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]

PART B

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A. CHARGE 4: PARAGRAPH 10 – ALLEGED INTIMIDATION, HARASSMENT AND/OR VICTIMISATION OF STAFF EITHER DIRECTLY OR THROUGH THE ERSTWHILE CEO, MR MAHLANGU

1. Paragraph 10 of Charge 4 of the Motion alleges that Adv Mkhwebane committed misconduct in that she has intimidated, harassed and/or victimised staff, alternatively has failed to protect staff in the PPSA from intimidation, harassment and/or victimisation by the erstwhile CEO of the PPSA, Mr Mahlangu, in particular the following staff members who have been threatened with, or had disciplinary action taken against them unlawfully and on trumped-up charges:

    1.1. Provincial Representative of the Public Protector: Free State, Mr Sphelo Samuel;

    1.2. Chief Investigator, Mr Abongile Madiba;

    1.3. Chief Investigator, Ms Lesedi Sekele;

    1.4. Executive Manager, Ms Pona Mogaladi;

    1.5. Chief Operations Officer, Ms Basani Baloyi;

    1.6. Senior Investigator, Mr Teboho Kekana; and

    1.7. Senior Investigator, Adv Isaac Matlawe.

(i) <u>General complaints</u>

2. In her response to para 10 of the Motion, Adv Mkhwebane raises various issues, including the relevance of the evidence of the witnesses called regarding the allegations in para 10. This was primarily premised on a on the fact that the IP, in performing a desktop exercise, found no *prima facie* evidence in respect of para 10. Further that the evidence led is irrelevant and that the majority of the witnesses called '*to the tune of more than 80%*' were called to testify on this charge and yet conceded that there was no basis for this charge.

3. First, as explained in the introduction to this Report, the IP did not and could not exclude para 10 of the Motion from what the Committee was mandated to consider. Second it is not correct that the majority of witnesses called were in relation to this charge. In total, the evidence leaders called eighteen witnesses to give evidence before the Committee. From those, eight witnesses (Ms Mogaladi; Ms Nkabinde; Ms Motsitsi; Ms Baloyi; Mr Mahlangu; Mr Samuel; Mr Kekana, Mr Tebele and Mr Tyelela) were called in relation to the allegations made in para 10. It is a deliberate misrepresentation that witnesses led in relation to Charge 10 constituted 80% of the witnesses before

the Committee. Given that five are referred to and had relevant evidence at their disposal, the Committee could not avoid calling them.

4. In particular, Mr Mahlangu was named as a possible offender, and entitled to be heard. Ms Mogaladi, Ms Nkabinde and Ms Motsitsi are the Executive Managers at PPSA and it was appropriate that they avail themselves to the Committee to answer questions regarding the PPSA working environment, relevant to both para 10 and 11. Their evidence was also relevant to other charges: para 7.3 of the Motion in respect of Ms Mogaladi, and para 11.1 in respect of Ms Nkabinde, Ms Motsitsi and Mr Samuel. Messrs Samuel and Kekana were also critical to the Vrede and Lifeboat investigations, respectively. This is not to say that other witnesses employed at the PPSA were not asked if there were victimised, harassed or intimidated, but it could hardly be construed with reference to the totality of their evidence, that it related to para 10. Moreover, the record reflects that Adv Mkhwebane's legal representative spent a considerable amount of time in relation to para 10 and seeking to discredit witnesses.

5. Moreover, Adv Mkhwebane's complaint regarding the relevance of the evidence of the above witnesses disregards the overlap between the allegations made in para 10 of the Motion, and those made in para 11.1 and the relevance of the witnesses's evidence to both para 10 and issues raised in para 11.1.

6. The Motion does not ascribe meanings to 'harassment; intimidation and victimisation'. The test applied by the Committee is therefore with regard to labour and common-law understandings of these concepts and a consideration of whether the alleged conduct goes against the standards of conduct to be expected of a person in the office of Public Protector. For comparative purposes the meanings are set out below.

(a) Definition of 'harassment'

7. The Oxford Dictionary defines harassment as '*intimidation, bullying, threatening, or coercive behaviour, including manner of speech, usually by a superior toward a subordinate, sometimes by colleagues in an organisation.*'

8. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 describes harassment as '*unwanted conduct in the workplace which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences.*'

9. The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace ('**the EEA Code**'), in terms of the Employment Equity Act 55 of 1998 came into effect on 18 March 2022. The EEA Code aims to eliminate all forms of harassment by providing guidance on the policies and procedures to be implemented to deal with harassment in the workplace. The EEA Code recognises various forms of harassment amounting to unfair discrimination. It is a useful indicator to the meaning of harassment in para 10 of the Motion. According to the EEA Code the term '*harassment*' is generally understood to be unwanted (or unwelcome) conduct which:

   9.1. impairs dignity;

   9.2. creates a hostile or intimidating work environment for one or more employees, or is calculated to, or has the effect of inducing submission by actual or threatened adverse consequences; and

   9.3. is related to one or more grounds in respect of which discrimination is prohibited in terms of s 6(1) of the EEA.[1]

10. Examples according to the EEA Code, include physical and sexual abuse, but also abuse of a psychological or emotional nature. It is an objective test whether conduct constitutes harassment, from the perspective of the person who alleges the harassment. The primary focus is on the impact of the conduct, with reference to the '*reasonable person*' test.

(b) Definition of 'intimidation'

11. The Cambridge Dictionary defines intimidation as '*the action of frightening or threatening someone, usually in order to persuade them to do something that you want them to do*.'

12. The EEA Code describes intimidation as intentional behaviour that would cause a person of ordinary sensibilities to fear injury or harm. The Labour Appeal Court held that, to constitute intimidation words need not be directed at particular persons, and further that words are intimidatory if they are calculated to '*terrify*', '*overawe*' or '*cow*'.[2]

(c) Definition of 'victimisation'

13. The Cambridge Dictionary defines victimisation as the act of treating someone in an intentionally unfair way, especially because of their race, sex, beliefs, etc. The statutes regulating Labour Law do

[1] 's6 Prohibition of unfair discrimination:
'(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.'

[2] **Adcock Ingram Critical Care v CCMA and others** (2001) 22 ILJ 1799 (LAC).

not directly define victimisation. However, the Labour Relations Act 66 of 1995 deals with victimisation in an indirect way. For example, s 186(2) deals with certain unfair labour practices that could amount to victimisation, including:

13.1. unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee;

13.2. the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

13.3. a failure or refusal by an employer to reinstate or reemploy a former employee in terms of any agreement; and

13.4. an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, on account of the employee having made a protected disclosure defined in that Act.

(ii) Para 10.1 of the Motion: Mr Samuel

14. Mr Samuel is a Provincial Representative (i.e. the Head of a Provincial Office) at the PPSA. He was suspended from the PPSA on 11 March 2020 and subjected to disciplinary action. The disciplinary action was based on, among other things, Mr Samuel's alleged assault of Mr Nchaupe Peter Seabi (a member of the public who had brought a complaint to the PPSA) as well as Mr Samuel's unrelated alleged conduct in bringing the PPSA into disrepute. Mr Seabi subsequently gave evidence to the Committee at the instance of Adv Mkhwebane detailing the assault and further events. That an altercation between the two occurred is common cause; although there are different versions regarding who instigated it. Both Mr Samuel and Mr Seabi initially laid charges of assault against each other but the NPA declined to prosecute. Mr Seabi reinstated his complaint and Mr Samuel was convicted by a criminal court for the assault, on 6 October 2017. An appeal is pending in respect thereof, the merits of which are for a court, not this Committee, to determine.

15. After the assault occurred in December 2011, which was during the tenure of Adv Madonsela, the PPSA absolved Mr Samuel of any wrongdoing following an assessment of what occurred. Following the criminal conviction, in 2017 Mr Seabi instituted a civil suit against the PPSA and Mr Samuel, claiming damages in an amount of R350 000.00 arising from the assault.

16. In November 2017, Mr Nemasisi alerted Adv Mkhwebane thereto and advised her, amongst others, that the failure to take disciplinary action against Mr Samuel as a result thereof had the potential to set a bad example for other employees at the PPSA. At this time his advice was not heeded.

17. On 11 February 2020, Mr Samuel deposed to an affidavit bringing to the attention of the Speaker of Parliament, *inter alia*, '*some of the unhealthy working conditions the staff in the PPSA are subjected to…*'. Mr Samuel alleged that Adv Mkhwebane had introduced an environment of '*fear, intimidation and mistrust among staff members*' and that the, Mr Mahlangu, as CEO, had '*issued threats and intimidated staff, including Senior Managers, with disciplinary action and earned himself the nickname of 'the PP's Henchman' among some staff members because of his relentless issuing of suspensions and disciplinary notices against staff members.*'

18. On 9 March 2020, Mr Samuel wrote to the acting CEO raising concerns about increasing legal costs at the PPSA, seeking documents relating thereto, especially in respect of litigation expenditure which appeared to be on the rise. The next day – on 10 March – he wrote to Adv Mkhwebane requesting that she resign given, *inter alia*, the CR17 judgment which had been scathing about her conduct. On 11 March 2020, the PPSA preferred various disciplinary charges against Mr Samuel, one of which related to the assault incident. The others related to Mr Samuel's conduct in submitting his first affidavit to the Speaker and answering media queries relating thereto allegedly in contravention of the PPSA communication policy. He was also charged with inciting fellow employees to come forward with complaints.

19. Mr Samuel claims that he was subjected to disciplinary proceedings in March 2020 because of Adv Mkhwebane's malice towards him. He was suspended pending the outcome of the disciplinary hearing during which time his laptop was removed. He was found guilty following the disciplinary hearing and dismissal was recommended. Adv Mkhwebane terminated his employment in December 2020. He challenged his dismissal and was subsequently reinstated.

(a) Did Adv Mkhwebane and/or Mr Mahlangu intimidate, alternatively harass, alternatively victimise Mr Samuel?

20. There is no evidence before the Committee which supports a conclusion that Mr Mahlangu victimised, harassed or intimidated Mr Samuel. Although the evidence of Mr Mahlangu was that Mr Samuel was charged at his instance, this is contradicted in that Mr Samuel was charged on 11 March 2020, by which date Mr Mahlangu had left the PPSA, having served out his notice by end January 2020. Mr Mahlangu's explanation for the failure to serve disciplinary charges relating to the assault during 2017 (after November); 2018; 2019 and earlier than March 2020 was that

Mr Samuel was on sick leave for long periods, and he invited the evidence leaders to verify this. However, the verification revealed that, in the relevant period, Mr Samuel was on sick leave during these periods: 15 April 2019 until 31 May 2019; from 13 October 2019 until 20 December 2019; from 4 February 2020 until 10 February 2020; and 12 February 2020 until 8 March 2020. The evidence therefore did not support Mr Mahlangu's explanation, and no records were provided that indicate that Mr Mahlangu had made any recommendation to institute disciplinary proceedings earlier, on the basis of the assault. Further, apart from the assault, the other disciplinary charges related to events that occurred after Mr Mahlangu had left the PPSA. His version is hence not credible.

21. In relation to Adv Mkhwebane, members expressed the views that the evidence shows that she either intimidated, alternatively harassed, alternatively victimised Mr Samuel on the basis of the timing of the charges brought against him. In her Part B Statement, Adv Mkhwebane denied that Mr Samuel was purged, victimised or intimidated. However, the timing of the disciplinary charges in relation to the assault was not explained by her, given her knowledge thereof since November 2017; and the fact that the charges were brought the day after he addressed a letter to Adv Mkhwebane requesting her to resign.

22. Members also felt that there is sufficient evidence to support a conclusion of intimidation, alternatively harassment, alternatively victimization of Mr Samuel by Adv Mkhwebane arising from him being served with disciplinary charges after what he regarded as a protected disclosure affidavit to the Speaker raising issues within the PPSA including Adv Mkhwebane's management style, the culture of fear, and engaging in reckless litigation at the expense of necessary programmes. This, various members viewed as a clear retaliation by Adv Mkhwebane against Mr Samuel as a result of his challenge to her authority.

(b) Was Mr Samuel subjected to an unlawful disciplinary process, based on trumped up charges?

23. Mr Samuel challenged his dismissal by referring a dispute to the CCMA on the grounds of unfair dismissal. On 4 July 2022 the CCMA exonerated him, ordering his reinstatement and a payout of R1 500 000. Over and above the award by the CCMA, the legal costs to the PPSA just in relation to the CCMA matter exceeded half a million Rand. The CCMA award characterised the case against Mr Samuel on some of the charges as *'hopeless'* and something that could not constitute misconduct *'by any stretch of the imagination*'. The Commissioner concluded that *'the disciplinary action … is a clear demonstration of anger. Anger at the applicant's request to [the Speaker of the National Assembly] of 11 February 2020.'*

24. Aside from his vindication in the CCMA, the evidence demonstrates that the charges levelled against Mr Samuel were motivated by an ulterior or improper purpose, as a result of his having spoken out to the Speaker and the media (and therefore the public) regarding conditions in the PPSA under the leadership of Adv Mkhwebane. The motive was to punish Mr Samuel and the purpose was to purge him from the PPSA.

25. In the circumstances, however, the allegation of unlawful disciplinary action based on trumped-up charges is not substantiated in respect of the charges related to the assault as these could be justified based on the information then available of the criminal conviction and the lodging of a civil claim. However, in relation to the submission of an affidavit with the Speaker, the Committee finds that this supports a finding of victimisation, alternatively harassment, alternatively intimidation. Given Parliament's oversight function of the Public Protector, it is the appropriate forum to raise concerns relating to the PPSA.

26. In addition, the Committee regards as serious any finding of a criminal conviction and respects the findings of a Court in this regard which, as Adv Mkhwebane's legal representative pointed out, presently still stand. Thus, whilst it acknowledges that the appeal in respect thereof is pending, its findings on this incident should not be construed as an acceptance of Mr Samuel's version of the assault incident or a rejection of Mr Seabi's version thereof. This consideration falls outside of the mandate of this Committee.

(iii) Ms Ponatshego Mogaladi and Ms Lesedi Sekele (10.3 and 10.4)

27. Ms Mogaladi and Ms Sekele are employed as EM and Chief Investigator respectively and on 14 November 2019, Ms Mogaladi was served with six disciplinary charges, five of which related to allegations of gross misconduct in respect of the review of the FSCA report in relation to para 7.3 of the Motion. Ms Sekele faced five disciplinary charges.

28. The documentary evidence reflects Adv Mkhwebane's involvement in determining witnesses to testify against Ms Mogaladi. The disciplinary hearing commenced in September 2020 before Adv Kuboni. On 9 April 2021, he found Ms Mogaladi guilty on four charges, recommending suspension without pay for three months, coupled with a final written warning. Ms Sekele was found guilty of three charges, and Adv Kuboni recommended that she be suspended for two months without pay, with a final written warning.

29. Adv Mkhwebane disagreed with the recommended sanction and dismissed both with immediate effect, considering '*the nature of the misconduct, the guilty verdict, and the breakdown of the*

relationship of trust' between the employer and employee. In her dismissal letter, Adv Mkhwebane invited them to make representations on why a sanction of dismissal was not appropriate in those circumstances. They urgently approached the Labour Court obtaining an interdict preventing Adv Mkhwebane from implementing her desired sanction (i.e. dismissal). The Court concluded that the PPSA had, in the circumstances, been bound to follow Adv Kuboni's recommendation and that the decision to dismiss rather than suspend Ms Mogaladi and Ms Sekele was unlawful. Leave to appeal was sought and dismissed with costs on 24 July 2021.

30. On 10 August 2021 Adv Mkhwebane wrote to Ms Mogaladi and Ms Sekele indicating that, pursuant to their suspension, they were to absent themselves from the workplace from 12 August 2021 until, in the case of Ms Mogaladi, 12 November 2021 and in the case of Ms Sekele, until 12 October 2021 as per the sanction recommended by Adv Kuboni. After their suspension, both returned to work. Further indicating her intent to '*review the sanction of the chairperson in the Labour Court. However, such review will not affect the implementation of the sanction*'. A review application was launched in the Labour Court. On 27 July 2022 (at which time Adv Mkhwebane was suspended) it was withdrawn by the PPSA with a tender of costs.

(a) Were Ms Mogaladi and Ms Sekele intimidated, harassed and/or victimised by Adv Mkhwebane and/or Mr Mahlangu?

31. Ms Mogaladi's victimisation claims appear in her written and oral evidence to the Committee. She alleges that she had '*personally been threatened with disciplinary action by the PP for not meeting the deadlines for submitting reports*' when she was '*going through traumatic circumstances due to death of an immediate family member*' or when '*objectively, based on workload and other factors related to that, the deadline just could not be met*'. She testified to various instances when Adv Mkhwebane instructed Ms Motsitsi, then the Acting Chief Operations Officer (ACOO) to whom Ms Mogaladi reported, and Mr Mahlangu to issue warning letters to her and the ACOO, for failing to deliver reports, after Adv Mkhwebane rejected the reasons given as to why those reports could not be concluded.

32. In relation to Ms Sekele, the evidence is that Adv Mkhwebane instructed the ACOO to issue Ms Sekele with a verbal warning for failing to meet the target set to submit s 7(9) notices – this in response to a detailed memorandum presented by Mr Madiba setting out why certain of the deadlines had not been met.

33. In relation to Ms Mogaladi, the evidence is that Adv Mkhwebane demanded the completion of reports by various units, to be submitted by 25 October 2018. On 31 October, Ms Mogaladi

submitted reasons to the ACOO why some were not submitted. On 13 November 2018, Adv Mkhwebane instructed the ACOO to issue Ms Mogaladi with a warning letter for failing to deliver in connection with the Dube investigation, in effect rejecting the explanation provided.

34. Also, on 19 November 2018, Adv Mkhwebane instructed Mr Mahlangu to issue a final written warning or a warning letter to Ms Mogaladi for failing to deliver the PEU report. On the same day, in the same instruction to the CEO, Adv Mkhwebane instructed the CEO to issue a final written warning or warning letter to Ms Motsitsi in her capacity as the ACOO, as Ms Mogaladi's supervisor, for failing to ensure the delivery of the PEU report.

35. In response to Adv Mkhwebane's instruction, Mr Mahlangu issued an *audi* letter to Ms Mogaladi, not the final written warning or warning letter he had been instructed to do, requiring her to submit reasons to him, by 23 November 2018, as to why Adv Mkhwebane's instruction had not been adhered to in relation to the PEU matter. This, notwithstanding the detailed explanation already provided directly to Adv Mkhwebane on 16 November 2018, setting out various challenges that had arisen during the course of the PEU investigation.

36. Ms Mogaladi further placed evidence before this Committee of an incident in April 2018 when a family member was ill. When she first informed Adv Mkhwebane hereof on 13 April 2018, she showed empathy for Ms Mogaladi and her family. However, after informing Adv Mkhwebane on 18 April of the passing of her relative and Adv Mkhwebane's expression of condolence, Adv Mkhwebane thereafter, on the same day, followed-up with a message requesting that all the letters and reports in connection with six different investigations be submitted, and informed Ms Mogaladi that if she (Adv Mkhwebane) did not get the Kgomo report on the same day Adv Mkhwebane would have no option but to request the ACEO to initiate disciplinary processes. Adv Mkhwebane further stated that the remaining work had to be submitted by 13h00 the following day, failing which Adv Mkhwebane would also take action.

37. Members of the Committee expressed differing views, to the effect that these incidents constituted evidence that justified a conclusion that Adv Mkhwebane victimised, alternatively intimidated, alternatively harassed Ms Mogaladi.

38. As Ms Mogaladi did not report to Mr Mahlangu, but to the ACOO, some members regarded Mr Mahlangu to having participated, or at the very least aided in the victimisation, alternatively intimidation of Ms Mogaladi by Adv Mkhwebane in his dealings with her on the PEU matter, as he executed her instruction. It bears pointing out, however, that this Committee is not tasked with making findings against Mr Mahlangu and accordingly does not do so.

39. Similarly in relation to Ms Sekele, members expressed the views that there is sufficient evidence of victimization, alternatively harassment, alternatively intimidation demonstrated in Adv Mkhwebane's instruction to the ACOO that a warning be issued to her for failing to meet deadlines, after rejecting the explanation furnished to her.

40. In making such findings the Committee had regard to the working conditions under which PPSA staff worked, including resource constraints (which appear to be historical); the failure of respondent institutions to co-operate in investigations; insufficient time for investigations and what appeared to be burdensome reporting obligations. It would also be remiss of the Committee not to acknowledge that Adv Mkhwebane inherited a backlog which, under her leadership, was significantly reduced and she sought to streamline processes and improve performance.

(b) Was the disciplinary action taken against Ms Mogaladi and Ms Sekele unlawful, and based on trumped-up charges?

41. In the Committee's assessment, Adv Mkhwebane put forward a notionally rational reason for disciplining Ms Mogaladi: she was the Executive Manager accountable for the FSCA matter, an investigation that was performed so poorly that the resultant report could not be defended in court. If it was appropriate to hold Ms Mogaladi accountable for the failings in the investigation and the flaws in the report, then it was appropriate to take disciplinary action against her. Similarly, Ms Sekele and Mr Madiba were responsible for the investigation, and the disciplinary charges against them too, arose from their responsibilities as such.

42. Ms Mogaladi's affidavit confirms that she (and Ms Sekele) personally completed the drafting of the FSCA report so that it could be issued by Adv Mkhwebane. It was therefore reasonable to hold them accountable for the contents of that report. There is no dispute that the FSCA report was so flawed that the PPSA could not even mount an effective defence thereof during the review proceedings – this even though the FCSC HC ultimately set the report aside because the PPSA lacked jurisdiction to investigate.

43. At the disciplinary hearing both presented evidence and the PPSA's witnesses were subject to cross-examination. Both were found guilty of some charges. The decision was not overturned for whatsoever reason in formal legal proceedings. They only challenged the sanction. The Committee's function is not to review or dissect the disciplinary finding. No evidence was led which required the Committee to disregard that finding, which appears *ex facie* reasonable.

44. The Committee is therefore satisfied that there is no evidence that the charges resulting from the performance by Ms Mogaladi and Ms Sekele of their respective duties were unlawful, without merit or '*trumped up*' – they were supported by an unchallenged, lengthy and reasoned decision conducted by an independent advocate.

45. Ms Mogaladi testified that she felt victimised because there had been '*several*' other reports taken on review, and no steps taken against employees who worked on them. That claim is not sustainable:

    45.1. The Committee heard from some witnesses – such as Mr Mataboge, the Chief Investigator in the SARS Unit and CR17 / Bosasa investigations – that they were not disciplined despite the reports they assisted in producing having been set aside by the courts and subject to various criticisms. However, the Committee heard no evidence as to why they were not disciplined. It could well be the case that the PPSA was of the view that the circumstances associated with those reports did not disclose culpability on the part of the relevant employees, given that those investigations were directly overseen by Adv Mkhwebane.

    45.2. The PPSA may also have been remiss in failing to initiate disciplinary proceedings in respect of the other reports. That could not have prevented it from taking appropriate disciplinary steps in respect of the FSCA matter. If there had previously been laxity in respect of workplace discipline, PPSA employees could not expect it to continue.

46. A question that therefore arises from Ms Mogaladi's sense of victimization for having been charged and subjected to a disciplinary process pursuant to the FSCA investigation is whether the mere fact of their being charged and subjected to disciplinary proceedings was itself a form of victimisation, harassment or intimidation. The Committee does not view this to be so, given its findings that the disciplinary actions taken against her and Ms Sekele were lawful and that the charges had merit, and given the facts, even if Ms Mogaladi herself regarded it is as victimisation.

47. However, Adv Mkhwebane's refusal to accept the outcomes of the independent disciplinary process and what then occurred after Adv Kuboni issued the ruling on sanction does, in the view of the Committee, call into question whether her conduct constituted intimidation, harassment, or victimisation against Ms Mogaladi and Ms Sekele. In this regard, it bears remembering that the Labour Court called into question Adv Mkhwebane's *bona fides*, in that she offered Ms Mogaladi

an opportunity to make representations on why Adv Kuboni's recommendation should not be replaced with a dismissal, but appeared already to have made up her mind:[3]

> *'[T]he circumstances would have been slightly different, had the Public Protector afforded them an opportunity to make a representation as to why a different sanction other than or including a dismissal ought to be imposed. Instead, they are informed that they are dismissed with immediate effect and are thereafter called upon to show cause why they should not be dismissed. The irony is clearly self-evident, and the applicants' scepticism of the Public Protector's bona fides is not misplaced.*
>
> *The submission made on behalf of the Public Protector that following representations by the applicants as requested, it may be so that their sanctions are even reduced. This proposition is indeed far-fetched and is clearly not supported by the content of her letter and its tone.'*

48. Adv Mkhwebane's rejection of the outcomes of the disciplinary process; the tenor of her letter imposing summary dismissal instead; and the lengths to which Ms Mogaladi and Ms Sekele were compelled to go to vindicate their rights and secure their livelihoods, caused members to conclude that Adv Mkhwebane's conduct constitutes either victimisation, alternatively harassment; alternatively, intimidation against Ms Mogaladi and Ms Sekele.

(iv) Mr Abongile Madiba (10.2)

49. Mr Madiba was a chief investigator at the PPSA who had, like Ms Mogaladi and Ms Sekele, been suspended and charged in relation to the FSCA investigation and was dismissed in July 2021. The evidence is that he passed away shortly after his dismissal.

50. In the absence of evidence from Mr Madiba, the Committee finds there to be no concrete evidence of his intimidation, harassment or victimization by Adv Mkhwebane and/or Mr Mahlangu. In addition, there is no evidence to substantiate a finding that the disciplinary action taken against him was unlawful, or that the charges against him were trumped-up because they lacked merit.

(v) Ms Basani Baloyi (10.5)

51. Ms Baloyi was appointed as the Chief Operations Officer ('**COO**') on 1 February 2019 on a fixed, 5-year contract, with a 6-month probationary period. In October 2019, she was informed by Mr Mahlangu that her employment would not be confirmed beyond the probationary period, which had lapsed on 1 August already. Her evidence was that she was purged from the PPSA by Adv Mkhwebane and Mr Mahlangu because she had come to be viewed by them as a barrier standing in the way of them pursuing their personal agendas in the institution unchecked.

[3] **Ponatshego Mogaladi and Another v Public Protector, South Africa** (J528/21) [2021] ZALCJHB 64 (28 May 2021) at paras 25.14 and 25.15.

52. The evidence is that she faced a massive backlog of approximately 466 cases older than two years. One of her priorities was to deal with that backlog. She resolved 284 (63%) of those cases in her first two months before the end of the 2018/19 financial year, and by the time that she left the PPSA in October 2019, she had finalized a further 83 cases. Adv Mkhwebane did not dispute this evidence in her AA filed in response to the HC application brought by Ms Baloyi against, *inter alia*, the PPSA and Adv Mkhwebane after Ms Baloyi's contract was not confirmed. This evidence was corroborated by Ms Thejane and Ms Motsitsi, the latter of whom testified that she has never met a more hands-on hard worker or dedicated public servant such as Ms Baloyi in her entire career, and that Ms Baloyi made significant strides in reducing the backlog during her short time in the PPSA.

53. According to Mr Mahlangu, however, Ms Baloyi was not performing, leading to her contract not being confirmed after her probationary period ended. Though that was on 1 August 2019, and she was only informed of the termination of her contract in October 2019.

54. In his letter to Ms Baloyi dated 8 October 2019 inviting her to make representations on the confirmation of her employment, Mr Mahlangu informed Ms Baloyi that since 1 August 2019 the PPSA had not been able to confirm her contract and considered it necessary to afford both her and the organisation an opportunity to continue assessing her performance. This explanation is inconsistent with the explanation upon which Adv Mkhwebane relies on in her Part B Statement, which is this: according to the evidence of Mr Tyelela, Ms Baloyi's issue was a slip on the part of HR in that information relating to the end of Ms Baloyi's six-month probation was sent to Adv Mkhwebane and not the CEO, and the CEO only became aware of this two months later in October. It is evident from Adv Mkhwebane's own explanation (based on Mr Tyelela's evidence) that she herself was timeously advised, that Ms Baloyi's probation had come to an end. Given Mr Tyelela's evidence that Ms Baloyi reported to Adv Mkhwebane, it seems correct that HR informed Adv Mkhwebane of the end of Ms Baloyi's probation, rather than the CEO. It would seem therefore from the evidence that is before this Committee that, after being informed thereof, Adv Mkhwebane took no steps in relation to Ms Baloyi's contract at the end of her probation.

55. The evidence of Mr Tyelela, the HR manager was that:

    55.1. He was not provided with any performance assessments relating to Ms Baloyi during her period of employment.

    55.2. When Mr Mahlangu informed him that he would not confirm Ms Baloyi's appointment, he was surprised as she was a good employee.

55.3. Mr Mahlangu did not advise him of what factors, other than performance, he considered in his decision not to confirm her contract.

55.4. Ms Baloyi in any event reported to Adv Mkhwebane functionally, and accordingly the decision not to confirm her contract was not Mr Mahlangu's to make. Mr Mahlangu's authority, or lack thereof, to terminate Ms Baloyi's contract is one of the issues Ms Baloyi raised in the HC litigation. Ms Baloyi's evidence was that when Mr Mahlangu delivered the letter of termination to her, he had stated that he was acting under the instructions of Adv Mkhwebane but there was no evidence that Adv Mkhwebane took any issue with her appointment not being confirmed.

56. The fact that Adv Mkhwebane endorsed the termination of Ms Baloyi's contract is evident from the letter she addressed to Ms Baloyi, dated 29 October 2019, where she reiterated the contents of the termination letter served by Mr Mahlangu on Ms Baloyi and further confirmed, for the avoidance of doubt, that the PPSA will not be confirming Ms Baloyi's permanent employment.

57. There is evidence of an incident in August 2019 when Ms Baloyi's daughter was hospitalised; she needed to take leave and Mr Mahlangu refused to allow this. Whilst at hospital with her daughter Adv Mkhwebane enquired about some reports. After Ms Baloyi informed her that she was in the hospital with her sick daughter; Adv Mkhwebane replied by informing her that she (Adv Mkhwebane) would be taking action against Mr Mahlangu for Ms Baloyi's failure to meet deadlines, and that if she had submitted all the required reports on time Ms Baloyi's emergency would not portray Adv Mkhwebane as insensitive. Ms Baloyi then had to continue working at the hospital to meet deadlines whilst attending to her child. This was corroborated by Ms Motsitsi.

58. Ms Baloyi's evidence that she was pressurised to issue *audi* letters to EMs, even in instances where she understood their constraints and had accepted their explanations was corroborated by Ms Thejane and Ms Motsitsi. In this regard, Ms Motsitsi testified of one night finding Ms Baloyi broken and sitting in her office, mulling over the prospects of her employment being terminated (as she was still on probation), if she did not comply with Adv Mkhwebane's instructions to act against the EMs. Due to the pressure that Ms Baloyi was facing, and the threats to her that if she did not issue the EMs with *audi letters* that action would be taken against her, the EMs asked Ms Baloyi to simply issue the *audi* letters to them, in order to remove the pressure from Ms Baloyi.

59. In the circumstances, views expressed by members were to the effect that there is sufficient evidence to conclude that Ms Baloyi was purged from the organisation without valid reason, and that

accordingly she was either victimised, alternatively harassed, alternatively intimidated by Mr Mahlangu acting on the instruction of Adv Mkhwebane or by Adv Mkhwebane herself.

60. Ms Baloyi was not subjected to disciplinary action. She left the PPSA because of her contract not being confirmed at the end of the probationary period. She therefore does not fall in the class of employees against whom disciplinary action was taken.

(vi) Mr Tebogo Kekana (10.6)

61. Mr Kekana was a senior investigator at the PPSA. His claims of harassment are set out in his affidavit of 12 December 2019, which he styled as a protected disclosure under the Protected Disclosures Act 26 of 2000 ('**the PDA**') – a characterisation that was disputed by Adv Mkhwebane.

(a) Was Mr Kekana intimidated, harassed and/or victimised by Adv Mkhwebane and/or Mr Mahlangu?

62. On 23 July 2019, Mr Kekana received a notice of intention to place him on precautionary suspension. Mr Kekana alleges that a precautionary suspension is only resorted to by an employer where there is a pending investigation against such employee. As he had not been informed of any, it appeared that the purpose of the precautionary suspension was to punish him and/or harass and/or victimise him as a result of him raising concerns of maladministration within the PPSA. Mr Kekana was placed on precautionary suspension on 27 August 2019 and a formal disciplinary inquiry was instituted. He testified that he believed he was being victimised because he had raised concerns of irregular conduct and maladministration on the part of Adv Mkhwebane with his trade union.

63. The views of members were that there is evidence to support either victimisation or alternatively harassment, alternatively victimisation of Mr Kekana by Adv Mkhwebane on the basis that his disciplinary processes, like in the case of Mr Samuel, appear to follow on as a direct result of raising issues of concern within the PPSA.

(b) Was the disciplinary action to which Mr Kekana was subjected unlawful, and based on trumped-up charges?

64. Based on the available documentary evidence, Mr Kekana was charged with three counts relating to the disclosure of confidential information. In 2020 Mr Kekana was found guilty on all three charges and his dismissal was recommended. He was subsequently dismissed in September 2020. This ruling was upheld in the CCMA and there is a review pending before the Labour Court.

65. It is not for the Committee to reconsider the proceedings or decisions of the disciplinary chair, and the CCMA. *Ex facie* there appears to have been a justifiable basis for instituting disciplinary action. There was no evidence before the Committee to gainsay the conclusions, nor would it be the Committee's task to second-guess the outcome of pending proceedings. Moreover, the Committee is not concerned with merits of such charges but rather the timing thereof.

(vii) Adv Isaac Matlawe (10.7)

66. Adv Matlawe was a senior investigator at the PPSA. Mr Samuel's affidavit alleges that Adv Matlawe was '*targeted and purged*' by Adv Mkhwebane. Adv Matlawe resigned from the PPSA on 29 November 2018 such that his last working day was on 31 December 2018. It was only after receiving the resignation notice, that Mr Mahlangu instructed that disciplinary action be taken against Adv Matlawe in relation to the alleged leaking of confidential information. Although Adv Matlawe's disciplinary hearing was set down for 21 December 2018, it was postponed and never concluded. The evidence is that Adv Matlawe was disciplined at the instance of Mr Mahlangu and the matter had nothing to do with Adv Mkhwebane. Moreover, it never came to fruition.

67. The Committee did not hear any evidence from Adv Matlawe. There is nothing to gainsay the evidence that Adv Mkhwebane was not involved in the disciplinary charges against Adv Matlawe. There is no evidence to indicate that Adv Matlawe resigned from the PPSA due to the disciplinary proceedings – he joined the Bar shortly after leaving the PPSA, and his departure may therefore have been completely unrelated to the charges against him, particularly given that any arrangements to join the Bar would presumably have had to have ensued several months prior thereto. There is also no evidence to indicate that the disciplinary charges against Adv Matlawe were unlawful or '*trumped up*'.

68. The evidence therefore does not establish intimidation, victimisation or harassment of Adv Matlawe as alleged in para 10.7 of the Motion.

(viii) Intimidation, victimisation and/or harassment of staff in general

69. Although it particularised the seven individuals dealt with above, para 10 of the Motion further alleged intimidation, harassment or victimisation by Adv Mkhwebane and /or Mr Mahlangu of staff of the PPSA.

70. The evidence of the names witnesses who testified is corroborated and supported by that of Ms Motsitsi and Ms Nkabinde in the context of what was described as a generally unhealthy working

environment within the PPSA. This unhealthy working environment was caused, in the main by the following factors: *(a)* the imposition of unreasonable deadlines; *(b)* instructions to issue formal *audi* and/or warning letters and other general threats that disciplinary steps will be taken; unreasonably long meetings and linked to that long working hours. The impact of these and other factors features more fully in the next charge, i.e., under para 11.1 of the Motion.

71. However, the evidence of Mr Tebele, in the main, supported by that of Mr Lamula, Ms Mvuyana, Mr Sithole, Mr Mataboge and to some extent Mr Van der Merwe does not support the existence of any intimidation, victimisation and harassment either of themselves by Adv Mkhwebane, or of others. Similarly, Mr Ndou's testimony was that he was neither harassed nor victimised.

(ix) Conclusion on intimidation, harassment and/or victimisation

72. The Removal Rules define misconduct as the intentional or grossly negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office. The Committee is in agreement with the IP that neither s 194 of the Constitution nor the NA rules exclude misconduct or incompetence in the context of labour relations from being considered, and the evidence before the Committee, was neither vague nor general. The IP concluded that the evidence before it was vague, resulting in it not being able to conclude that there was *prima facie* evidence of misconduct or incompetence against Adv Mkhwebane in relation to this charge.

73. The Committee shares the conclusion of the IP that the characterisation of an employee as a '*disgruntled employee*' who had either been dismissed or faced disciplinary proceedings does not preclude such person from submitting relevant evidence to this Committee, and consideration being given to that evidence.

74. The Report above has sought to record the views expressed by members in relation to the allegations made in para 10 in the Motion as, during the deliberations, members held and expressed different and divergent views regarding whether particular event/s signified victimisation, or harassment, or intimidation. In regard to all of the named staff members, individual members often expressed the view, in relation to the same incident against the same named individual, that there was victimisation, whilst another member felt that there was intimidation, whilst another member felt there was harassment. It was, however, explained to members that it was not likely that one conclude that Adv Mkhwebane had committed all of the three, i.e., victimisation and intimidation and harassment, or two of the three together (e.g. harassment and intimidation) in relation to the same events regarding the same individual.

75. Although it clear, based on the evidence that the Committee has heard, that the individuals who testified feel subjectively victimised, or harassed or intimidated, it bears remembering by the Committee that, for the purposes of reaching a rational finding in a process that could potentially result in the removal of a constitutional office bearer, the test to be applied is an objective one.

76. The question that is before the Committee is whether the subjective views of members during the deliberations regarding the characterisation of the evidence of the witnesses in relation to para 10 of Charge 4, justify a finding that Adv Mkhwebane committed misconduct, in that she intentionally, or grossly negligently failed to meet the standard of behaviour or conduct expected of a holder of a public office.

77. Certainly, in light of the aforestated there are instances that can be identified as victimisation and/or harassment and/or intimidation, the issue ultimately is whether it meets the threshold for misconduct, taking into account all the evidence made available to the Committee.

78. Adv Mkhwebane appears to have been a hard taskmaster (and the Committee heard a hard worker herself): she was not forgiving when people did not meet their deadlines and was not inclined to give extensions; she required *audi* letters to be issued when people did not meet their deadlines, but as the evidence reflected although the manner in which *audi* letters were used may have made staff feel threatened or harassed especially given the frequency with which it appears to have been issued, it did not result in significant suspensions or dismissals. There was no serious dispute that, in this regard, Adv Mkhwebane was motivated by a desire to improve efficiency in the PPSA rather than to get rid of particular persons. That, generally, is a laudable goal, though the mental and emotional impact on the employees in the organisation was largely ignored.

79. Adv Mkhwebane viewed *audi* letters as no more than an opportunity to explain why a particular individual should not be disciplined (even if an explanation had already been provided) – they were a precursor to formal disciplinary action and allowed for clear communication in order to avoid, if possible, such action. They therefore were not inherently bad but, in fact, could serve a positive function in the workplace.

80. From evidence before the Committee of the staff who received *audi* letters, seemingly the only ones actually disciplined were Mr Samuel, Ms Mogaladi, Ms Sekele and Mr Madiba. In respect of Ms Mogaladi and Ms Sekele, it seems, there may have been some justification: Adv Mkhwebane believed them responsible for conducting an investigation so poorly done that she was forced to concede the review in the HC. Whether they were to blame or not in the circumstances is not the

question for the Committee's determination but whether Adv Mkhwebane can be regarded as having committed misconduct for taking that approach. We think not.

81. In the circumstances, the Committee does not believe that evidence of victimisation, harassment and intimidation of staff by Adv Mkhwebane that had occurred rises to the level of misconduct required as a precursor for removal. The evidence does not reflect that Adv Mkhwebane intentionally set out to victimise, harass and intimidate staff or fail to protect them; nor does the evidence show that Adv Mkhwebane grossly negligently victimised, harassed and intimidated staff at the PPSA. On the contrary, the evidence is that Adv Mkhwebane believed that she was pursuing and maintaining both the standard of behaviour and conduct expected of a holder of the office of the Public Protector.

82. The impact of Adv Mkhwebane's chosen approach, in terms of whether it resulted in the effective and efficient management of internal capacity and staff resources is a matter that arises for consideration in the next section, under para 11.1 of the Motion. For this reason, the evidence in relation to para 10 of the Motion remains relevant for the assessment of the allegation in para 11.1 and the impact of the decisions taken bear relevance to the conclusions raised therein.

