refer to March 2017. This, too, is not true.

1007. The evidence (including Adv Mkhwebane's previous evidence under oath) indicates that Adv Mkhwebane was aware of the Vrede investigation shortly after assuming office in October 2016, was participating in Think Tank discussions on the draft report in December 2016 and was apprised of Adv Madonsela's position in relation thereto in February 2017. So it simply is not the case that Adv Mkhwebane only became aware of the Vrede investigation in March 2017, while on a provincial roadshow.

1008. This is in any event contradicted in the same Vrede HC AA where she stated:

> 'Upon assuming office in October 2016, and in March 2017 I familiarised myself with the Provisional Report and the investigation (both of which had by this stage been completed).'

1009. So even on Adv Mkhwebane's version under oath in the litigation, she had already begun acquainting herself with the Vrede investigation '*upon assuming office in October 2016*'.

1010. The reliance on the date of March 2017 was to contextualise the steps taken and to reflect that she had not been dilatory, in the Vrede investigation. In doing so she was misleading having omitted four to six months of the investigation period, and not explaining what transpired then.

1011. Both the Rule-53 record and Adv Mkhwebane's affidavits were misleading by omission. Both failed to disclose the extent of Adv Madonsela's unhappiness with the Vrede investigation during her tenure, and the extent to which PPSA staff members were satisfied that adverse findings should be made in respect of the overcharging allegations and remedial action could be included in respect of politicians. They also did not disclose the extent to which Adv Mkhwebane overrode these proposed findings at the last minute, shortly before the Vrede Report was published.

(i) <u>Conclusion</u>

1012. In her statement to the Committee, Adv Mkhwebane includes the following:

> 'The unescapable truth is that the Vrede matter represents part of the mess and unacceptably neglected matters which I found on my desk. This investigation should never have taken 4 to 5 years to complete. I did all I could to attend to it…'

1013. As set out above, it is true that between September 2013 (when the first complaint was received) and October 2016 (when Adv Mkhwebane assumed office), the investigation undertaken, and the draft report produced were wholly inadequate. However, Adv Mkhwebane then had more than 15 months to rectify the process. Instead, she produced a report so watered down, compromised and irrational – the Vrede Report – that it did not address the substance of the complaints and failed to provide any real administrative justice, least of all to the beneficiaries. It then took in excess of two more years for the Vrede 2 Report to be published in December 2020, and even then Adv Mkhwebane did not deal with critical issues arising from the complaints (particularly in respect of moneys paid to Estina and how they were used and diverted).

1014. Adv Mkhwebane alleges that the Vrede investigation should never have taken four years to complete. In truth, it took more than four years of her being in office for the Vrede 2 Report to be produced, and even that did not result in the complaints being dealt with comprehensively or in a fully satisfactory manner. Those failings can only be attributed to her – all the more so because of the active interest and approach she adopted to the investigation even firsthand engaging in the report writing on the evening of 8 February 2018.

(iii) <u>Alleged incompetence in respect of the FSB Report</u>

1015. On 11 April 2017 Mr Malema (EFF) lodged a complaint in which he alleged maladministration, abuse of power and improper conduct, and corporate governance deficiencies, at the Financial Services Board ('**the FSB**'), now the Financial Sector Conduct Authority ('**the FSCA**'). On 28 March 2019 Adv Mkhwebane published her report in respect thereof ('**the FSCA Report**'), which contained numerous serious and adverse findings against the Executive Officer of the FSCA, Adv Tshidi.

1016. On 7 June 2019 the FSCA and Adv Tshidi applied to the Pretoria HC to review and set aside the entire FSCA Report '*for lack of jurisdiction*', and alternative relief to set aside specific conclusions, findings and remedial actions contained in the report. The founding affidavits set out a number of review grounds in respect of the FSCA Report, in addition to arguing that Adv Mkhwebane had no jurisdiction because the complaint was in respect of conduct that was more than 10 years old, there

were no special circumstances to justify Adv Mkhwebane taking on the investigation, and her purported exercised of a discretion to determine special circumstances was irrational.