83. **Accordingly, the Committee does not make any finding of misconduct against Adv Mkhwebane in respect of para 10 of Charge 4 of the Motion.**

B. PARAGRAPH 11

84. There are four subsections to this charge, in essence relating to a determination as to whether Adv Mkhwebane failed, intentionally or in a grossly negligent manner, to conduct her investigations and / or make her decisions in a manner that ensures the independent and impartial conduct of investigations. It relates to the investigations falling under Charges 1, 2 and 3 and extends to the CR17 Report; the Gordhan / SARS Report; the Sars subpoena case and the GEMS Report. The four subsections read as follows:

> *'Adv. Mkhwebane has committed misconduct by and/or demonstrated incompetence in the performance of her duties by:*
>
> *11.1 failing intentionally or in a grossly negligent manner to manage the internal capacity and resources of management staff, investigators and outreach officers in the Office of the Public Protector effectively and efficiently;*
>
> *11.2 failing intentionally or in a grossly negligent manner to prevent fruitless and wasteful and/or unauthorized public expenditure in legal costs;*
>
> *11.3 failing intentionally or in a grossly negligent manner to conduct her investigations and/or make her decisions in a manner that ensures the independent and impartial conduct of investigations; and/or*

11.4 by deliberately seeking to avoid making findings against or directing remedial action in respect of certain public officials, while deliberately seeking to reach conclusions of unlawful conduct and impose far- reaching disciplinary measures and remedial action in respect of other officials (even where such conclusions and/or measures and/or remedial action manifestly had no basis in law or in fact).'

85. In considering para 11.3 of the Motion and the second part of Para 11.4, with reference to the SARS Unit Report and CR17 Report, consideration must be given to whether Adv Mkhwebane's conduct as established amounts to misconduct or incompetence by enquiring whether: (1) in the performance of her investigations and issuing of her reports she reflected a '*lack of independence and impartiality'* and (2) when she concluded that Messrs Gordhan, Ramaphosa and Pillay were guilty of unlawful conduct and imposing remedial action in respect thereof, such finding was based in law or fact

C. PARAGRAPH 11.1 – MISCONDUCT AND/OR INCOMPETENCE: MANAGING INTERNAL CAPACITY AND RESOURCES

86. Para 11.1 of the Motion alleges that Adv Mkhwebane has committed misconduct and/or demonstrated incompetence in the performance of her duties by failing intentionally, or in a grossly negligent manner, to manage the internal capacity and resources of management staff, investigators and outreach officers in the PPSA effectively and efficiently.

(i) Management staff

87. The evidence of the EMs, Ms Baloyi and Mr Samuel relating to para 10 of the Motion is relevant to para 11.1 of the Motion, as it assists with an assessment of whether internal capacity and resources were effectively and efficiently used. In this regard, they testified to what they described as a generally unhealthy working environment within the PPSA, specifically during the tenure of Adv Mkhwebane. This unhealthy working environment was, according to them, as stated above, caused, in the main by: *(a)* the imposition of unreasonable deadlines; *(b) audi* and/or warning letters including the instruction to issue such *audi* and/or warning letters and other general threats that steps will be taken, coupled with Adv Mkhwebane's operational management style, disabling managers from managing their staff; and *(c)* unreasonably long meetings that negatively impacted on the time available to oversee the conduct of investigations, and linked to that long working hours.

(a) The unhealthy working environment

Meetings

88. There are various governance meetings within the PPSA at which investigation reports are discussed: Leadership meetings; Full Bench meetings; Task Team meetings; and Dashboard meetings.

89. Leadership: executive committee meetings typically attended by Adv Mkhwebane; the DPP; CEO; COO, CFO and the Chief of Staff. When Ms Basani Baloyi was the COO, EMs did not attend Leadership meetings, but after she left, EMs also began to attend Leadership meetings. Leadership meetings deal with management and operational matters and, at times, some items that are dealt with at Dashboard or Task Team meetings often spill over into Leadership meetings. Leadership meetings initially were geared to strategy, though they became less strategic and more operational over time.

90. Full Bench meetings were introduced by the Deputy Public Protector ('**DPP**') when Adv Mkhwebane was on leave and the DPP was Acting Public Protector. The purpose of this was to exercise ultimate oversight of reports before they are signed off by Adv Mkhwebane.

91. Task Team meetings were held on a Monday and they covered priority matters that had to be monitored on a weekly basis, including special attention matters ('**SAM**') and EMEA matters. Every week a Task Register was generated which listed the matters that formed the subject matter of a Task Team meeting. The Task Register had to be updated by the Thursday preceding the Monday meeting. These meetings were attended by the EMs, Adv Mkhwebane, DPP (if available), CEO, the COO, sometimes the investigator or senior investigator and PRs who had to report on a particular matter that was before Task Team.

92. Dashboard meetings are reporting meetings where EMs were required to present their unit's performance on matters that were older than two years. This Dashboard intervention was designed to look at what strides could be made to deal with the backlog of cases, i.e., matters the investigation and completion of which did not occur within the ideal turn-around times set out in the PPSA's service standards, it being common cause that there was a significant backlog that had spilled over to Adv Mkhwebane's term of office.

93. However, over time Dashboard meetings became more intense and more time consuming, because, instead of reporting on the status of each case at a high level, the meetings became more operational in nature. In addition to backlog cases and organisational performance reports, Adv Mkhwebane

required the meetings to report on all active cases (GGI, service delivery, EMEA and early resolution cases). The responsible EMs would be required to report on and explain each one of those matters.

94. Initially Dashboard meetings were scheduled for one day to give a high-level report on older matters, but as they became more intense a single Dashboard meeting could last for up to three days. The scope of Dashboard meetings was further extended to include even matters that were recently received and allocated.

95. Staff capacity, at all levels, began to be consumed by providing input, preparing for and attending Dashboard meetings. This is because preparations for a Dashboard meeting entail: Investigators preparing reports on the progress of all matters (both backlog and current matters) for submission to senior investigator; those reports then being considered, revised and passed up the chain of command i.e. from senior investigators to chief investigators, then to PRs, then to the relevant Senior Manager at Head office, then to the relevant Executive Manager, who would attend Dashboard meetings to explain the contents of the reports and spreadsheets (accompanied by PRs and CIs, on invitation).

96. The reporting requirements for these meetings were substantial, and affected the organisation as a whole, not just executive or senior management. Preparations for a Dashboard meeting could continue well into the night because of meetings during the day and other pressing obligations especially where more information was required from provinces.

97. Ms Motsitsi corroborated the evidence given by Ms Thejane to the Committee, regarding the effect of long meetings on productivity. She stated that under Adv Mkhwebane, EMs, Chief Investigators and Senior Investigators worked abnormally long hours. This was a result of the fact that Adv Mkhwebane required EMs to sit in meetings that would last for hours, and sometimes days, to account mostly on the deadlines and progress of deliverables of work rather than debate the substance/merits of the contents of reports being prepared by those reporting to the EMs. These meetings would then eat into the time required to perform their other functions – i.e. managing their respective branches and various PPSA operations – and this would then require them to work abnormally long hours to discharge those functions. She confirmed that the meetings also became more frequent, more intense and that the scope of Dashboard meetings became more expansive.

98. The EMs corroborated and expanded on Mr Samuel's evidence regarding the reporting meetings held, and how meetings were conducted. Whilst Mr Samuel accepted that in principle it is sensible to have regular reporting to executive management to ensure progress and efficiency within the office, he took issue with the manner in which, in practice, this reporting system was implemented, which rendered it, according to him and as echoed by the EMs, a tool of terror and intimidation.

99. This level and style of reporting took a great deal of time that the EMs would have spent guiding investigations, which is their core work. The length of time that the meetings took, and the manner in which the meetings were conducted by Adv Mkhwebane became problematic for EMs to oversee investigations that fell under their control, because they were seemingly constantly in meetings or preparing for meetings.

Unreasonable deadlines

100. In relation to this heading and the next (*audi* letters), the EMs lauded Adv Mkhwebane's motivation to deal with the backlog of cases and to require staff to set their own deadlines in investigations. There was an appreciation that she was hardworking. They approved of the setting of deadlines as a monitoring tool during investigations. In addition, they also supported the principle of *audi* letters as these provide an opportunity to an employee to be heard in accordance with the principles of natural justice. It was also accepted by them that deadlines can be self-imposed as, when an investigation is starting out, an investigator sets their own deadlines in their investigation plans and may change these thereafter during the course of the investigation.

101. The evidence is that this was not the only challenge presented by Dashboard meetings. The other challenge for staff was the manner in which Adv Mkhwebane conducted Dashboard meetings, and the outcomes that she demanded from EMs and management at these meetings.

102. At these meetings Adv Mkhwebane would insist on deadlines that were impossible to meet and would not allow those deadlines to be missed even when there were good investigation-related reasons for the delays (such as a particular organ of state's failure to provide information timeously).

103. Ms Mogaladi testified regarding Adv Mkhwebane's inflexibility when it came to dates for the delivery of reports. According to Ms Mogaladi, the reasonableness of a deadline must of necessity be informed by factors which include the stage at which an investigation is; its complexity; the resources available to conduct that investigation, and constraints presenting in the investigation.

104. The evidence is that Adv Mkhwebane demonstrated no interest in these factors, all of which can be of relevance to the deadline to be set for the production of the next product. If she was of the mind that a report or s 7(9) notice ought to be delivered sooner than the deadline given, she would then impose her own date. This is what rendered the deadlines unreasonable, the failure or refusal to have regard to factors impacting on the ability to meet a deadline.

105. According to Ms Motsitsi, Ms Baloyi was given unreasonable and unmanageable deadlines in her task to reduce the backlog. Because investigations were already part of a backlog, Adv Mkhwebane insisted on them being completed by a given date irrespective of the peculiarities of each matter, including complexity or uncooperative or unresponsive organs of state. The evidence was that Adv Mkhwebane's was a top-down approach which ignored the realities that the investigators had to deal with and her approach was therefore unworkable.

106. In her Part B Statement to the Committee in response to the complaints raised regarding deadlines imposed by her, Adv Mkhwebane relied on the evidence of Mr Tebele, who testified that investigators and managers imposed their own deadlines for the achievement of certain milestones in their investigations. It is when those self-imposed deadlines were not met that Adv Mkhwebane was unhappy and insisted on consequence management. In her statement, Adv Mkwhebane states that she introduced deadlines in order for employees to perform optimally. She stated that the work at the PPSA, as corroborated by Mr Tebele, is highly demanding and the institution is enjoined by the Constitution to perform professionally at all times. All she ever wanted to do was for staff to put themselves in the shoes of the complainants and as a result, Adv Mkhwebane states, she made staff set their own deadlines and encouraged them to follow standard operating procedures.

107. Additional evidence was presented to the Committee that deadlines were set without due regard to existing challenges thereby comprising deliverables. This was evident from a report drafted by the current CEO, Ms Thandi Sibanyoni, to Adv Mkhwebane dated 17 January 2022, wherein the CEO was reporting to Adv Mkhwebane on corrective action to be taken as a result of non-compliance with targets set in the approved Consolidated Project Plan: Backlog of old matters: August 2021 (Backlog Report). The contents of this Backlog Report support the views expressed by the EMs.

108. The project commenced on 17 August 2021 and its end date was set as 30 September 2021. In that period of 44 days, 272 investigations were to have been completed, 159 of which were GGI cases of two years and older and 113 service delivery cases of twelve months and older. GGI cases are generally accepted to be complex cases.

109. The Backlog Report states the reasons for the non-achievement of the target, which reasons included that the deadline was unrealistic to begin with; the factors that contributed to the development of a backlog in the first place which included low staff morale; various human resource capacity constraints; frequent *ad hoc* requests from head office and meetings which disrupt workflow. The evidence of Ms Thejane was that the 44-day deadline was set by Adv Mkhwebane. In the end, for all the reasons the CEO set out in her report to Adv Mkhwebane, she concluded that any disciplinary

or corrective steps against the responsible EMs would not meet the test for fairness, and she recommended that no disciplinary action be taken against them.

110. This evidence corroborates that of the EMs who testified regarding the imposition of unreasonable deadlines and the impact this had on the ability to meet these targets, and its impact on staff morale. According to Ms Thejane, the factors that contributed to the development of a backlog in the first place included but were not limited to low staff morale. The various human resource capacity constraints and frequent *ad hoc* requests from head office and meetings disrupted workflow. She stated that the manner in which Adv Mkhwebane was proceeding was destroying staff morale; people were broken, chasing Adv Mkhwebane's unrealistic deadlines.

Audi letters

111. Clause 2 of the PPSA's *Policy on Disciplinary Code and Procedure* stipulates that the following principles must inform any decision to discipline an employee: discipline is a corrective measure and not a punitive one; discipline must be applied in a prompt, fair, consistent and progressive manner; and discipline is a management function.

112. The evidence of the EMs, Mr Samuel and Ms Baloyi is that the various reporting meetings became gatherings of fear, both for attendees and for those affected by the meetings, alert that as deadlines were not met that at any time an *audi letter* would be ordered.

113. As is evident from the evidence of Ms Sekele, Adv Mkhwebane instructed the ACOO to issue a verbal warning to Ms Sekele for failing to meet targets, in circumstances where Adv Mkhwebane was not Ms Sekele's line function manager. Ms Sekele reported to Ms Mogaladi, who in turn reported to the ACOO and the latter reported to Adv Mkhwebane. In term of the Disciplinary Policy, the authority to decide whether or not any kind of action was warranted against Ms Sekele lay with Ms Mogaladi.

114. The evidence of Ms Mogaladi was that, in the space of a few days, Adv Mkhwebane instructed:

    114.1. The ACOO to issue a warning letter to Ms Mogaladi, in circumstances where Ms Mogaladi reported to the ACOO. Once again, the authority to decide whether such a letter was warranted lay with the ACOO, not Adv Mkhwebane.

114.2. The CEO to issue a written warning to Ms Mogaladi. Once again, Ms Mogaladi's supervisor was the ACOO. The CEO issued Ms Mogaladi with an *audi* letter, when Ms Mogaladi had already furnished a detailed explanation to her supervisor, the ACOO.

114.3. Mr Mahlangu to issue a warning letter to the ACOO, for failing to manage Ms Mogaladi.

115. In all of these instructions, Adv Mkhwebane does not appear to have had regard to the principles stipulated in Clause 2 of the Disciplinary Code.

116. Ms Thejane testified that she assumed her current position at the PPSA – EM: PII – on 1 March 2019 at a time when there was already a massive backlog of over 400 cases older than two years, and the target was to eradicate them by 31 March 2019, being the financial year end. The target was not met, and Adv Mkhwebane was unhappy about this. The target was shifted, first to the end of June 2019, and then once against to 31 July 2019. After a tense Dashboard meeting on 24 June 2019 where these unmet targets in the various cases was discussed, at which it became apparent that Ms Thejane's unit would not meet the target date of 31 July 2019, Adv Mkhwebane instructed the COO, Ms Baloyi to take steps against EMs. On 6 August 2019, Ms Baloyi issued Ms Thejane with an *audi* letter in relation to the failure to meet the target of 31 July 2021, when she was merely five months in the institution, and still serving her probation.

117. Ms Thejane's evidence is that she responded by setting out the following regarding the target dates:

117.1. She explained that whilst she had agreed to the target of 31 July 2019, this was done at the insistence of Adv Mkhwebane who gave no leeway to go beyond this period, and rejected any suggestion that went beyond the stipulated period on the basis that the cases should already have been finalised by 31 March 2019.

117.2. These targets were also set without consultation with the PRs and without taking into account the workload of the affected investigators. This approach created acrimony between Ms Thejane as the EM: PII Inland and the PRs who felt that Head Office did not appreciate their workload.

117.3. This further became evident in an escalation of absenteeism due to ill health. There was no evidence to corroborate this.

117.4. Ms Thejane further pointed out her concern regarding the poor quality of the s 7(9) notices and reports she was receiving from the provinces, which to her was indicative of a serious need for training on report writing for both investigators and PRs.

118. As solutions Ms Thejane proposed that allowance be made for realistic targets to be set that could be committed to and achieved; limiting the number of meetings until these cases can be finalised; in the long-term provide further training to investigators and PRs which will limit re-work, which consumes a lot of time and delays the finalisation of cases.

119. Ms Thejane's evidence was that after she sent her response to the COO, the EMs were instructed to issue *audi* letters to affected PRs but she refused to do so, so that she could maintain morale and focus on the task at hand. Some PRs issued *audi* letters where appropriate but at times, affected individuals would lodge grievances to block action, or request transfers.

(ii) Additional evidence relevant to internal capacity and resources

120. The further corroborative evidence, other than that of the EMs and Ms Baloyi and the Backlog Report of the CEO to Adv Mkhwebane, regarding, amongst other issues, the issue of deadlines and their impact; their being set without regard to capacity issues; the effect of *audi* letters and long meetings is reflected in a Report on engagements with PPSA investigators, provincial representatives and EM's. The engagements were conducted for purpose of gathering information and concerns relating to: (*a)* the non-finalisation of matters within prescribed time frames, resulting in implementing backlog projects to enable finalisation thereof; *(b)* shifting of deadlines, resulting in non-achievement of targets; *(c)* any other matters which may be hindering operations in the office, and to find proposed solutions thereof. The DPP was requested to lead the discussions with the assistance of the acting CEO and the Chief of staff. Meetings were conducted with senior investigators, investigators and assistant investigators countrywide.

121. The following human resources capacity issues were identified:

121.1. Staff stated that capacity challenges are not considered when planning, setting targets, deadlines and/or allocating files. It was recommended that deadlines should consider the available capacity; and that the targets baseline be revised in the 2020/2021 financial year.

121.2. Under tools and practicalities staff stated that travel restrictions adversely impacted on effective investigations as only desktop investigations were being conducted.

121.3. Staff identified the historic backlog as an issue, in that the PPSA was dealing with a backlog of many years with no clear plan, whilst new files are allocated and must be worked on simultaneously to meet service standards. One of the proposed solutions was that a backlog plan be put in place and that there be an analysis conducted of the number and complexity

of the backlog cases and that a special project team be established for cases that are two years and older who will focus only on those files, and no new files should be allocated to members of that team. It was recommended that a project team be considered for the backlog, and that EMs were to drive the turn-around strategy.

121.4. Staff identified as a problem the fact that files as old as 2014 were being allocated in 2019/2020 financial year, which needed investigators to perform miracles to close them before the end of the financial year. They proposed as a solution that it be acknowledged that realistically there will always be a backlog as long as they did not have the resources that they needed such as staff; tools; budget; specialised skills and so on.

121.5. Under target setting and deadlines, staff consulted stated that the 100% targets were not realistic, worsened by the lack of resources, and are not achievable. They proposed that realistic time frames should be developed taking into account the shortcoming, realities and practicalities of the PPSA. It had to be accepted that the backlog can only be reduced not eradicated an accordingly the target level for its reduction cannot be 100%.

121.6. Staff stated further that targets are set very theoretically, and yet the turnaround times depend on the content of each file. They further stated that deadlines / turn-around times are very tight. They proposed as a solution that the performance of investigators should be assessed based on the realities such as case load; when the file was received; complexity of the matter etc. They further proposed that decisions taken by or with Adv Mkhwebane at Dashboard meetings need to consider what is already on the plates of investigators.

121.7. Staff further identified as a problem the fact that managers give short notice on due dates; leaving insufficient time to ensure quality of work due to the high workload. It was recommended that deadlines be discussed for feasibility, be realistic and monitor progress.

121.8. According to staff, *audi* letters were not always justified and cause fear / intimidation. It was recommended that such actions should be considered for exceptional circumstances only.

121.9. Staff stated that they are often called into *ad hoc* meetings or trainings and asked for information at short notice by Head Office most of the time, which breaks concentration and takes up time that is needed for actual investigations.

121.10. Staff reported that there were too many reporting templates at different periods with the same information to be submitted to different offices, which imposes a heavy administrative burden that takes staff away from investigations. It was proposed that templates be streamlined; and that information needed could be drawn from existing information already submitted rather than through repeated requests for the same information in different forms.

122. This Report dated 2020, which resulted from the wide-ranging country-wide consultation with PPSA staff at all levels involved in investigations and reporting, confirmed the following, *inter alia*:

122.1. Deadlines set for the achievement of targets are unreasonable.

122.2. The targets to deal with backlogs are themselves unreasonable.

122.3. Deadlines have no regard to the existing realities of PPSA staff.

122.4. The manner of issuing *audi* letters intimidates staff and creates fear.

123. Ms Thejane's evidence, although clear, under direct evidence, lost some of its lucidity when challenged under cross examination by Adv Mkhwebane's legal representative and she could not remember the minutiae of details, including what she did or did not have regard to. However, the above reports presented by her in her evidence, and their contents – which are reports independent to her and speak for themselves – and were not questioned or addressed during cross examination. Neither did Adv Mkhwebane address the contents of these reports in her statement before the Committee.

(iii) Outreach officers

124. One of the key objectives of operating outreach programs is to ensure access to PPSA services to the most marginalised members of the community. This is a constitutional imperative enshrined in s 182(4) of the Constitution. One way of ensuring this is through outreach, education and public awareness campaigns, as these are more likely to reach communities who are not city-based and do not readily have access to the services of the PPSA or the communications networks that otherwise facilitate such access. Outreach clinics are hence an important component in the performance by the PPSA of its mandate. They entail PPSA staff members going to far-flung areas and informal settlements to take complaints and raise awareness by engaging and interacting directly with members of the community. Funding for outreach had to be accessed from, and approved by, the CEO at Head Office, albeit that there was a budget allocated to provinces.

125. The evidence is that there was a significant reduction in the number of outreach clinics conducted in the 2018/2019 financial year, when compared to the clinics which had been conducted in the 2017/2018 financial year. Clinics conducted dropped from 815 in the 2017/2018 year to 277 in the 2018/2019 year, whilst new cases dropped from 11 943 to 8 717.

126. Furthermore, the target for outreach clinics to be conducted was reduced significantly from that of the 2017/2018 period to the target set in the 2018/2019 year: from more than 800 during the previous financial year to a target of just over 200.

127. The evidence is that by reducing the target so substantially, it became much easier to meet, and therefore much easier to show above-target compliance for audit purposes, at significantly less cost than would previously have been the case. This raised the question as to what happened to the funds that had previously been used to do significantly more outreach to the ordinary people in South Africa, in circumstances where the overall PPSA budget had not been reduced, but in fact increased.

128. The evidence of Mr Samuel was that funds were channelled from the outreach clinics and other core programs of the PPSA such as investigations and necessary travel for the conduct of investigations, to litigation. He stated that he regarded the litigation in which Adv Mkhwebane was involving the PPSA as reckless because some of the litigation was not necessarily for the office to engage itself in or get involved in. He was of the view, that the litigation was not pursued in a circumspect manner considering such factors as prospects of success; and the amount of money that might be involved in pursuing the litigation.

129. Whilst Mr Samuel accepted, as is asserted by Adv Mkhwebane in her Part B Statement, that the Nkandla judgment, which made remedial action of the Public Protector binding, had the effect of increasing litigation against the PPSA in general as more reports were thereafter taken on review, he nevertheless insisted that a more considered approach was required towards litigation in the PPSA, and that the organisation did not have to defend every report that is taken on review unless it is in the interests of the organisation to do so. The evidence is that even as the use of radio to do outreach can indeed enable a wider reach of people for outreach, radio has the limitation of being a one-way communication medium in that it was not an interactive medium as would be the case during physical outreach clinics where complaints and documents are submitted and advice is sought and obtained.

130. Ms Motsitsi's evidence corroborated, in material respects, that of Mr Samuel, with reference to the significant reduction of outreach clinics in the 2018/2019 financial year and the reasons therefor.

131. In May 2017, as EM: Complaints and Stakeholder Management, she looked at the monthly and quarterly reports from provinces. Given that each provincial office had only being allocated R110,000 per annum, two outreach officers and one motor vehicle, with the latter having to be used for investigations and other administration functions as well, she was of the view that a more focused approach rather than a '*one-size fits all*' to maximise the use of limited funds was required, as provinces had varying needs.

132. During a planning session held in November 2017, the PPSA developed a new outreach strategy (intended to be implemented over a period of 3 – 5 years) to raise awareness of, and facilitate access to the PPSA at local level. The evidence of Adv Mkhwebane, which was corroborated by Ms Motsitsi, was that a further rationale for the restricting of outreach to the district model was that under the old model, where the target set for outreach officers was to conduct seven clinics per months, outreach officers would sometimes report having seen five to ten people in their targeted seven outreach clinics per month and would report having achieved their target. This was not ideal, and the new model, devised by Ms Motsitsi, sought to achieve a wider reach.

133. Due to a lack of financial and human resources, the new strategy was implemented conservatively. It was first implemented during the 2018/2019 financial year and continued into the 2019/2020 financial year, when the country was hit by Covid-19 pandemic – which then materially impacted on implementation. This meant that any assessment on the success / failure of the new strategy would be skewed. The evidence of constrained financial resources was presented by Ms Motsitsi through a memorandum dated 7 February 2018 which the Acting CFO, Mr Vusi Menzelwa ('**ACFO**'), addressed to Adv Mkhwebane setting out the dire financial situation in which the PPSA found itself and the causes thereof.

    133.1. Amongst other things, the ACFO referred to the insufficiency of the baseline budgetary allocation to cover the PPSA's financial needs.

    133.2. Overspending on employee costs, mainly due to the implementation of Occupation Specific Dispensation notch progression and merit bonuses for the prior two financial years. The PPSA was allocated R301 million for the 2017/18 financial year of which R217 million (72%) was allocated to employee costs. As of 31 January 2018, the total overspending on employees was R9 143 914.

    133.3. The continued mismatch between the PPSA's allocated budget and its core activities.

133.4. The fact that legal costs had spiralled out of control with a resultant current overspending of R13 345 052; and spending on information and communication technology.

134. The ACFO concluded that, without immediate additional funds being allocated, the '*PPSA will not be able to deliver on its constitutional mandate and will not be able to continue as a going concern.*' It must be noted that this concern was expressed before the end of the first full financial year that Adv Mkhwebane was in office.

135. The memorandum recorded that the PPSA senior management had met twice to discuss the budgetary constraints, which led to the formulation of various cost containment measures. The AFCO also recorded that there were '*no funds to continue with core activities (outreach programs and investigations which require travel)*' and therefore recommended that the annual performance plan should be suspended. It was during this financial year that the then CEO, Mr Mahlangu, issued a circular setting out various cost containment measures, including that provincial offices that had already achieved their outreach targets should not hold further clinics.

136. In addition, the ACFO and Ms Motsitsi, who was then the Acting CEO, signed a memorandum for submission to the NT on 22 February 2018, which sought to secure a bank overdraft facility of R15 million, to address the organisation's financial needs. It followed Adv Mkhwebane's request to the Minister of Finance to approve the facility for purposes of accessing bridging finance. Among the measures mentioned in the memorandum that the PPSA would use to curb expenditure was the '*suspension of all travel including outreach clinics – the only travel that is allowed is for key and strategic trips and only on a special motivation basis*'. This obviously impacted on outreach initiatives, which corroborates Mr Samuel's evidence.

137. From the PPSA's records, the number of people reached by the PPSA significantly decreased with the imposition of the new policy from the 2017/2018 to the 2018/2019 financial years (being the precursors to the Covid-19 pandemic).

138. In 2019/2020 planned outreach clinic targets were 208 and actual achievement was 237. During this financial year Mr Mahlangu issued another circular setting out cost containment measures, again indicating that the provincial offices should consider scaling down on outreach clinics if their annual targets were already achieved. Whilst outreach clinics were reduced, the impact on the PPSA is not known. However apparent from the complaints data is the following: the number of new complaints in the 2019/2020 financial year increased from 8 717 the previous year to 10 111 in 2019/2020.

139. In 2020/2021 though there was a planned target of 208, given the Covid-19 pandemic no outreach clinics were held. Outreach efforts were concentrated more on webinars, radio interviews and simulcast, but even so the total number of new complaints received reduced by almost 50% (2019/2020 – 10111 and 2020/2021 – 5108), only marginally increasing in 2021/2022 to 6749.

140. Adv Mkhwebane's response in her Part B Statement does not dispute in any respects the version of Ms Motsitsi regarding the outreach program, and in fact she corroborated that version in her oral evidence to the Committee. However, in her oral evidence before the Committee, which she gave before the submission of her Part B Statement, she nevertheless said the following, inter alia: *'…it was a lie that we had to cut the budget for outreach…'*

141. As to the connection between soaring legal costs and the financial constraints that the PPSA found itself in at the time, Adv Mkhwebane attributed this solely to the effect of the Nkandla judgement in her Part B Statement.

142. Further in her Part B Statement Adv Mkhwebane referred to the ACFO memorandum to her as having stated '*various issues such as budget allocated to the PPSA having been reduced by 10%, the issue of mismatch in terms of the budget allocated to the PPSA and its core activities*,' as some of the reasons for the constraints in which the PPSA found itself at the time.

143. This, however, is not an accurate reflection of the statement made by the ACFO in his memorandum to Adv Mkhwebane regarding budget allocated. Rather, what the ACFO stated was: *'The total cost of employment has grown by 60 percent since the 2014/15 financial year, whereas the average budget growth allocated to the PPSA has been less than 10 percent in the same period.'* It is therefore apparent that the ACFO was reflecting the budget as having grown during the period referred to, rather than having been reduced as alleged by Adv Mkhwebane. The issue was that the growth in budget allocation was less than ideal given the growth in the PPSA's total costs of employment.

144. There are no material differences between the evidence of Mr Samuel and Ms Motsitsi regarding outreach programs, and that of Adv Mkhwebane.

145. There are various aspects of their evidence that Adv Mkhwebane did not address directly in her statement, such as the evidence relating to the impact of cost containment measures on investigations and the administration, as well as Mr Samuel's evidence regarding reckless litigation being a critical component of why, Nkandla judgment aside, litigation costs soared in the manner

that they did, and ultimately negatively impacting outreach, investigations and the administration. This evidence therefore stands undisputed before the Committee.

146. Given that outreach clinics are at the heart of PPSA outreach programs, the rationale to change strategy towards a district model in order to achieve a wider reach is laudable. It can only have been motivated by the desire to be more effective, and to use limited PPSA resources more efficiently. There is no evidence before the Committee therefore to support a conclusion that the internal capacity and resources of outreach officers was managed other in a manner that was not efficient and effective.

147. To the extent, however, that outreach programs may have been negatively impacted by the need to redirect necessary funds away from outreach programs towards litigation, this is a separate issue and more fully dealt with under para 11.2 of the Motion.

(iv) Investigators

148. The evidence is that in much the same way as outreach activities suffered under Adv Mkhwebane, so too did their core activities such as the ability of investigators to conduct investigations.

149. By the time Mr Mahlangu became CEO (in May 2018), provincial offices' funding requests to Head Office for items such as travel would routinely be denied, even though travel allocations had not yet been spent. In other words, even though there was an approved travel budget, staff were not permitted to utilise the funds allocated for travel purposes, because they had already been spent elsewhere. They were not spent by, or even transferred to, the Provincial Office. Mr Mahlangu issued a circular, stating that travel expenditure would not be approved because there was no money for it, even if travel funds had been approved in the budget.

150. Mr Samuel's evidence is that initially, the Free State office leased several vehicles for purposes of undertaking its various activities. The Head Office then cancelled that lease and required staff to purchase vehicles for the provincial office. By 2020, the Free State Provincial Office had acquired two such vehicles. However, they were later effectively grounded because Head Office refused to authorise expenditure associated with travel, including fuel.

151. Outreach officers and investigators were required to use PPSA vehicles to conduct their work. However, when those vehicles were grounded, the officers and investigators' ability to discharge their functions, i.e., travelling for outreach and to conduct investigations, was significantly impaired.

152. Senior managers were permitted to use their own vehicles for PPSA purposes. However, Mr Samuel was the only senior manager in the Free State Provincial Office who could do so. Even then, the travel expenditure he was permitted (e.g., fuel allowances) was limited. His ability, for example, to undertake monitoring visits and file inspections was significantly curtailed.

153. Mr Samuel's evidence in this regard was specific to the Free State office which he headed. He testified that as far as he was aware, other provincial offices were subject to similar restrictions as the Free State office, but he did not have personal knowledge of the situation in those provinces.

154. He testified further that staff were therefore unable to travel from their offices to conduct investigations in the areas where the complaints originated / where relevant witnesses were situated. They were reduced to undertaking desktop investigations and conducting enquiries through correspondence. This greatly hampered the ability to investigate complaints of maladministration and wrongdoing in public affairs and also significantly slowed down the ability to deal with matters. Moreover, the quality of investigations was hampered when limited to a desktop investigations.

155. The evidence shows that this all occurred in a context where the PPSA's budgetary allocation from Parliament was not decreasing revenues for the office increased from year to year. This is borne out by the Annual Reports, and to some extent the ACFO's memorandum to Adv Mkhwebane. These reductions of funds from necessary programs therefore had to be the result of a reprioritisation of funding flows that was internal to the PPSA, rather than one that was imposed externally. In other words, programmes, expenditure and activities were cut because Adv Mkhwebane decided that the funds should be spent elsewhere, not because Parliament reduced its fund allocations.

156. Although Adv Mkhwebane does not dispute the last sentence of the previous para, it would nevertheless appear from the evidence of Ms Motsitsi that it was in fact management that held a meeting and took a decision regarding cost containment measures that were necessary because of the budgetary constraint which the PPSA found itself in at the time. The memorandum from the ACFO to Adv Mkhwebane demonstrates this.

157. A further aspect of the evidence that is before the Committee which is relevant to the assessment of whether the internal capacity and resources of investigators was managed effectively and efficiently relates to the system that the PPSA had in place to ensure that reports that the Public Protector are '*quality assured*' before they are issued. This system requires input from the investigator and/or Chief Investigator responsible for the investigation; then the EM to whom they report and who is accountable for that investigation; the COO (where there is one place) to whom the EM reports as well as input from one of the legal advisers from Legal Services.

158. In relation to the CR17 investigation Adv Mkhwebane testified to a '*team*' being involved in the investigation. The only employee of the PPSA included in this '*team*' was Mr Mataboge working directly with Adv Mkhwebane on both the s 7(9) notices and the drafting of the CR17 Report.

159. Both in relation to the CR17 and SARS Unit investigations the EM and COO was bypassed. Their involvement was minimal. The extent of quality assurance by Legal Services in relation to CR17 was non-existent and minimal in relation to the SARS Unit matter. Moreover, given time and capacity constraints with demands to meet deadlines and reports issued to coincide with media briefings, quality assurance was not always effective, and this impacted negatively on the quality of some of the reports issued. This was the evidence of Ms Thejane, as well as Ms Baloyi.

160. Ms Mvuyana confirmed that in respect of the SARS Unit Report, it went from her to Mr Mataboge and then to Adv Mkhwebane. She believed that at the time there was no Acting CEO, or the one that was there was fairly new but that '*Ultimately that was a decision of the Public Protector'*. Ms Baloyi had been appointed on 1 February 2019, but was not brought into the fold of the SARS Unit investigation or finalising of the report, nor was Ms Mogaladi, who was then the Acting EM: GGI. Ms Mvuyana confirmed that with the SARS Unit report she did not receive any comments from either Ms Mogaladi or Ms Baloyi on the documents. She submitted the SARS Unit Report to Mr Mataboge and does not know who he shared it with. In fact, when Ms Mvuyana was asked whether quality assurance or legal had input into the report, she could not recall whether she had received an email or verbal input. This is a reflection of the limited or absent quality assurance on the final product.

161. In the CR17 investigation, Ms Baloyi accompanied Adv Mkhwebane to the meeting with the President after being given a hard copy of the s7(9) notice to read an hour before the meeting, which she was told to destroy. This was understood to have occurred '*purely for securing the integrity of the investigation but to protect as well, the person we are investigating to protect any person which we got the information from*'. But Ms Baloyi was the COO tasked to oversee the very reports being kept hidden from her.

162. Ms Baloyi also alleges that the investigation into CR17 was conducted by external people and not in terms of the ordinary process, which was most unusual. This Committee will be aware from evidence before it that one, Mr Paul Ngobeni was one of the external parties involved in the CR17 investigation.

163. Given that the PPSA's core constitutional mandate includes the conduct of investigations, the Committee concludes that the above evidence demonstrates that the redirection of funds away

investigations limited the resources available to investigators, and consequently hampered their capacity to perform their functions. In addition, there was a failure to fully and properly utilise the available human resources for purposes of ensuring proper quality control of reports.

164. With all of the above being said in respect of investigations, there no evidence before the Committee to show that in any investigation, the flaws flowed from a lack of investigators. There is insufficient investigator-specific evidence regarding their resources; what they were and what they ought to have been in order to function effectively and efficiently.

165. To the extent that investigations were negatively impacted by funds being channelled to investigations, this is a matter that is dealt with in para 11.2 of the Motion**.**

(v) Conclusion on the failure to manage internal capacity and resources effectively and efficiently

166. The Committee has considered this charge read together with the evidence summarised in respect of Para 10 in respect of the unhealthy working environment.

167. The Committee agrees that it is a laudable and necessary objective to clear the backlog but there appears to have been an emphasis on quantity rather than quality. Whilst the public has the right to have their matters resolved timeously such resolution must be effective. It is also unfair to employees who are constrained, due to factors beyond their control, to be forced into what can be described as malicious compliance whilst Adv Mkhwebane ought to have been aware of the unreasonableness of deadlines and the challenges faced by staff .

168. In addition, the use of certain external service providers rather than internal resources also raises various concerns, which are dealt with further in respect of para 11.2 of the Motion. There was a further view that the evidence established a failure to implement appropriate internal governance measures. In addition, that the way in which the PPSA operated contributed to repetition of errors and therefore a concomitant increase in legal costs. Thus, the use of internal capacity and resources of management staff appears to have therefore been utilised in a manner that was not effective and efficient.

169. An additional view was expressed that whilst previous Public Protectors adopted a benevolent approach to employees, Adv Mkhwebane cracked the whip perhaps too harshly, but the intent was for reports to be finalised speedily.

170. In relation to outreach officers there is insufficient evidence to substantiate this finding. There is no evidence specific to them that sets out for the Committee what their resources were at a given

time; what they ought to have been in order to allow for the effective and efficient performance of their functions. In addition, the Covid-19 pandemic also affected outreach and its impact has not been measured. To the extent that funds for outreach may have been diverted to increasing legal costs this is dealt with separately in respect of para 11.2 of the Motion.

171. However, as was the case in para 10 of the Motion, members were cautioned to bear in mind that the standard is an objective one, and to remember not to be swayed by subjective considerations.

172. **Therefore, whilst the Committee agrees that the working environment was unhealthy and that resources were poorly managed, the Committee is of the view that, on the evidence available to it, this does not rise to the definition of misconduct or incompetence as provided for in the Removal Rules. Accordingly, the Committee does not find that, in respect of Charge 11.1, the conduct of Adv Mkhwebane amounts to misconduct or incompetence.**

D. PARAGRAPH 11.2

173. Para 11.2 of the Motion reads '*Adv Mkhwebane committed misconduct by and/or demonstrated incompetence in the performance of her duties by* ***failing intentionally or in a grossly negligent manner to prevent fruitless and wasteful and/or unauthorised public expenditure in legal costs'*** and for purposes hereof reliance is placed on all the evidence contained in the Motion.

174. Para 11.2 refers to '*fruitless and wasteful*' and '*unauthorised expenditure*'. The meaning of both terms is as per the definition contained in the Public Finance Management Act 1 of 1999 ('**PFMA**') are:

> *'**unauthorised expenditure**' means—*
>
> *(a) overspending of a vote or a main division within a vote;*
>
> *(b) expenditure not in accordance with the purpose of a vote or, in the case of a main division, not in accordance with the purpose of the main division'*
>
> *'**Fruitless and wasteful expenditure**' means expenditure which was made in vain and would have been avoided had reasonable care been exercised.'*

175. Unauthorised expenditure does not apply to the expenditures of the PPSA. To the extent that the Motion may have incorrectly stated '*unauthorised*' as opposed to '*irregular*' expenditure, this has not been considered and the Committee has confined itself to the wording of the Motion.

176. To determine misconduct and/or incompetence requires an assessment as to whether there had been an intentional failure or a grossly negligent failure **to prevent expenditure of legal costs in vain** and **which would have been avoided had reasonable care been exercised**.

(i) Clean audit and fruitless and wasteful expenditure

177. Both in her written representations to the IP and in her evidence to this Committee Adv Mkhwebane stated that under her tenure, the PPSA achieved the unprecedented feat of obtaining three consecutive clean audits from the AGSA. This indeed is laudable.

178. A '*clean audit*' is described on the AGSA website as occurring when: *'The financial statements are free from material misstatements (in other words, a financially unqualified audit opinion) and there are no material findings on reporting on performance objectives or non-compliance with legislation.*'[4] Further, for AGSA purposes, materiality is important. '*Material*' does not mean that the auditee is achieving its targets, but that the information which has been sampled is reliable. Material non-compliance is taken into account but misstatements that are not material or which relate to non-compliance with legislation are not included in the audit report. The quantum of the expenditure may also not be sufficiently material to impact on a clean audit finding for the year in question. For example, based on the institution's budget, it may well be that fruitless and wasteful expenditure under a pre-determined amount would not disturb a clear audit finding.

179. Under s 40(3)(b)(i) of the PFMA the annual report and audited annual financial statements ('**AFS**') must include any fruitless and wasteful expenditure that occurred during the financial year under audit and the PPSA must take effective and appropriate steps to prevent fruitless and wasteful expenditure. The AFS can only refer to what is reported. The annual report and AFS of the PPSA must include particulars of fruitless and wasteful expenditure, that occurred during the financial year and any criminal or disciplinary steps taken as a result of such fruitless and wasteful expenditure. The annual reports for the PPSA indicate that all expenditure relating to fruitless and wasteful expenditure is recognised as an expense in the statement of financial performance in the year that the expenditure was incurred. The expenditure is classified in accordance with the nature of the expense. If the expenditure is recoverable it is treated as an asset until it is recovered from the responsible person or written off as irrecoverable in the statement of financial performance.

180. The auditing process does not involve a 100% audit of all transactions and account balances. Instead, the AGSA considers a sample of transactions and account balances. If expenditure is not regarded

[4] https://www.agsa.co.za/AuditInformation/AuditTerminology.aspx#:~:text=We%20can%20express%20one%20of,or%20non%2Dcompliance%20with%20legislation. Further the AGSA states: 'My objectives are to obtain reasonable assurance about whether the financial statements as a whole are free from material misstatement, whether due to fraud or error, and to issue an auditor's report that includes my opinion. Reasonable assurance is a high level of assurance but is not a guarantee that an audit conducted in accordance with the ISAs will always detect a material misstatement when it exists. Misstatements can arise from fraud or error and are considered material if, individually or in aggregate, they could reasonably be expected to influence the economic decisions of users taken on the basis of these financial statements.' (Emphasis added)

by the institution to be fruitless or wasteful or reported by the institution, it may go undetected by the AGSA unless it is picked up in the sample assessment by the AGSA. It may also be that costs incurred are of such a nature that an auditor will not easily, during the audit, identify that the expense should be classified as fruitless and wasteful. With reference to legal costs, auditors would not question whether or not the legal steps taken (for example a choice to obtain a legal opinion or defend an application), were fruitless and wasteful with the result that fruitless and wasteful expenditure incurred in such cases would not be reflected in the audit.

181. Clean audits are not disturbed if the costs incurred are either not identified as fruitless and wasteful expenditure or have not been identified or communicated to those charged with the audit or are either not material or result in significant risk which requires the auditor's attention.

182. Mr Sithole's evidence confirmed that AGSA audits selected invoices for a specific period and do not consider all invoices. For example, they would take a sample from the panel of attorneys. For example, if the PPSA incurred legal costs and paid the amounts as invoiced, notwithstanding that such amounts do not comply with the PPSA tariff rates for legal services, it would not necessarily upset the clean audit. The PPSA annual reports do not reflect that the AGSA had specifically scrutinised the legal costs incurred in the context of the ongoing and increasing litigation. The AGSA audit assessment at the PPSA was typically focused on its 'Programme 2 – Investigations' which is its core work and it would render an audit opinion accordingly.[5]

183. The Committee is also not inhibited in its regard of legal costs by the ceiling of materiality required by the AGSA in performance of Adv Mkhwebane's responsibilities in the context of audits. An auditor would not be able to make a determination as to whether litigation decisions resulting in exorbitant legal costs would amount to fruitless and wasteful expenditure. However, a consideration

[5] For example with reference to the 2021/2022 the AGSA stated:
'10. In accordance with the Public Audit Act 25 of 2004 (PAA) and the general notice issued in terms thereof, I have a responsibility to report on the usefulness and reliability of the reported performance information against predetermined objectives for selected programme presented in the annual performance report. I performed procedures to identify material findings but not to gather evidence to express assurance.
11. My procedures address the usefulness and reliability of the reported performance information, which must be based on the constitutional institution's approved performance planning documents. I have not evaluated the completeness and appropriateness of the performance indicators included in the planning documents. My procedures do not examine whether the actions taken by the constitutional institution enabled service delivery. My procedures do not extend to any disclosures or assertions relating to the extent of achievements in the current year or planned performance strategies and information in respect of future periods that may be included as part of the reported performance information. Accordingly, my findings do not extend to these matters.
12. I evaluated the usefulness and reliability of the reported performance information in accordance with the criteria developed from the performance management and reporting framework; as defined in the general notice, for the following selected programme presented in the constitutional institution's annual performance report for the year ended 31 March 2022.'

of para 11.2 of the Motion would require the Committee to be able to make such assessment based on evidence it has at its disposal, different to that of an accounting nature.

184. The Committee further received evidence on the question of who is responsible for the incurrence of costs at the PPSA and where the responsibility lies to prevent fruitless and wasteful expenditure.

(ii) The Role of the accounting officer vis-à-vis the Public Protector

185. Ordinarily, executive authorities are the political heads removed from the day-to-day running of a government department. But the Public Protector is defined as a constitutional institution listed in Schedule 1 of the PFMA. Though the PFMA defines an executive authority, such definition does not include the head of a Chapter 9 Institution, nor is it provided for in the Public Service Act, 2014.

186. Unlike s 7(5) of the South African Human Rights Commission, 2013 which provides that the Chairperson is, for the purposes of the PFMA, the executive authority of the Commission, there is no similar provision in the PPA. An incumbent Public Protector is not an executive authority under the PFMA, the Constitution or any other law. It is only with reference to liability that the Public Protector is treated akin to a Minister as provided for in s 5(2) of the PPA.[6]

187. Section 3 of the PPA provides as follows:

> *'The Public Protector shall, **subject to his or her directions and control**, in the performance of his or her functions under this Act and the Constitution, be assisted by –*
>
> *(a) The Deputy Public Protector;*
>
> *(b) A suitably qualified and experienced person as Chief Administrative Officer, appointed by the Public Protector or seconded in terms of subsection (12), for the purpose of **assisting the Public Protector** in the performance of all financial, administrative, and clerical functions pertaining to the office of the Public Protector.'*

188. Given the role, functions, and powers of the Public Protector, in particular, the need to preserve her independence and impartiality and her mandate, she cannot in fulfilling her constitutional functions be aloof from operational matters, nor are her role and functions akin to that of an executive authority in the national or provincial sphere of government. This is especially so because of functions closely aligned to her constitutional obligations, and directly or indirectly linked to the investigation of complaints lodged with the PPSA, reports issued and legal challenges to those reports, necessitating her involvement in those decision-making processes. For example, it is the Public Protector that signs the investigative reports and directs what is contained therein and steers those investigations.

[6] Section 5(2) of the PPA provides: *' The State Liability Act, 1957 (Act 20 of 1957), shall apply with the necessary changes in respect of the office of the Public Protector, and in such application a reference in that Act to 'the Minister of the department concerned' shall be construed as a reference to the Public Protector in his or her official capacity.'*

Evidence before the Committee reflected that Adv Mkhwebane had a hands-on approach guiding investigations and, as elaborated upon below, was the ultimate decision-maker on litigious matters.

189. However, it is the appointed CEO that is the accounting officer,[7] who bears the general responsibilities under s 38 of the PFMA and the budgetary and reporting responsibilities under ss 39 and 40 of the PFMA. This includes managing available working capital, efficiently and economically, settling all contractual obligations and not committing the PPSA to any liability for which money has not been appropriated. In relation to '*fruitless and wasteful expenditure'* the Accounting Officer–

189.1. must take effective and appropriate steps to prevent fruitless and wasteful expenditure and losses resulting from criminal conduct;

189.2. on discovery of fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury; and

189.3. must take effective and appropriate disciplinary steps against any official in makes or permits fruitless and wasteful expenditure.

190. Adv Mkhwebane is, however, not set apart from the tasks which ordinarily would be the sole domain of an accounting officer (referred to in the PPA as the '*Chief Administration Officer*'). She cannot be given the nature of her functions and powers. This appears to be appreciated by s 4 of the PPA headed '*Finances and accountability*':

> *'(1) The Chief Administrative Officer referred to in section 3(1)(b)–*
>
> *(a) shall, subject to the Public Finance Management Act, 1999 (Act 1 of 1999)–*
>
> *(i) be charged with the responsibility <u>of accounting for money received or paid out for or on account</u> of the office of the Public Protector;*
>
> *(ii) cause the necessary accounting and other related records to be kept; and*
>
> *(b) <u>may exercise such powers and shall perform such duties as the Public Protector may from time to time confer upon or assign to him or her, and shall in respect thereof **be accountable to the Public Protector***</u>.
>
> *(2) The records referred to in subsection (1)(a)(ii) shall be audited by the Auditor-General.'*

191. Whilst the chief administrative officer as CEO is charged with the responsibility of **<u>accounting for</u>** money received or paid out for the PPSA and of causing the necessary accounting and other related records to be kept, the CEO does not ultimately decide how the funds are to be spent, nor would the CEO be able to direct the decisions of the Public Protector, based on her budgets. For example, a

[7] S 36(2)(b) of the PFMA.

CEO could not take the decision that a complaint would not be investigated because of budgetary constraints or that a review application could not be opposed because of fiscal constraints.

192. The CEO's powers and duties are determined and conferred on the CEO by the Public Protector, to whom the CEO accounts.

193. In the context of para 11.2 of the Motion the interplay between the role of the accounting officer in relation to the incurrence of legal costs is subservient to the decision to bring or oppose litigation, obtain a legal opinion or engage attorneys and advocates, which results in the incurrence of such costs. The Public Protector remains the ultimate decision-maker that can instruct the implementation of decisions with the consequence of legal costs being incurred, the impact of which results in substantially less funds being available to implement the core business of the Public Protector. In essence that is what lay at the heart of Mr Samuel's complaint of '*reckless litigation*'.

194. Clause 11.2 is not a charge that Adv Mkhwebane had directly incurred the fruitless and wasteful expenditure but rather that she has failed intentionally or in a grossly negligently manner to prevent such in relation to legal costs so much so that it constituted misconduct and/or incompetence. Obviously the more that is spent on legal costs, the less is available to be used for the core business of the PPSA.

(iii) <u>What are legal costs in the context of the PPSA budget</u>?

195. When questioning Mr Van der Merwe, Adv Mkhwebane's legal representative sought to obtain concurrence that '*legal costs*' referred to in para 11.2 of the Motion relates to legal costs narrowly construed as the costs being awarded by the courts (where an unsuccessful litigant is ordered to pay costs of the other party) as opposed to the legal fees paid by the PPSA, more particularly, the legal fees paid to legal practitioners.

196. Legal costs as referred to in the context of the Motion clearly emanate from an affidavit of Mr Samuel in which he pertinently referred to the budget of the PPSA being used to pay legal fees which had ballooned from the 2018/2019 financial year to the 2019/2020 financial year for what he termed to be '*Adv Mkhwebane's reckless litigation*'. He referred to litigation which '*does not improve the jurisprudence of the PPSA and does not enhance its effectiveness*' at the expense of other PPSA programs.

197. It follows that both the legal costs awarded by the courts against the PPSA, as well as the legal fees paid for by the PPSA – both being expenses of the PPSA arising from decisions of the Public

Protector as it relates to litigation or the decision to procure legal services – fall within the scope of para 11.2 of the Motion.

198. The PPSA budget has annually increased. Whilst staff costs absorb the bulk of the PPSA's budget, its percentage of the total has remained fairly stable as reflected in Table I below. Further, though more staff establishment posts were increased, the evidence to the Committee was that not all posts were filled. In '*rand and cents*' terms thus percentage-wise more money was not spent on staff during the periods 2017/2018 to 2021/2022.

199. Table I below reflects that from 2017/2018 to 2018/2019 to 2019/2020 notwithstanding that the PPSA budget increased by approximately R15 million, any increase in budget or increased savings from other costs were largely being absorbed by an increasing expense on legal fees as reflected in Table II which were largely absorbed by concomitant increases in legal costs. The budget increase in costs being from the approximately R6.5 million spent in the 2016/2017 financial period to it being as high as R48 million in the 2019/2020 financial period. Although Mr Mahlangu suggested during his evidence that the amount in the AFS included professional and consulting fees, as apparent form the figures provided by the PPSA, the amount spent on other professional and consulting fees since 2017 was negligible compared to legal fees resulting in legal fees totalling approximately R147 million being incurred for the period 2016/2017 to 2021/2022 for the services of attorneys, advocates and disbursements.

200. It is against this background that regard must be had to whether these costs could have been avoided with reasonable care.

(a) Cause of increased legal costs

201. The statistics reflect even prior to the commencement of Adv Mkhwebane's tenure there was an increase in litigation. This resulted in the then CEO establishing an interim panel of attorneys to deal with litigation. The 2015/2016 Annual Report reported that 18 cases were at that point being challenged. The 2016/2017 Annual Report reflected that it had increased to 21. The exact number is not reflected in the AFS thereafter, nor are all the litigious matters listed as contingent liabilities.

202. In the 2017/2018 Annual Report, Adv Mkhwebane stated as follows:

> 'The litigation that we have attracted since the Constitutional Court judgment that declared that our remedial action is binding is another source of our financial challenges. Millions of rand in resources that we should be putting to good use in the service of the people of this country goes towards our legal costs. While we accept that organs of state against whom we make adverse findings have every right to take those matters on judicial review when they disagree with the findings, we must also ask if frivolous

> court challenges that eat away at the little resources we have at our disposal do not go against the constitutional provision for other organs of state to assist and protect this office to ensure its independence, impartiality, dignity and effectiveness. I highlight these issues because I remain hopeful for a larger share of the national budget and that the National Assembly will assist us in that regard.'

203. Burgeoning legal costs during Adv Mkhwebane's tenure were attributed to the Nkandla judgment. It was traversed in the evidence of Ms Zulu-Sokoni as well as Adv Mkhwebane that those implicated turn to the Courts to have reports set aside because the remedial actions are binding. There is no examination as to the reasons for the court applications or the bases on which reports are set aside.

204. Ms Zulu-Sokoni testified to the Zambian experience when her office's remedial action similarly became binding. She testified that there had only been one instance where the respondent institution took them to court. This was because making her office's remedial action binding had resulted in the Ombudsman office upping its game and making sure that it interrogates each and every submission when are carrying out investigations, to ensure that it is not taken on review because the respondent institution is dissatisfied with the outcome. In other words, Ms Zulu-Sokoni avoided excessive litigation by improving the quality of her processes and reports.

205. Her evidence was also that the Zambian Ombudsman endeavours to avoid going to court in that they do not have the sort of funding to allow for continuous litigation. In contrast, the South African experience has been that a significant amount of the PPSA budget has been diverted to legal costs, from a budget which is considerably more than what the Zambian Ombudsman has at her disposal.

206. Also, in December 2016, Adv Mkhwebane replaced the system of issuing of provisional reports inclusive of remedial action with one involving only the issuing of a s 7(9) notices, without remedial action included therein. Provisional reports were made available to complainants so that the latter were afforded an opportunity to engage with the Public Protector on any inadequacies in the report prior to its finalisation and publication. This changed after the '*leak'* of the Lifeboat provisional report. Provisional reports contained a remedy, which allowed implicated parties and complainants, albeit under strict confidentiality, to make representations to the Public Protector in relation thereto. Once that was no longer so, material concerns in relation thereto could only be ventilated after the report had been finalised and after Adv Mkhwebane was already *functus officio,*[8] leaving a court application as the only recourse for a person implicated by her report. Affected parties were left with no option but to resort to the courts when the findings and remedial action were incorrect, inappropriate, or provided for no *audi* in relation to remedial action. For example, Adv Mkhwebane

[8] A legal doctrine which gives expression to the principle of finality meaning that in respect of the Public Protector her reports cannot be reviewed or revisited except by a court.

elected not to engage on the remedy with SARB in relation to the Lifeboat Report and with Minister Gordhan in relation to the Pillay Pension matter, prior to her reports being issued, despite both requesting such. This was not an absolute position in that on her evidence she did engage with both the SSA and the Presidency on the remedy in relation to the Lifeboat Report.

207. This could very well have been an unintended consequence of s 7(9) notices, but would also have resulted in litigation costs being higher.

208. But costs also increased because of more reports being taken on review. Consideration hereto should be given in the context of the number of complaints lodged and finalised and the number of investigative reports finalised.

(b) Increased number of reports taken on review

209. **'BM13'** annexed to Adv Mkhwebane's Part A Statement reflected that from October 2016 to February 2022, the PPSA had a total caseload of **60 962** cases of which **58 964** had been finalised.

210. The number of investigations was canvassed during the evidence of Mr Van der Merwe for a portion of the financial period commencing 2016/2017[9] covering October 2016 to end of 2021/2022. As reflected in the annual reports, not every complaint lodged requires PPSA resources for investigative purposes. Some complaints will not be investigated because: *(a)* the PPSA has no jurisdiction; *(b)* complaints are referred to other institutions; *(c)* complaints are withdrawn by complainants; and *(d)* complaints are resolved by the parties before the office could investigate or conclude the investigation. The audited figures in the annual reports reflected that when the aforegoing are excluded, the total investigations that had been finalised are **40 117** (and not **58 964** as indicated in Annexure **'BM13'**). But even if these were not excluded, the amount would have in fact been **54 334**.

211. Each year there had been inroads made into the backlog of complaints. Apart from concerted efforts being made to eradicate the backlog, this was obviously made easier with fewer complaints being received. The evidence provided was that **47 410** new complaints had been lodged. During their tenure Adv Madonsela had finalised **131 015** complaints; Adv Mushwana **110 663** and Adv Baqwa, **36 669**. These figures are referred to not for purposes of reflecting a comparison because it is not equitably comparable but to show the number of complaints the PPSA is able to deal with. First, the total number of cases during the period of Adv Mkhwebane's tenure under review fall short by

[9] For this period the number was halved in that Adv Mkhwebane's term only commenced in October.

approximately fifteen months and she faced the formidable task of operating during the covid pandemic which saw significantly fewer complaints lodged and made delivery harder. This is at least one of the obvious causes of the nearly 50% drop in new complaints from 31 March 2020 to 31 March 2021.

212. The investigative reports which become the subject matter of litigation are a small percentage of the aforementioned complaints received by the PPSA. Most of the latter complaints are not of the nature that require a sign-off from Adv Mkhwebane and are mostly managed provincially. This is reflected on Table III below. Closing reports are those where the complaints are not substantiated and reviews in relation to those are rare. At the time it reflected the following:

212.1. Of the 412 reports issued and signed off by Adv Mkhwebane, 76 were closing reports of which 1 had been reviewed and set aside.

212.2. In total 36 reports had been reviewed and set aside (8.7%).

212.3. A further 47 review applications were pending at court, totalling 83 reports subjected to litigation (20.15%).

212.4. Of those pending, 24 were being opposed and external legal representation engaged (with the consequence of legal fees being incurred) and 23 were being dealt with internally (with no external legal representative as yet appointed).

213. In contrast, Annexure **'BM13'** provided by Adv Mkhwebane reflected that **17** reports from October 2016 to February 2022 had been reviewed and set aside, though in the small print at the bottom of the table of Annexure **'BM13'**, was written '*From October 2016 to February 2022 * March 2022 numbers are not in yet. However, please be aware that the 21/22 numbers have yet to be audited.*'

214. An updated list of reports reviewed and set aside as at 25 June 2023 is attached marked **'A'**.[10] At that stage there remained 23 review applications pending that were unopposed; a further 10 that are being opposed and a further 5 that the PPSA was not certain of the status of the reports in question at the time the information was being sought. These are all at various stages of the legal process.

215. Mr Sithole testified that where reviews were unopposed, invariably the report was reviewed and set aside, or litigants did not take further steps and the litigation is left incomplete.

[10] Six of these reports were set aside after Annexure **'BM13'** was compiled. Numbers 1, 2, 3, 6, 7 and 9.

216. The evidence was further that due to financial constraints at the PPSA, austerity measures were imposed, including decisions taken in relation to litigation.

(c) Austerity measures included financial constraints in litigation

217. The Committee heard evidence of austerity measures being imposed. Mr Samuel's testified that these measures affected day-to-day operations as funds were being channelled to legal fees instead of core business such as investigations or outreach activities. Mr Mahlangu and Mr Sithole testified that there were also restrictions placed on litigation and instructions relating thereto were referred to.

218. On or about 18 April 2018, Adv Mkhwebane gave an instruction that opposition on all pending judicial review matters be withdrawn, save for the ones in which hearing dates had already been allocated. Thirteen cases were reflected on this list in relation to which opposition was to be withdrawn, ostensibly because of financial constraints. A consideration of these cases reflects that whilst opposition was withdrawn on four pending matters related to reports prepared by Adv Madonsela – two of these related to the State Capture Report - this was not the case with the remaining cases on the list. Notably these four cases have never been finalised and remaining pending. Of the remaining matters, they either remain pending or have been unsuccessfully defended. There was only one case on this list that was successfully defended (Mbina-Mthembu), even though Mr Sithole testified there were three.

219. Mr Sithole testified that this was due to financial constraints. It is to be noted that this instruction comes at the start of the financial year though it was Mr Sithole's evidence that if the review application was brought near the commencement of a financial year, the PPSA has the financial wherewithal to deal with it based on the merits and would not be compelled to take a decision based on financial constraints. In other words, near the beginning of the financial year there are funds to litigate a decision and reconsider whether to oppose. According to Mr Sithole there was no set criteria determining what stance would be adopted but litigation was not stopped on all matters.

220. This occurred two months after the Vrede Report was released and in the 2018/2019 financial year. Approximately R16.5 million was spent during the 2018/2019 financial year, which was approximately R4 million less than the previous year.

221. Mr Sithole testified that though it appeared that a lot of funds were spent on litigation on certain cases these were funded over several financial years. It is so that certain cases spanned over several financial years when it included applications for leave to appeal to the HC and SC, a reconsideration

to the SCA and an application for leave to appeal and a possible rescission from the CC, then costs are continually incurred, especially if there is a continual lack of success in relation to several cases ongoing.

222. Mr Sithole's evidence was that not all review applications were opposed. Some were not and some were opposed internally to save costs.

223. In January 2019 a complainant indicated that the remedy on a report was not being complied with. The report was being reviewed. The complainant was advised by the Legal Service Manager that the only option was for him to approach the Court with an application to compel compliance with the remedial action as the PPSA was not opposing the review due to financial constraints. Ultimately the report was set aside, and costs were ordered against the PPSA. The non-opposition was based on financial constraints. The complainant was left remediless. This is reflective of every report that is taken on review and set aside, invariably leaving a complainant remediless.

(iv) General Court orders and judgments and Costs orders

224. Whilst the increased litigation was blamed on the Nkandla judgement, the question was asked of Ms Zulu-Sokoni whether when a court rules against the Ombudsman because of a legal deficiency, that would constitute dereliction of duty pointing to a job not properly done in the first place. She disagreed with that notion, indicating that even a court can find against a particular party and it can still be revised on appeal. It did not necessarily mean that the court had not done its job properly. Judgments that get overturned are the same as the reports of the Ombudsman taken on review. If the judgment goes against the Ombudsman, it is the duty of that Ombudsman '*to interrogate the judgment and ensure that they do not repeat the sorts of errors that were caused in that particular report*'. She referred to it as a '*cleansing process*' – a quality control process.

225. Her evidence presupposed that the Ombudsman would not repeatedly make the same mistake. The hypothesis put to her was that if an implicated person had come and told the Ombudsman '*you failed to give me a hearing before you made a finding against me*', then a year or two later the same person would come back to court with exactly the same argument and say, '*here's another report that you've issued and you've again not given me a hearing and made a finding against me*'. Ms Zulu-Sokoni's response was that whilst the courts could take the matter further within the judgment and noted. She pointed out that:

> *'It is not good for the reputation of an Ombudsman definitely, to have judgments coming out continuously on the same issue, especially on the same matter, the same error the same mistake, obviously. I would take it serious and I would ensure that that error is corrected.'*

226. The example given to Ms Zulu-Sokoni was prefaced on the repeated lack of *audi* afforded to affected or implicated parties – in the evidence before the Committee this issue arose in the Lifeboat matter (with regard to the SARB and ABSA), the Vrede matter (with reference to the beneficiaries), CR17 (the President in relation to Mr Wilson and on the remedy) and the SARS Unit matter (Mr van Loggerenberg and Minister Gordhan pursuant to his request). Mr Pillay annexed the papers in the matter of Barry Hore & SARS v the PP in relation to a Report 4 of 2022/23 in relation to which again he was not given *audi*. This matter was settled and report set aside in 2022.

227. A summary of judgments and orders were provided to the Committee relating to the litigation commenced and/or ongoing during Adv Mkhwebane's tenure.[11] These were dealt with during the evidence of Mr Sithole and Mr Van der Merwe. The legal costs referred to in **Table I** relate mostly to this litigation.[12] These were separated into five Excel spreadsheets[13] split as follows:

227.1. Applications to review and set aside reports together with interlocutories and appeals relating thereto;

227.2. Matters that are not review applications but which had been initiated by Adv Mkhwebane;

227.3. Pending cases;

227.4. Other matters; and

227.5. Matters which originated during the time of Adv Madonsela and in relation to which the litigation ensued during the tenure of Adv Mkhwebane.

228. In summary, with particular with reference to review applications, the following is apparent:

228.1. There were five HC personal costs issued against Adv Mkhwebane. Three relate to the reviews pertaining to the Lifeboat report, SARS Unit matter and the Vrede matter. These cost orders were upheld on appeal. In relation to the SARS subpoena case and the interlocutory order made by Potterill J whilst the personal costs orders were overturned on appeal. A fifth personal costs order relates to a rescission application brought in the CC.

228.2. Both the SARS Unit and Vrede cases were appealed to the SCA. The CC dismissed them, and the cost orders stand. In addition, the appeal courts ordered the PPSA to bear the costs of the appeals. In relation to the SARS subpoena matter, whilst the CC upheld the court

[11] Judgments and orders handed down until September 2022 are reflected in the table, unless otherwise indicated.
[12] Apart from labour matters and legal opinions. The former was dealt with separately.
[13] As at September 2022, unless specifically adjusted and has not since been updated.

below on the merits, and though the court overturned the personal costs order against Adv Mkhwebane the PPSA still had to pay the costs of the court below. The CC made no order as to costs on appeal.

228.3. In relation to Vrede, the costs of the applications for leave to appeal from the HC to the SCA and the CC were awarded against the PPSA in addition to the costs already awarded against the PPSA by the HC.

228.4. In at least four instances, the HC ordered punitive costs (CR17, Pillay Pension case, Vrede and Minister Police).

228.5. At the time the table was compiled, the application for leave to appeal in the SARS Unit matter was pending at the CC. The CC has since refused leave to appeal with costs.

229. In very few of the review application was opposition successful and costs orders made in favour of the PPSA. From evidence before the Committee, it appears to include the following 5 matters only:

229.1. Nkwint**i** matter in the review and in the leave to appeal, including an attorney-client punitive cost order;

229.2. Motsoeneng matter;

229.3. Mbina-Mthembu matter an amount of R319 258. (This was one of the cases that, during the period of financial constraints, Adv Mkhwebane reversed the instruction to abide, and the matter was opposed);

229.4. USAASA matter totalling R73 415.39 received; and

229.5. Minister of Arts And Culture settled with costs (no advocate).

230. The only other costs in favour of the PPSA related to interlocutory matters:

230.1. Pillay Pension matter – only the costs for the leave to cross-appeal;

230.2. SARS Unit matter – the costs relating to the part of the strike out application that Adv Mkhwebane succeeded with and the dismissal of the counter-application;

230.3. the interlocutory matter with the Minister of Finance on a punitive scale; and

230.4. cost of the condonation application (Mokaba-Phukwanatem), there were no other orders as to cost.

231. In most cases (approximately 40 court hearings in various courts across the country) there have been orders that the PPSA must bear the costs of the litigation either whether reports are set aside or appeals have no prospects. In a number there were either no costs ordered, or each party agreed to pay their own costs. The former related mostly to matters that were not opposed. This too was demonstrated in the summary of judgments and orders provided to the Committee.

232. It bears noting that these statistics relate to less than 10% of the total 402 reports produced. The remaining reports produced were not challenged. The impact on the PPSA budget for the period amounted to R147 million relating mostly to those reports. A few million do relate to litigation arising from labour related disputes or payments arising from CCMA proceedings or settlements.

233. There are two instances where Adv Mkhwebane initiated the litigation.

233.1. First, involving matters relating directly or indirectly to the s194 proceedings t commencing with advices received from Seanego Inc. and Mr Paul Ngobeni and matters related and progressing to litigation. Based on the legal fees data as reflected in July 2022, the legal costs incurred for the period July 2017 to July 2022 exceeded R20 million.

233.2. Second, the complaint of defamation against Adv Glynnis Breytenbach, MP who referred to Adv Mkhwebane as a '*spy*' which cost the PPSA approximately R2.3 million. Initially successful in an interlocutory application, this was overturned by the SCA. In the Breytenbach matter the litigation was instituted in the name of both the PPSA and Adv Mkhwebane. It related to allegations made against Adv Mkhwebane prior to her taking office as Public Protector. The PPSA has since withdrawn.

234. This litigation should not have been embarked upon in the name of the PPSA, nor should funds have been deferred from the PPSA core functions to pay for litigation in relation to allegations made prior to Adv Mkhwebane taking office. PPSA funding and resources were being used in relation to a litigious matter of a personal nature to Adv Mkhwebane.

(v) <u>Litigation decisions and costs specific to the Motion</u>

235. Whilst the CEO is responsible for putting in place proper procurement processes, the CEO is not involved in the litigation decisions. Her role is a perfunctory one of signing off on the appointment of legal representatives. The CEO does not decide whether to litigate or to obtain external legal

advice or make decisions which result in legal costs being incurred. Mr Mahlangu testified that as CEO he was not *'involved in any litigation decision-making or strategic decisions'*. It was channelled through Legal Services who liaise directly with Adv Mkhwebane who makes the decisions.

236. Mr Sithole's evidence was that an instruction to brief and advocate or to engage a consultant would come from Adv Mkhwebane in practice, or it would have been suggested by Mr Nemasisi. The decisions whether to bring a case, oppose or abide are not taken by the CEO, but by Adv Mkhwebane, whom Mr Sithole confirmed ultimately makes the decision, including who should be briefed. This was informed by legal advice in most instances, but not in all instances was it followed and that ultimately the decision whether to follow the legal advice rendered lies with her. He confirmed that she would consult with him and possibly others within the PPSA Office, and then makes her decision. Even if the identity of the advocate to be briefed is determined through one of the several avenues identified by Adv Mkhwebane's legal representative, the final decision lay with her[14] and which she communicated with Legal Services or her Chief of Staff in respect thereof. If the latter, he relays it to Legal Services. Mr Sithole was clear that when he obtained instructions from the Chief of Staff it emanated from Adv Mkhwebane and that ultimately – whether based on internal or external advice which she may or may not follow – decisions in relation to legal matters lay with Adv Mkhwebane.

237. It bears mentioning that whilst Adv Mkhwebane instructs the briefing of advocates the invoices rendered are confirmed and signed off by the end user department, Legal Services and it is the PPSA staff that attend to the administration of the invoices, which should involve checking it for errors. If a service provider wrongly bills, overreaches, over-charges the PPSA or are not compliant with the PPSA tariff this would be fruitless and wasteful expenditure. However, even if such services were engaged at the behest of Adv Mkhwebane it cannot be expected that she checks the invoices received. Any errors in relation thereto would lie at the doors of those employees tasked with the verification of the amounts reflected and those who confirm the payment thereof. It is only if such fruitless and wasteful expenditure was brought to her attention, and she did nothing about it could she be held accountable but there is no evidence that that was the case.

[14] During questioning Adv Mkhwebane's legal representative put it to Mr Sithole that there were seven ways in which external legal persons were engaged and listed them: *(1)* the attorney identifies an advocate or requests an advocate with special expertise; *(2)* attorney asks client for preferred advocate; *(3)* Legal services identify advocate *(4)* junior advocate recommends a silk *(5)* senior advocate recommends a junior; *(6)* when Adv Mkhwebane makes a recommendation; and (*7)* the Special Adviser / Chief of Staff to Adv Mkhwebane who instructed is also a lawyer. Another category is where attorneys to be instructed are selected by the senior advocate. This resulted in one instance that could be identified in the termination of the mandate of one law firm and the engagement of Seanego Inc. in its stead.

238. On instructions from the Committee, the evidence leaders broke down the legal fees paid by the PPSA for the financial period 2016 to 2022, it being noted that Adv Mkhwebane only assumed office some almost 7 months after the commencement of the 2016/17 financial year. The breakdown distinguishes between law firms and advocates (who would have been briefed by a law firm). At the evidence leaders request the breakdown in relation to counsel capped not to exceed R2 million, save where they were briefed in relation to matters not referred to in the Motion. The primary purpose of the request was to obtain a breakdown to ascertain if there was a fair distribution of work or whether certain services providers (whether law firms or counsel) were receiving lion share of instructions and briefs.

239. The attorneys instructed are selected from a panel of attorneys who had tendered to render services at predetermined PPSA tariffs. The initial panel of 38 in 2018 was reduced to 18 in 2020. For the financial period 2016/2017 to end of July 2022, 14 law firms were paid **R133 205 902.20**. Still not all have received an instruction. Of these 14, at least two or three law firms were being paid for instructions prior to Adv Mkhwebane taking office, when an interim panel was still in place.

240. According to Mr Sithole's evidence, Seanego Inc. had not received more instructions than other attorneys, and the statistics would reflect that there are other firms that have received more than Seanego Inc. He justified the instructions on the basis that they were given in respect of matters that had received huge public coverage and which were interlinked. A perusal of the statistics reflects that contrary to his evidence, by far the most instructions were given to Seanego Inc. amounting to **R55 444 105.79**. Their instructions commenced in mid-2018, corresponding with the engagement of Mr Ngobeni and the commencement of Adv Mkhwebane's engagement with the NA on issues relating to the s194 process. It was the only attorneys' firm, Mr Sithole testified, through whom payments were made to Mr Ngobeni. They also appeared to be the only attorneys present at meetings with Ms Heller.

241. It is indeed so, on the evidence before the Committee, that contrary to Mr Sithole's evidence, Seanego Inc. was given by far more instructions than any other law firm on the panel. At least more than 20 instructions were identified as having been given to Seanego Inc. The next law firm, VZLR Attorneys (previously Van Zyl Le Roux Attorneys), received approximately R14 429 810.21 for approximately 7 matters. Both commenced rendering legal services in 2018 as part of the new panel.

242. It was argued that these payments do not take into (including advocate's fees) and taxes to be paid by the law firms. This misconstrued the purpose of breaking down the figures to seeing if there had been an equitable spread of work, rendered competitively and to give an indication as to how much

the PPSA paid in legal fees, which cases burdened the budget and whether there was a discernible pattern in the service providers engaged.

243. At the request of the Committee a further breakdown of counsel's fees were determined, using both the matters that form the subject of the Motion and R2 million as a cap, it reflected that only seven counsel had earned more than R2 million over the period. On the PPSA system one is not able to divide the R146 million legal fees between attorneys, advocates and other disbursements. The cases which are discussed in the context of this Motion, save one or two exceptions, are the highest in fees, but for FCSC, the instructing attorney – though not from inception as reflected below – was Seanego Inc. Also, according to Mr Sithole it is the only law firm which effected payments to Mr Ngobeni. The costs incurred in relation to the following were as follows:

243.1. In SARB/CIEX matter – The total legal costs inclusive of the taxed bill, the attorneys' fees, counsels' fees on both litigation and opinions that have emerged as a consequence of the matter including an opinion obtained after the CC judgment in an amount just over R900 000, the cost of taxation amounted to approximately R14.5 million.

243.2. In Vrede – The total own litigation costs exceeded R4 million. The taxed bill has not as yet been included. From the application for leave to appeal stage Seanego Inc. was instructed and Mr Ngobeni then got involved.

243.3. In the Gordhan / Pillay related matters including both the Pillay Pension matter and the SARS Unit matter the PPSA's own legal bills including opinions and interlocutory applications was approximately R16.5 million. The evidence before the Committee was that some of the taxed bills exceeded R3 million. Again, in this matter Seanego Inc. was instructed with Mr Ngobeni in the background drafting papers.

243.4. In the CR17 matter, inclusive of opinions, the PPSA's own legal fees amounted to approximately R6.5 million. In this regard Mr Ngobeni provided the initial opinion, under a Seanego Inc. letterhead, which contained a material error of law which was followed by Adv Mkhwebane to a misconceived endeavour to rescind the CC judgment, again following his advice.

243.5. The SARS Subpoena matter inclusive of the opinion obtained amounted to approximately R4 million. Whilst the opinion was obtained from a different law firm. When the litigation was commenced Seanego Inc. was instructed.

243.6. In FCSC – the total own litigation costs were approximately R6.5 million. This amount was incurred in respect of a matter which from inception counsel's advice was unequivocal that there were no prospects of success. This is the only case that there appears to be no involvement of Seanego Inc.

244. The total costs of these cases alone will exceed R50 million when the taxed costs are also paid. It would have been considerably more had the SARB, Minister Gordhan, SARS or the President sought to execute the costs orders against the PPSA and Adv Mkhwebane personally, respectively, where applicable.

245. The aforestated costs are exacerbated where there are obviously no prospects of success and perpetual applications for leave to appeal. Despite Adv Mkhwebane seeking senior counsel's advice for a variety of issues, not one opinion was provided to the Committee reflecting advice sought from a *bone fide* senior counsel indicating the prospects of success after a HC judgment was handed down, Save for the FCSC matter, Adv Mkhwebane instructed that litigation in these matters ensue with several appeals and failed on the merits in all of them. In the Sars Subpoena matter and in the interlocutory Gordhan matter the CC overturned the personal costs order against her but as demonstrated, this came at a greater cost to the PPSA.

246. The above invariably therefore includes expenditures which were made in vain and would have been avoided had reasonable care been exercised. The fruitless and wasteful nature of the continuous litigation is readily demonstrated with regard to the costs incurred respect of the SARB/Absa litigation on the Lifeboat Report, but more so if regard is had to what the Courts have stated in relation to the litigation pursued in these matters.

247. For example, in the Lifeboat matter, the constant change of counsel and attorneys exacerbated costs. In 2017 Sefanyetso Attorneys used the services of two different sets of senior counsel, totalling approximately R1.5 million. Mr Kekana testified that he was instructed by Adv Mkhwebane not to disclose all the draft reports to the counsel briefed. He was subsequently not included in meetings with counsel for talking too much. Senior counsel was changed. Whilst Mr Sithole indicated that this was not the reason, he was not personally involved in the matter at that stage, and his evidence to the Committee was mired by his lack of recollection especially, where it related to Mr Ngobeni's involvement in matters. Approximately R2.5 million was spent just on the applications for leave to

appeal to the CC seized primarily with the issue of the personal costs awarded against Adv Mkhwebane.[15]

248. Under case no. 52883/17 the taxed bill that had to be paid by the PPSA was in the amount of R1 510 812.97. This was lower than expected as the SARB and Minister of Finance had not sought to recover costs. Of this Adv Mkhwebane was ordered to pay 15% personally being an amount of R226 621.94. Her portion was paid by way of crowd funding organised by Democracy in Action.[16] Further, though not previously involved in the litigation in this matter Seanego Inc. was instructed to secure this opinion. The invoice reflects that the opinion cost the PPSA, who had no direct interest in the opinion, an amount of R213 943.76. An opinion, as it turned out in relation to a taxed bill which Adv Mkhwebane had to pay in the amount of R226 621.94 as per the court order.