1017. Adv Mkhwebane filed her FSCA AA conceding that the FSCA Report should be set aside (with costs), but rejecting the allegations that she lacked jurisdiction, and arguing that, in respect of any new report, the question of jurisdiction would have to be determined afresh.

1018. In reply, the applicants complained that Adv Mkhwebane had not answered the serious allegations levelled against her and had not explained her investigation or the findings made against Adv Tshidi.

1019. On 9 October 2020 the FCSC HC set aside the FSCA Report aside (with costs) because Adv Mkhwebane lacked jurisdiction to entertain the complaint. It expressed frustration at both parties that the matter had proceeded to a hearing, even though there was no dispute that the FSCA Report should be set aside. It noted that '*the insistence of all the parties to proceed on an opposed basis is perplexing and only resulted in unnecessary costs being incurred.*'

1020. Paragraph 7.3 of the Motion alleges that the litigation in respect of the FSCA Report demonstrated Adv Mkhwebane's incompetence. Adv Mkhwebane did not address the substance of the charges in respect of the FSCA Report.

(a) <u>Did Adv Mkhwebane decline to defend the lawfulness of the FSCA Report's findings and remedial action?</u>

1021. The short answer is Yes. Aside from a lack of jurisdiction, the applicants argued that the FSCA Report was vitiated by a number of flaws, including unreasonableness, arbitrariness, irrationality, vagueness, lack of explanation and justification, failure to have regard to relevant evidence, failure to assess credibility and veracity properly, failure to provide reasoned justifications for her decisions, unfairness, intruding on the domain of the courts, bias, bad faith, ulterior purpose or motive, gross incompetence and legal incompetence. They alleged that '*the true source of the EFF's allegations was Mr Simon John Nash, one of the chief participants in a criminal pension surplus-stripping scheme… Mr Nash is currently facing criminal charges of inter alia fraud, theft and breach of fiduciary duties*'.

1022. Although Adv Mkhwebane denied some of the claims – such as the allegations of bad faith and bias – she did not answer most of them. While she was emphatic that she had jurisdiction to investigate the complaint, she did not provide substantive answers to most of the rest of the applicants' allegations which would have vitiated the report anyway. She was content to concede the review

without disclosing reasons and hence declined to defend the lawfulness of her findings and remedial action against the slew of allegations made by Adv Tshidi and the FSCA. This at a cost of approximately R 6.5 million to the PPSA.

(b) Did Adv Mkhwebane fail to give a proper explanation for the FSCA Report's findings and remedial action?

1023. Again, yes. In her FSCA AA Adv Mkhwebane did not answer each of the serious allegations levelled against her. Nor did she attempt to explain or justify the FSCA Report.

(c) Did Adv Mkhwebane thereby concede that the FSCA Report was irrational, forensically weak and misunderstood or misapplied legal principles?

1024. No. Adv Mkhwebane's answering affidavit provides no reason at all for her concession. It is not necessarily the case that she conceded the review because the FSCA Report was irrational, forensically weak or subject to an error of law. It may be that she conceded the review because it transpired that there had been unreasonableness or procedural unfairness.

(d) Did Adv Mkhwebane thereby demonstrate a failure to appreciate her heightened duty towards the court as a public litigant?

1025. Yes. If Adv Mkhwebane was prepared to concede the review, it might not have been necessary for to address each and every challenged raised in the founding affidavits. However, as a constitutional citizen subject to duties of candour and full disclosure, Adv Mkhwebane should, at the very least, have explained why she believed the FSCA Report to be invalid, so that the FCSC HC could be satisfied that, when exercising its discretion to set the report aside, it had a sufficient legal basis for so acting. A proper explanation would also have allowed the HC to determine whether remittal was appropriate, and whether the punitive costs order sought by the applicants warranted.