249. That there was no impediment to Adv Mkhwebane receiving crowd funding was informed by a legal opinion premised on an assumption that the cost order would '*ruin her financially*'. The opinion does not consider the appropriateness for the incumbent Public Protector to receive crowdfunding organised by Democracy in Action:

> '42. Whilst it is clear that such a punitive cost order on her might have the effect of ruining her financially, we are unable to come to the conclusion that that was the intention of the Court –to ruin her and or bankrupt her. Even if it was, our view is that it would not be unlawful, much less unethical, and against public policy, if she received the benefit of an unsolicited windfall that came from a crowd funding campaign. What we would argue is in the interest of the court is that its orders are met and complied with in full.
>
> 43. We are of the opinion that acceptance of the donation is legally sound and her acceptance of the donation does not place her in any precarious position where it can be said that she contravened a particular law of the country and more in particular her constitutional duties as defined in the Public Protector Act.
>
> 44. We express, respectfully, our considered opinion that if the Public Protector accepts the donation raised through crowdfunding to assist her with meeting the cost order obligations occasioned by the Court order, she neither circumvents the court order nor contravenes any law for the reasons we have discussed in this opinion.'

250. This instruction to obtain this opinion was given to Mr Sithole by Adv Mkhwebane through the Chief of Staff who in turn reported directly to Adv Mkhwebane and obtained instructions from her.

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[15] **PP v Absa CC** at para 131:
'This matter calls for the adjudication of two core issues. First, whether this Court should interfere with the discretion exercised by the Full Court of the High Court of South Africa, Gauteng Division, Pretoria (High Court) to award punitive costs in favour of the South African Reserve Bank (Reserve Bank) against the incumbent Public Protector, Ms Busisiwe Mkhwebane, in her personal capacity. Second, whether the Reserve Bank is entitled to the declaratory order it seeks to the effect that the Public Protector abused her office in conducting the investigation that gave rise to her impugned report.'

[16] It is noted that they are one of the parties in the litigation of the **Public Protector v Speaker of the National Assembly** (2107/2020); **Democracy in Action v the Speaker & 12 Others** (1731/2020) litigating in support of the Public Protector.

251. During 2019 this opinion was paid for by the PPSA, albeit that it had nothing to do with the PPSA core business. PPSA funding and resources were being used to obtain legal opinions for Adv Mkhwebane's personal benefit.

    251.1. Significant costs were incurred to challenge the personal costs orders awarded against Adv Mkhwebane in the HC's. In ABSA there was no appeal of the merits to the CC of the HC's judgment, only the costs.

    251.2. It should be noted in this regard that the anticipated cost that Adv Mkhwebane would have had to pay after taxation would not have been known. Likely it was less than the anticipated amount at that stage as the State Respondents did not seek to recover personal costs from her.

    251.3. As it was the first personal cost order made against an incumbent of a Chapter 9 Institution, arguably it could be a justifiable reason to appeal such to the CC for purposes of obtaining certainty in respect thereof, and whether, apart from the merits of the costs order, the principle would be confirmed that the incumbent could be held personally liable. Whilst Ms Zulu-Sokoni labelled personal cost orders as a form of judicial harassment the fact is that the principle that such order may be appropriate in certain circumstances is settled.

252. However, once the ABSA judgment provided the requisite road map on the issue of personal costs orders against a public protector, there was no justification to similarly appeal the dicta in the Vrede matter to the SCA and CC given the lack of prospects of success on the merits that existed from inception in that matter and knowing, (or should have reasonably known) that the approach that had adopted in the circumstances warranted a punitive cost order.

253. In the Vrede matter at the inception of the litigation, Adv Mkhwebane had accepted the advice not to oppose because of a lack of prospects of success only then to change her mind. The litigation was driven – not to save the investigative report from review – but because personal costs orders were sought against her personally. There were no prospects of success she had been advised.

254. In the Vrede matter, Adv Mkhwebane indicated that she initially elected not to oppose the matter '*out of fear of being unreasonably mulcted in a personal cost order*'. But as pointed out by the Court,[17] in changing her stance and filing opposing papers, Adv Mkhwebane's Vrede HC AA was not limited to the cost order. Instead, the applications were opposed on the merits extensively. The

[17] Vrede cost at para [24].

Court further pointed out that the Vrede HC AA and argument went way beyond an attempt to avoid a personal cost order. However, in her Vrede HC AA Adv Mkhwebane stated that after receiving the Vrede HC SFA, and seeking legal advice, it was necessary for her to file opposing papers. She denied acting in bad faith or incompetently as alleged or at all.

255. It was put to Mr Sithole by Adv Mkhwebane's legal representative that initially Adv Mkhwebane had filed a notice to abide because the DA had adjusted the relief to seek a personal cost order, the course was changed. He agreed. But this is incorrect. The DA had not changed their relief[18] – they had from inception sought a personal cost order and this would have been known and informed by Mr Nemasisi's advice to abide. His recommendation was that neither the DA, nor the CASAC application be defended and that a Notice to Abide be filed instead because, *inter alia*:

255.1. Three issues had been identified for investigation but only two were investigated due to '*resources and financial constraints experienced by the Office of the Public Protector*' notwithstanding that Adv Mkhwebane should have investigated it as it fell within her jurisdiction. He pointed out specifically that the applications reflected –

255.1.1. a POCA application detailing money laundering in the Vrede Project and the involvement of the MEC, HOD and CFO of the FS Department;

255.1.2. that Adv Mkhwebane ought to have used her statutory powers to obtain financial records from the FS Department and Estina;

255.1.3. the remedial action does not and cannot reasonably be expected to undo the prejudice, impropriety, unlawful enrichment and corruption in the Vrede Project;

255.1.4. the complaint of 10 May 2016, including direct allegations against the Premier, was ignored; and

255.1.5. as certain complaints were not investigated it would be difficult to defend the application successfully as the Court would require justification of how financial resources impacted on an investigation, especially since Adv Mkhwebane had not used her power to subpoena any person or documents.

256. Mr Nemasisi recommended that Adv Mkhwebane file an affidavit only dealing with the issue of costs, in light of the **ABSA** judgment and the personal cost orders against her. He advised that

[18] It was CASAC that first amended its relief to such personal costs.

generally a court will be reluctant to grant cost orders, especially punitive cost orders, against a party not opposing the application and not cited in her personal capacity. Adv Mkhwebane approved the advice on 28 February 2018.

257. The litigation commenced in 2018. As confirmed by the Court subsequently, Mr Nemasisi was correct that there were no prospects of success. If what he had indicated was factually correct this should have been clearly apparent.

258. Mr Sithole confirmed this advice was given. He suggested that the decision to abide was to avoid '*further wastage of money*'.

259. Initially, senior counsel had been briefed to advise as to whether the Rule-53 reasons could be supplemented by way of supplementing the papers, alternatively at the hearing of the matter, certain issues arising from the papers could be dealt with. This was rendered styled as a preliminary memorandum, making it clearly apparent that he was rendering advice without having interrogated the merits of the application as he had not had the time to consider the pleadings and the issues raised and yet stating that Adv Mkhwebane '*would be in jeopardy of this personal or punitive cost order*' unless she entered the fray, more specifically advising that:

> *'13. We are of the view that it is necessary for Consultant to file a notice of intention to oppose the matter and file an answering affidavit. Unless Consultant agrees not only with the relief sought in both applications but also with the factual bases therefor, on the one hand, and legal conclusions derived therefrom, on the other, it is in our view not advisable for Consultant simply to abide the Court's decision. If Consultant's apprehension is an adverse costs order in the event of an unsuccessful opposition, it seems to us that the DA makes it clear in its supplementary affidavit that whether Consultant opposes or not (in fact, especially if Consultant files no opposing affidavit) it seeks a personal costs order. Thus, it seems to us that an adverse personal costs order would be a counter-intuitive basis for not opposing the DA application.*
>
> *14. The same is true of the CASAC application.'*

260. The advice goes further to state the following in para 20:

> *''20. Consultant seems to suggest that the issues raised by the DA are not part of her report but are rather issues the DA wishes she had investigated and therefore should not be susceptible to review. If this is the understanding, then it cannot be correct because every decision (including a failure to make a decision or a decision not to investigate) is reviewable. In truth, it is the decision rather than the report that is under review. The report is simply a vehicle by which the decision is conveyed.'*

261. Counsel also advised that in respect of the Rule-53 record, if there were documents that had been omitted, same should be provided with an explanation as to why they were originally excluded, and that based on the defence of budgetary constraints, that they identify '*which projects have suffered as a result of insufficient funds provided*'.

262. Despite being advised of no prospects of success (which the preliminary memorandum does not directly address) and knowing of the PPSA's financial difficulties, a comprehensive opposition was launched, escalating litigation costs dramatically.

263. There is no indication that Mr Nemasisi's advice that the Vrede Report was vulnerable to review was provided to the counsel.

264. The decision went from non-opposition based on material deficiencies in the report, to a full-blown opposition as follows:

264.1. The engagement of TGR with one senior counsel initially, who rendered preliminary work, who was then replaced by the team of senior and junior advocates dealing with the Lifeboat matter, ostensibly because both concerned the question of personal cost orders. It was regarded as a cost saving mechanism to have the same advocates deal with the same issues, albeit in two different matters.

264.2. At the stage of heads of argument, Mr Sithole testified that the senior counsel on brief indicated that he was not in a position to argue both the DA and CASAC matters and that a second team of advocates should be engaged to deal with the CASAC application at the stage of the proceedings when heads of argument were due, leaving Mr Sithole with no option but to instruct that a second set of counsel be appointed. This in the context of where a matter the main defence was that the matter could not be completely investigated, leaving the poor beneficiaries remediless, because of financial constraints. Further, where the litigation was being pursued because of a personal costs order being sought and in the face of advice having been rendered that there were no prosects of success by the Senior: Legal Manager. This meant that in respect of one hearing, same relief on substantially the same grounds, two sets of counsel were engaged, ballooning costs, to what was quite evident, when fee notes were rendered, to almost double, approximately R2.5 million.

265. Whereafter, not only did Adv Mkhwebane proceed with an application for leave to appeal, but she did the following:

265.1. terminated the services of TGR in favour of engaging the services of Seanego Inc. from July 2019;

265.2. engaged the services of and followed the advice of Mr Ngobeni; and

265.3. briefed counsel to deal with the application for leave to appeal (when leave to appeal was refused different senior counsel was engaged to again lodge another leave to appeal to the CC).

266. It is apparent from emails that whilst Seanego Inc. were only substituted as the attorneys of record on 11 July 2019, they had been consulting with Mr Sithole in respect of the notice of application for leave to appeal since June 2019 already. In October 2019 Seanego Inc. was instructed to replace the senior counsel.[19] It is noticeable from the fee notes that, Seanego Inc. travelled to filed the application for leave to appeal in Bloemfontein,[20] followed by a return trip the to make an application for condonation a week later, after which the attorney travelled again to Bloemfontein to serve and file the replying affidavit. The filing of the SCA application alone cost approximately R144 100.[21] Some of these costs are then duplicated on a different invoice causing the PPSA to be charged again. However, the duplication of costs is demonstrated to make the point that this is not the kind of cost issues that falls under the purview of Adv Mkhwebane, but that of the CEO, CFO and Mr Sithole.

267. It was indeed Mr Sithole's evidence that he had no recollection of Mr Ngobeni being involved in the Vrede matter, and yet evidence before the Committee indicated that Adv Mkhwebane, via email, directly informed Mr Sithole that she had engaged Mr Ngobeni and requested that Mr Sithole provide him with the requisite record and heads of argument which he duly did. It is hence highly improbably that Mr Sithole did not know of Mr Ngobeni's involvement in the Vrede matter, especially given Mr Ngobeni's subsequent involvement and article on Tolmay J.

268. The ABSA CC judgment was handed down prior to Tolmay J handing down the Vrede costs judgment in which a personal costs order was made against Adv Mkhwebane. Tolmay J has reserved her judgment until after the CC judgment was handed down. Tolmay J's exercise of discretion in the cost judgment was unassailable, and subsequently upheld by both the SCA and the CC as the appeals were dismissed.

269. Judge Tolmay expressly stated:

> '[25] The failures and dereliction of duty by the Public Protector in the Estina matter are manifold. They speak to her failure to execute her duties in terms of the Constitution and the Public Protector Act. In my view her conduct in this matter is far worse, and more lamentable, than that set out in the **Reserve Bank** matter. At least there her failures impacted on institutions that have the resources to fend for themselves. In this instance her dereliction of her duty impacted on the rights of the poor and vulnerable in society, the very people, for whom her office was essentially created. They were deprived of their one chance to create a better life for themselves. The intended beneficiaries of the Estina project were

[19] One senior advocate drafted the application for leave to appeal and another argued the application for leave to appeal.
[20] The PPSA paid these fees.
[21] This includes the double charging on 13 March 2020.

> disenfranchised by the very people who were supposed to uplift them. Yet the Public Protector turned a blind eye, did not consult with them and did not investigate the numerous irregularities that allegedly occurred properly and objectively. She even completely failed to investigate the third complaint. In the judgment on the merits this Court dealt in detail with the failures of the Public Protector to properly investigate and to propose an appropriate remedial action. What was said there stands and requires no repetition. Her conduct during the entire investigation constitutes gross negligence. She failed completely to execute her constitutional duties in the ways illustrated in the judgment on the merits.'
>
> . . .
>
> [27] Her inability to comprehend and accept the inappropriateness of her proposed remedial action constitutes ineptitude. As was stated in the **Reserve Bank** judgment a higher duty is placed on her due to her great importance in our democracy. The Public Protector failed the people of this country in the way she dealt with the investigation of the Estina dairy project.
>
> [28] The Public Protector has immense power, but with that power comes great responsibility. If she fails, as she did in this case, (to execute her duties), she must take full responsibility.
>
> [29] What was also of great concern and a factor that this Court took into consideration, when considering the appropriate costs order, is that the Public Protector made use of two different sets of counsel.
>
> [30] These appointments must have caused an enormous escalation of legal costs for her office. This must be seen in the light of the fact, that although two applications were brought, by two different entities, they were based on exactly the same facts, and dealt with the same project. Accordingly they also relied on the same legal principles. One set, of any of her very competent legal teams, could easily have dealt with both matters. In argument the decisions to appoint two legal teams was defended on the basis that two applications served before the Court. There is no merit in this argument for the reasons already alluded to. This decision by the Public Protector unfortunately shows a total disregard for the taxpayers, who will have to foot the bill and flies in the face of her complaint about how financial constraints limited her ability to properly investigate the complaints.'

270. The reasons given in Adv Mkhwebane's AA in both the DA and CASAC applications as to why a personal cost order against Adv Mkhwebane should not be made was the following:

270.1. Far-reaching and serious implications on the administration of justice and the rule of law;

270.2. It was incompetent because she had not been cited in her personal capacity; and

270.3. It would interfere with the functioning of the Public Protector and hence be inconsistent with s 181(4) of the Constitution and the PPA, which interference constituted a criminal offence.

271. In light of the Absa CC judgment, the Court rightly found there to be no merit in this argument, especially given that the initial advocates had been briefed to do both.

272. Tolmay J referred to the words of Mogoeng J who had penned the minority judgment in the Absa CC judgment, where he did not exclude the possibility of granting a punitive personal cost order, but stated that '*extraordinary circumstances should be present for such an order to be awarded*' and that the Public Protector should not be allowed to abuse her power or office with impunity.

273. Tolmay J, in para [18] quoted further from the judgment of Mogoeng J and indicated: '*... it is only those who knowingly defend the indefensible or oppose in circumstances where they ought reasonably to have known that their defence was hopelessly without merit and were thus abusing Court processes, who should be punished for persistently opposing applications to the end, it is not every unsuccessful litigant that will be mulct with costs on an attorney-client scale*'.[22]

274. Mr Sithole was of the view that the Court had been unfair because they probably would have spent the same amount of money and time as the advocate would have prepared heads for both. This is clearly not correct given the considerable overlap between the issues in both applications. Moreover, appearance costs, as well as the cost of additional perusal that had to be incurred as a consequence of a second set of counsel, and additional instructions from the instructing attorney, would clearly have inflated the costs considerably. Given that Mr Sithole had limited private practice experience before joining the PPSA, it may well be that he lacked the requisite experience to assess this adequately, alternatively he sought to deliberately mislead the Committee in respect of what should have been an obvious consequence of briefing additional counsel.

275. Lastly, the Committee acknowledges complaints received from certain counsel whose names appeared on the cost summaries prepared by the evidence leaders and the view that this was done in a manner that sought to discredit them. The Committee emphasises that the purpose of sourcing this information was to consider PPSA expenditure and not for any other nefarious reasons, it being noted that the evidence leaders delivered services as per their instructions from the Committee and in fulfilling their functions.

(vi) <u>In summary</u>:

276. A clean audit does not necessarily mean that fruitless and wasteful expenditure had not occurred or that the Committee is precluded from considering whether legal costs incurred constitute fruitless and wasteful expenditure.

277. The existence of a clean audit does not prevent a conclusion that misconduct, or incompetence has occurred because of an intentional failure or a grossly negligent failure to <u>*prevent fruitless and wasteful expenditure of legal costs*</u>.

[22] Vrede cost at para [18].

278. In undertaking such consideration, it does not infringe on the terrain of the AGSA as this consideration is not by its nature an audit, nor does it undermine the stringent requirements adhered to by the AGSA for accounting purposes.

279. The Public Protector as the head of the PPSA cannot – by virtue of the provisions of the PFMA or otherwise – lay at the door of the CEO the decisions taken which given rise to legal costs that may constitute fruitless and wasteful expenditure.

280. There is a difference between briefing an advocate because Adv Mkhwebane seeks a legal opinion, and whether that instruction in and of itself was made in vain and could have been avoided had reasonable care been exercised.

281. The Nkandla judgment alone is not the reason for increased review application and is certainly not responsible for reports being reviewed and set aside and legal costs being incurred. Give the extent and reasons furnished in the court judgments it reflects both incompetence and misconduct. In other words, an increase in review applications is not merely on the basis that the action therein is binding but rather that the conduct of the investigation or remedial action and report is flawed.

282. **Adv Mkhwebane failed in a grossly negligent manner to prevent this from occurring by ignoring basic legal principles expected from an incumbent Public Protector in finalising reports and then pursing litigation endlessly and needlessly.**

283. **Adv Mkhwebane committed misconduct in utilising PPSA resources to obtain legal advice and commencing litigation for personal gain and in doing so committed misconduct by failing intentionally to prevent fruitless and wasteful public expenditure in legal costs.**

284. **Adv Mkhwebane committed misconduct in the performance of her duties by failing in a grossly negligent manner to prevent fruitless and wasteful public expenditure in legal costs by litigating recklessly as demonstrated hereinabove and in the judgments relating to the matters in the Motion.**

285. The Committee found that there was fruitless and wasteful expenditure incurred and that in pursuing litigation the Public Protector did not take due care in dealing with public money. There was a failure to establish appropriate corporate governance. There were no mechanisms to ensure that appeals with less prospect of success were not pursued. The Public Protector is the executive authority and ultimately responsible for making decisions including litigation decisions. Priorities were given to litigation, fighting political battles, and defending reports in which there was no real

chance of winning and as such the funding was taken from the core mandate of the institution. The Public Protector failed to use the resources of the institution in effective and efficient manner as expected of the holder of a public office in s 195 of the Constitution and intentionally incurred fruitless and wasteful expenditure.

286. The minority view expressed is that if anyone is to be blamed for wasteful expenditure it should be the auditors given that there was in the second audit and the third audit no reference to wasteful expenditure . The CEO cannot be excused. The evidence put before this Committee is rejected, and the auditors are to be blamed and not the Public Protector South Africa or the Public Protector herself.

E. TABLE I

Date	Total Revenue including "*in kind*"	Total Funded Staff Establishment	Staff costs	Percentage	Total left after staff costs (B – D)	Legal costs (Already less professional fees)	Total left for PPSA work (F – G)
2016/2017	R274,859,669.00	395	R202,513,336.00	73.68	R72,346 333.00	R6,446,036.00	R65,900,297.00
2017/2018	R327,213,660.00	389	R238,917,686.00	73	R88,295 974.00	R20,512,818.00	R67,783,156.00
2018/2019	R341,580,535.00	365	R238,172,647.00	69.63	R103,407 888.00	R16,458,737.00	R86,949,151.00
2019/2020	R368,013,000.00	357	R252,817,797.00	68.7	R115,195 203.00	R48,371,186.73	R66,824,016.27
2020/2021	R367,188,000.00	366	R253,382,250.00	68.7	R113,805 750.00	R31,018,307.04	R82,787,442.96
2021/2022	R362,714,000.00	368	R245,998,223.00	67.8	R116,715 777.00	R24,190,962.62	R92,524,814.38

TABLE II

Consulting and professional fees		Legal fees
revised NM17 (bundle B, item 24)		
2016 – 2017	**R13,020,511.00**	**R6,446,036**
2017 – 2018	**R24,538,780.00**	**R20,512,818**
2018-2019	**R17,189,915.00**	**R16,458,737**
2019-2020	**R47,209,433.00**	**R48,371,187**
2020-2021	**R31,590,119.00**	**R31,018,307**
2021-2022	**R25,427,392.00**	**R24,190,963**
	R158,976,150.00	**R146,998,047.39**

TABLE III

	Reports	Closing Reports	Reports Reviewed & Set Aside	Closing Reports Reviewed & Set Aside	Reviews Pending (opposed)	Reviews Pending (unopposed)	
2016/2017	10	0	3	0	0	1	total of 17
2017/2018	34	2	5	0	2	2	
2018/2019	46	6	8	0	5	5	
2019/2020	137	21	12	0	10	6	
2020/2021	73	24	3	0	1	7	
2021/2022	112	23	3	1	6	2	
2022/2023	???	???	2				
	412	76	36	1	24	23	

??? These figures are not confirmed as yet.

F. PARAGRAPHS 11.3 AND 11.4

287. Para 11.3 reads '*Adv Mkhwebane has committed misconduct by and/or demonstrated incompetence in the performance of her duties by* ***failing intentionally or in a grossly negligent manner to conduct her investigations and/or make her decisions in a manner that ensures the independent and impartial conduct of investigations***'.

288. Para 11.4 reads *'Adv. Mkhwebane has committed misconduct by and/or demonstrated incompetence in the performance of her duties* ***by deliberately seeking to avoid making findings against or directing remedial action in respect of certain public officials, while deliberately seeking to reach conclusions of unlawful conduct and impose far-reaching disciplinary measures and remedial action in respect of other officials (even where such conclusions and/or measures and/or remedial action manifestly had no basis in law or in fact).'***

G. THE APPOINTMENT OF MESSRS NYEMBE, NGOBENI & OTHERS

(i) The appointment of Mr Sibusiso Nyembe

289. The evidence is that on 8 February 2018, the late Mr Nyembe addressed correspondence to Adv Mkhwebane wherein he sought to provide his services to the PPSA either through the conclusion of a long term contract for the duration of Adv Mkhwebane's period of office, alternatively three years, either as Lawyers for Radical Economic Transformation – a company of which Mr Nyembe was the sole director – alternatively as a natural person. This letter was a follow-up to previous communications between Mr Nyembe and Adv Mkhwebane dating back to November 2017 and January 2018.

290. Adv Mkhwebane appointed Mr Nyembe as her Special Advisor for a fixed period commencing in April 2018 and ending on 30 June 2018. His letter of appointment, dated 15 February 2018, stated that his duties and responsibilities were to be determined by Adv Mkhwebane from time to time and would be exercised subject to Adv Mkhwebane's control and subject to the applicable provisions of the Constitution and the PPA, and were to include those set out in the performance contract to be signed. Mr Nyembe accepted the appointment on 29 March 2018. According to Mr Sithole, Mr Nyembe's mandate as Adv Mkhwebane's special advisor was wider than just legal matters. It included communication, the economic landscape, the political landscape and the environment in which the PPSA operated. The evidence is that this was Mr Nyembe's mandate both in his role as special advisor and in the later role he assumed of Chief of Staff in the PPSA.

291. From the evidence that has already been placed before the Committee the period of Mr Nyembe's appointment as Adv Mkhwebane's Special Advisor is the same period that the PPSA was said to be experiencing financial constraints the extent of which was that it could not conduct certain aspects of the Vrede investigation and had to limit travel for investigations.

292. On 14 February 2018, Adv Mkhwebane approved a *Policy of Appointment of Special Advisors to the Executive Authority* ('**the Policy**'). The Policy gave Adv Mkhwebane the prerogative to appoint a special advisor without following any recruitment process. According to the Policy, the Special Advisor was not part of the staff complement of the PPSA.

293. On 22 March 2018, Adv Mkhwebane addressed a letter of consultation to the Minister of Finance with regard to the Policy. She sought approval from the Minister of Finance for the PPSA to appoint special advisors, in terms of s 3 of the PPA. In the letter Adv Mkhwebane informed the Minister of, *inter alia*, the approval by her of the Policy earlier in February 2018.

294. On 24 May 2018, Mr Nemasisi rendered a preliminary legal opinion to the CEO, Mr Mahlangu about the process to be followed subsequent to the concerns raised in the bargaining forum and media enquiries regarding the appointment of the Special Advisor and Chief of Staff. The Chief of Staff was then Ms Linda Molelekoa who had been internally seconded by Adv Mkhwebane when she took office to the position of Chief of Staff in her private office. The Public Servants Association later directed a query to Adv Mkhwebane regarding an allegation that Adv Mkhwebane had appointed Ms Molelekoa to the position of Chief of Staff in circumstances where she was not qualified for the position. The allegation was that she did not possess a matric qualification.

295. In his preliminary advice to Mr Mahlangu, Mr Nemasisi therefore sought to address the appointments of both Ms Molelekoa and Mr Nyembe to their respective positions as Chief of Staff and Special Advisor. Mr Nemasisi's advice to Mr Mahlangu was that, *inter alia*, the prerogative to appoint a Chief of Staff without following PPSA recruitment policies does not mean that Adv Mkhwebane can appoint a person without minimum qualifications for the position. As a result of the fact that the incumbent did not meet the minimum qualification requirement for the position of Chief of Staff, the appointment is invalid and must be terminated with immediate effect. Adv Mkhwebane ended Ms Molelekoa's secondment and she returned to her substantive position as Manager: Customer Services in the Complaints and Stakeholder Management unit, with effect from January 2019.

296. In relation to the appointment of Mr Nyembe, Mr Nemasisi's advice to Mr Mahlangu was the following, in the main: *(a)* s 3(1) of the PPA is applicable only to staff of the PPSA; *(b)* due to the

fact that the special advisor is not part of the PPSA staff establishment, s 3(1) of the PPA is not applicable to the appointment of a special advisor; *(c)* when appointing a special advisor Adv Mkhwebane is required in terms of s 3(10) of the PPA to consult with the Minister of Finance as required under s 3(1) and 3(9) of the PPA; *(d)* as the consultation with the Minister of Finance did not take place, the Policy is not in line with the PPA and it is therefore invalid; *(e)* s 3(11)(c)(i) of the PPA and suggested that Adv Mkhwebane could implement her determination on the Policy pending its approval, however, should the NA disapprove in terms of s 3(11) a of the PPA, Mr Nyembe's appointment shall cease on the date of such disapproval; *(f)* due to the invalidity of the Policy, the appointment of Mr Nyembe must be terminated with immediate effect and a process prescribed by the law must be followed.

297. On 4 June 2018, the Finance Minister responded to Adv Mkhwebane, noting in his response that the Policy in relation to which Adv Mkhwebane sought to consult him had already been approved without consultation. The Minister proposed the withdrawal of the Policy to allow for due consultation with him as required by s 3 of the PPA. Once such consultation had occurred Adv Mkhwebane could then table the Policy in the NA within 14 days after making a determination as required by the PPA.

298. On 7 June 2018, Mr Seanego was instructed to obtain a legal opinion from counsel on Adv Mkhwebane's powers to appoint special advisors. The opinion, dated 12 June 2018, was furnished by Adv G Shakoane SC. In essence, the opinion of Adv Shakoane SC confirmed that of Mr Nemasisi i.e. that Adv Mkhwebane's powers to appoint advisory staff is subject to consultation with the Minister of Finance in terms of s 3(10) of the PPA.

299. On 13 June 2018 the Justice PC considered the Policy. It expressed the following concerns: *(a)* Given that the Policy clearly indicated that the special advisor is not a member of staff, and that Mr Nyembe was also not seconded to the office, the Committee was concerned about Adv Mkhwebane's authority to appoint a special advisor given that s 3 of the PPA provides for the appointment of staff (which Mr Nyembe was not) by Adv Mkhwebane, or staff seconded to the PPSA (which Mr Nyembe was not); *(b)* The availability of resources to pay for the services of the special advisor, given that whilst the Committee had been informed that the PPSA could afford the appointment because it had savings from the vacant CEO position, the PPSA now had a full time CEO in its employ and therefore might not have the funds to pay for the services of the special advisor, and there was no budget for the position.

300. On 18 June 2018, the Justice PC Chairperson addressed a letter to Adv Mkhwebane relating to the Policy. He noted that a special advisor had already been appointed and that his term of office was set to expire at the end of June 2018. The letter noted further that the Finance Minister had requested further consultation before the Policy could be finalised. In light of its reservations regarding the appointment and the fact that the Finance Minister had requested consultations, the Justice PC Chairperson advised Adv Mkhwebane not to appoint a special advisor after Mr Nyembe's contract ended pending consultation with the Minister.

301. The evidence is that after Mr Nyembe's appointment as special advisor to Adv Mkhwebane came to an end on 30 June 2018, the post of Chief of Staff was then advertised. Mr Nyembe applied for the position of Chief of Staff; he was interviewed subsequently appointed on a fixed term contract of employment linked to Adv Mkhwebane's own term of office, with effect from 1 January 2019. Mr Nyembe accepted the appointment on 20 December 2018.

302. Mr Nyembe reported directly to Adv Mkhwebane in his role as Chief of Staff. Mr Sithole's evidence was that Mr Nyembe instructed him to obtain a legal opinion in respect of a crowdfunding campaign to raise funds for Adv Mkhwebane's personal costs orders against her. In this regard, Mr Nyembe instructed him to obtain a legal opinion from a certain senior counsel, and Mr Sithole understood that although the instruction came to him from Mr Nyembe, he would have first consulted Adv Mkhwebane.

303. In an email dated 30 April 2019, Mr Nyembe wrote to Adv Mkhwebane, copying Mr Sithole, with the subject line: *'My View is PPSA Must Institute a court Action.'* In the email he addressed what he regarded as the state of the PPSA being insufficiently funded by government in particular when compared to entities such as SAPS, Independent Police Investigative Directorate ('**IPID**'), the Hawks who, according to him, have funding enabling them to meet 75% of their demands and needs whilst the funding given to the PPSA enabled it only to meet 57% of its needs, which was unfair. To remedy this he proposed immediately instituting a court action alleging that the government is unconstitutional in its failure to sufficiently fund the PPSA. He admitted at the end of the email that the idea was initially mooted by '*Adv*' Ngobeni.

304. Mr Sithole confirmed in his oral evidence that Mr Nyembe was indeed an admirer of Mr Ngobeni, and he confirmed that the recommendation to appoint Mr Ngobeni to render services to the PPSA came from Mr Nyembe. They referred to him as '*Adv*' Ngobeni.

305. From the evidence presented through Mr Sithole, Mr Nyembe also played a role, in his capacity as the Chief of Staff, during the investigation into the SARS Unit and SARS subpoena matters.

Regarding the latter, he was for instance copied in by Adv Mkhwebane on the correspondence wherein, after receipt of the opinion of Adv Maenetje SC and Adv Ferreira with which she did not agree, she instructed that the opinion of Adv Sikhakhane SC be obtained to contradict that of Adv Maenetje SC.

306. Mr Nyembe's role, and influence, in the SARS Unit matter is evidenced by his email contribution after he was provided with a proposed response to Minister Gordhan, drafted by Mr Mataboge on 24 April 2019, the day after Adv Mkhwebane had issued a media statement announcing, amongst other things, that she was granting Minister Gordhan an extension to respond to the subpoena she had issued, and that she had been reliably informed of some collusion between the '*implicated*' parties to coordinate their responses to her.

307. In response to the draft letter prepared by Mr Mataboge, Mr Nyembe proposed that Adv Mkhwebane's sentiments be captured in the letter to be sent to Minister Gordhan's attorneys, those sentiments being that: *(a)* The conduct of Minister Gordhan's attorneys' is deplorable and amounts to interference with Public Protector operations; *(b)* Warning the attorneys and their principals to desist from conducting themselves this way against a Constitutional institution; *(c)* Drawing Minister Gordhan's attention to the fact that they have violated the subpoena as they did not present themselves physically; and *(d)* The letter was to bring to the attention of Minister Gordhan the point which Adv Mkhwebane wanted to bring to his attention, which was that he has already shown signs of being unruly.

308. Adv Mkhwebane's assertions regarding what she viewed as the attitude of Minister Gordhan's attorneys and Minister Gordhan himself during the investigation, which echo the above sentiments, have been set out in detail elsewhere in this Report.

309. The above sentiments are reflected in 5.8 of the SARS Unit Report, wherein Adv Mkhwebane saw fit to respond to what she described as allegations made against her in the performance of her duties during the investigation. She stated, *inter alia*, that there has been a continued tone of resistance and undermining of the functions and integrity of her as a person and the PPSA as an institution. These complaints were also reflected in the affidavits she filed in the review heard by the Full Court which was not upheld.

310. The evidence establishes that:

310.1. Adv Mkhwebane appointed Mr Nyembe as her special adviser in an irregular manner, in the absence of compliance with the provisions of the PPA in circumstances where she had

been advised and should reasonably have known that under s 3(10) of the PPA it was not lawful for her to do so without consultation with the Finance Minister as required under s 3(1) and 3(9) of the PPA, and should not have needed to procure a senior counsel's opinion to have told her as such.

310.2. The irregular appointment occurred during a period when the PPSA was said to be experiencing financial constraints that negatively impacted on its ability to conduct investigations which is a core component of its work.

310.3. As chief of staff Mr Nyembe performed the same functions as he did when he was special adviser.

310.4. Adv Mkhwebane's views about Minister Gordhan and his attorneys in the SARS Unit investigation, which views ultimately were reflected in the final Report, were influenced by Mr Nyembe's advices.

311. The evidence further established that Mr Nyembe was not the only person engaged to render services to the PPSA at this time, under the direction of Adv Mkhwebane.

(ii) <u>The services of Mr Paul Ngobeni</u>

312. Evidence was led before the Committee by Mr Van der Merwe, the Senior Legal Services Manager at the PPSA, and Mr Sithole which showed that the PPSA, under the direction of Adv Mkhwebane, enlisted and paid for the services of Mr Ngobeni, who is not an admitted to practice law in South Africa, but nevertheless provided legal opinions and drafted court papers, including arguments in at least one instance premised in the litigation of some of the matters that form the subject of this Enquiry. From inception, correspondence reflects that he was to 'process his invoices' through the office of Seanego Inc.

313. In his oral evidence, Mr Sithole was referred to several invoices rendered by Seanego Inc which reflect that that they were paying fees to Mr Ngobeni, ostensibly for rendering advices, writing or settling letters and consultations at the PPSA offices. Sometimes Mr Ngobeni's services would be coupled with an advocate others not. It commenced around July 2018, coinciding with communications to the Speaker and included the rendering of legal advice relating to an initial complaint rendered by Mr Steenhuizen, then Chief Whip of the DA. Over half million costs were incurred during the period June 2018 to October 2018, in effect using Mr Ngobeni, Seanego Inc and Adv Mankge to write opinions and submissions to the Speaker/PC Justice. In fact at this juncture

the Seanego Inc. invoices referred to Mr Ngobeni as a consultant and reflected him as 'Adv Ngobeni'. On one occasion attached to the Seanego Inc invoice rendered to the PPSA is an invoice rendered by him as 'Adv Ngobeni'. In correspondence to the Committee Secretariat Mr Ngobeni disavowed having rendered any invoice as 'Adv Ngobeni' or of himself off as an advocate. Noticeably, on subsequent invoices he is invariably referred to as Mr Ngobeni, being an indication that it was known that he was not an admitted attorney or advocate. Yet Mr Sithole's evidence was that he believed him to be an advocate whose services were already being used when he was transferred to Legal Services. Despite fee notes reflecting legal opinions being done by Mr Ngobeni, none were forthcoming under his name or letterhead. It appears to have been done under the letterhead of Seanego Inc. This lends itself to the conclusion that it was known that he was not an advocate. Certainly, it was so that save for a handful of persons at the PPSA, it was not known that his services was engaged from time to time. It is clearly apparent that filtering his invoices through Seanego Inc as a conduit, was to bypass any procurement processes.

314. Moreover, under the guise of legal services he billed for writing articles making scathing remarks therein of persons including Mr Tito Mboweni and the then State Security Minister. His advices were clearly not only of a legal nature described in one invoice as follows: '*researched and analysed renewed political attacks on the Public Protector. The matter of the ABSA ruling is on appeal and rules of Parliament prohibits a discussion of the same matter pending before the courts and yet the Parliamentary Committee was scheduled to deliberate on the same matter, with a whole lot of articles.*' It further referred to the following (all of which the PPSA paid for at a time when there were monetary constraints on the PPSA):

314.1. Research, drafted and published article on Minister's Mboweni unwarranted attack on the Public Protector.

314.2. Research, drafted and published article on State Security's attack on Public Protector.

314.3. An entry described as: '*Research, drafted and published article on State Security Minister's attack on Public Protector – Constitutional mandate of Public Protector and apartheid era classifications of documents issued published act'*.

315. Mr Ngobeni's invoice in this regard- in the amount of R 87000- was filtered through Seanego Inc for a fee of R 3000. The production of articles of this nature were interspersed among the work for which Seanego Inc paid Mr Ngobeni , in turn being paid by the PPSA with Mr Sithole authorising payment thereof. This engagement of obtaining opinions and using Mr Ngobeni to draft letters, which cost more than half a million, occurred during the 2018/2019 financial year when the PPSA

was engaging in austerity measures given financial constraints. There can be no doubt that extensive funds were diverted for these purposes at the expense of the core business of the PPSA. Self-evident is an invoice exceeding R 20000 to settle a letter to the Speaker and payments for various opinions not related to the PPSA's main functions but to advice Adv Mkhwebane on the complaint lodged. This was during a period in which the PPSA was experiencing financial difficulties and withdrawing its defence of certain court matters and yet Mr Ngobeni was engaged charging a consultancy fee whilst simultaneously an instruction is given to brief an advocate. Mr Sithole's evidence was that the instruction would have come from Adv Mkhwebane or it would have been suggested by Mr Nemasisi. He was insistent that he knew Mr Ngobeni to be an advocate who did not hold chambers and for that reason his advices were rendered under other letterheads. This explanation is farfetched.

316. Mr Sithole could not confirm Mr Ngobeni's legal qualifications. He confirmed, however, that to his knowledge Mr Ngobeni was not a senior counsel, nor was he registered with any professional body in the country, but that he was engaged by the PPSA as an advocate to provide opinions for them and could only recall him to have provided services of that nature. He could specifically not recall Mr Ngobeni being engaged in the Vrede matter from the application for leave to appeal stage, despite being the one instructed directly by Adv Mkhwebane to provide him with documentation. In this regard Mr Sithole's evidence was inherently unreliable.

317. As elaborated upon below, in the context of the CR17 matter it is to Mr Ngobeni that Adv Mkhwebane turns to render advice. These services are invoiced by Seanego Inc under the heading '*Offer to appoint to act on behalf of the Public Protector in the provision of a legal opinion from senior counsel*,' to which an invoice of Mr Ngobeni – who it should reasonably have been known was neither an advocate or a senior counsel – is attached. The evidence is that this was initially to be an instruction to a senior counsel but Adv Mkhwebane was amenable to it being rendered by Mr Ngobeni. The evidence of Mr Sithole further confirmed that the CR17 opinion drafted by Mr Ngobeni was rendered under a Seanego Inc. letterhead. Mr Sithole claimed not to know why it was sent on a Seanego Inc letterhead.

318. Mr Sithole confirmed that only Seanego Inc. instructed Mr Ngobeni. Mr Nyembe had made that recommendation to Seanego Inc., who appointed Mr Ngobeni knowing that he was not a senior counsel or registered with any bar. There was no process for selecting advocates and no due diligence was done on Mr Ngobeni. Mr Sithole confirmed that Mr Ngobeni's invoices were paid and that the items included writing and publishing in particular. He was not sure why that would be in contravention of SCM regulations.

319. Mr Sithole admitted that he had signed off on the payment for the communications services too. He described these services as a '*value add*'. He could not dispute that a value add would not have been charged for and then said it was an '*extra service*' and could hardly be construed as legal services to be paid through an attorney.

320. In addition an entire media campaign was embarked on as considered below.

(iii) The services rendered by Mr Ngobeni, Miss Kim Heller and Prof Seepe

321. Mr Ngobeni was not the only service provider for similar or associated services rendered to the PPSA during this period.

322. On 18 February 2019, Ms Kim Heller of Kim Consultancy addressed an email to Mr Ephraim Kabinde, the personal assistant of Adv Mkhwebane, requesting a meeting following on discussions had with Adv Mkhwebane in late 2017 to render communications and strategic services to the PPSA. This, notwithstanding that the PPSA employed personnel to perform tasks of this nature.

323. After Mr Kabinde forwarded Ms Heller's email to Adv Mkhwebane and Mr Nyembe, Adv Mkhwebane responded on the same day confirming that they had previously engaged and requested a meeting to be arranged. Adv Mkhwebane further instructed the CEO and CFO to engage Ms Heller on her behalf and advise on how the PPSA could use the communications and strategic services to augment marketing of PPSA and its impact. She advised the CEO that she had sent the proposal, and she hoped the CEO would follow-up and advise her on how the PPSA could source the services.

324. On 4 June 2019, Mr Seanego provided Prof Seepe and Ms Heller with his contact details. Prof Seepe acknowledged receipt of Mr Seanego's details.

325. On 5 June 2019 Ms Heller addressed an email to Mr Seanego expressing appreciation for their meeting earlier that day and stating they *looked forward to working alongside him, in a clear* acknowledgement that they – Mr Seanego, Ms Heller and Prof Seepe were to collaborate.

326. On 5 June 2019, Ms Heller followed up with an email to Mr Seanego and Mr Oupa Segalwe, the spokesperson for Adv Mkhwebane, to which was attached a proposal for the strategic communication services they were to provide. The content of their proposal elaborated on their offer of strategic communication services to '*counter the total and unwarranted onslaught by media*'. Their work would include '*key thought pieces*' focusing on, *inter alia*, items described as follows: *(a)* judicial prejudice; *(b)* the lynch mob mentality of the media, judiciary and civil society in the

deliberate unsteadying of Adv Mkhwebane; *(c)* unpacking the Pravin Gordhan saga; *(d)* the undone matter of the rogue unit and CIEX; *(e)* profiling the People's Public Protector.

327. According to the proposal the first article was to be ready for publication in the week of Monday, 10 June 2019. The costs for strategic communication services set out in the proposal was to be R120 000.

328. In the document in which they provided the proposal detailed above, they included what they described as the key skillset of Prof Seepe and Ms Heller, none of which reflected legal skills, competencies or qualifications. Prof Seepe subsequently indicated that this whilst they had *'been in conversation with the Office of the Public Protector as far back as 2018 regarding possible provision of strategic communication services'* their proposal was not successful.

329. This only emerged after Mr Van der Merwe, who is the custodian of the relevant records and documents in his capacity as Senior Manager: Legal Services, had been requested by the evidence leaders to find an invoice dated 27 August 2019, rendered by Seanego Inc. which was identified as '*media publications*' in the amount of R 416 726 reflected on a statement they had come across, and despite request was not provided by Mr Sithole. The invoice was found and, according to the records of the finance department, that specific invoice was not paid. Attached thereto was an invoice he had found that he described as relating to services rendered as part of the '*Public Protector Project*' from Ngobeni Executive Consultants dated 1 August 2019 for the period May 2019 to July 2019 in the amount of R 390 000 detailed below.

330. This invoice in turn refers to work done for the PPSA in the main by Mr Ngobeni. It further refers to an invoice from Wekunene BS (Pty) Ltd (Inv No: SS-KH.1-19) in the amount of R 120 000 being the vehicle through which Ms Kim Heller and Prof Sipho Seepe sought to be paid for their services rendered. Neither are directors of this entity.

331. The remuneration charged by Mr Ngobeni for his attendances to this project are incorporated in an invoice of Seanego Inc., dated 26 August 2019 that reflects the following activities as having been undertaken, *inter alia*:

> *'04-06-19 Travelled to Pretoria and met with client, Mr Ngobeni, Prof. Seepe and Ms Heller to discuss how to counter the Onslight (sic) on the media on the Public Protector. (Director (TNS) – (6 hours 30 minutes)* - R 12 000
>
> *01-07-19 Travelled to Pretoria to meet with client, Prof Seepe and Kim Heller (Director (TNS) – (4 hours 28 minutes).* - R 8250
>
> *01-07-19 Ngobeni Executive Consultants' Fee'*

332. The invoice of Ngobeni Executive Consultants incorporated in Seanego's invoice referred to above, in the amount of R390 000.00 reflected the following activities to have been undertaken, in return for which that amount was charged to the PPSA:

21 May 2019 – 03 June 2019	*Received **CASAC DA Vrede Judgement** and provisional and final PP Reports; Final Notice of Appeal; All DA CASAC Papers; researched and drafted preliminary argument.*
05 June 2019	*Draft Letter to Speaker Research.*
06-10 June 2019	*Received and Research **Direct Access**; Leave to appeal Amended NOM and Supplementary Affidavit and Amended NOM.*
11-12 June 2019	*Drafted Legal Opinion on Controversy on **PP's Social Media and Section 7(9) Notices.***
12-13 June 2019	*Drafted correspondence urging Challenge to the BUSA Self-Styled Petition; Drafted Letter to the Speaker*
13 June 2019	*Drafted Legal Opinion on Waterkloof and Zondo Commission.*
17 June 2019	*Received Urgent Demand Publication of False defamatory Statement Re: **Pillay and Von (sic) Loggerenberg** from Webber Wentzel; **Researched Sikhakhane Panel Report; Kroon and Nugent Reports** and researched defamation law; Read PP Address to Sheriffs*
19 June 2019	*Correspondence on **Judge Tolmay's** Proposal for Stay Until Concourt decides costs; Research on piece-Meal Judgements.*
30 June -01 July 2019	*Researched and Drfated (sic) Advisory Opinion on Urgent Need to Litigate Matter of Sect.194 Removal*
02 July 2019	*Read Correspondence from Accountability Now regarding 'Holding the Public Protector to account under C (sic) 181(5)'Researched allegations on **ABSA Lifeboat matter in which ordered parliament to change the mandate of the SA Reserve Bank**, a matter about which NA had allegedly not complained. Wrote advisory on need to wrote to Speaker about referral of PP removal matter to a Committee.*
19-20 July 2019	***PP report on Pres. Ramaphosa** and researched legal challenges CR raises; jurisdictional and factual issues.*
21-22 July 2019	*Hoffman's Correspondence to LPC; research on effect of Concourt judgement on disciplinary matters; researched referral rule and mero motu disciplinary proceedings.*
23-24 July 2019	*Researched disbarment issues and Concourt Judgement and penned article: Why Advocate Mkhwebane Will Not be Disbarred' which was published.*
25-31 July 2019	***Read Gordhan's Urgent interdict and Review documents; Researched jurisdictional issues and interdict legal standards; analysed Poterill's judgement in Gordhan v Public Protector and authored an article 'Judge Poterill's Unethical and Incompetent Judgement.'***

333. It is for these activities that Mr Ngobeni charged the PPSA R390 000.00 (inclusive of the Wekunene invoice of R120 000 referred to above). It is this amount that was incorporated into the Seanego Inc.

invoice presented to the PPSA. It is apparent from the invoice itself that it is for services rendered from April 2019 until July 2019.

334. The evidence before this Committee is that during this period when Mr Ngobeni, Ms Heller and Prof Seepe were engaged to provide the strategic communications services as described, the PPSA had, and still has a communications department which is tasked with dealing with media responsibilities and communication functions of the office. Further, the communication strategy devised, based on a proposal submitted by Ms Heller never served before MANCO.

335. In response to these proposals received from Ms Heller, Adv Mkhwebane instructed Mr Nyembe that '*Adv*' Ngobeni be included in the proposal or proposed services, and requested a cost breakdown so that all could be accommodated. She further instructed Mr Nyembe to clarify with Mr Seanego some aspects of the proposed services, such as the costs of each article and the costs for each interview arranged. Adv Mkhwebane sent this email some five minutes after receiving Ms Heller's proposal.

336. Mr Nyembe relayed Adv Mkhwebane's instruction to Mr Seanego.

337. Mr Van der Merwe testified that to his knowledge at the time, Mr Ngobeni was involved in some projects in the PPSA, there was '*a panel*' apparently advising Adv Mkhwebane on the side. As far as he knew, Mr Ngobeni was not a legal practitioner that was on the PPSA panel of attorneys of the PPSA's service providers.

338. On 12 June 2019, Mr Seanego wrote to Mr Nyembe advising that Ms Heller would have a discussion with Prof Seepe and thereafter advise on an itemized fee proposal, and also consider whether they could include Mr Ngobeni. This accorded with the instruction from Adv Mkhwebane to them from the earlier email.

339. On 13 June 2019, Ms Heller sent an email to Messrs. Seanego, Segalwe, Nyembe and Ngobeni and Prof Seepe, providing Mr Seanego with the cost breakdown requested by Adv Mkhwebane and stating that Mr Ngobeni would send his costs under separate cover. It was evident from this communication that Mr Ngobeni had been accommodated as requested by Adv Mkhwebane in the provision of the strategic communication services.

340. This cost proposal submitted was for 'Strategic Communication Services including reading and research; article preparation, publication and marketing; interview set-up, preparation and

marketing; social media activation and advisory notes. The estimated time was 65 hours at an hourly rate of R1850.

341. The evidence, through Mr Van der Merwe, is that neither Prof Seepe, Ms Kim Heller nor Mr Ngobeni or any entity to which some of the invoices were made out to is on the PPSA database of consultancy service providers.

342. The evidence leaders wrote to Prof Seepe and Ms Heller, who responded as follows:

> *'For reasons that have nothing to do with the incompetence, that proposal was not concluded. Subsequently in mid-2019 and for a period of three months, strategic communication services were provided on an ad-hoc part-time basis to Adv Paul Ngobeni, who was assisting Seanego Attorneys on matters of legal services and opinions. No services were provided beyond the three months period.*
>
> . . .
>
> *the invoices to support services rendered were duly submitted through Wekunene business services, registered in 2016.'*

343. According to a letter from Prof Seepe dated 25 October 2022, pursuant to an inquiry from the Secretariat, the Committee was advised that this was for media services for a 'brief period of 3 months in 2019' rendered to Mr. Ngobeni Consultancy. Ms Heller and Prof Seepe stated that '*at no time was any money paid to us by the Office of the Public Protector*' and confirmed that '*we provided our services, this time to Mr Ngobeni, who was contracted by the Office of the Public Protector.*' Further,

> *'The format of engagement was deliberative. It was about providing expert insight and advice on how the client could respond to what we considered a determined and orchestrated onslaught*
>
> *3. The invoices submitted to Mr. Ngobeni provide details of breakdown of rates, nature of work done and hours spent.*
>
> *4. We had no direct working relationship with Theo Seanego or Seanego Attorneys Inc, except for the email communication regarding meetings, among others. We were engaged y Mr. Ngobeni.*
>
> *5. Attached is a tax clearance certificate of Wekunene Business Services.*
>
> *6. The issue of procurement does not arise since we were sub-consulted through Mr Ngobeni's consultancy.'*

344. The evidence above, however, establishes that a proposal was sent to Adv Mkhwebane, whereafter contact was made by Mr Seanego with Ms Heller and Prof Seepe; Mr Ngobeni was later included in the work on the instruction of Adv Mkhwebane and the manner of invoicing further does not support their response.

345. An email from Ms Heller dated 30 June 2019 to Adv Mkhwebane, Mr Seanego, Prof Seepe, Mr Nyembe, Mr Mahlangu and Mr Segalwe, had attached to it a report that set out an overview of the strategic communication activities conducted over the previous three weeks and recommendations on the next steps.

346. The last para of the report read:

> *'Our work has been orientated around high impact initiatives and interventions that influence and shape desired outcomes. We have sought and secured prime space and audience on radio and television and in newspapers. We have also pursued and delivered a high-presence social media campaign. Our media interventions have been coupled with advisory notes to the office and briefing of key influences behind the scenes. We believe we have managed to cause some disruption of the master narrative and succeeded in spearheading multiple calls by others for tax on the Public Protector to cease.'*

347. The next steps proposed:

> *'We are looking into the feasibility of public televised colloquium on the deliberate manufacture of discontent and partisan Eyes Wide Shut approach of media to the truth by advocating decisive legal action against those who trade in propaganda without evidence and harm, the reputation and standing of the Public Protector is recommended.'*

348. The report further stated that the activities for the period were: three opinion pieces, radio interviews, one television interview and nine social media activations with over 250 000 impressions.

349. Mr Van der Merwe perused the invoice '*SS-KH-1-19*' (which represented the initials of Prof Sipho Seepe and Ms Kim Heller) and was the same reference as that on the Ngobeni Consultancy invoice and he confirmed that the rate and hours corresponded to what had been contained in the proposal by M Heller and Prof Seepe. Two invoices in the amounts of R 99 000 and R 120 000 were provided to the Secretariat though the name to whom such invoice was rendered was removed. It is not indicated that they were not paid for these services which were described as follows on one of the invoices:

> *'Breakdown of hours: 3 hours reading and research, 15 hours article writing and publication (3 articles in period), 11 hours interview set up and broadcast for radio and TV (Interviews included ETV, SABC TV, SAFM), 9 hours social media narrative building and activation, 3.5 hours briefing notes and lobbying, 5.5 hours meeting and correspondence A summary and impact report will be provided at the next meeting with the Office.'*

350. From the aforestated invoice from Ngobeni Executive Consultants, Mr Ngobeni was involved in matters included in the Motion. He charged on 11 and 12 June for drafting a legal opinion on '*controversy on PP social media and Section 7(9) Notices*'. This was in relation to the announcement by Adv Mkhwebane on YouTube, during the SARS Unit investigation to the effect that she intended to issue Minister Gordhan with a s 7(9) Notice. Mr Ngobeni's advice to

Adv Mkhwebane included the following words: *'In dealing with a serial offender like Gordon, would tax the Public Protector's findings on one case, it may be necessary to inform the public about the other serious matters still in the pipeline of investigation. Gordhan has no legitimate constitutional interest in maintaining a reputation or perpetuating status as a victim based on a false foundation.'*

351. Significant in respect of the litigation was Mr Van der Merwe's evidence in appointing the legal team in the '*PG, Pillay and Magashule matter*'. Reference was made to an email in May 2019 saying that they could '*suspend the completion of the team on PG*', to which Adv Mkhwebane responds '*noted*'. The Chief of Staff then wrote an email that '*in order to satisfy counsel's preference*' they proposed to terminate VZRL attorneys and appoint Seanego. Mr Van Der Merwe said that the termination of VZRL was to accommodate counsel's preference which was to include the team which Adv Mkhwebane wanted on the matter including Mr Ngobeni, whose invoices were channelled through Seanego Inc.

352. Mr Ngobeni also advised on the Business Unity South Africa (**'BUSA')** petition for the removal of Adv Mkhwebane. Mr Ngobeni noted that it was a '*non-compliant*' petition and Prof Seepe agreed. Ms Heller then asked Mr Ngobeni to '*draft an initial letter which the team can review prior to distribution'.* Mr Ngobeni then sent a draft letter addressed to the Speaker in response to the BUSA petition. However, Mr Van der Merwe was unable to confirm whether it had been sent but confirmed it had not been sent from the PPSA.

353. Mr Van der Merwe explained that there had been a request from the Zondo Commission for records in connection with the '*Gupta landing of the plane at the Waterkloof Airforce base*'. He thought that was what the invoice entry relating to 13 June 2019 related to – that invoice was for a legal opinion on Waterkloof and Zondo Commission. Mr Ngobeni had written to Adv Mkhwebane saying that his opinion was rushed as '*time was of the essence*' advising that in his opinion Adv Mkhwebane must co-operate with the Zondo Commission, but *'must explicitly inform the Commission that it is not answerable to the Executive and that the Public Protector is not a Department of State or administration, and neither can it be said to be part of the national, provincial or local spheres of government'.*

354. Adv Mkhwebane responded to Mr Ngobeni stating, '*legal opinion well received and agreed with*'.

355. Telling however is the entry which relates to the CR17 matter.

19-20 July 2019 ***PP report on Pres. Ramaphosa*** *and researched legal challenges CR raises; jurisdictional and factual issues.*

356. This confirms Ms Baloyi's evidence of external persons being consulted. Moreover, it appears to contradict the proposition but to Mr Mataboge by Adv Mkhwebane's legal representative that it was Adv Sikhakhane SC that rendered advices in relation to the CR17 report. Given what is said below, about the legal inadequacies of the CR17 report this entry reflects that Adv Mkhwebane had sought advice against from Mr Ngobeni.

357. Earlier in May 2019 after the judgement of Tolmay J in the Vrede Dairy matter, Mr Ngobeni had authored an article titled: '*MOBILIZING THE JUDUICIARY FOR POLITICAL ATTACKS ON THE PUBLIC PROTECTOR: CAN JUSTICE BE DONE AMID EFFORTS TO INTIMIDATE AND REMOVE OUR PUBLIC PROTECTOR*'.

358. In that article, Judge Tolmay was described as one of the judges '*who allow vicissitudes of political controversy, their policy preferences, shaped by an almagam of factors that include their race, and most importantly, ideology or partisanship to determine court judgements they issue*'.

359. The further criticisms against Judge Tolmay set out in the article include, but are not limited to the following:

359.1. She is a white paragon of judicial virtue.

359.2. She has committed a plethora of legal errors in her judgement.

359.3. She knowingly or unwittingly aligned herself with a politically driven narrative and agenda to ensure that Adv Mkhwebane is condemned in court judgements and that the newly sworn Parliament is seized with the matter of her removal, which is said to be a damnable and disconcerting instance of judges being unashamedly transformed into echo chambers and willing instruments of political parties.

359.4. She committed incomprehensible judicial overreach when she found that an exercise of public power is constitutionally invalid, declared the Vrede Report invalid, reviewed and set aside and then claimed that the '*specific circumstances in this case*' made it not appropriate to refer the matter back to Adv Mkhwebane.

359.5. Her judgement was biased.

359.6. Judge Tolmay is no stranger to utilizing court judgements to advance populist causes untethered to the Constitution and the rule of law.

360. After Mr Ngobeni's article about Tolmay J was sent to Adv Mkhwebane and on 23 May 2019 she responded that the article is good and can be published.

361. Mr Van der Merwe confirmed that Mr Ngobeni had also charged on 2 July for reading '*correspondence from Accountability Now, regarding holding the Public Protector to account*'. This related to an email from Adv Hoffman SC to Parliament, in which Adv Mkhwebane was copied. Adv Mkhwebane sent this to Mr Ngobeni, Mr Seanego, Mr Sithole and Mr Nyembe. Mr Ngobeni drafted a letter to the Speaker.

362. Mr Ngobeni then rendered an opinion on the Accountability Now litigation (for the removal of Adv Mkhwebane).

363. On 22 July 2019 Mr Ngobeni provided a draft response to Adv Hoffman SC's complaint to the LPC which he sent to Mr Sithole '*for the Prof and Kim*'. He proposed they set up a '*working document on these contradictions from the justices*'. Adv Mkhwebane then added '*add the background of this matter per COS article, institution under threat and letter to JP Mlambo*.' The judgment of the CC was shared with the legal people and Adv Mkhwebane asked for a summary of the dissenting judgments. She thanked Mr Mhlongo for the summary and proposed: '*Let us share as widely as possible. Am advised that you alliances to do that instead of appearing as if I am fighting the judiciary*.'

364. From this it is evident that Adv Mkhwebane was well aware of the impropriety of her attacking the judiciary. It is for this reason, it appears, that she wished for her message to be disseminated through proxies rather than directly by herself. This, notwithstanding that she must have known her obligations under 165 of the Constitution.

365. During this period Adv Mkhwebane expressed a desire for Mr Ngobeni to be appointed more than once:

365.1. In the Mostert application, she said 'Please contact Ngobeni, SC to check his availability.'

365.2. In DA and CASAC Adv Mkhwebane requested the papers which she then sent to '*Adv Ngobeni*' as she had asked him if he could '*assist the senior junior to prepare papers for appeal*'.

365.3. In the Gordhan/SARS unit and related matters she expressly instructed that the appointment of Adv Masuku SC was subject to Mr Ngobeni being appointed to assist. This was clearly understood to be in the 'background.'

366. The evidence leaders sent several questions to Mr Ngobeni. His responses, which form part of the record of the Committee, were lengthy but in essence:

366.1. Mr Ngobeni denied that he had referred to himself as an '*advocate*' in his invoices. He is neither an admitted advocate nor an admitted attorney. He submits that he is eligible to practice law in South Africa by virtue of a Ministerial exemption in terms of the Recognition of Foreign Legal Qualifications and Practice Act 114 of 1993.

366.2. He resigned following a process to disbar him in the USA.

366.3. He describes himself as a 'Litigation and Communication Consultant' and rejects the suggestion that he was providing services of the nature that would have required him to be a practising advocate or attorney. His services should be viewed against the context of the CC's judgment stating that there was a developing trend of seeking personal costs orders against Adv Mkhwebane. (This statement was made long after his service was engaged.)

366.4. The Public Protector project was to provide legal and communications services to assist in the '*vicious propaganda war*' against Adv Mkhwebane.

366.5. He provided Legal and Communication consultancy services to Seanego attorneys who he invoiced for his services. This did not require a tender process. He declined to disclose the agreement between himself and Seanego Inc.

366.6. He had not corrected any impression on the part of the PPSA that he was an advocate as '*[n]one of the persons I worked with on the 'Public Protector Project*' ever referred to me as '*advocate*' or '*SC*'. Further in none of the emails, legal opinions and correspondence that he had authored did he ever refer to himself as '*Advocate*' or '*SC*'.

366.7. Mr Ngobeni, Ms Heller and Prof Seepe had an agreement with Seanego Inc.

367. He denied that he had ever received payment on behalf of Ms Heller at any time in respect of services provided by her directly or indirectly to Adv Mkhwebane. This is contradicted in the communication received from Prof Seepe who stated that they rendered services via Mr Ngobeni (albeit that they

used the vehicle of Wekunene BS (Pty) Ltd and rendered it to Ngobeni Executive Consultants). Given that meetings were held and reports provided, the role players were known to each other.

Summary:

368. Though Mr Ngobeni's initial appointment may have been at the recommendation of Mr Nyembe, evidence reflects that Adv Mkhwebane on several occasions engaged and communicated with him directly.

369. Adv Mkhwebane knew that he was not admitted to practice law in South Africa, given that she had requested that Mr van der Merwe search for the file of the investigation that Adv Madonsela had conducted of Mr Ngobeni, seeking documentation required for his admission. Moreover, Adv Madonsela's report details the circumstances under which Mr Ngobeni left the USA. This report remains unchallenged and was reasonably available to Adv Mkhwebane.

370. The services that she engaged Ms Heller, Prof Seepe and Mr Ngobeni to perform were primarily aimed at disseminating in the media and social media platforms information that was used to promote her point of view, and views which she endorsed.

371. The period in relation to which Mr van der Merwe was giving evidence regarding the provision of services by Prof Seepe, Ms Heller and Mr Ngobeni covered the period when Adv Mkhwebane was conducting the investigation into the SARS Unit and, for that matter, the CR17 investigation.

372. The evidence before the Committee is that in this period communications services were to be provided to the PPSA at the instruction of Adv Mkhwebane, aimed as they were at, *inter alia*, what was described as judicial prejudice and the Pravin Gordhan saga, whilst the SARS Unit matter investigation, whose Report was issued on 5 July 2019, was ongoing.

373. Hence at the same time as she was investigating a matter in which Minister Gordhan was an implicated party, Adv Mkhwebane used PPSA resources for external service providers to publish articles about him and judges in litigation involving him, aimed at what was described as 'countering a media narrative' that she perceived to be hostile. This makes her impartiality questionable.

374. In addition, Mr Ngobeni was rendering services in relation to litigation matters in which senior and junior counsel were already engaged. The duplication of costs is apparent. Having rendered invoices it is clear that there was an expectation that he would be paid.

375. **The engagement of these external consultants was clearly at the behest of Adv Mkhwebane and does not reflect an appropriate use of PPSA resources. Furthermore, it demonstrates misconduct in the manner that the investigations and/or decisions were taken in relation to Minister Gordhan, which reflected a lack of independence and impartiality, and accordingly substantiates the misconduct alleged under para 11.3 and 11.4.**

H. CR17 (AND EMEA COMPLAINT OVERLAP IN RELATION TO MR GORDHAN)

(i) Background

376. On 6 November 2018, Mr Musi Maimane (then leader of the DA) posed a question -in relation to VBS Bank-to President Ramaphosa in the NA. President Ramaphosa answered, and Mr Maimane was allowed to ask a follow up on VBS as provided for in in the NA Rules. Mr Maimane instead asked a question relating to a payment from BOSASA to the President's son, Mr Andile Ramaphosa. The question represented to the NA and the President, that: (a) Mr Gavin Watson, the then CEO of AGO had paid R500 000.00 into a bank account of the President's son, Andile Ramaphosa; and that (b) this bank account, EFG2, is a trust or foundation of Mr Andile Ramaphosa.

377. Even though the follow-up question was unrelated to the original question, and hence impermissible under the NA Rules, the President elected to answer the question immediately. He indicated that he was aware that AGO had paid his son but had been satisfied that it was a lawful payment for consultancy services rendered. The incorrect part of the President's oral response to Mr Maimane was that the R500 000.00 was a donation to his campaign to be elected ANC President in December 2017 at the party's elective conference.

378. Thereafter the President wrote to the Speaker advising that he had provided incorrect information in response to Mr Maimane's question. More particularly that

378.1. The reply to the question was based on the information he had at the time of a business relationship that his son's company has with AGO. '*The said consultancy services were provided by my son's company to African Global Operations in a number of African countries other than South Africa. He informed me that South Africa was specifically excluded to avoid a potential conflict of interest.*'

378.2. He was subsequently informed that the payment referred to in the supplementary question by Mr Maimane did not relate to that contract.

378.3. He had been told that the payment to which Mr Maimane referred was made on behalf of Mr Watson into a trust account that was used to raise funds for a campaign established to support his candidature for Presidency of the ANC (**'CR 17 Campaign'**).

378.4. This donation was made without his knowledge. He was not aware of the existence of the donation at the time that he answered the question in the NA.

379. The R500 000 had been paid to EFG2, a trust account of a firm of attorneys, tasked with collecting donations for the CR17 Campaign.

380. This gave rise to two complaints lodged with the Public Protector:

380.1. From Mr Maimane titled, '*IN RE: COMPLAINT: RELATIONSHIP OF PRESIDENT WITH AGO FORMERLY KNOWN AS BOSASA*' raising the following: *(a)* The President **lied** to the NA; *(b)* The facts reveal **possibly an improper relationship** existing between the President and his family on the one side, and the company, AGO (formerly BOSASA) on the other; and *(c)* The nature of the payment passing through several intermediaries, does not accord with a straightforward donation and **raises the suspicion of money laundering**.

380.2. A complaint from Mr Shivambu that the President misled the NA based on 2 issues: *(a)* First, *'Whether the statement made by President Ramaphosa in the National Assembly on 6 November 2018 that he saw a contract between his son's company and African Global Operations is true, and whether such existed'*; and *(b)* Second, whether the President saw the contracts.

381. The complaints related to the same event, i.e. whether the President, in breach of the Executive Ethics Code, made a misrepresentation to the NA when he answered Mr Maimane's question.

382. Report 37 of 2019/20 (**CR17 Report**) titled '*Report on an investigation into allegations **of a violation of the Executive Ethics Code** through an improper relationship between the President and African Global Operations (**AGO**), formerly known as BOSASA*', signed on 19 July 2019 by Adv Mkhwebane was issued as a result of the complaints investigated.

383. The CR17 Report identified the following for investigation: *(a)* the President had deliberately **and** inadvertently misled Parliament; *(b)* the President had failed to disclose donations to the CR17 Campaign; and *(c)* that the investigation conducted by Adv Mkhwebane supported a *prima facie* suspicion of money laundering. Serious findings were made against the President and remedial

action was directed at the Speaker, the NDPP and the National Commissioner of Police Against these findings Adv Mkhwebane issued certain remedial actions. The Courts held that Adv Mkhwebane only had jurisdiction in relation to *(a)*.

384. On 31 July 2019 the President instituted review proceedings to set aside the CR17 Report and challenge Adv Mkhwebane's decision to investigate the CR17 Campaign. Adv Mkhwebane denied all the review grounds. The CR17 HC set aside the CR17 Report on numerous grounds and ordered the PPSA to pay the costs of the President on a punitive scale as between attorney and client. The CR17 CC dismissed the appeal with Mogoeng CJ dissenting in part. Adv Mkhwebane brought a rescission application premised solely on the CR17 CC judgement being patently wrong in relation to its application of the 2000 Executive Ethics Code. This was dismissed. The litigation is reflected in annexure marked **Table IV**.

(ii) Incompetence

385. A Public Protector requires a core element of competence; to have a basic ability to read and understand statutes, especially those that bestow powers on the Public Protector.

386. A functionary in the position of the Public Protector must not only get the facts right, she must also get the law right. This is a fundamental requirement of the principle of legality. If the findings of fact and conclusions of law are based on an inaccurate understanding of fact and a gross misunderstanding of the law, the outcomes can bear no rational relationship to the facts presented.

387. The Committee concludes that Adv Mkhwebane has demonstrated incompetence in respect of the CR17 Report for numerous reasons as set out below:

(a) Patently incorrect interpretation of the Executive Ethics Code and repeatedly putting up difference versions

388. Adv Mkhwebane was patently wrong in that the Executive Ethics Code does not make provision for the inadvertent misleading of Parliament. (Adv Mkhwebane now accepts that the correct law is the 2000 Executive Ethics Code ('**2000 Code'**).

389. There are two EMEA complaints. In CR17, against the President and in the SARS Unit matter, against Minister Gordhan. Both were accused of having misled the NA. Given the similarity, and overlap, and it being investigated in approximately the same time period both are dealt with in this section. In both instances there was no oversight in the drafting of the s 7(9) notices and report by

an EM and/or the COO of the PPSA. They were bypassed and the investigation was handled directly under the aegis of Adv Mkhwebane. In CR17, assisted by the chief investigator, Mr Mataboge and in the SARS Unit by both Mr Mataboge and Ms Mvuyana, a senior investigator.

390. In the SARS Unit Report, the matter of misleading is dealt with in less than 5 pages under investigation and 4 paragraphs under the '*Findings*' of the 122-page SARS Unit Report. There is no reference to either a ministerial handbook to a 2007 Executive Ethics Code (**the 2007 Code**) in the SARS Unit Report. Para 5.1.11 provides '*Paragraph 2.3(a) of the Executive Ethics Code which provides that Members of the Executive may not* ***'intentionally or inadvertently mislead …***'. This is neither the wording of the 2000 or 2007 Code.

391. The issue of the incorrect code first arose before Potterill J in relation to interlocutory relief as considered in paras [1026] to [1039] below and in relation to which Potterill J faced trenchant criticism from Adv Mkhwebane. It was handed down on 29 July 2019, several months before Adv Mkhwebane deposed to affidavits in November 2019. There was no confusion on the part of Potterill J or Minister Gordhan on what the correct law was that had to be applied. Adv Mkhwebane deposed to an affidavit in the SARS Unit HC AA, on **16 November 2019**, **in respect of the Part B relief**, stating under oath that Potterill J was misleading and that s 2.3(a) expressly states that Members may not *'**deliberately or inadvertently***' mislead … the legislator. Attached to this affidavit was the 2000 Code, marked as **'PP6'** . The 2000 Code was also attached marked **'PG69'** to Minister Gordhan's affidavit which Adv Mkhwebane responded to. This further contradicts the email from Mr Mataboge referred to in para [398] below.

392. In the leave to appeal judgment the Full Court states further:

> '[11] The manner in which the first respondent is capable of reaching conclusions which are unsupported by the fact and the law, a fact which supports the improper motive and biasness ground of review, is demonstrated when she deals with the applicable Executive Ethics Code in relation to the Ambani meeting. **It is an irrefutable fact that the executive members code 2000 does not punish inadvertent mistakes**. Yet the first respondent states in her heads of argument that 'the finding that the applicable code does not punish advertent mistakes is incorrect.' To start with, that was not the finding of this court as explained above. Yet the first respondent perpetuates the misunderstanding by stating: 'the applicant is cognizance (sic) of the fact that unlike the 2000 version the 2007 version of the executive code reads thus: 'members of the executive may not wilfully or inadvertently mislead the legislator to which they are accountable.
>
> [12] The fact is that there is no 2007 version of the Executive Ethics Code and this was conceded by counsel who represented the First Respondent during the handling of this matter, Mr Masuku SC. According to Mr Masuku the First Respondent had based her findings in this regard on a ministerial handbook. The repetition of the misunderstanding in an application for leave to appeal can only be described as astounding. It bears mentioning that the misunderstanding was the basis on which the First Respondent recommended remedial action with potentially far-reaching consequences against Minister

> Gordhan or the President.' (Judgment was handed down December 2020 and reflects Adv Mpofu SC and Matlhape as also being counsel on record).'

393. It is to be noted that in the heads of argument filed on Adv Mkhwebane's behalf in the leave to appeal another version of s 2(3)(a) of the Code appears i.e. '***wilfully or inadvertently***'.

394. This is raised in some detail to juxtapose it with the explanation that is subsequently rendered to the Committee. Before the SARS Unit HC in the leave to appeal proceedings the 2000 Code is accepted, and it is explained to have been based on a reliance on the Ministerial Handbook. The Court dismissed the leave to appeal application on 26 May 2021.

395. The Court is not told of a '*confusion*', a reliance on the Nkandla judgment or the precedent of touchstone reports / cases dealt with in paras 412] to [422] below – being the evidence given by Adv Mkhwebane in the CR17 CC rescission application and with some adjustment repeated before the Committee.

396. In contrast in the CR17 Report there were four versions of the relevant phrase of clause 2(3)(a) reflected:

396.1. Under the heading '*Findings*' at para 7.1.3 (p. 100), a conclusion of '***deliberately and inadvertently***' misleading is relied on which is also the case in the Executive Summary at para cc, (p. 15).

396.2. At para 2.3.3 (p. 20) and at para 5.1.19 (p. 47) the 2000 Code is repeated referring to **wilfully misleading.** The latter is relied on by Adv Mkhwebane under oath in her CR HC AA as the correct version.[23]

396.3. At para 5.1.34 (p. 50) it is stated as '***inadvertently and/or deliberately***'.

396.4. At para 5.1.28 (p. 57) reference is made to '***deliberately or inadvertently misleading***'.

396.5. At para 6.3 (p 99) the phrase '***inadvertently or deliberately***' is used.

396.6. At para 5.1.34 (p. 50) the standard used is '***deliberate and inadvertent misleading***'.

[23] CR17 HC AA para 129, 820 – **(14 Nov 2019)**.

> *'129. I admit that the correct version of the Code appears at paragraph 5.1.19 of the Report which provides that a member may not wilfully mislead the legislature. I admit that In certain sections of the Report reference is made to a different version of the Code which provides that a member may not deliberately or inadvertently mislead the legislature. The Ministerial Handbook also refers to the version of the Code which provides that a member may not deliberately or Inadvertently mislead the legislature.'*

397. In CR17 the standard under '*Findings*' was that the President had **'*deliberately and inadvertently*'** (conjunctively) misled the NA. In other words, done both. This reflects neither the wording of the 2000 Code, nor the 2007 Code. This, against the background of an admission that actually the standard is one of '*wilful*'. It is based on this formulation that the Court criticised Adv Mkhwebane of having created a new version of the EMEA Code. Whilst she denies this to be the case there is no explanation for this expression in the CR17 Report. The only conclusion can be that she had thus created a new standard.

398. Whilst Mr Mataboge in an email informed the Committee that at all material times:

> 'Furthermore, the team has also consistently used par 2(3)(a) from the Handbook approved by Cabinet in 2007, which is the source of the word inadvertently and not the PP team.'

399. This is simply not borne out by either the SARS Unit Report or the CR17 Report.

400. His explanation is simply false given that Adv Mkhwebane referred to the correct Code (the 2000 Code) in her CR17 HC AA, admitted that it was the correct Code and that other versions were incorrect. Both failed to explain how these inaccuracies were relied on in the CR17 Report when the initial draft of the s 7(9) notice had correctly referred to the 2000 Code. Mr Mataboge testified to following Adv Mkhwebane's instruction to incorporate parts of an opinion when the report was drafted. This opinion dated 12 April 2019 relied on was initially drafted by Mr Ngobeni though rendered under a Seanego Inc, letterhead, to Adv Mkhwebane at the cost of R96 000 with no reference to Mr Ngobeni at all on the opinion. Had there not been a reference on a Seanego Inc. invoice which reflects in its heading *'Offer to appoint to act on behalf of the Public Protector in the provision of a legal opinion from senior counsel'* that referred to Mr Ngobeni therein, the latter's involvement would not have been apparent. It was furnished following a consultation with Adv Mkhwebane and in relation to which Seanego Inc. apparently redrafted the opinion. Mr Sithole approved payment of this invoice. Mr Mataboge regarded it to be an opinion from an '*SC*'.[24]

[24] ***Advocate Bawa –*** Were you party to any inputs by SC in respect of the Bosasa draft.
Mr Mataboge – Bosasa draft? No. The only input by the SC was when it was legal opinion at the beginning of the investigation. But I wouldn't know. There was no any other involvement or SC beyond that, as far as I'm concerned, because I've got all the drafts that are many that went through to my laptop.
Mr Mataboge – No. I didn't have a person in mind. I was just saying initially when the Bosasa investigation started, the PP through the Legal Services had sought legal opinion from an SC. That's what I was referring to. And that went through the Office of Legal Services or Mr Sithole. We then obtain the legal opinion on that.
Advocate Bawa – And was that legal opinion shared with you Mr Mataboge?
Mr Mataboge – Yes, it was.
Advocate Bawa – And do you recall who the SC was that provided that legal opinion?

401. During Mr Mataboge's evidence he testified that he was not aware that it had been written by Mr Ngobeni. In fact, he went so far as to testify that he did not know Mr Ngobeni and yet he knew to call him Adv Ngobeni (albeit erroneously, but consonant with several internal emails reflecting him to be known as such by a few PPSA staff, privy to his involvement in other matters and even referring to him as (SC) on occasion.) As the record reflects Mr Mataboge introduced the appellation '*Adv*' when testifying and then sought to represent that he was merely following the evidence leader. The record reflects this to be untrue.[25] Mr Mataboge's evidence was inherently unreliable when regard is had to his evidence of not knowing that an attorney does not bear an appellation of '*SC*', his penchant of denying having read or had access to documentation, then reversing this denial when proof was provided that he had indeed been given the documents during the course of the investigation or on instruction. Also, it is the improbability that he had not read the IGI Report, being the very first time he had a top secret document in his possession.

402. To have referred to the correct version in the compilation of the initial s 7(9) notice, Mr Mataboge and/or Adv Mkhwebane must have had the 2000 Code at the time or otherwise the fact that they had previously used a different version ought reasonably to have raised a question as to which is the correct version. Whilst the evidence was that they had used the Ministerial Handbook, the aforestated opinion originating from Mr Ngobeni (but rendered under the Seanego Inc. letterhead) to provide advice in relation to the CR17 matter had erroneously referred to the 2007 Code, is the obvious source given his ongoing advice that the 2007 Code applied, knowing that EMEA required it to be gazetted.

[25] ***Mr Mataboge –*** It was provided at the beginning of the Bosasa investigation through our Legal Services, not directly from Mr Seanego himself. It was originally … [over-talk, interruption]
Advocate Bawa – So were you… I don't have the reference to the email, but I will provide it to Advocate Mpofu in the course of it. Are you aware that the opinion had been secured through Mr Seanego securing the services of Mr Ngobeni to write this opinion?
Mr Mataboge – No, that one I wouldn't know.
Advocate Bawa – Right. And to that effect, the Public Protector had consulted with Mr Ngobeni in respect thereof?
Mr Mataboge – In my response Advocate Bawa I would even ask who's Advocate Ngobeni. I may ask back the question even though I'm trying to say I don't know who he is clearly
Advocate Bawa – So the question I'm asking, you were not party to the consultation with Mr Ngobeni in the discussion of the provision of the Bosasa opinion?
Mr Mataboge – Not at all. I wouldn't even point him out if I were to meet him.
Advocate Bawa – Sorry, I didn't get that Mr Mataboge?
Mr Mataboge – I said: 'Not at all. I would not even be able to point him out if I were to meet him,' Advocate Bawa.
Advocate Bawa – But I said Mr Ngobeni and you said Advocate Ngobeni. So what makes you say Advocate Ngobeni?
[INTERUPTION FROM ADV MPOFU SC]
Advocate Bawa – Mr Mataboge, I asked you the last question was I called him Mr Ngobeni and you responded by saying Advocate Ngobeni, and so I wanted to know what informed your calling him Advocate Ngobeni?
Mr Mataboge – I did not say that Advocate Bawa. You're the one who said Mr Seanego sourced the opinion from Advocate Ngobeni. I didn't start by calling him Advocate Ngobeni if the record would show.