(e) Conclusion

1026. The HC set aside the FSCA Report on the basis that Adv Mkhwebane lacked jurisdiction to entertain Mr Malema's complaint in the first place, despite the fact that Adv Mkhwebane vociferously argued to the contrary. This again indicates that Adv Mkhwebane failed to appreciate the essential limits placed on her office by the rule of law. However, the Motion does not impugn Adv Mkhwebane for failing to understand her jurisdictional limits in respect of the FSCA Report. This failing therefore cannot be taken into account as a ground of incompetence.

1027. The allegation that Adv Mkhwebane conceded the irrationality, forensic weakness or error of law in the FSCA Report is not supported by the evidence, because there simply is no explanation for her concession. However, that lack of explanation demonstrates that Adv Mkhwebane failed to make the necessary full disclosure to the FCSC HC, thus failing to appreciate, and act in accordance with, her heightened duty as a public litigant.

(iv) Did Adv Mkhwebane demonstrate incompetence as alleged in Charge 3

1028. In respect of the Lifeboat Report, the preceding investigation and the subsequent litigation, the evidence establishes that Adv Mkhwebane:

1028.1. grossly exceeded her powers, in a manner that was legally indefensible and resulted in substantial economic harm;

1028.2. failed to appreciate her jurisdictional limitations and issued a report that was internally contradictory on the issue of what the PPSA was properly investigating;

1028.3. failed to appreciate not only the requirements of the Prescription Act, but the basic elements of how legislation applies and is interpreted;

1028.4. completely failed to ensure a rational and adequate evidentiary basis for the remedial action she imposed, which remedial action was entirely inappropriate and bore no rational relationship to the concerns that had been identified in the Lifeboat Report; and

1028.5. repeatedly sought to defend her unlawful conduct before the courts.

1029. In respect of the Vrede Report, the preceding investigation and the subsequent litigation, the evidence establishes that Adv Mkhwebane:

1029.1. granted entirely inadequate remedial action that failed to provide administrative justice in respect of the core components of the complaints and the members of the public most in need of her assistance;

1029.2. treated the issues and evidence in respect of the complaints of overcharging in an irrational and incoherent manner;

1029.3. was responsible for numerous material omissions and misleading impressions in presenting the PPSA's case to the HC; and

1029.4. repeatedly sought to defend her unlawful conduct before the courts.

1030. In respect of the FSCA Report, the preceding investigation and the subsequent litigation, the evidence establishes that Adv Mkhwebane failed to explain to the court and the other litigants why she believed the FSCA Report to be invalid, thus depriving the HC of the ability to assess *(a)* whether Adv Mkhwebane had conceded for a good reason; *(b)* whether its order should include any further directions to avoid a repetition of the vitiating error; and *(c)* whether the punitive costs order sought by the applicants was warranted.

1031. Thus, across very important investigations, and in numerous rounds of superior court litigation, Adv Mkhwebane has demonstrated a repeated and sustained failure to deal with evidence in a rational and appropriate manner, as well as a fundamental inability to engage with critical legal principles or to fashion appropriate remedial action. Adv Mkhwebane has also repeatedly neglected the duties that a constitutional office-bearer, an officer of the court and an organ of state owe to the courts, demonstrating lack of knowledge and legal skill and failing to ensure that the complete Rule-53 record and an accurate and full account is provided in her affidavits. Numerous inaccuracies are reflected above. The inadequacies of the Vrede investigation, and the excesses of the Lifeboat investigation – both of which caused serious harm, though in very different ways – are such that they would have destroyed a reasonable member of the public's confidence in her ability to discharge her duties and functions.

1032. These repeated failures, and Adv Mkhwebane's conduct in seeking to defend them before numerous courts, shows both a sustained lack of the necessary knowledge and skill, as well as a fundamental inability, to discharge the duties of office in an effective and efficient manner, or at all.

1033. **The Committee therefore finds that Adv Mkhwebane has demonstrated incompetence.**