403. In her CR17 HC AA deposed to on 14 November 2019, Adv Mkhwebane admitted that the 2000 Code was the correct Code but submits that the use of the incorrect version was immaterial to her findings:

> '129. **I admit that the correct version of the Code appears at paragraph 5.1.19 of the Report which provides that a member may not wilfully mislead the legislature. I admit that In certain sections of the Report reference is made to a different version of the Code which provides that a member may not deliberately or inadvertently mislead the legislature**. The Ministerial Handbook also refers to the version of the Code which provides that a member may not deliberately or Inadvertently mislead the legislature.
>
> 130. I submit that the 'error' is **immaterial** in light of the fact that my **finding is based primarily on the President deliberately misleading Parliament rather than inadvertently doing so**. **Whether the President wilfully misled Parliament or deliberately did so is one and the same thing. There is absolutely no basis for the claim made by the President in this regard**.
>
> 131. What is concerning is that the President raises **all sorts of technical issues** but fails to address the facts.'

404. She disavowed reliance on the Ministerial Handbook and 2007 Code, even though she continued to oppose all the relief sought.

405. Two days later, on 16 November 2019, Adv Mkhwebane deposed to an AA in the SARS Unit Report,[26] and persisted in relying on an incorrect version of the Code with reference to the SARS Unit Report dated 5 July 2019. It is noted that it was released **14 days prior to** the CR17 Report, issued on 19 July 2019.

406. Both versions are under oath, in the same month, 2 days apart. Mr Mataboge was the Chief Investigator in both matters. This contradicts his representation to the Committee. Further, conflicting, is that the 2000 Code was also set out in the CR17 HC FA, and in answer, Adv Mkhwebane does not specifically deny that its wrong, other than a general denial.

> The following is cited at p. 39 of the SARS Unit Report, in para 5.1.11:
>
> 'Paragraph 2.3(a) of the Executive Ethics Code which provides that Members of the Executive may not 'intentionally or inadvertently mislead the President, or the Premier or as the case may be, the Legislature.'

407. The following is cited in the CR17 Report, in para 5.1.19:

> 'Paragraph 2.3 of the Executive Ethics Code further states that:
>
> Members of the Executive may not wilfully mislead the legislature to which they are accountable .....'

[26] Issued on 5 July 2019 (SARS Unit Report).

408. To the Committee, Adv Mkhwebane provided no explanation as to how it came about in the CR17 matter that different versions of clause 2(3)(a) came to be contained in the CR17 report even though it was pertinently raised in the questioning of Mr Mataboge.

409. Under the heading '***Executive Ethics Code***' of her Part A Statement, Adv Mkhwebane asserted that there was both a 2000 and a 2007 Code (para 291). Further that the 2007 Code had since **repealed the 2000 Code**, but that the President based his argument on the repealed 2000 Code, for obvious reasons, seeking to take advantage of the fact that in terms of the 2000 Code the prohibition is against wilful misleading of Parliament.

410. These obvious reasons presumably being that it was not the Code on which Adv Mkhwebane relied and the threshold of 'wilful' not being attained. This is an inexplicably opportunistic motive being attributed to the President in light of Adv Mkhwebane's own evidence that the 2000 Code was the correct Code.[27] The contradiction between the written affidavit and oral evidence is simply unfathomable.

411. There is no explanation given for the versions of clause 2(3)(a) in the reports. Adv Mkhwebane rejected, however that she had deliberately '*invented*' a new Code. Further in neither her written, nor oral evidence is reference made to the opinion relied on which erroneously relied on the 2007 Code from which she expressly instructed Mr Mataboge to insert parts into the CR17 Report drafts. Adv Mkhwebane did not deny giving the instruction.

412. Instead Adv Mkhwebane states further in her Part A Statement that her findings were not based on the 2000 Code, since this Code was repealed by the 2007 Code. No notice of repeal is ever referred to or a gazette produced in which such is to be found. Further she stated that the 2007 Code was **consistently** applied by Adv Madonsela and **endorsed by** the Constitutional Court **in various matters**.

413. This is not correct. It appears to have originated from an email sent a day after the CR17 CC judgment was handed down on 1 July 2019 by Mr Ngobeni to the private emails of both Adv Mkhwebane and Mr Sithole[28] in which he raises:

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[27] ***'Advocate Bawa –*** *Advocate Mpofu, just so that we're on the same page when you talk about them mix-up and a confusion, are we in agreement that* ***the 2000 Code was the law, and that the 2007 Code was not the law****?*
Advocate Mpofu – *Thanks, Chair. Yes, that's exactly what I think has been cleared here,* ***that is indisputable****. What I'm referring to is the fact that the Constitutional Court, the Public Protector, the President to some extent as we will show, and as I say the investigators, clearly worked under a misapprehension. And I don't think any of those people was doing it just for some nefarious purpose, especially the Constitutional Court.'*

[28] This was not consonant with Mr Sithole's recollection of Mr Ngobeni's involvement in matters.

413.1. the Nkandla judgment as a form of precedent establishing the 2007 Code as the correct Code;

413.2. that Adv Madonsela used the 2007 version of the Code in writing several adverse reports against Ministers such as Shiceka; and

413.3. that at least since 2010 in the same Nkandla judgment, Adv Madonsela admitted she relied on the 7 February 2007 version and the CR17 CC's judgment affirming that it was the correct Code.

414. Mr Ngobeni further referred to the '*dishonesty and political manipulation within the Concourt*' and concluded his email by saying that:

> 'In the judgment against the Public Protector, the judgment ignored the Concourt's own **Nkandla judgment** and relied on an old superseded version of the Code based on the submissions of CR which ignored the Nkandla ruling and other Public Protector findings relying on the 2007 Code. This was an 'erroneously sought' judgment. Further, the order or judgment contains a 'patent error or omission' because it ignores Nkandla judgment and relies on an old superceded code. There is ambiguity to the extent the Concourt implies it only recognizes the 200 code while in Nkandla it recognized the 2007 version.
>
> For a remedy, the Public Protector must demand an apology because the Concourt relied on its own errors to make accusations and slanderous remarks implying dishonesty and incompetence when she was actually correct. **We must dramatize the fact that all our judges including at the highest levels can make mistakes**.'

415. It was Mr Ngobeni who advised that the CC had endorsed the 2007 Code in its Nkandla judgment, saying it is binding on Adv Mkhwebane. What followed was a rescission application to the CC based on an alleged patent error along similar lines to what was indicated in the email received from Mr Ngobeni. The recission application argued that the Nkandla judgment is a form of *'stare decisis'* and that Adv Mkhwebane also relied on precedent at the PPSA.

416. Adv Mkhwebane stated under oath in the CR17 CC rescission application (para 33 (p. 17):

> '**Upon my appointment** to the Office of Public Protector I duly familiarised myself with this Court's key judgments, **including the 'Nkandla judgment', the 2007** Code of Ethics and also **followed the precedent set by my predecessor Advocate Thuli Madonsela**. In accordance with the principle of stare decisis and Sections 39 and 182 of the Constitution, I was **duty-bound as the Public Protector to follow this Court's 'Nkandla judgment' in the interpretation of the applicable code**. Had I acted differently, I would have been correctly criticized for not respecting the principles of continuity.'

417. This was the first time that the Nkandla judgment and precedent at the PPSA was raised by Adv Mkhwebane to justify her reliance on the 2007 Code, and she was now alleging that this was based on her understanding that had existed since she took office in 2016. However, she had not raised this in either the CR17 HC or the application for leave to appeal in the CR17 CC or in the

SARS Unit papers. Nor does the CR17 Report – which quotes paras from the Nkandla judgment – cite this judgment as authority for the 2007 Code or refer to a '*stare decisis*'.[29]

418. First, a perusal of CC judgments do not reflect that it had been referred to in various judgments. Moreover, reliance is placed on a footnote in the Nkandla[30] judgment which is misconceived as the Committee is advised it does not create any form of state decisis, nor create any precedent. But further, Adv Mkhwebane then represents to the CC that such reference reflected that *'in the so-called 'Nkandla' judgment this Honourable Court **unambiguously** stated that my predecessor, Advocate Thuli Madonsela 'concluded that the President violated the provisions of the Executive Members' Ethics Act and the Executive Ethics Code.'*

419. There was no such admission by Adv Madonsela, nor any such unambiguous affirmation by the CC. Reliance on a footnote in the introductory paras under the heading '*Background*' as constituting binding precedent reflects a lack of the common law principle of *stare decisis*[31] and what constitutes a *ratio decidendi*[32] of a court.

420. At best the reference to the Ministerial Handbook as contained in a footnote was *obiter dicta*. It does not form part of a system of precedent which would be binding. But more so, the *ratio decidendi* of the Nkandla judgment is not related to the Executive Ethics Code. The Nkandla judgment does not explicitly or expressly affirm or apply the Executive Ethics Code at all. Nor is there explicit or express application or affirmation of para 2.3(a) of the Code. It is not part of the ratio in the **Nklandla** judgment, and it is a misconception to regard an arbitrary footnote as constituting some sort of *stare decisis*.

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[29] In the CR17 CC rescission FA (p. 15, para 28) it was stated: *'Abandoning its recognition of the 2007 Code in 'Nkandla judgment' this Court **erroneously concluded** that I as the current Public Protector had **'seriously misconstrued the Code'.** This was because the Honourable Court **laboured under the erroneous impression that I was using the old 2000 Code as opposed to the later 2007 Code approved and endorsed by the same Honourable Court.** I was not called upon to 'construe' or 'misconstrue' the old 2000 Code **but was legally required, in accordance with the stare decisis doctrine to apply the 2007 Code whose applicability had been expressly endorsed by this Honourable Court in the Nkandla judgment**. It was therefore a **patent error** for this Court to conclude and pronounce as follows: 'Quite clearly, this statement shows that she thought that the Code prohibited members of the Executive from furnishing any and every piece of incorrect information, regardless of their state of mind and the objective they wished to achieve.'*

[30] **EFF v The Speaker** 2016 (3) SA 580 (CC) ('*Nklandla Judgment*').

[31] *Stare Decisis* is a Latin term that means '*let the decision stand*' or '*to stand by things decided*'— a system of precedent holding that courts and judges should honour '*precedent*' i.e. so when considering judgments one does not depart from their *ratio decidendi* from prior cases.

[32] A *ratio decidendi* (Latin plural *rationes decidendi*) is a Latin phrase meaning '*the reason*' or '*the rationale for the decision*' of a judgment or '*the point in a case that determines the judgment*' or '*the principle that the case establishes*'. **Another way** the *ratio decidendi* are the principles of law formulated by the Judge for the purpose of deciding the case before him. This must be contrasted with *obiter dicta* which are comments or observations, in passing, on a matter arising in a case before which a Judge is not required to make a decision. Obiter remarks do not create binding precedent to which *stare decisis* applies i.e. observations made by the Judge but are not essential for the decision reached.

421. Second, Adv Mkhwebane stated that the 2007 Code was consistently relied on by Adv Madonsela and because of such institutional reliance she instructed Mr Mataboge to use the 2007 Code indicating under oath to the CC that the 2007 had been used since 2009.[33] This is also not so, but even if it had been, a material error of law over a period of time would not create a binding precedent. In any event, a number of touchstone reports issued by Adv Madonsela reflect that the 2007 Code was not consistently applied since 2009:

421.1. In the State of Capture Report (6 of 2016/17), the 2000 Code is correctly included in the list of legislation and other prescripts at para 5.2.5.4. There is no reference to the Ministerial Handbook. In fact, it reflects the contrary.

421.2. In the Secure in Comfort Report (25 of 2013/14) , at para 5.2.5, under '*Legislation and prescripts*', the 2000 Code is listed; and separately, the Ministerial Handbook approved by Cabinet on 7 February 2007.

421.3. In the Disturbing Rumours Report (15 of 2012/13) the list of legislation refers simply to the Executive Members' Ethics Code with no reference to either 2000 or 2007.

422. Whilst there are reports issued by Adv Madonsela that do refer erroneously to the 2007 Code, the statement that it was done consistently since 2009 is wrong.

423. The CR17 HC held:

> '[54] In her treatment of this issue the Public Protector demonstrated a fundamentally flawed approach to the principles underpinning the question of whether the President violated the Executive Code by wilfully misleading Parliament. **It is to be expected of the Public Protector to proceed from the premise of the correct formulation of paragraph 2.3(a); to understand what the test is that must be applied to determine whether there has been a violation; and finally, to pronounce a conclusion that can be clearly understood and is in line with that test. Unfortunately, the Public Protector's approach to the issue, in this case, falls far short of this.'**
>
> [55] In this regard, the Public Protector's finding on the misleading of Parliament issue is **fatally flawed due to a material error of law**. For this reason alone, **the finding warrants review and setting aside**. However, there are **further reasons for reaching the same conclusion**.'

[33] *'29. Both the majority and minority opinions [in CR17 CC Judgment] did not question whether **the 2007 Code of ethics that has been used by the Office of the Public Protector since, at least, 2009** is the applicable code instead of the superseded 2000 code relied upon by the extant judgment. This **is an unprecedented and unconstitutional departure from the well-established principle of stare decisis** which has been consistently upheld by this Honourable Court. **The doctrine of precedent** not only binds lower courts but also **binds courts of final jurisdiction to their own decisions**. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. It endangers certainty among the general public and other 'users' of court judgments, such as the office of the Public Protector.'* (affidavit in CR17 rescission application)

424. The CR17 CC confirmed that Adv Mkhwebane seriously misconstrued the Code.[34]

(b) EMEA in relation to Minister Gordhan in the SARS Unit Report

425. The issue was whether Minister Gordhan had misled Parliament about a meeting that ensued with a member of the Gupta family in circumstances where he had no recollection of such meeting.

426. The standard used that he had '*deliberately misled*' Parliament. It is dealt with in less than 5 pages under the investigation section and in 4 paragraphs under the findings of the 122-page SARS Unit Report, which had more to do with the SARS Unit than the EMEA complaint.

427. In the SARS Unit Report there is no reference to the Ministerial Handbook or to a 2007 Code. In para 5.1.11 of the SARS Unit Report it is stated that '*Paragraph 2.3(a) of the Executive Ethics Code which provides that Members of the Executive may not* ***'intentionally or inadvertently mislead …***'. [but this is neither the words of the 2000 nor that of the 2007 Code].

428. There was no documentary evidence relied on to support the claim. The basis for concluding that Minister Gordhan deliberately misled Parliament in responding to the Parliamentary question on 16 April 2016 was his response did **not seem like a *bona fide* mistake**. Adv Mkhwebane found it, '*rather implausible when one considers the prominence of the subject of state capture in South Africa.*' and on this reasoning the conclusion was drawn that he deliberately misled Parliament and thus violated para 2.3(a) of the Executive Ethics Code.

429. There was no investigation and evidence thus *(a)* to confirm (or deny) whether Mr Gupta was indeed present and *(b)* whether Minister Gordhan's representations were wilful. Minister Gordhan's approach had been that Mr Gupta may have been present but that he could not recall. There was no evidence that he was in fact there. It was based on what Minister Gordhan had relayed to the Zondo Commission about Mr Mogajane having told him that Mr Gupta had been present. Adv Mkhwebane made no attempt to confirm whether Mr Mogajane was correct. There was no interview with Minister Gordhan's staff, not even Mr Mogajane. It appears because haste to answer is attributed to Minister Gordhan, it was concluded that he was deliberately misleading Parliament:

> 'Why was he not reminded by the Chief of Staff? Because when you supposed to respond to Parliament, normally, those are sent to the Minister. The Minister will have to sit with the possible ministerial staff if it has an impact with the department. The DG must also check with the staff, give me information, that with the intention of making sure that Ministers, because they're executive they account to Parliament. It means you must respect Parliament. You must make sure that you are transparent, you are

[34] CR17 CC at para [57].

> honest in your response. So that's what he picked up. And that was the finding based on the defects before us, the responses, and the documents we received from Parliament on this matter. (p. 8340)'

430. This is all speculation without there being evidence to contradict Minister Gordhan's version. He is simply disbelieved, and it is then taken a step further to say that his forgetfulness was not only misleading the NA but also wilful (or intentional being the word used erroneously in the SARS Unit Report). Adv Mkhwebane indicated, that forgetting about the meeting was not a defence from liability under the Code. She did not explain how if he had no recollection it could amount to having wilfully (or even deliberately) misled Parliament. In other words, done so '*consciously and intentionally; on purpose*'.

(c) EMEA in relation to the President: First issue raised in CR17

431. As recorded in the CR17 Report Adv Mkhwebane considered, whether on 6 November 2018, President Ramaphosa **deliberately misled** the NA and thereby acted in violation of the provisions of the Executive Ethics Code and the Code of Ethical Conduct and Disclosure of Members' Interests for the National Assembly and Permanent Council Members ('**Parliamentary Code'**).

432. The first error was the application of the Parliamentary Code to events that transpired when he was already President, and hence not subjected hereto.

433. In Adv Mkhwebane's interview with the President she enquired from the President why he didn't ask the Speaker for time to answer the question given it was not the subject matter he had to respond to. This was his response reflected in the transcript:

> 'PCR: It happened in a heat of the moment and I think what really stung me was here is the President, here is his son and there seems to be a corrupt relationship and that is what prompted me to answer on my feet because I thought let me give an explanation lest after the hearing it goes around being said that the President has brought his son is benefiting from a corrupt relationship and all that. So the connotations of that is what prompted me to respond and also because I knew from what he had shown me and that there was actually a contract, that whatever relationship he had with the company was based on a clear and straight forward business relationship. So, that is I think what prompted me to answer because for me it was like as I said in my statement that it was an attack. That because you are President. now your son is in a corrupt relationship, you are all benefiting from this relationship, which in my view is not correct and I felt the need to answer then and there.'

434. Further at Transcript **p. 209**:

> 'I therefore did not have an opportunity to reflect on the question, in its totality. To examine what was being averred in the affidavit that Mr Maimane said he had in his possession. Now I felt the need to respond to what I perceived as Mr Maimane's **attack on my and my son's integrity**. On the basis of what **I** knew was incorrect. Particularly when he said the rich are protected and they steal from the poor and the unemployed. Now it has been suggested to me that maybe I should have just said, 'I will inquire first before answering.'

> But because I had some information about this relationship and there was this attack on something that touched on integrity. I felt I should answer immediately. But as it turned out I did not have all the facts.
>
> PUBLIC PROTECTOR: Mm.
>
> PCR: In the main my reply to Mr Maimane's supplementary question was based on the information I had at the time and it is against this background that I reasonably made the assumption that the alleged payment was related to advisory mandate that my son's company had signed with African Global.'

435. The President in his CR17 HC FA indicated: '*The Public Protector seems to believe that my correction of the facts was an admission that I had misled Parliament. This is preposterous*.' It is not apparent from the CR17 Report on what evidence it was concluded that the President in relaying the aforegoing was lying and/or that the reasons provided for answering immediately were untrue or unreasonable.

436. Adv Mkhwebane indicated that she reached the conclusion based on:

436.1. a concession in the President's written statement that he inadvertently provided incorrect information in reply to a supplementary question;

436.2. having responded immediately to a question he was not obliged to do so;

436.3. the certainty with which it was answered and then revising such certainty with a statement;

436.4. that the President was aware of the issue i.e. that Bosasa had paid his son and that he had seen the contract dated December 2017;

436.5. a lack of concern that *(i)* the contract was signed in December 2017 and payment of the funds occurred in October 2017 and that *(ii)* Mr Maimane had referred to the EFG2 bank account;

436.6. a rejection of the President's **heat of the moment response** because it was stated with conviction that the matter had been raised with him '*some time ago*' and the '*certainty and sanctimony*' of the answer not being consistent with the claim that such an answer was a result of the '*heat of the moment*', but rather with a **well calculated and considered** answer; and further in the answering affidavit;

436.7. provocation not being a justification for giving a poorly prepared answer nor should it affect his demeanour. Further, though Adv Mkhwebane readily accepted that the President was advised of the payments by Mr Andile Ramaphosa and Mr Chauke, his special adviser, the use of '*allegedly*' in referring to what Ms Nicol had told him after he answered

Mr Maimane, reflects that she was not believed by Adv Mkhwebane, the implication being that the CR 17 Campaign managers had lied under oath.

437. In the CR17 CC application for leave to appeal, Adv Mkhwebane stated further:

> 'As confident as he was when he stated these 'facts' I am confirming that **the matter had been brought to his attention**, he later realised that **his falsehoods** could not be sustained and reverted to Parliament with his purportedly correct version.'

438. Adv Mkhwebane concluded the President deliberately lied and then reverted to fix his deliberate lie – on her reasoning the President deliberately lied in response to a question he did not have to answer in the first place.

439. In the CR17 HC RA the President responds as follows:

> '95.2. I admit the recording of my exchange with Mr Maimane but **deny that anything I said was untrue or misleading**. I also admit the contents of my letter to the Speaker.
>
> 95.3. I deny that the Public Protector's findings are borne out by the facts and refer to what is stated above and in the founding and supplementary affidavits in that regard.
>
> 95.4. I note that In para 35 part of the reason the Public Protector has found against me is that in her opinion I was not obliged to give an immediate answer to a supplementary question. I point out that this cannot support the conclusion that I deliberately misled the National Assembly. At best for the Public Protector, it can mean that my conduct was negligent (which I also deny).
>
> 95.5. I admit that I was familiar with my son's company's business relationship with AGO as it had been brought to my attention and I had asked him about it. But I deny that as I stood on the podium listening to and responding to Mr Maimane's follow up question I had a vivid recollection of minutiae such as the date on which my son's company's agreement with AGO was signed and the exact amounts which had been paid and the dates on which they had been paid. I did not and could not under those circumstances pay detailed attention to every word uttered by Mr Maimane and in particular, in my mind, I did not record nor attach any significance to the mention of account EFG2 and the date of 18 October 2017.
>
> 95.6. I repeat that if anything was misleading it was Mr Maimane's question. It is clear from his question that Mr Maimane himself did not attach any particular value to the description of EFG2 account as he clearly associated it with my son.
>
> 95.7. I also note in para 41 that what informs the Public Protector's negative finding against me is her view that I changed my statement subsequently in my letter to the Speaker on 14 November. I deny that I did, and that letter speaks for itself. All I pointed out in my letter to the Speaker was that it had been brought to my attention that account EFG2 had nothing to do with my son and was a CR17 campaign account, and therefore that the payment of R500,000.00 was not to my son, but a donation to the CR17 campaign. I did not change anything I said on 6 November 2018.
>
> 95.8. I deny that my stating in my letter to the Speaker that 'inadvertently provided incorrect information ... 'is an admission that I deliberately misled the National Assembly.'

440. Further in reply, the President disputes that he had made any statement with the intention to mislead saying in this regard:

'61. The Public Protector has not in fact found that I deliberately misled the National Assembly. She has not pointed to a single statement in what I said in response to Mr Maimane on the 6 November 2018 that is untrue. She cannot point to anything in my subsequent letter to the Speaker either that is untrue.

62. I must point out that paragraph 7.1.1 of the Report clearly confines the finding to on '06 November 2018, during the question session in Parliament ... '. Therefore, **for the finding to have any hope of survival I must have deliberately said something false on the 06 November 2018 with the intention to mislead the National Assembly.**

63. The Public Protector has recorded that 'he also conceded in his correspondence to my office on 01 February 2019, and even in his subsequent letter to the Speaker of the National Assembly' on 14 November 2018 where he sought to correct the incorrect information he provided in the National Assembly. This is repeated in paragraph 34 of the Public Protector's answering affidavit.

64. This statement does not detract from the plain fact that the information I conveyed was a truthful answer to the question posed by Mr Maimane.

65. In paragraph 137 of her answering affidavit. the Public Protector says her finding that I deliberately misled the National Assembly was made because:

65.1. 'the President's heat of the moment response is concerning because Parliamentary Questions are an important means used by Members of Parliament to ensure that Government is accountable to Parliament ... '

65.2. The President's provocation by the question from Mr Maimane cannot justify giving poorly prepared answer ...

65.3. 'the President as the head of state and the epitome of the Constitution should have acted with restraint ...'

66. Furthermore, in paragraphs 48 and 138 of her answering affidavit, the Public Protector says that Mr Maimane's reference to account EFG2 and the fact that the payment was made on 18 October 2017 prior to the signing of the Advisory Mandate between my son's company and AGO should have put me on alert. This is nonsensical. While Mr Maimane mentioned account EFG2, he clearly had no idea what it referred to. Neither did I.

67. I have gone back to double check the date of the Advisory Mandate. And it is December 2017, and it is correct that Mr Maimane mentioned the date of 18 October 2017 in his question to me. When further information became available, I provided it. At no stage did I make any statement with the intention to mislead.

68. The Public Protector has on a number of occasions claimed that I admitted that I misled the National Assembly, and the latest instance of that claim is in paragraph 34 of her answering affidavit. **This is demonstrably untrue.** I have never made such concession whether in my correspondence to the Speaker or the Public Protector. I cannot understand on what basis the **Public Protector finds my clarification letter to the Speaker on 14 November 2018 to be a concession that I had misled the National Assembly, deliberately or otherwise.'**

441. With reference to the evidence of what the President knew in relation to the R500 000, the CR17 Report states that Mr Chauke told the President on or about 5 September 2018:

'about a rumour that President Ramaphosa's son, Mr Andile Ramaphosa had received a payment of R500 000.00 from AGO.'

442. Adv Mkhwebane testified that Mr Chauke confirmed this. In addition, the CR17 Report indicated:

'5.3.10.20 Miss Nicol also confirmed what President Ramaphosa had stated that she had been the one who alerted him to the inaccuracy of his response in Parliament on 06 November 2018, because she had been the one who was responsible for opening the EFG2 trust account, as well as having facilitated the

payment of R500 000, 00 to the CR17 Campaign by Mr Watson into the account, and therefore knew all about it.'

443. However, in the CR17 HC AA, Adv Mkhwebane stated:[35]

> '184.1.5. In his statement of 1 February 2019, a copy of which is attached hereto as Annexure 'BM11'. the President actually states as follows:
>
> > 'I was therefore not aware at the time that I appeared in the National Assembly on 6 November 2018 that Mr Gavin Watson had made a donation to the .. CR17' campaign.'
>
> 184.1.6. This is despite the fact that both Mr Chauke and Mr Andile Ramaphosa had actually discussed **the issue** with the President as early as September 2017. It is simply contradictory, to say the least.'

444. It is clear that the discussion did not relate to donations to the CR17 Campaign but of Andile Ramaphosa doing business with AGO and receiving funds, being the '*issue*' discussed with him by Mr Chauke. It did not follow that the President knew or ought to have known about Mr Watson's donation to the CR17 Campaign. There was no evidence that Mr Chauke had discussed an AGO donation to the CR17 Campaign with the President and therefore the basis upon which Adv Mkhwebane regarded it as being contradictory, is not readily apparent.

445. There appears therefore to have been no evidence which could lead to a rejection of the direct evidence of Mr Chauke and Miss Nicol for it to be concluded that **President Ramaphosa knew at the time of his statement to the NA that Mr Watson had paid R500 000.00 as a donation to the EFG2 account**. There is also no evidence in the CR17 Report that reflect that President Ramaphosa knew that Mr Watson was making, intended making or had made a donation of R500 000.

446. In terms of the evidence in the CR17 Report nothing indicates that the President knew of the donation of the R500 000 prior to his question session in Parliament on 6 November 2018 and prior to when Miss Nicol told him thereof, thereafter that could have resulted in him wilfully misleading the NA.

447. In this regard the CR17 CC judgment [36] confirmed that incorrect information alone would not be a violation of the Code and that it has to be given with the intent to mislead. The CR17 Report reflect that Adv Mkhwebane reached such conclusion without regard to evidence to show any intent to mislead.

448. In this regard the CR17 CC described the reasoning as '***not only devoid of a legal foundation but also reveals ignorance as to how information furnished to Parliament is gathered*' and found no fault with the CR17 HC conclusions**.

[35] CR17 Report at para 184.1.5 and 6.
[36] CR17 CC at para [56].

449. Even the minority judgment of Mogoeng CJ concludes that the Adv Mkhwebane was wrong in this regard describing it as manifesting some overzealousness.

450. Mogoeng CJ adopts a different reasoning to the majority for the errors, construing it more of giving a wrong meaning to a legal instrument than amending it.

451. Despite the aforegoing Adv Mkhwebane's evidence before the Committee was that contrary to what the CC (both majority and minority) had concluded, she remained of the view that the President wilfully misled Parliament, and her conclusion was that he had '*deliberately misled the National Assembly'*.

(d) Second Issue: Whether President Ramaphosa improperly and in violation of the provisions of the Executive Ethics Code and Disclosure of Members' Interests for the National Assembly and Permanent Council Members exposed himself to any situation involving the risk of a conflict between his official duties and his private interest or used his position to enrich himself and his son through businesses owned by AGO.

452. Adv Mkhwebane concluded that the President *(a)* exposed himself to a risk of conflict between official duties and private interests; and *(b)* used his position to enrich himself and his son through AGO.

453. Two issues arose *(a)* whether the President had a duty to disclose donations made to the CR17 Campaign, and *(b)* Adv Mkhwebane's competence to investigate the affairs of the CR17 Campaign. The CR17 CC concluded there as a matter of law no such duty and no such competence existed. This issue was finally resolved that Adv Mkhwebane did not have jurisdiction to investigate the CR17 Campaign in that neither s 6 of the PPA, nor the EMEA complaint empowered Adv Mkhwebane to investigate the CR17 Campaign. It also concluded that Adv Mkhwebane had no jurisdiction under s 182 of the Constitution, because a political party's internal affairs are not '*state affairs*'. In addition, the CC rejected the notion that Adv Mkhwebane had jurisdiction under s 96(2)(b) of the Constitution.[37]

454. As to the jurisdiction issue Adv Mkhwebane represented in her Part A Statement that she was asked by Mr Maimane '*to look into a potential compromise in donations to the President*'. This is not born out by the complaint.

[37] CR17 CC at paras [100] – [109].

455. Before the Committee, Adv Mkhwebane relied on the dissent of Mogoeng CJ on this aspect of the judgment to point out that, if the then Chief Justice came to such conclusion and agreed with her, then she could conceivably not be removed from office on this basis for misconduct or incompetence. It bears noting that the Chief Justice would only have been privy to what had been put into the Court – the Rule-53 record and oral argument, and considered the issue only within that prism. Also, no consideration was given to whether it was misconduct or incompetence in the context of the Motion, or to how Adv Mkhwebane's conduct must be evaluated in the context of the Motion, being the task that the Committee performs.

456. The CR17 CC found that Adv Mkhwebane relied on sweeping findings failing to identify the President's private business and his official responsibilities, in respect of which he had exposed himself to a risk of a conflict[38] and specifically referred to the quality of the reasoning leading up to the various findings concluding that the CR17 Report does not contain the evidence to support the conclusions reached. It did not reflect that the President had personally benefitted and thus no disclosure under the Code was required.

457. With specific reference to the CR17 Campaign donations, the CR17 CC concluded on the basis of the uncontroverted facts, that the President did not personally benefit from the donations made to the CR17 Campaign and hence the duty to disclose was not activated, pertinently stating that *'in the entire report the Public Protector has not even once referred to any evidence that indicates that the President benefitted personally from the CR17 campaign donations. The absence of such evidence was expressly raised in the representations made by the President in response to the interim report*' concluding that the President did not have any financial interest in the donations made to CR17 and did not have any claim to the money or any say over it, with the exception of amounts he himself loaned to the CR 17 Campaign. The reasons furnished by Adv Mkhwebane to show such personal interest was recorded as being confusing and addressed the issue of members of Cabinet exposing themselves to a potential risk of conflict of interest between their official responsibilities and private interests and not whether the President had received donations for personal benefit.

458. On the basis of the undisputed evidence, both the CR17 CC and CR17 HC concluded that it was the CR17 Campaign that received donations and not the President. Moreover, that the CR17 Report did not reflect that the President received '*direct personal sponsorship through the campaign'* or *'personal financial benefit'.*

[38] CR17 CC at para [67].

459. In this regard the CR17 CC confirmed that the funds transferred from the CR17 Campaign to the Cyril Ramaphosa Foundation ('**the CRF**') did not benefit the President and his family as they are not beneficiaries of the CRF. This was clearly articulated in the President's s 7(9 response which was simply ignored by Adv Mkhwebane in the CR17 Report.

460. As to the CR17 Campaign funds being used to promote the President's presidential aspirations the CR17 CC stated as follows:

> '[91] In the first place, **the Code does not apply to matters which are not state affairs like internal party elections**. According to section 2 of the Members Act, the objective of the Code is the promotion of an open, democratic and accountable government. And members of **Cabinet are obliged to comply with the Code when performing their official responsibilities**. In an attempt to overcome this obstacle, **the argument seeks to link the election of the President of the ANC to being President of the country. But this falters at the starting line. In our multi-party system, being President of a political party is not a guarantee to being President of the country. Under our Constitution, there can be only one President at any given time. This means that a number of party Presidents cannot be President of the country. Moreover, the Constitution tells us that the President of the country is elected by the National Assembly**.'

461. Adv Mkhwebane is bound by the CC's determination of the legal question of jurisdiction and the Committee does not understand her evidence to say differently. Rather, she relies on the dissenting judgment of Mogoeng CJ to say that she could not have been biased or targeted the President as he held differently to the majority and supported her position. Adv Mkhwebane's oral evidence in respect hereof involved her legal representative reading and re-reading paragraphs of the dissenting judgment to which she agreed, interspersed with comments.

462. In her affidavit submitted to this Committee, Adv Mkhwebane contends that her '*powers to investigate were sourced from s 182(1) of the Constitution and section 6(4) of the Public Protectors Act*'. Yet it came to Adv Mkhwebane as an EMEA complaint raised as a breach of the Executive Ethics Code. Adv Mkhwebane's investigation fell outside the scope of the complaint and she investigated matters arising from private conduct, which included political parties.[39]

463. The complaints received did not require of Adv Mkhwebane to investigate the President's failure to disclose benefits derived from the CR17 Campaign donations and neither complaint mentioned this issue.

464. So for this part of the investigation reliance was placed on s 96(2)(b) of the Constitution, under the guise of an EMEA investigation. Adv Mkhwebane assumed jurisdiction under s 96(2) of the

[39] CR17 CC at para [90].

Constitution that the CR17 Campaign created a '*risk*' of conflict for the President that he should have avoided.

465. Adv Mkhwebane regarded as false *'the theory that [President Ramaphosa] did not personally benefit from the campaign for his own election into the ANC Presidency as a sure gateway to the Presidency of the country or even as an end in itself*'.[40]

466. Adv Mkhwebane concluded that the CR17 Campaign donations was a personal benefit to the President. And from the premise that irrespective of whether he knew about each and every CR17 Campaign donation or that as explained the funds were not solely for the CR 17 Campaign, it was still concluded that **as he was the ultimate beneficiary**, he had a duty to disclose under EMEA and that this Chinese wall that was erected could not be relied on as a defence against disclosure. As the Cr 17 Campaign bore expenses that were incurred in his interest, even if not in direct receipt, he would have derived a direct benefit, those benefits ought to have been disclosed.

467. In her affidavit to the Committee, Adv Mkhwebane gave the following evidence:

467.1. Notwithstanding the findings of the CR17 HC and CR17 CC she **remains of the view that the evidence discloses that '*the President did derive a personal benefit from these CR17 donations*'**.[41]

467.2. Although faced with the same facts, the minority and majority judgments in the CC '*differed vigorously*', with **Mogoeng CJ emphasising transparency, openness, accountability, ethical leadership and good governance**.[42] Adv Mkhwebane agreed with the Chief Justice's reasoning that there '*is an ever abiding risk of conflict between being financed to become President of a party (private interest) and one's position as the Deputy President and leader of government business in parliament or President of the Republic (official responsibility)*'.[43]

467.3. She also was of the view that President Ramaphosa was '*a direct and primary beneficiary of the money sourced by the CR17 campaign*', because the CR17 Campaign '*was **about him fulfilling his dream** to become the President of the party and by extension of the Republic.*'[44]

[40] Part A Statement at para 271.
[41] Part A Statement at para 314.
[42] Part A Statement at para 315.
[43] Part A Statement at para 317.
[44] Part A Statement at para 318.

468. It should be noted that there was no evidence before Adv Mkhwebane of the President '*fulfilling his dream*'. It does not appear in the transcript of the President's interview or in his s 7(9) response.

469. Adv Mkhwebane further argued that, given the similarity between her conclusions and those of Mogoeng CJ's, her approach was '*neither far-fetched nor irrational*' and cannot justify impeachment.[45] It bears noting that the test before the Committee is one of '*misconduct'* and '*incompetence'* based on what serves before this Committee. This was not the consideration of Mogoeng CJ. The CR17 CC held:

> 'The Public Protector reached the conclusion that the President, as then Deputy President of the country, had personally benefited from donations made to the CR17 campaign. But her own report which contains the summary of the evidence she heard during the investigation, does not support this conclusion. Nowhere in the report has the Public Protector recorded evidence that shows that the President had personally benefited.' [para 72]. '
>
> The emails on which the Public Protector relied simply showed that the President was more involved in the affairs of the campaign. This is not the same as receiving personal benefits.' [para 78].
>
> 'It is a leap in logic to hold that the President personally benefited from the donations made to the CR17 campaign. That campaign, on the undisputed evidence, existed separately from the President. And there was no evidence that it was appointed to act as his agent. There is therefore no basis in law to regard donations to the CR17 campaign as personal benefits to the President.'' [para 88].]

470. The CR17 CC confirmed[46] that the CR17 Report neither identified the private business nor the official responsibilities giving rise to a risk of conflict. Nor that the CR17 Report clearly set out findings in subpara 7.2.1 as to which ground is substantiated. The CR17 CC[47] concluded that President Ramaphosa had not infringed the Code, because internal party elections were not State affairs, and the Code only applied to the latter. It also concluded that President Ramaphosa did not receive a personal financial benefit that had to be disclosed, because his personal capacity was separate from the internal political-party campaign that bore his initials. Funds received were neither a benefit received in the President's official capacity, nor was there any evidence that it was paid to influence him in the performance of his duties. The CR17 Campaign and its fundraising operations did not concern public administration or the exercise of public or statutory power and no public funds was implicated.

471. The CR17 CC essentially rejected Adv Mkhwebane's conclusions that the President had exposed himself to '*a risk of conflict between his official duties and his private interests or used his position*

[45] Part A Statement at para 321.
[46] CR17 CC at para [67].
[47] CR17 CC at para [64]. See in particular paras [72],[78], [88], [91] and [92].

to enrich himself and his son through businesses, owned by AGO'. This was regarded as being somewhat confusing by the CC at para [42].[48]

472. In the CR17 HC it was also not disputed that the President had no operational involvement in the decisions on the transactions between Linked Environmental Services ('**Linked**') and Ria Tenda Trust ('**Ria Tenda**'). A media statement had explained the CR17 Campaign's function and that its focus was not an individual's campaign but an overall campaign. This was not disputed in the CR17 HC. As a matter of law at the time the funds were received into the CR17 Campaign, there was no requirement that party funding of this nature be disclosed. Under the Code, benefits of this nature – campaign donations for internal political-party campaigns – need not have been disclosed.

(e) PRECCA

473. Adv Mkhwebane confused the Prevention and Combatting of Corrupt Activities Act 121 of 1998 ('**PRECCA**') with the Prevention of Organised Crime Act 121 of 1998 ('**POCA**') and assumed that PRECCA dealt with money laundering.

474. Under PRECCA – Adv Mkhwebane has the powers specifically to investigate corruption but is not empowered to investigate crimes under POCA such as money laundering. This Adv Mkhwebane herself made patently clear in the Vrede matter.

475. In the CR17 Report, Adv Mkhwebane considered and discussed PRECCA and concluded that her '*investigation into the issue pertaining to possible money laundering is premised on the above legislation* **[being PRECCA]** *dealing with corruption and applies not only to private individuals who offer bribes, but also to private individuals who accept bribes*'.[49]

476. To the Committee: Adv Mkhwebane conceded that PRECCA was the incorrect law testifying that '*it's neither here nor there.* ***But I acknowledge that we should have mentioned the correct legislation***' and that she **intended to convey that '*there is this suspicion of money laundering*'**.

477. She expressed the view that it is unclear why a '*misapplication of the law*' would constitute an act of misconduct or incompetence, '*otherwise all judges would be guilty of an act of misconduct … where the judges judgments are successfully appealed on an error of law*'.[50] Adv Mkhwebane repeated this stance during her oral evidence, indicating that the court's conclusions which '*... showed a complete lack of basic knowledge of the law and its application …*' and that her findings

[48] CR17 CC at para [42].
[49] CR17 Report at para 5.3.10.
[50] Part A Statement at para 312.

'*... were irrational and reckless ...*' was a magnification of her mistakes and that it was not apparent why her '***misapplication of the law***' should constitute an act of misconduct or he incompetence.

478. It was presented to the Committee as a minor or immaterial issue and simply a case of the wrong statute having been referred to and described as not being a major issue that the drafter in error made a reference to PRECCA and not POCA. It was erroneously represented to the Committee that '*in the report, when reference was sought to be made to PRECCA,* ***there was a reference to POCA****'*. Further that as both related to criminal offences, it was inferred that it was a substance over form issue. The impression was created that there was some debate of the correct law but this was not so. The Court and the President got the law right and Adv Mkhwebane did not.

479. Absent from the CR17 Report was any definition of the crime of money laundering. Instead, the *prima facie* suspicion of money laundering was based erroneously on PRECCA, which was referred to not only once, but several times and nor in conjunction with POCA:

479.1. The heading on p. 85 in para 5.3.10.68;

479.2. Section 12 of PRECCA is specifically quoted;

479.3. Section 3 of PRECCA is quoted in para 5.3.10.69;

479.4. It is dealt with in para 5.3.10.70 (pp. 85 – 86) of the CR17 Report which stated:

> '[PCCA] **[PRECCA]** also criminalises specific corrupt activities relating to, amongst others, public officers, contracts and the procurement of tenders. It also recognises the link between corrupt activities and other forms of crime such as organised crime and financial crimes including money laundering.'

479.5. In para (c) on p. 12, s 12 of PRECCA is quoted again;

479.6. In para 5.3.10.72. Adv Mkhwebane stated that:

> 'My investigation into the issue pertaining to possible **money laundering is premised on the above legislation [PRECCA] dealing with corruption** and applies not only to private individuals who offer bribes, but also to private individuals who accept bribes.
>
> It would therefore have been remiss of me not to deal with this aspect of the complaint so as to be able to confirm or dispel with any such suspicion as referred to in the allegations brought before me by the complainants.'

480. The CR17 HC judgment was correct in saying that the CR17 Report quoted extensively from the provisions and that Adv Mkhwebane interpreted and misconstrued PRECCA to be criminalising financial crimes, including money laundering.[51]

481. Adv Mkhwebane also represented to the attorneys for the CR17 Campaign (EFG) that it was an investigation pursuant to PRECCA. As apparent from the aforegoing, PRECCA was materially relied on and it was not simply the wrong name of an Act being referred to but a belief that reliance could be placed on PRECCA. It was expressly relied upon to inform what was regarded as a *prima facie* suspicion of money laundering. Contrary to what was expressly represented to the Committee, the CR17 Report makes no reference to POCA. It was clear that there was no distinction made between money laundering and corruption.

482. Further, before the CR17 CC, counsel for Adv Mkhwebane, clearly having known that the wrong Act had been used, indicated to the CC that it was an '***innocent reference to the incorrect Act***' – being a submission to which the CR17 CC held (para 114):

> [114] Having interpreted the PCCA, the Public Protector concluded that it criminalises corrupt activities and other forms of organised and financial crimes including money laundering. But **as the High Court rightly pointed out, the PCCA does not create the crime of money laundering. Before us, counsel for the Public Protector attempted to explain this as the innocent reference to the incorrect Act. There is no merit in this submission. The report quotes extensively from the provisions of the PCCA which the Public Protector interpreted to be criminalising financial crimes including money laundering. This illustrates plainly that she misconstrued the PCCA. In fact, a reading of the report shows that she equated money laundering to corruption and bribery**.'

483. Despite Adv Mkhwebane making a concession that PRECCA was wrongfully applied she persisted before the Committee that there existed a *prima* facie suspicion of money laundering. This could mean that she still did not comprehend / accept / understand / want to believe that the movement of funds per se between intermediary bank accounts could not per se give rise to any suspicion of money laundering, without an indication that the underlying transaction was unlawful. There was no evidence before her of the latter as appears from the CR17 Report.

484. The President in his CR17 FA set out the statutory crime of money laundering at which point – albeit that it should reasonably have been known to Adv Mkhwebane – if it was not she would have been apprised thereof when she considered it for purposes of her response:

> '152 To begin with, money laundering is a statutory offence in terms of the Prevention of Organised Crime Act 121 of 1998 ('POCA'). Nowhere does the Public Protector reference this Act in her Report. In terms of section 4 of that Act a person is guilty of money laundering if:

[51] CR17 HC at para [48].

> 152.1 he knows or ought reasonably to know that a property forms part of the proceeds of unlawful activities;
>
> 152.2 despite that knowledge enters into an agreement or engages in any arrangement or any transaction with anyone in connection with that property or performs any other act with such property;
>
> 152.3 the effect of any agreement or arrangement or transaction or any other act must be to conceal or disguise the nature, source allocation, disposition or movement of the said property or its ownership or must be intended to enable any person to avoid prosecution or to remove or to diminish the property in question.'

485. In her CR17 HC AA, Adv Mkhwebane stated that these paragraphs were responded to elsewhere and denied anything inconsistent with her affidavit. But she did not deal with it elsewhere, nor is the crime of money laundering or the erroneous reliance on PRECCA dealt with in this affidavit. The only ground ever raised for *prima facie* suspicions of money laundering remained (wrongfully) the use of the intermediary bank accounts. The POCA is not dealt with. There is also no reference to any unlawful activity.

486. Adv Mkhwebane did not engage with the definition at all and hence conceivably it could not give rise to findings that she has made for a suspicion or a *prima facie* case that there were any '*unlawful activities*'. Nor is there any basis for the suspicion or a *prima facie* case made out that there is any person that knew that any unlawful activities were carried out in connection with any monies. There is no evidence at all that anyone tried to enter into an agreement or engage in a transaction to conceal the nature, source location, disposition or movement of any monies or for that matter their ownership. It all rested on the supposition that the funds being paid from Mr Watson to EFG2 via Miotto was an attempt at disguising the source and yet Mr Watson's evidence in relation hereto was that:

486.1. the transfer of funds to EFG2 via Miotto Trading was effected on the basis of advice from Mr Venter, his tax consultant, that this was the best way to do so; and

486.2. this was not the first transaction effected via Miotto Trading; and that he had not known at the time that Mr Venter's sister was a director of Miotto Trading but had found this out afterwards.

487. Nothing in the CR17 Report disputes this. In this regard the CR17 CC judgment points out:

> '[95] … Evidently, the complaint was not that the President is suspected of having laundered money. The complaint was that the donation made by African Global Operations passed through several intermediaries and that gave rise to the suspicion of money laundering. But the evidence by the donor and the person who made the payment quashed the suspicion.'[52]

[52] CR17 CC at para [95].

488. The CR17 Campaign had no way of knowing why a donation sought from Mr Watson was paid via an associated company. Mr Watson indicated that he did it on advice of Mr Venter and Mr Venter did not testify to the effect that there was ever any attempt or intention to disguise the source of the funds.

489. There may be different categories of '*errors of law*' and different degrees of '*misapplication of the law*'. The inability to distinguish between PRECCA and POCA, or to understand that there is a distinction between the offences of corruption and money laundering – despite it pertinently being raised, is a material error and misapplication. If, when the error of law was pointed out to her, Adv Mkhwebane, conceded the review on that basis, then with reasonable care the millions of rands of legal costs incurred to oppose every review ground would have been avoided and not spent in vain. To do so is not only incompetent, notwithstanding, but also grossly negligent.

490. Even, after the CR17 HC judgment points out the material errors of law (now conceded to this Committee), Adv Mkhwebane appealed **the whole of judgment and order** including the errors of law that the Court finds to the CC. Yet, despite having indicated that the appeal is against the whole judgment and order there is no mention of PRECCA, let alone an erroneous reliance on it in the appeal papers. This alone would have made the appeal academic.

491. Whilst Adv Mkhwebane relies on the judgment of Mogoeng CJ, he too concluded that the wrong laws were referred to but finds it irrelevant.[53]

> '[194] **The Public Protector relied on an incorrect legislation in dealing with the offence of money laundering in her report.** But, that does not really matter.'

492. What Mogoeng CJ does not consider in the dissenting judgment is whether or not there is as a matter of fact a basis for the referral to the NPA in the first place, with reference to the elements of the offence of money laundering. If there was not, then it begs the question of what Adv Mkhwebane was alerting the NPA to investigate, and for that matter bypassing SAPS who has the constitutional powers to investigate crimes.

(f) Audi

493. Whilst Adv Mkhwebane testified to the Committee that the process in relation to the President had been fair, it did not include giving him *audi*, prior to the release of the CR17 Report in relation to:

[53] CR17 CC at para [194].

the emails, the FIC Report, the remedy and he was not afforded the opportunity to ask Mr Watson question.

(aa)Audi in relation to Mr Watson

494. Regarding *audi*, the President contended that he was not given copies of the notice of the complaint and that he was denied an opportunity to question Mr Watson even though Mr Watson was available to be interviewed. The President averred that Adv Mkhwebane insisted that questions must be sent to Mr Watson instead of facilitating an oral questioning. There was no dispute that this occurred.

(bb) Audi in relation to remedial action

495. A trite proposition was set out in the CR17 HC judgment which pertinently stated:

> '157. In addition, the right to be afforded a reasonable opportunity to make representations on matters that may detrimentally affect one's interests is a well-established principle of natural justice and of our common law. It is an important component of the right to just administrative justice and is expressly recognised as such in the Constitution. Whether or not a decision-maker has complied with this obligation or not will depend on the facts of the particular case.'[54]

496. The fact that Adv Mkhwebane **refused *audi* to the President** on the remedial action when she was requested to do so, she **failed to show appreciation for elementary principles of due process**. (It is not disputed that the President did not get a hearing.)

497. There can be no dispute that a person against whom a finding is made to their detriment in a report or implicated must be notified of the decision contemplated, as well as afforded an opportunity to make representations. This need not be entrenched in s 7(9) of the PPA to be applied.

498. In her affidavit to the Committee, Adv Mkhwebane says that her decision not to allow the President an opportunity to make representations on remedial action was taken in '*good faith*' and '***based on the law at the time***'. This being a reference to the misinterpretation of s 7(9) of the PPA. In terms of whether Adv Mkhwebane was obliged to alert implicated persons '*about possible adverse findings*', but not to '*anticipate remedial action when issuing a section 7(9) notice*', this approach was informed by, among other things, advice from Mr Nemasisi at the time.[55] It has been

[54] *'Adv Mkhwebane: And I think hence I said earlier this information we received, almost, at the end of the investigation, but indeed, it is not an excuse, **we should have then gone ahead again and issued a supplementary Section 7(9). Again, it goes back to the issue of the timeframe to make sure that, you know, we are not keeping the person or implicated person or the person the complaint is against to be waiting for the outcome of the investigation. So in other words, I do agree with this**, and I think that is where we improve continuously.'*

[55] Part A Statement at paras 299 – 300.

demonstrated that the decision whether to follow advice rendered lies with Adv Mkhwebane. In Vrede, for example, she does not follow his advice, with catastrophic consequences.

499. While Adv Mkhwebane accepted the CR17 CC's decision, she explained that she had previously acted on advice, and without any '*sinister motive*'. And yet this was not consistently applied. For example, in both the Vrede investigation and the CIEX investigation, implicated parties were notified of the remedial action that Adv Mkhwebane proposed imposing.

500. It was only after several courts, including the CR17 Full Court, and several refusals of applications for leave to appeal that Adv Mkhwebane accepted that an implicated party must be given an opportunity to make representations before a final and adverse finding is reached. So even though HC judgments indicated that there was a failure to give *audi*, this was not accepted and an appeal was still persisted with. There were *audi* complaints in several review applications.

501. The CR17 CC concluded that '*when the Public Protector contemplates taking remedial action against the subject of an investigation, that subject is entitled to an opportunity to make representations on the envisaged remedial action. For a proper opportunity to be given, the Public Protector must sufficiently describe the remedial action in question to enable the affected person to make meaningful representations*'. The CR17 HC's finding that Adv Mkhwebane's failure to afford the President a hearing on her proposed remedial action '*was fatal to the validity of that remedial action*' was supported.[56]

502. During her oral evidence, Adv Mkhwebane did note that, under her predecessor, the practice had been to issue provisional reports, which would include the proposed remedial action. She changed that when the system moved from provisional reports to s 7(9) notices which may not contain remedial action. It is noted that in Vrede, where the s 7(9) notices were issued in June 2017 (i.e. before the s 7(9)s in the CR17 matter), the implicated parties were notified of the proposed remedial action.

(g) Adv Mkhwebane's failure to appreciate that she cannot direct the NDPP regarding prosecutions to be instituted

503. In the CR17 Report:

503.1. Adv Mkhwebane directed the NDPP to take note of the allegation of an improper relationship between President Ramaphosa (and his family) and BOSASA, and that the

[56] CR17 CC at paras [126] – [127].

suspicion of money laundering, had merit, and to '***conduct further investigation into the prima facie evidence of money laundering … and deal with it accordingly***'.

503.2. As part of the '*Monitoring*' mechanism, Adv Mkhwebane directed the NDPP to submit an '*implementation plan*' to her, within 30 days, on how it intended to comply with the remedial action.

504. On 5 August 2019, the NDPP, Adv Batohi, sought clarity, **informing Adv Mkhwebane that she could do no more than notify the NPA of facts that in her opinion evidences the offence that had been committed** and sought clarity as to whether what she had meant to do with the remedial action and monitoring as set out in paras 8.2 and 9.4 of the SARS Unit Report, was to simply notify Adv Batohi of the offence had been committed.

505. In a response letter dated 7 August 2019 the integrity of Adv Batohi was questioned and she was accused of having written to Adv Mkhwebane after having unilaterally engaged with the President's attorneys and at the President's attorneys' behest. The latter then proceeded to educate Adv Batohi on a Public Protector's authority and powers, indicating that the case law says that Adv Mkhwebane can direct organs of state to take certain steps and even direct how the steps must be taken.

506. This reflects a lack of appreciation of the independence of the prosecuting authority.

507. In light hereof, the NDPP became embroiled in the litigation to set aside the remedial action insofar as it relates to the NDPP – resulting in more public funds being fruitlessly and wastefully spent on litigation as a result of an unlawful stance adopted. The NDPP complained that remedial orders interfered with the prosecutorial independence to prosecute and investigate crimes free from interference or influence. Adv Mkhwebane had no powers to direct the NDPP to investigate allegations of money laundering or of any crime or to submit implementation plans in respect of criminal investigations.

508. In the CR17 HC: Adv Mkhwebane contended that in the remedial action granted in relation to the NDPP was couched in a manner that left it with the discretion to perform its functions. In other words, if they believe they should do nothing, they were entitled to do so if they exercise their discretion lawfully and for legitimate purposes. Yet this is not what was stated in the aforementioned letter. She disputed that she had ordered remedial action and sought to take away the autonomy of the NDPP to decide whether or not particular criminal conduct should be prosecuted. She stated that she was merely referred the matter to the NDPP – not telling the NDPP how they should go about discharging their constitutional mandate. Nothing was said about the

aspersions cast on Adv Batohi in the process. This is not borne out by the language in the CR17 Report.

509. To the Committee Adv Mkhwebane's evidence was that:

509.1. The CR17 HC criticised her for her remedial action in respect of the NDPP and for failing to understand that '*she has no power to direct the NDPP to investigate any criminal offence and how to go about doing this.*'

509.2. In the CR17 Report, she had only been acting in accordance with the Nkandla judgment. She therefore questioned the fairness of the CR17 HC's criticisms of her remedial action. She also testified that the CR17 HC's decision created '*a lot of confusion in how we operate as an institution*'.

509.3. Under s 181(3) of the Constitution, she was required to be assisted by other organs of state to ensure the PPSA's effectiveness, and that, under s 6(4)(c)(i) of the PPSA, she was entitled to bring any possible offence to the notice of the relevant authorities.

509.4. The power to determine an effective remedy and to determine how it should be implemented, which arises from the Nkandla judgment, and pursuant hereto that Adv Mkhwebane had referred allegations of criminal conduct to the NPA for further investigation.[57]

509.5. The referral to the NDPP was drawn directly from Mr Maimane's letter of complaint.

509.6. She did not '*have the mandate to investigate criminal conduct or criminal matters*' and was doing no more than asking the NPA to look into a matter that fell within its constitutional mandate.

509.7. She was permitted by her empowering statute to refer matters to the NDPP, and that '*if they find nothing, they find nothing. That has got nothing to do with you*'.

509.8. In the NDPP, Adv Batohi, issued a *nolle prosequi* certificate, Adv Mkhwebane would have accepted that '*that's the end of the matter*'.

510. This of course presupposes that it was referred directly to the NDPP for prosecution. It is not apparent why it was not referred to SAPS to investigate but directly to the NDPP. It has the

[57] Part A Statement at paras 303 – 304.

appearance that it was assumed that a prosecution would follow Adv Mkhwebane's investigation without a SAPS investigation.

511. It was clear that Adv Mkhwebane expected Adv Batohi to implement the remedial action and that Adv Mkhwebane intended to manage and monitor the investigation by requiring the NDPP to seek her approval on an implementation plan.

512. The CR17 HC held that the NDPP could not lawfully simply ignore the remedial action directed at her.[58] The remedial action was not in the form of a mere recommendation. On the contrary, it required the NDPP to act and, furthermore, it required her not only to submit an implementation plan on her action to the Public Protector, but also to obtain the Public Protector's approval of the plan.

513. It cannot be gainsaid that the remedy together with the monitoring thereof was more than simply '*bringing to the notice*' thereof. Adv Mkhwebane did not address the '*monitoring*' of the NDPP as contained in the CR17 Report in her evidence to the Committee, nor the aspersions cast on Adv Batohi.

514. It is akin to the remedy in the SARS Unit matter – where Adv Mkhwebane directed the NDPP to expedite the criminal trial against Mr Pillay and other former SARS officials and directed the Commissioner of Police to investigate, within 60 days, '*criminal conduct*' of Messrs Gordhan, Pillay and officials involved in the unit.

515. The CR17 HC's criticism was that it was not a case of where Adv Mkhwebane stumbled upon what appeared to be money laundering and then sought to bring it to the attention of the NPA. On the contrary, Adv Mkhwebane actively from the time of the complaint sought to investigate the allegation of money laundering, despite having no power to investigate the crime of money laundering – it being the very crime she clearly said in the Vrede matter she had no powers to investigate.

516. The CR17 CC held at para [189]:

> '[189] We are constrained to find that the Public Protector's issuing of the remedial action to the NDPP coupled with her insistence, **when the NDPP queried her, that she expected the NDPP to carry out her directive, displays, in our view, a complete lack of understanding on her part of the limits of her powers as provided in s 6(4)(c)(i) of the PPA in relation to matters falling under the NPA. We**

[58] CR17 HC at para [181].

> **also find that she displayed a clear failure to grasp the meaning of the concept of prosecutorial independence decreed by s 32(1)(b) of the NPA Act**.'[59]

(iii) Instructions to Parliament on how to discharge its responsibilities

517. As part of the remedial action, Adv Mkhwebane:

517.1. directed that the Speaker refer the matter to the Joint Committee of Ethics and Members Interest so that the Joint Committee can consider it in terms of para 10 of the parliamentary Code which relates to breaches and procedures for investigation;

517.2. directed the Speaker to demand the publication of all donations received by the President on the basis that he was bound to declare his financial interests when he was Deputy President as required in para 9 of the Parliamentary Code.

518. This remedial action is imposed when the President is no longer a Member of Parliament, and the Parliamentary Code would not have applied to him. So that remedial action was not implementable.

519. In her CR17 HC AA, Adv Mkhwebane **adopted the view that the Speaker was opposing the remedial relief as a support of the President based on the fact that the Speaker came from the same Party as the President**, rather than holding the Executive to account.[60]

520. The CR17 HC held that there was an unwarranted encroachment on the Speaker's discretionary powers by Adv Mkhwebane, and it is similarly reviewed and set aside:

> '[211] Her attitude to the Speaker is equally concerning. In her answering affidavit, in response to the Speaker's review, the Public Protector says that the Speaker's review is tantamount to 'demonstrating support for the President' and is a failure to 'stand on the side of accountability'. **These are reckless statements to make against another Organ of State and deserve the opprobrium of the Court**. (censure)

(iv) Misconduct

521. **The Committee concludes that Adv Mkhwebane committed misconduct in the sense of an intentional or gross negligent failure to meet the standard of behaviour / conduct expected of a holder of public office in respect of the CR17 Report for the following reasons:**

[59] Section 32(1)(b) of the National Prosecuting Act provides that no one may improperly interfere with or obstruct the NPA in carrying out its powers, duties and functions.
[60] CR17 CC at para [18].

*(a) The findings against the President on the issue of **money laundering**.*

522. Further, to this Committee, Adv Mkhwebane for the first time admitted that mentioning PRECCA was a mistake yet testified that she **intended to convey that '*there is this suspicion of money laundering*'**.

523. Adv Mkhwebane persisted that whilst she relied on the wrong legislation there still remained *prima facie* evidence of money laundering. (This remained her position before the Committee).

524. In CR17 HC judgment:

> **'[143] The essence of the offence is the concealment of proceeds of crime. Unless the money involved in the suspected money laundering transactions is the proceeds of crime, it does not matter how many accounts and transactions are involved in dealing with the money: there can be no offence of money laundering without the proceeds of crime.'**

525. In the CR17 CC judgment it was held:

> '[115] Having investigated the money laundering allegations, the Public Protector decided to dispose of them in terms of section 6(4)(c)(i) of the Public Protector Act.[61] **Once more the Public Protector overlooked the fact that this provision is triggered where the facts disclose the commission of an offence during the course of dealing with a matter that properly falls within her competence**. This disclosure must occur at any time, before, during or after an investigation of an issue **listed in section 6(4)**. Money laundering is not one of the matters listed in section 6(4) as falling within the competence of the Public Protector. And apart from specified offences under the PCCA, crime is not reported to the Public Protector for investigation. The Constitution empowers the police service to investigate crime.[62] Yet here the Public Protector undertook to investigate an allegation on money laundering made by the leader of the official opposition. This differs from stumbling upon money laundering facts during an investigation.'

526. If Adv Mkhwebane at that stage had recognised the limitation of her jurisdiction and conceded the review on the basis that she had committed an error when the President's CR17 FA came to her attention, then with reasonable care millions of rands of legal costs could have been avoided, instead of being spent in vain. But instead, the relief sought by the President was opposed **on every ground**, and millions were spent.

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[61] Section 6(4)(c)(i) of the Public Protector Act provides:
'The Public Protector shall, be competent—
...
*(c) **at a time prior to, during or after an investigation**—*
(i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority; and charged with prosecutions.'

[62] Section 205(3) of the Constitution provides:
'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

527. In her CR17 AA Adv Mkhwebane adopted the stance that in investigating one transgression, she could not ignore other transgressions without recognising that to investigate she requires jurisdiction, which in relation to money laundering she did not have. This was materially different her stance in the Vrede matter.

528. As apparent from the transcript of the interview, Adv Mkhwebane misrepresented to the directors of the law firm, EFG, when she interviewed them on 23 April 2019 that '*there are aspects of the complaint which says, Public Protector can you also Investigate because the monies were deposited Into EFG2, then they were moved to other bank accounts*.[63] This is not apparent from the complaint. The evidence of the movement of funds from the EFG2 account came from information she obtained on request from the Financial Intelligence Centre ('**FIC**').

529. Adv Mkhwebane persisted with allegations to justify a suspicion of money laundering premised solely on '***several intermediaries***', being conduits for funds for the CR17 Campaign, even though this is not an element of the offence of money laundering.

530. As this is a matter of law was confirmed by the CR17 CC (and there could be no quibble that this is so), it is binding precedent – even Mogoeng CJ did not disagree.

531. It was undisputed that when Mr Maimane, raised the issue before the NA that there was only one intermediary bank account, Miotto Trading, before the R500 000 was deposited into the EFG2 bank account – being the CR17 account, and no evidence to the contrary was provided at the time the complaint was lodged. Mr Maimane's complaint of a suspicion of money laundering was not only erroneously premised on '***several***' intermediary bank accounts (when it was only one) but also the mistaken belief that the use of an intermediary bank account gives rise to a *prima facie* suspicion of money laundering when this is not the case. Whilst the reference to '*several*' in Mr Maimane's complaint was not correct, the continued use thereof thereafter is misleading.

[63] When Adv Mkhwebane interviewed they were accompanied by an advocate, representing them. They appeared pursuant to a subpoena and refused to answer questions that fell outside the scope of the subpoena. Bundle H, item 31.7.5, p. 1031 *et seq* from lines 23 to 1032 line 6:

'BUSISIWIE MKHWEBANE: The complaint, I have put in on record and I have read it to you. That what the complaint ls saying, in addition to what is mentioned In the subpoena. ***there are aspects of the complaint which says, Public Protector, can you also investigate. because the monies were deposited into EFG2, then they were moved to other bank accounts****. In fact, it was from the personal account of Mr Wilson into Miotto. from Miotto Into EFG2. So from EFG2.* ***Also we have all the bank statements which its shows which accounts the monies were deposited Into****. so as I am saying that,* ***the complaint is also saying****, the nature of the payment, passing through several intermediaries docs not accord with a straightforward donation and raises the suspicion of money laundering, so that is the question. That Is the issue and the second part. they alleged, Donne is further widely reported to have received billions of rands in State tenders, of and in an Irregular manner.'*

532. The CR17 HC judgment held:

> '[137] From the Miotto account the money was deposited into the EFG account, being the CR17 campaign bank account. What this illustrates is that only one account is involved on the CR17 campaign side as -far as this amount is concerned. **There is no evidence of 'several intermediaries' as stated by the Public Protector**. We also point out that the paucity of evidence of the so-called 'several intermediaries' points to the Public Protector **simply repeating the language used by Mr Maimane in his complaint to her office**.'

533. There was no evidence that traced the R500 000 paid into the EFG2 bank account to any illegal source nor was there evidence to indicate precisely what the R500 000 was spent as it co-mingled with other funds in the EFG2 bank account.

534. As raised by the President investigating money laundering fell outside the jurisdictional limitations of Adv Mkhwebane's powers and the breach of the Executive Ethics Code.

535. Notwithstanding that both the CR17 HC and the CR17 CC confirmed the elements of the crime of money laundering, Adv Mkhwebane, even before the Committee, still maintained that the movement of money from one account to another account is indicative of either round-tripping, which she alleges to be akin to money laundering, or some alleged illegality. Furthermore, notwithstanding the explanations provided by the President and the Court judgments, Adv Mkhwebane still testified that the payment of R500 000.00 had passed through '*several intermediaries*'. Even if the latter had formed part of Mr Maimane's complaint in the first place, the explanation from the President in relation thereto was simply ignored or disbelieved, even though there was no contrary evidence to ground such disbelief reflected in the CR17 Report. The instruction to hence persist with the application for leave to appeal knowing that the reference to PRECCA throughout the CR17 Report was wrong left her counsel to resort to a submission to the CC that it was an '***innocent reference to the incorrect Act***'.

536. It would (or reasonably should) have been known that it is established law and trite that a decision deliberately and consciously taken under a wrong statutory provision cannot be validated by the existence of another statutory provision authorising that action.[64] Further, also trite, as confirmed in **Min of Education v Harris** 2011 (4) SA 1297 (CC) wherein the CC held that when a decision-maker consciously or deliberately elects to rely on one statutory provision for a decision, but that reliance is invalid, the decision cannot be rescued by later on pointing out the fact that an alternative

[64] **Electoral Commission of South Africa v Democratic Alliance** (5) SA 476 (SCA) at para [30]; **Min of Education v Harris** 2011 (4) SA 1297 (CC) at paras [16]-[18].

statutory provision would, in fact, have applied. These cases do not reflect new or novel legal propositions but simply confirmed what was already the law.

537. It is for that reason that when the President pointed out the error in relation to money laundering, the review should have been conceded and the continued litigation amounted to expenditure in legal fees made in vain, which could have been avoided had reasonable care been exercised. In April 2019 already there had been a meeting with representatives from FIC during which Mr Mataboge specifically asked for confirmation on whether or not evidence of money laundering was found. He was informed that there was **no indication of money laundering found as no predicate offence had been identified from which the monies could have been proceeds of**. Based on this one would have expected Mr Mataboge (and Adv Mkhwebane) to have understood that the threshold of money laundering had not been reached. Unlike other legal entities that FIC assists Adv Mkhwebane had powers of investigation. Thus whilst the FIC's findings on the existence or not of the predicate offence are not conclusive, given that FIC had not investigated whether or not such predicate offence existed, Adv Mkhwebane having been so informed, did not instruct any further investigations to be conducted, independent of FIC, that showed differently in relation to the R500 000 or even any other donor funding – even if she had misconceived her powers to investigate money laundering.

538. It is so that money laundering is not an offence under the Executive Ethics Code and cannot be investigated under EMEA as complaints must relate to a breach of the Executive Ethics Act. In this regard the CC concluded that Adv Mkhwebane knew this, and for that reason invoked PRECCA, albeit erroneously, precisely because she had powers under PRECCA:[65]

> '[112] But the absence of facts is not the only defect. The Public Protector once again misconstrued the empowering legislation. The complaints to her were made in terms of section 4 of the Members Act which stipulates that the complaints should relate to an alleged breach of the Code. The Code does not refer to money laundering and yet the Public Protector treated the allegation as separate and dedicated a large portion of the report to addressing it and making a finding specifically on it. It appears that the Public Protector was aware that the Members Act did not empower her to investigate the money laundering allegation and she invoked the Prevention and Combatting of Corrupt Activities Act (PCCA), whose specific provisions were cited and interpreted in her report.'

539. This conclusion may well be borne out given that Adv Mkhwebane represented to the attorneys from EFG during their subpoenaed interview that the investigation was being done, *inter alia*, in terms of PRECCA. If so then it was directed at coming the conclusion that the President was *prima facie* involved in money laundering and not simply an innocent reference to an incorrect law.

[65] CR17 CC at para [74].

540. This is further borne out by Adv Mkhwebane's failure to deal with the explanations as contained in the President's s 7(9) response that the following as held in the CR17 HC judgment:

> '[209] As Counsel for the President pointed out, although the Public Protector received full representations from the President, she did not engage meaningfully with them. She did not deal with the explanations as to how the CR17 Campaign was structured and how it functioned. She did not engage with the explanations that the transfers between the various accounts were aligned with the very structure of the CR17 Campaign itself. Instead, and despite this evidence before her, she persisted with her thesis that there were reasons to suspect that the CR17 Campaign was involved in State capture of some sort, and that a prima facie case of a suspicion of money laundering had been established. She recklessly ignored the evidence at her disposal, which pointed to the opposite conclusion. In doing so, she breached her duty to approach every investigation in an openminded fashion.'

541. There is no evidence to gainsay the CR HC held conclusions to the effect that:

> '[146] Clearly the Public Protector had **no foundation in fact and in law to arrive at her finding that the President had involved himself in illegal activities sufficient to evoke a suspicion of money laundering. In addition the Public Protector based her finding on legislation that has nothing to do with the offence of money laundering**. The conclusion is inescapable that in dealing with this issue the **Public Protector completely failed to properly analyse and understand the facts and evidence at her disposal. She also showed a complete lack of basic knowledge of the law and its application. She clearly did not acquaint herself with the relevant law that actually defines and establishes the offence of money laundering before making serious unsubstantiated findings of money laundering against a duly elected Head of State. Had she been diligent she would not have arrived at the conclusion she did**.
>
> [147] **It is so that at the time that the Public Protector conducted her investigations, the alleged corrupt activities of AGO in state tenders had aired at the Commission into State Capture. But this is immaterial. The evidence before the Public Protector from Mr Watson was that he had made a donation to the CR.17 campaign as a long-standing member of the ANC. There was no contrary evidence. In fact, the FIC had told the Public Protector in April 2019 at a meeting with her that its investigation could find no indication of money laundering, as they could not establish whether any of the monies deposited to the CR17 campaign accounts constituted the proceeds of crime. The FIC told the Public Protector that the payment from Mr Watson 'came from sources that appeared to be lawful'. Of course, even if Mr Watson's sources of funding were suspect (and there was no evidence of this before the Public Protector) the suspicion of money laundering might fall on Mr Watson. But he was not the subject of the Public Protector's investigation.**
>
> [148] As we have already noted, **the uncontradicted evidence of the President, Miss Nicol and Mr Motlatsi is that the President had nothing to do with the donation from Mr Watson**.
>
> > In order to be suspected of money laundering **a person must know, or they ought reasonably to know, that the money in question is the proceeds of crime**.
> >
> > Quite how the Public Protector thought that the President might have harboured the requisite knowledge to constitute this crucial element of the offence on the evidence before her i**s unfathomable**.
>
> [149] The only real clue to the Public Protector's reasoning on the money laundering issue comes from the following passage: **a criminal may attempt to integrate the funds he/she received from corrupt activity, such as a bribe or kickback, into a financial system by channelling the funds through complex financial transactions during which he/she may involve several entities as conduits and use financial institutions as a means to disguise the corrupt source of funds as well as the ultimate beneficial owner of the proceeds of unlawful activity.**' (This is stated at Report, para 5.3.10. 71)
>
> [150] This passage **formed a direct link to her conclusion that there was a suspicion of money laundering. In her reasoning, the Public Protector assumed that the monies donated to the CR17**

campaign constituted bribes or kickbacks, presumably for political favours. It is not clear who the Public Protector suspected.

[151] The allegation at the heart of her reasoning is extremely serious. It implies that the President orchestrated the entire CR17 campaign and used it as a vehicle for laundering the bribes he received from donors in return for political favours. This kind of allegation, even if implied and not express, ought not to be made without strong supporting evidence. We need to emphasise, once again, that in this case, the Public Protector had no evidence before her to substantiate this very serious allegation.

[153] **On the money laundering issue, the Public Protector displayed anything but an open mind. She made serious findings based on unfounded assumptions. She paid no regard to the statute that establishes the very offence in which she implied the President is suspected to have been involved. She also ignored the detailed explanations from Miss Nicol, Mr Motlatsi and Mr Chauke about the provenance of each of the accounts involved in the CR17 campaign, and how and why the transfers were effected between them. Had she considered this evidence properly, she could not rationally have concluded that these accounts were being used in such a manner as to warrant a prima facie suspicion of money laundering. We find that her findings on the money laundering issue were not only irrational, but, indeed, reckless.**'

542. Similarly, the CR17 CC held that:

> '[116] With regard to the allegation that the President and his family were involved in illegal activities that gave rise to the suspicion of money laundering, the High Court held that the finding lacked legal and factual foundation. **This conclusion is unassailable**.'

(v) The President's *bona fides*

543. Adv Mkhwebane's **doubting of the *bona fides* of the President** without reason and her failure to have an open mind on the issues to be determined.

(a) Shivambu complaint

544. As Adv Mkhwebane confirmed the existence of Andile Ramaphosa's contracts and reproduced such in the CR17 Report and the President confirmed that he had seen the contracts the complaint from Mr Shivambu was hence unsubstantiated and it should have been recorded as such in the CR17 Report as confirmed in para [73] of the CR17 HC judgment, but it was not. That this was so is indicative of a lack of an open mind and a determination to make a finding against the President.

545. Before the CR17 HC Adv Mkhwebane denies this:

> '195.5 I further deny that I did not deal with the complaint of whether a contract existed. It was not in dispute that the President's son Mr Andile Ramaphosa had business contracts with African Global Operations for which he was paid large sums of money for services he rendered to the company.
>
> 195.6 Once again. The President fails to address the facts of the matter and instead looks for all sorts or technical issues to fault my investigation. This is simply disappointing and an impermissible attempt at avoiding taking responsibility by a Head of State.
>
> 195.7 Save as aforesaid. The allegations contained herein are denied.'

546. To the Committee, Adv Mkhwebane did not state in terms that Mr Shivambu's complaint was unsubstantiated.

(cc) The investigation of the CR17 Campaign

547. There was nothing in the written complaints constituting a request to Adv Mkhwebane from Mr Maimane to look into a potential compromise in donations to the CR17 Campaign as she had indicated to the Committee.

548. Yet the bulk of Adv Mkhwebane's CR17 Report and oral evidence to the Committee centred around the investigation of the CR17 Campaign and findings in relation thereto, even though the CR17 CC has definitively ruled that she did not have jurisdiction to investigate internal political funding.

549. The President's position was that to the extent possible he would not be directly involved in the solicitation of donations and that he did not generally participate but was consulted '*on a range of political and strategic issues and also received briefings*.' He was generally not aware of the donations *and 'the general practice was that the details of donors and amounts would not be shared with him*'. He attended dinners and the campaign team generally consulted him on the invitation list to dinners and guidance on possible donors.

550. According to Adv Mkhwebane, the non-disclosure of donors' identity to President Ramaphosa was not reconcilable with avoiding the risk of a conflict as contemplated in s 96 of the Constitution, because under that provision it is not necessary for the risk to materialise – all that is required is for the relevant member of the National Executive to be exposed to the risk.

551. In the CR17 HC it was held that the undisputed evidence was that the reason '*why it was decided that he should be insulated from information about donations to the CR17 campaign was* ***precisely to avoid him being placed in a position of possible conflicts of interest.*** *His uncontested version is that* ***his insulation from the details of the financial transactions and donors to the CR17 campaign ensured that he avoided the risk that donors might subsequently expect some form of pay-back from him. There is no evidence to the contrary, nor is it an implausible explanation. On the contrary, it seems to have been a reasonable strategy to employ in order to avoid possible conflicts of interest****.*'[66]

[66] CR17 HC at para [72].

552. Adv Mkhwebane disputed the evidence of the campaign managers relying on evidence relating to (a) emails; (b) campaign dinners and (c) funds paid to the CRF to conclude that this was not so.

553. Adv Mkhwebane placed reliance on the emails included in the Rule-53 record delivered on 14 August 2019 and referred to in media articles, more particularly the *News24* article of 3 August 2019 and the *Daily Maverick* article of 8 August 2019 indicating in her Part A Statement that the President's version – **that he was '*ignorant of the identity of the donors of the CR17 campaign*' – was false**.

554. During her evidence before the Committee, Adv Mkhwebane emphasised the findings of Mogoeng CJ that **the President '*gave a false account*' of the relevant events**. According to Adv Mkhwebane her evidence showed that the President was involved **in fundraising for the campaign and had knowledge of who donated**, contrary to the position as explained by the campaign managers. She highlighted that this was evident from the President's letter to the Speaker clarifying that the payment had been in respect of the CR17 Campaign; the interviews with the campaign managers; confirmations of the gala dinners, **one of which was attended by Mr Watson**, who had donated R500 000; and the email correspondence with the President, including '*emails to prospective donors to facilitate*'. During her oral evidence, Adv Mkhwebane reiterated that, aside from the emails, '*there would be **a lot of other information** which proved that the President was involved, or he was aware about those donors and funders.*' This ***'lot of other information'*** is not apparent. It is not referred to in the CR17 Report, nor was it obvious from either the affidavits or the Rule-53 record filed as it ought to have been. It has not been explained to the Committee.

555. The emails[67] relied up were provided anonymously to the PPSA offices, in hard copies. They were not authenticated before being relied on for purposes of the CR17 Report. Issue was taken as to whether Adv Mkhwebane was in lawful possession thereof under ROICA.[68]

556. The CR17 Report does not mention these emails. They not included in the '*Key sources of documents*'. The actual date on which they were received is not known. They were not referred to in the s 7(9) notice issued. The emails were leaked to the media even prior to the Rule-53 record

[67] During the court process, the President declined to respond to the substance of the emails, instead attacking the legality of the emails and questioning how Adv Mkhwebane came to be in possession thereof. Neither admitting or denying the contents thereof. This solicited a response from Adv Mkhwebane that the President should not be raising technical defences but instead embrace the principles of openness and transparency and deal with the substance of the emails. As the President declined to deal with the contents of what he regarded to be illegally obtained emails, Adv Mkhwebane also declined to deal with how the emails came to be '*lawfully*' in her possession and did not share with the Court whether the contents were authenticated.

[68] As the sender and receiver of the emails indicated that they had not given their consent for the disclosure of their communication, *prima facie* it appears that these emails were illegally obtained in contravention of ROICA. If so, *prima facie* it appears that Adv Mkhwebane did not obtain the emails lawfully. As such reliance was placed on illegally obtained evidence in the CR17 Report.

having been filed on 14 August 2019 and in that regard the Rule-53 record was filed before any preservation order was made.

557. Neither the President, nor the campaign managers (any sender or recipient of the emails) were afforded any ***audi*** in relation to the emails. The President objected to this in his affidavit before the CR17 HC denying this was so relying on broad wording of the s 7(9) notice.

558. In her affidavit submitted to the Committee and in oral evidence, Adv Mkhwebane relied on four emails. Two of the emails from Ms Nicol to President Ramaphosa and an email from Ms Nicol's personal assistant to another manager of the CR17 Campaign, Marion Sparg, are included in the leak together with an email from the President to a certain '*Donald*'. These were also the only emails referred to in media reports.

559. From none of the emails can it be said that President Ramaphosa knew the specific identity of any donor or precisely how much they donated. Nor do they reflect that President Ramaphosa either knew that Mr Watson had paid R500 000.00 as a donation to the EFG2 account or that he knew that the EFG2 was a campaign account. In the main they refer to persons to be approached for donations – potential donors from whom funds are being solicited and who may or may not provide a donation to the campaign as opposed to confirmed donors with amounts.

560. Adv Mkhwebane referred the Committee to several newspaper articles, including a *News24* article, in which the journalist indicated that they had verified certain information as contained in the emails, including that the emails were authentic. Reference is not made to the article as a representation of its authenticity but to reflect on what is stated in the emails and what Adv Mkhwebane could have found out had an investigation ensued.

561. The first email from Miss Nicol to the President in November 2017, reflect that she provided the President with questions, notes around fundraising and events, targets to be achieved and potential donors to be approached. It tells the President what Minister Gordhan is going to do and that he was tasked to raise R15 million and that he got Johnny Copeland on board (Hosken Consolidated Investments ('**HCI**')), to do what precisely is not clear. Whilst the email also reflects is that the President was asked to make a call to a '*Mick Davis*', *News24* then contacted the latter and reported that he was never approached by the President or any member of the CR17 Campaign. Further *News24* investigated the references in the email[69] that goes on to list the persons who could provide

[69] On 12 November 2017, Ms Nicol sent an email to the President stating that: '*Stavros says the following would fund if we had a small cocktail party. I need to discuss diary with you.*'

funding. *News24* reported that it was confirmed that whilst a party had taken place in December 2017, those who attended were vastly different to the list as set out in the list of 7 November 2017, and at the party though they met with the President, there was no mention of any fundraising.[70]

562. With reference to the email from President Ramaphosa to Donald,[71] on affidavit, in the leave to appeal, Adv Mkhwebane referred to this as **an uncontested** email from the President to a Mr Donald. One does not know who Donald *ex facie* the email the President is giving an instruction that he transfers funds. According to the *News24* report, '*Donald*' is believed to be a reference to the President's banker, who is requested to transfer funds from President's own account to the Ria Tenda Trust account, a trust used as part of the Campaign's financial machinery. The President had in his s 7(9) notice disclosed how much money he had donated and loaned to the CR17 Campaign.

563. These unauthenticated emails were relied on at face value,[72] and as demonstrated with reference to the *News24* investigation, had Adv Mkhwebane directed that they be investigated she may have reached different conclusions. But there is no evidence that prior to the CR17 Report that any investigation was conducted to follow the leads on the emails.

564. Though Adv Mkhwebane testified that the President was given '*regular updates*'[73] and '*constantly informed*', this conclusion was reached on the basis of the aforestated four emails and despite a reference '***to evidence***' which indicates that the President was aware of campaign reports and donors in the CR17 Report, all that was forthcoming in the Rule-53 record were these emails.

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[70] 'The final leaked email, dated November 7, 2017, LS from Stavros Nicholoau, who has been described as a long-time supporter of the ANC. He ls a senior executive at listed pharmaceutical giant Aspen.
Nicholoau is also the head of the Hellenic section of the Hellenic, Italian and Portuguese Alliance (HIP Alliance).
News24 reported that:
- *'In a statement issued on Tuesday, the HIP Alliance said it met regularly with the ANC led government as concerned citizens and 'at times raises funds for political, charitable and other causes'.*
- *'We can confirm that a cocktail party took place with the assistance of Miss Nicholl in December 2017, and the attendees were vastly different to that of the list of 7 November. At the cocktail, members from the Hellenic and other communities met with the now president and briefly discussed their concerns with him'* the HIP Alliance said.
- *'The president limited his discussions to the issues of the day and made no mention of funding whatsoever.'*

The HIP Alliance further reiterated its support for Ramaphosa and expressed concern that the emails may have been illegally obtained.'

[71] Annexure **'BM7'**, p. 894:
'Hi Donald
Thank you for assisting with the Internet banking the other day. Could you kindly transfer an amount of R20 million from the Money Market Investment that was left after we shifted R75 million from the Money Market Select to Ria Tenda Trust Standard Bank, account number……., branch code ……..
I shall call you to confirm all this.
Cyril'

[72] *News24* could not get hold of Samson. There is no evidence that Adv Mkhwebane did.

[73] Part A Statement at para 270.

565. All 3 campaign managers corroborated each other in saying that they decided to approach donors '*with a clear condition that the donors should not expect any favours in return for their contributions to the CR17 Campaign*'. Mr Watson's evidence corroborated this. All three campaign managers stated under oath that they had agreed with the President that he '*should not know the identities of the donors or the amounts they have pledged*'.

566. The aforestated emails also do not show that President Ramaphosa knew the actual identities and amount each of the donors donated to justify a sufficient basis for Adv Mkhwebane's rejection of the President's explanation of the CR17 Campaign and his involvement.

567. Adv Mkhwebane testified to the Committee that these were only a '***sample***' of the emails reflecting the President's knowledge and involvement in the CR17 Campaign, indicating that the remaining emails could not be disclosed because during the litigation they had been sealed.[74] This is not correct.[75]

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[74] Adv Mkhwebane testified as follows:
'we will not but we also cannot show all of the emails and all that. *I think the role of the emails, if we show one or two, what we are really after is what role did the emails play, rather than the contents per se; so that is the first reason. The reason is that* ***even if we had all the emails, we cannot show them because they are sealed somewhere in Gauteng***. ***These ones we can show because they come from the pleadings and not from the sealed documents.'***
Public Protector Advocate Busisiwe Mkhwebane – *This version was unacceptable because I've shown of the emails that I have read earlier, because there would be a lot of other information which proved that the President was involved, or he was aware about those donors and funders.'*

[75] In respect of the sealing of documents, the following further exchange occurred during the oral evidence with Adv Mkhwebane:
'Advocate Mpofu – *Yeah, All right. Now, let's stop there, because when we deal with what I call the base documents, this becomes a central thing. And Chair, again for the sake of progress, we won't but* ***we also can't show all of the emails and all that.*** *I think the role of the emails, if we show one or two, what we are really after is what role did the emails play, rather than the contents per se; so that's the first reason. The second reason is that* ***even if we had all the emails, we can't show them because they are sealed somewhere in Gauteng***. *So these ones we can show because they come from the pleadings and not from the sealed documents. Right. Okay, fine. All right, can we then go back to paragraph 258, so that we deal with what I am going to call the base documents, which we are going to use in your testimony.'*
At 8011: **'Public Protector Advocate Busisiwe Mkhwebane –** Then, 'I pause here and state that the records which include **emails** and bank records which I intend to rely on as evidence were sealed by the High Court in order to prevent them from being made public.' That was done … [inaudible] … by the Deputy.
Advocate Mpofu – *Deputy Ledwaba.* ***That's what I was mentioning earlier.*** *So those bank statements, bank records and so on ... [inaudible] ... you saw them before they were sealed, correct?*
Public Protector Advocate Busisiwe Mkhwebane – Yes ... [inaudible] ... sealed.
Adv Mpofu – Analysed?
Public Protector Advocate Busisiwe Mkhwebane – Yes. After we issued the report.
Adv Mpofu – *Alright. 267?*
Public Protector Advocate Busisiwe Mkhwebane – *Over and above showing how the money was moved around, the sealed records revealed that as false the version that the President was ignorant of the identity of the donors of the CR17 Campaign'. When we go to the Constitutional Court Judgment, because we availed all the information to the Constitutional Court.'*
So the version of all these people, the managers, the President? 'No, there was a deliberate plan that he must not know' and so on, and so on. So let us call that the version. And then you subsequently ***got to acquire confirmed evidence contained in the emails.*** *You are now the 'judge' because these two things, at least at face value, look like they are contradicting each other. You then had to assess, that is your job, to assess the evidence, as you said earlier, correct?*
Adv Mkhwebane: *Yes, the investigator; but yes, under my direction.*
Adv Mpofu: *When I say 'you' now, I mean plural, Public Protector. Okay, good.*

568. In response to the claim that she had not identified any evidence to substantiate her conclusions against the President, Adv Mkhwebane said the following in evidence.

> 'I totally disagree. I mean, it's worse **because the evidence was before the judges in terms of Rule 53**, where every information I take it, Legal Services availed all the records, and worse, in this particular matter, currently we have a situation where **there are those records which are sealed**. And when they come and say I didn't have…I have not identified any evidence or facts to substantiate my conclusion, what do they mean? Because the bank statements are there. **The monies, how they flowed from one account to another account, the emails,** the transcribed record of Mr Watson where he said: 'I was a sponsor, and I am the one who donated. I attended one of the gala dinners.'

569. However:

569.1. The emails were not sealed;

569.2. The emails were included in the CR17 Rule-53 record which was filed before any order to seal records was made;

569.3. There was ultimately no request for emails to be sealed;

569.4. There was only a request for metadata which did not materialise because the emails were provided in hard copy; and

569.5. It was disputed that Adv Mkhwebane had been in legal possession of the emails.

570. The emails before the Committee was not a '*cross section*' as per Adv Mkhwebane's version but appear to be the <u>only</u> emails in Adv Mkhwebane's possession as reflected in the Rule-53 record.[76] The Rule-53 record was filed with the Court register prior to any documentation was sealed by Deputy President Ledwaba. The index of the Rule-53 record reflects the emails item 36 in the record index comprising pp. 309 – 316, i.e. seven pages – being the four emails that was referred to in evidence. No other emails were filed as part of the Rule-53 record. This is what transpired at the time as evident from the correspondence.

571. What was sealed emanated from the FIC and the CR17 Campaign bank account statements and not the emails or '*other documents*'. bank statements of the bank accounts of the CR17 Campaign and

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Adv Mkhwebane: *Besides the email, SC and Chairperson, remember the evidence of one of the people who donated and who was part of one of the dinners.*

. . .

of hearing a version from somebody and when you have the objective evidence of an email that is not denied, then you can test it. That is more or less the methodology that you were using, correct?'

[76] *'This is just two paragraphs that I want you to go through, so that we do not* ***<u>come back to the contents of the emails. This is, if you like a cross-section of the emails, and which indicated to you that the President knew what was going on</u>.*** *We will come to that later. And you then read paragraphs 260 and 261 of the affidavit.'*

the CRF. On 29 August 2019, Adv Mkhwebane's attorneys addressed a further letter to the DJP protesting against the sealing of parts of the Rule-53 record on the basis that the public is entitled to disclosure of the entire Rule-53 record, quoting a pertinent paragraph from the matter of **Public Protector v SARB**, dated 22 July 2019 which indicated that the Public Protector was obliged to make available all the documents that were the basis of her findings. This included every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentiary. This must be borne in mind in light of what is stated in relation to incomplete Rule-53 records filed in the Lifeboat matter, the **SARS Unit**, **Vrede** and **CR17** matters.

572. The CR17 CC pointed out:

> '[74] Despite acknowledging that the campaign managers corroborated one another in their oral testimony, the report reveals that the Public Protector preferred evidence in the form of e-mails which indicated that the President had played an active role in the affairs of the CR17 campaign. On this issue, the report reads:
>
> . . .
>
> [75] Apart from those e-mails which suggested that the President was more involved in the affairs of the campaign than the managers had testified, **there is no other evidence that links the President with the campaign**.
>
> [76] The question which the Public Protector's report does not address is how the divergence between the managers and the e-mails was resolved. It appears that the Public Protector simply chose the e-mails over the managers' oral testimony which she disregarded. This was inconsistent with the principles laid down by the Supreme Court of Appeal in Mail & Guardian, a decision to which the report refers. That decision affirms that the objective of investigations by the Public Protector is to discover the truth. Where the investigation yields disparate pieces of evidence which do not fit into place, the Public Protector must continue digging until the true picture emerges. As Nugent JA observed in that case:
>
> > **'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.'**
>
> [77] Mail & Guardian makes plain that the duty of the Public Protector is not only to discover the truth but is also to inspire public confidence that in each investigation, the truth has been discovered. Where the evidence is inconclusive or diverges, the Public Protector is obliged to carefully evaluate it to determine the truth. At the end, she must be in a position to say that the truth has been revealed.
>
> [78] Here, the truth which the Public Protector was seeking was whether the President had personally benefitted from the CR17 campaign donations. She has failed to discover this. The manager's testimony was to the effect that he did not benefit personally. But even if this evidence was to be rejected, there is just no evidence that established a personal benefit. The e-mails on which the Public Protector relied simply showed that the President was more involved in the affairs of the campaign. This is not the same as receiving personal benefits.
>
> [79] Moreover, the Public Protector could not disregard the evidence of the campaign managers solely on account of the e-mails that diverged with that evidence on the involvement of the President in the campaign's affairs. Instead, she was required to evaluate those witnesses' credibility and reliability of their testimony on the one hand and the authenticity and reliability of the e-mails, on the other. And she should have also tested each version against the probabilities. When the versions placed before the Public Protector diverged on some of the relevant issues, she could not without more prefer one version over the other. The truth is established by facts and not one's preference.

> [80] In these circumstances, the duty of the President to disclose under the Code was not triggered. On the basis of the uncontroverted facts, he did not personally benefit from the donations made to the CR17 campaign. Under the Code, the duty to disclose is activated once a benefit is given to a member of Cabinet in his or her personal capacity.'

573. In para [81] stated further:

> '[81] The issue is not whether the President deliberately kept himself ignorant of matters he was required to disclose. Instead, the question is whether there was proof that he personally benefited from the CR17 campaign donations. The EFF did not point to any evidence on record which established that the President benefitted in his personal capacity because such evidence was not placed on record. It does not exist.'

574. Essentially confirmed by the CR17 CC judgment at paras [74] to [81] and [128] – [131], was that there was no evidence to dispute – not emails, invitations and instructions before Adv Mkhwebane that reflected that President Ramaphosa had been '*constantly informed of the activities of the CR17 Campaign*'. There was no evidence that the President had met with donors during the banquet function or that he had broader interaction with donors whom he knew well.

575. There does not appear to be any evidence reflecting that the President had '*further and broader interaction with the donors, some of whom he knew very well*'.

576. The second aspect Adv Mkhwebane relied on as evidence that the President lied was the dinners.

577. It was known that the President had from inception admitted that he was consulted about dinners, to which potential donors would be invited, and he had made speeches at several fundraising dinners where he outlined his vision for the ANC and the country but that he had no knowledge as to who precisely donated and what amounts they donated.

578. Adv Mkhwebane relied on Mr Watson's presence at a fund-raising dinner hosted by the President – the inference being that the President must have had knowledge of R500 000 donated by Watson – because he addressed dinner guests and Mr Watson was at such dinner. In her affidavit to this Committee, Adv Mkhwebane explained that her **investigation revealed** that the President hosted donor dinner functions, '*which was further proof that he actively participated in the campaign process and knew who the donors were*'.[77] It was not '*revealed*'. The President had informed Adv Mkhwebane hereof. There is no evidence that those who attended were going to donate, or how much or that attendance could only be secured on the basis of a future donation.

[77] Part A Statement at para 269.

579. In her written statement Adv Mkhwebane indicated that the evidence relied on was that, during his interview with Adv Mkhwebane, Mr Watson had repeated to her that he had attended a dinner with the President. Mr Watson's evidence was that he had been present only at one dinner which the President hosted. Neither Mr Watson's affidavit nor his interview reflect that he had been present at a CR17 Campaign dinner. This is apparent from the affidavit in response to the questions that were asked of Mr Watson in writing by the President's legal team, reproduced in the CR17 Report. Mr Watson indicated that the dinner he had attended was the Back to School dinner in 2016 or 2017 and that he had not attended a CR17 fundraiser dinner.

580. The third aspect related to the CR17 Campaign funds. The CR17 Report reflected that there were large sums of money transferred by various benefactors into the EFG2 trust account for the CR17 Campaign and that they were disbursed by the attorneys to several beneficiaries, including Ria Tenda, Linked and the CRF. The President in his s 7(9) notice, and again in his affidavits in the CR17 HC, expansively elaborated on the flow of funds, which could readily have been verified with reference to the bank statements in Adv Mkhwebane's possession and for purposes of the CR17 Report this was not taken into account, nor referred to in her evidence.

581. Before the Committee Adv Mkhwebane testified at length about the identity and funds from '***various benefactors*** *into EFG2 trust account for the CR17 Campaign*', which funds were then disbursed from the EFG2 account to, among others, the Ria Tenda, Linked and the CRF, categorising them as large sums of money. Its relevance is not apparent as this specific information of donors is not in CR17 Report.

582. In the CR17 Report Adv Mkhwebane expresses a preliminary view that such a scenario would create a risk of some sort of State Capture by those donating these moneys to the campaign. It is not apparent how the investigation morphed to one of State Capture or that public funds were involved. Nowhere is it explained how '*state capture*' was reached, other than it being the view of Adv Mkhwebane. Evidence was also given as to who the funds were paid to from media reports, but no investigation had taken place prior to the CR17 Report concluding anything untoward. No recipient was interviewed. Among these, the President was not included as a recipient of funds. This is repeated in Adv Mkhwebane's statement to the Committee:

> '282. In conclusion on the above revelations in relation to exchanges of large sums of money, some of which received from private companies, I wish to express my **preliminary view that such a scenario when looked at carefully**, creates a situation of the risk of some sort of state capture by those donating these amounts to the campaign, as properly articulated in the minority judgment of Chief Justice Mogoeng, with which I am in total agreement.'

583. It bears noting having expressed that she is in total agreement with the minority judgment of Mogoeng CJ, in a number of respects Mogoeng CJ agreed with the CR17 CC majority judgment. Furthermore, to the Committee it was stated that '*very important economic players in the South African economy paid millions of rands into the CR17 campaign* ***raising reasonable suspicion that they were buying influence***'.[78] The inference being that any donor to a political party buys influence? But this too was not investigated at all and based solely on supposition. During the investigation no donors were interviewed and no foundation to the suspicion was provided besides providing names and amounts donated. None were linked to money laundering and no public funds were involved. No particular links were made between state patronage and donors. There is no evidence of what precisely informed the suspicion or preliminary views of '*the risk of some sort of state capture*'. The only information at her disposal being the identities of donors and amounts they paid. It is thus not clear what purpose this evidence served, other than to show how much money the CR17 Campaign raised and who supported it. There was no evidence of any unlawfulness.

584. In explaining the amounts, Adv Mkhwebane indicated that the financial transactions were '*complicated*' and that in providing the figures it was no more than '*bush accounting*'. On the basis of such '*bush accounting*' the credibility of a sitting President is impugned, with potentially dire repercussions. This is not what is expected of a Public Protector. These figures appeared on the s 7(9) notice issued to the President. The same figures of the s 7(9) notice are in the CR17 Report without regard to the information and submissions by the President in his response to the s 7(9) notice. The CR17 Report did ignored the information provided by the President.

585. In the CR17 HC FA, the President referred to material errors of fact in the CR17 Report, in that Adv Mkhwebane '*misunderstood the flow of the funds, miscalculated the amounts paid, double counted the same amounts in certain instances, referred to incorrect time periods, and misunderstood the relationships between the various entities*'. Adv Mkhwebane, despite being informed that the CRF is a charitable trust persisted that the President's family were beneficiaries of funds that were so transferred to CRF. She categorised it as '*belonging'* to the President with a lack of understanding that it had a separate corporate identity.

586. Adv Mkhwebane admitted that the '*the nature of the transactions lends itself to possible miscalculations*', but that this should not detract from the fact '*that there were suspicious transactions warranting further investigation by the relevant authorities*'. Based on the erroneous view that the transfer of funds in and out of these accounts raised suspicion of money laundering. In

[78] Part A Statement at para 265.

this regard what this meant was that large sums of money was being paid into the CR17 accounts and disbursed.

587. Adv Mkhwebane testified that the CR17 Campaign funding amounted to approximately R1,200,000,000, being movement between the various accounts. However, Adv Mkhwebane acknowledged that '***sometimes maybe some money moved twice***', highlighting that this was significantly more than the R200 million that the campaign manager had testified to.

588. Adv Mkhwebane confirmed that donors would deposit donations into the EFG2 account (an attorney's trust account) '*and then they will then move the monies to Ria Tenda to Linked Environmental Services, and then it's paid to various beneficiaries, various service providers*'. Despite the management, and the evidence of money both in the CR17 Report and to this Committee, every deposit and transfer was counted without regard to inter-account transfers. This appeared to be deliberately misleading.

589. Adv Mkhwebane testified that Mr Motlatsi and Miss Nicol indicated that approximately R200,000,000 was raised for the election campaign. However, that they were not truthful, and the totals evident from the bank statements was definitely '*far more than either R300,000,000 or R200,000,000*'. At the Zondo Commission, President Ramaphosa acknowledged that the campaign donations amounted to '*around R300,000,000*'.

590. In his s 7(9) response, the President pointed out the incorrectness of Adv Mkhwebane's calculation and representation of the trail of funds actually received by the CR17 Campaign into the three bank accounts (EFG2, Linked and Ria Tenda) and accounted for payments made to CRF. It bears noting that the contents of the President's s 7(9) notice are dealt with in a materially different manner to the approach adopted to the s 7(9) response from Mr Magashule in the Vrede matter. In relation to the latter it was believed, in the absence of contrary information.

591. The amount of '*over a billion Rand*' of R 1.2 billion as a reflection of funds received by the CR17 Campaign is a material misrepresentation. On the one hand acknowledging that funds flow among these accounts and yet simply adding the various funds paid with reference to each: the EFG2, Ria Tenda and Linked Environmental Services bank accounts. No cognisance was taken in the calculation of the following:

591.1. transfer of funds from one of the accounts to the other resulting in double counting or even triple counting, though it was acknowledged that this occurred;

591.2. the transfer of funds to and from money market investment accounts are similarly double counted and

591.3. with Linked funds unrelated to the CR17 Campaign in its bank account are included. Given this there is an apparent mathematical miscalculation.

592. This is demonstrated by the following example: R100 000 deposited into EFG2, the same R100 000 then transferred to Ria Tenda. The same R100 000 is invested into a Money Market account and then transferred back to Ria Tenda and then the same R100 000 gets paid to Linked. On the '*bush accounting*' to this Committee this could be reflected as R500 000, even though it is the same R100,000 being moved from one account to another.

593. During her oral evidence Adv Mkhwebane took the Committee through the paras of the CR17 Report relating to the funds, without any reference to the President's s 7(9) notice though it was not disputed in the CR17 HC application.

594. With reference to the CRF, it was concluded in para 7.2.4 of CR17 Report that Adv Mkhwebane had evidence which indicates that some of the money collected through the CR17 Campaign trust account was transferred into CRF and then transferred to other beneficiaries. The President apprised her of deposits to CRF.

595. There was no evidence that the President and the Ramaphosa family received private benefit from CRF. When this was raised in the CR17 HC SFA, it was not dealt with.[79]

596. In the CR17 Report there was no evidence of direct deposits to the President or his family (apart from what was paid to Andile Ramaphosa for consulting services in Africa, which he had disclosed to Adv Mkhwebane).

597. There is no conclusion in the CR17 Report that the bank statements of the Ria Tenda account, EFG2 and the Linked show that the money that went in or out of these accounts come from an illegal source and constituted money laundering, even if Adv Mkhwebane had the jurisdiction to investigate money laundering.

[79] *'203. I now tum to deal with the specific averments in the supplementary affidavit to the extent necessary.*
204. Most of what is contained in the supplementary affidavit has already been dealt with above.
205. I therefore only respond to the necessary paragraphs.
206. Insofar as the contents of the supplementary affidavit are inconsistent with my submissions made above, they are denied.'

598. In her investigation leads were followed and bank accounts subpoenaed. Adv Mkhwebane even had the bank statements of the Ria Tenda without the Rule-53 record disclosing a subpoena. This stands in stark contrast to the Vrede investigation, where there were no subpoenas, no following up on available leads, no incremental expansion into issues that arose during this investigation which extended beyond simply President Ramaphosa.

599. There appears to be a misunderstanding that a Trust is a separate entity to its founder,[80] resulting in a conclusion that that if funds are paid to the CRF, it is to the benefit of the President and/or his family or belong to him. This may well be as a consequence of a lack of understanding of the legal status of trusts.

600. In the s 7(9) response, the President tells Adv Mkhwebane that he was not involved in any decision where venues and additional assistance was sought from the CRF by the CR17 Campaign and that he hadn't benefitted personally at all.[81]

601. It is explained further in the s 7(9) response:

> '76. The President and his family have never been beneficiaries of CRF and in fact have been significant donors to the Foundation. In aggregate. he has contributed close to R220 million to CRF. He initially set aside 5% of his shareholding in the Shanduka Group for two trusts that now form CRF. These shares were realised when the President divested from the Shanduka Group. On becoming Deputy President of the Republic, he also donated shares in other companies to CRF. He also supports CRF's partner entities with donations for students and has also made donations to Adopt-a-School.'[82]

602. The President also tells Adv Mkhwebane that he contributed R6.2 million to the campaign and loaned it a further R31 million, of which he had only been refunded R21.5 million.

603. The details of President Ramaphosa's s 7(9) response is dealt with in a materially different manner to that of Mr Magashule in the Vrede matter. In the CR17 investigation, there was no evidence to gainsay what was being told to Adv Mkhwebane about the movement of funds as explained above and in more detail in the President's s 7(9) response, and yet the explanation provided was not dealt

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[80] The CRF is governed by a board of seven trustees. As the founder, the President's values are infused throughout the work of the CRF, but his involvement is limited to his role as a board member. He is not involved in the management and operations of the trust. The day-to-day operations are managed by an executive management team, supported by a staff complement across the partner entities of 133 people. The partner entities have independent boards on which the CRF has representation.

[81] *'72. CR17 occasionally requested the Cyril Ramaphosa Foundation he CRF17) to provide venues for meetings and also provide additional assistance. Donne Nicol was the CEO of the CRF at the time (and until September 2018). CR17 reimbursed the CRF for all of these costs. This was done on an arms' length basis and CRF was reimbursed for a total amount of R335 735.42.*

73. The President was not involved in any decision where venues and additional assistance were sought from the CRF by the CR17 campaign. He would not be involved in any decision such as reimbursement for services rendered by the CRF to the CR17 campaign. No payments made by the CR17 campaign to the CRF benefited the President personally in any manner whatsoever.'

[82] One of the beneficiaries is Adopt a School Foundation, being the fundraising dinner which Mr Watson stated he attended in casual clothes.

with in the CR17 Report and was effectively rejected. There is no explanation for rejecting it. In contrast, in respect of Mr Magashule s 7(9) submission, Adv Mkhwebane assumed that as she had no basis on which to disbelieve the contents of Mr Magashule's s 7(9) response and therefore had to accept it. This, even though she came to be in possession of the OUTA Report.

604. The Ria Tenda Trust was established on 13 April 2017. Its objectives are apparent from para 80, p. 360.[83] It was mandated to receive donations that were made towards the CR17 Campaign. The President did not establish the Ria Tenda. His s 7(9) response makes it clear that he had no role in directing its operations as these were done separately and independently of him.

605. Adv Mkhwebane testified that:

> 'And one of the people you will be showing now or who has the benefactor, **is the sole director of Ria Tenda**, which is in the report, but maybe Adv Mpofu will show you.'

606. Yet, the trustees of the Ria Tenda Trust are James Thokoane Motlatsi, Raymond Sifiso Ndlovu, Chrispian Garth Olver and Leigh Donne Nicol.

607. Linked was described as a private company independent of the CR17 Campaign that offers services to the public and private sector including, but not limited to: project management, advisory services, knowledge management and Information Technology services, and sustainable strategic planning services. In 2017, a service level agreement was concluded between the Ria Tenda (the customer) and Linked (the service provider) for the provision of accounting, financial administration, allocation of payments to budget items and payment of salaries and payroll services to support and sustain the objects the Ria Tenda. All monies received by Linked for the purposes of the CR17 Campaign were disbursed according to an approved budget and on instruction from the CR17 Campaign management. These transactions have been audited and verified by the company's auditors.

(dd) <u>Further flaws evident from the investigation</u>

608. Failure to resolve the dispute of fact between the evidence of Mr Venter that Mr Watson told him the R500 000 was for Andile Ramaphosa and that of Mr Watson on affidavit reproduced at p. 32 of the CR17 Report stating:

[83] *'80. The Ria Tenda Trust was founded by the Fundraising Committee of CR17 in 2017 to advance the social, political and economic interests of South Africa as a whole and to advocate for the establishment and maintenance of non-racist, non-sexist, democratic, ethical, accountable and properly functioning social, political and economic environments in South Africa. The Letters of Authority of the Ria Tenda Trust were issued by the Master of the South Gauteng High Court on or about 13 April 2017.'*

'I did not tell Venter that the donation was to the Andile Ramaphosa Foundation.'

609. Not inquiring as to **who** had exercised duress on Mr Venter to sign an affidavit under duress which he partially repudiated and though he claimed as recorded in para 5.3.10.42 of the CR17 Report that the contents were correct insofar as it related to the R500 000 given that it was not paid to Andile Ramaphosa it was clearly wrong.

610. Whilst Mr Maimane alleged that the donor was further widely reported to have received billions of Rands in state tenders, often in irregular fashion, the CR17 Report does not reflect that any investigation ensued to link the award of any State tender received by the donor to the R500 000 donation received by the CR17 Campaign.

611. Despite Mr Maimane's suspicion being directed at AGO, and not the President or CR17 Campaign, Adv Mkhwebane relied on it as a basis to investigate the CR17 Campaign and did so in the context of an EMEA complaint relating to a breach of the Executive Ethics Code, on which her jurisdiction was founded.

612. An issue raised was that Absa denied receiving a subpoena on 29 January 2019. There was also no subpoena for the bank records of Standard Bank, yet Adv Mkhwebane had bank statements of the Ria Tenda Trust.

(vi) Conclusion

613. Adv Mkhwebane contends that her '*decision to investigate was never influenced by the desire to target a certain individual in particular President Ramaphosa*'.[84] She also argues that, given that she has already been 'mulcted with a cost order', she should not be 'punished twice for the same offence' given the 'double jeopardy principle'.[85] But she was not mulcted with a cost order. No personal costs were granted against her in her personal capacity, even if this principle did apply.

614. Adv Mkhwebane made serious findings against the President in the CR17 Report impugning his *bona fides*, in material respects and calling him a liar under oath. She found that the President had misled Parliament; that he had failed to disclose donations to the CR17 Campaign; and that her investigation supported a *prima facie* suspicion of money laundering and then recommended serious remedial actions that she intended to monitor.

[84] Part A Statement at para 309.
[85] Part A Statement at para 311.

615. Adv Mkhwebane argued that she was '*being victimised for honestly doing [her] work*', notwithstanding that the then Chief Justice and Mr Mataboge agreed with her conclusions. She relied extensively on the minority judgment of Mogoeng CJ.

616. The CR17 CC aptly summed up as follows in paras [198] to [212] of the judgment as follows:

> '[198] As to the Public Protector, there is no question that she should be ordered to pay the costs of the President, the Speaker and the NDPP, for her unsuccessful opposition to their review applications. The only question is the scale of the costs that she should be ordered to pay. The President submits that she should be ordered to pay costs on the punitive scale of attorney and client. He does not suggest that the conduct of the Public Protector warrants her being ordered to pay costs in her personal capacity.
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> [199] Counsel for the President submitted that the conduct of the Public Protector in this case **shows a reckless determination to make an adverse finding against the President**. They pointed to what they submitted was her **egregious misreading of the Executive Code, and her baseless, and very serious conclusion that there was prima facie evidence of a suspicion of money, laundering**. They submit that her **investigation showed a determination to malign the President by making very serious findings against him without engaging meaningfully with the evidence before her and the applicable law**. The general principle is that an attorney and client scale is awarded when a court wishes to mark its disapproval of the conduct of a litigant. Courts have awarded this scale of costs to mark their disapproval of dishonest or mala tides conduct, vexatious conduct, conduct that amounts to an abuse of the process of court, or conduct that is extraordinary and worthy of a court's rebuke. As costs lie at the discretion of the court, this is not a closed list.
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> [201] Public officials attract special consideration when it comes to punitive costs orders, and they may even be ordered to pay costs out of their own pockets.
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> [203] We have discussed the Public Protector's broad powers and the particular mandate given to her under the Constitution. Her broad powers come with important obligations. In using them she must act independently, impartially and she must approach each investigation with an open mind. It is not surprising that, given the weight of the constitutional burden she carries, and the breadth of her powers, she is required to be a highly skilled professional in her relevant field of expertise. She must be expected to understand and correctly apply legal prescripts that may be relevant i:o her investigations. She should consider all the evidence before her and weigh it appropriately and fairly before making an adverse finding. She should be conscious of the impact that an adverse conclusion may have on the rights of those she is investigating. She should not hesitate to make adverse findings when the evidence reasonably and rationally supports such a finding. Equally however, she should not rush to conclusions and should tread carefully before making findings that may have serious implications for people within the scope of her investigations.
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> [204] Unless the Public Protector conducts herself in this manner, she runs the risk of undermining the very reason for the existence of her office. If she strays from this path, she will lose the confidence of the citizens for whom she has been appointed protector. For these reasons, it is critical that, where appropriate, Courts should show their displeasure should the Public Protector fail to meet her constitutional mandate. It is a duty imposed on the Courts by the Constitution itself.
>
> [205] We earlier concluded that the Public Protector acted not only irrationally, but also recklessly in reaching her conclusion that there was evidence supporting a prima facie case of money laundering. We noted that this conclusion had potentially extremely serious consequences for the President. This is not a consequence peculiar to him because of the position that he holds: anyone against whom such a finding is made would potentially find themselves under investigation for an extremely serious offence. However, the fact that it was the President is an added concern. When the Head of State is implicated in money laundering it immediately presents a threat to the well-being of the public at large. If the implication is well-founded, then this is a consequence with which the general public must come to terms. However, if it is reached irrationally and recklessly it is another matter entirely.

[206] What makes the Public Protector's conduct in this regard worse is that **despite being requested to give the President an opportunity to respond to the remedial action she had in mind, she refused to do so. The President was not given sight of her remedial action directing the NDPP to investigate money laundering. It is unclear why the Public Protector failed to comply with one of the most fundamental principles of natural justice by declining the President's request to be permitted to make representations on the remedial action.** It would not have unduly slowed down her investigation, which seems to have been conducted at relative speed. The Public Protector ought to have understood the importance of not making findings that will have such serious implications without affording a proper hearing to the persons affected. At the very least, she failed to show appreciation for an elementary principle of due legal process.

[207] **Of similar concern is her confusion over the proper version of the Executive Code.** She has not explained how she committed this error. Her conduct in this regard goes further than simply having reference to two different versions of that Code. The legal test for a violation of the Code by misleading the National Assembly was fundamentally different in the two versions. Instead of appreciating the difference between the 'willfuf' misleading of the National Assembly, and the 'inadvertent' misleading of it, **she asserted that if she had made an error at all it was an immaterial error of form over substance**. This submission shows a **flawed conceptual grasp of the issues with which she was dealing**.

[208] Like any official required to make pronouncements to the public, the Public Protector must surely strive to be as clear as possible in her findings. **Her reasoning on the disclosure issue was muddled and difficult to understand. It failed to explain to the public why she had found that the President of the country had willfully breached the duty of transparency established by the Code. Indeed, her conclusion inexplicably found that at the same time the President had also inadvertently misled Parliament, sowing further confusion**.

[209] As Counsel for the President pointed out, although the Public Protector received full representations from the President, she did not engage meaningfully with them. She did not deal with the explanations as to how the CR17 campaign was structured and how it functioned. She did not engage with the explanations that the transfers between the various accounts were aligned with the very structure of the CR17 campaign itself. Instead, and despite this evidence before her, she persisted with her thesis that there were reasons to suspect that the CR17 campaign was involved in state capture of some sort, and that a prima facie case of a suspicion of money laundering had been established. She recklessly ignored the evidence at her disposal, which pointed to the opposite conclusion. In doing so, she breached her duty to approach every investigation in an open-minded fashion.

[210] Finally, we are concerned by her attitude to the Speaker and the NDPP. As we have already described, in her letter in response to the NDPP, the Public Protector implied that the NDPP was being unduly influenced to back the President's case. Such an implication is completely unfounded, particularly in circumstances where we have found that the NDPP was entirely correct to seek clarity and, subsequently, a review of the Public Protector's directive.

[211] Her attitude to the Speaker is equally concerning, in her answering affidavit, in response to the Speaker's review, the Public Protector says that the Speaker's review is tantamount to 'demonstrating support for the President' and is a failure to 'stand on the side of accountability'. These are reckless statements to make against another organ of state and deserve the opprobrium of the court.

[212] The totality of the Public Protector's conduct highlighted above warrants an adverse costs order against her. ln our view, an order that she be directed to pay the President's costs on an attorney and client scale is warranted.'

617. Adv Mkhwebane testified that the precedent of personal costs orders against public servants, particularly the Head of a Chapter 9 Institution, would have a chilling effect and would render officials '*scared to do their work*', but it is not apparent from the CR17 HC judgment that it was a personal cost order.

618. It was the case before the CR17 HC that from inception Adv Mkhwebane had misrepresented the investigation and was not doing it in good faith. Material information was being withheld from the President and the CR17 Campaign managers and Adv Mkhwebane was determined to investigate the CR17 Campaign money flow, and did not act honestly, in good faith and with due observance of the principle of legality.

619. Adv Mkhwebane's response is that it was inappropriate and unwarranted attack by those who believe they are above the law – the alleged untouchables who were implicated in the investigation. The difficulty is to implicate people, one has to first get the law right. On her own version she got both the Code and her reliance on PRECCA wrong.

I. SARS UNIT MATTER

(i) Background

620. The issue for determination is whether Adv Mkhwebane can be said, on a balance of probabilities, to have committed misconduct or demonstrated incompetence in: *(i)* performing her investigation and making decisions reflecting a '*lack of independence and impartiality*' and/or *(ii)* deliberately seeking to reach conclusions of unlawful conduct and impose far-reaching remedial action without basis in law or fact.

621. The SARS Unit Report relates to two complaints lodged with the PPSA, from:

621.1. Mr Floyd Shivambu on 9 November 2018; and

621.2. an '*anonymous whistler-blower*' on 12 October 2018. Less than 5 pages of the SARS Unit Report relates to the breach of the EMEA. That is dealt with separately in this report.

622. The SARS Unit Report relates to six allegations emanating from the 14 allegations that arose from the above-mentioned complaints (eight stood over). The six allegations are:

622.1. Minister Gordhan violated the Executive Ethics Code by deliberately misleading the NA which is dealt with in paras [425] to [430] above;

622.2. As SARS Commissioner, Minister Gordhan, established an intelligence unit in violation of SA Intelligence Prescripts;

622.3. SARS failed to follow correct procurement procedures when procuring intelligence equipment which the SARS Unit utilised for gathering intelligence;

622.4. SARS failed to follow proper recruitment processes in appointing employees who worked for the SARS Unit;

622.5. The SARS Unit carried out irregular and unlawful operations (in plural); and

622.6. Mr Pillay was appointed as Deputy SARS Commissioner and subsequently as SARS Commissioner without the necessary qualifications for the positions.

623. Adv Mkhwebane found six allegations to be '*substantiated'*. She ordered remedial action against the President, the Speaker, the State Security Minister, the NDPP and the Commissioner of the SAPS.[86]

624. The SARS Unit Report triggered extensive litigation. There were interlocutory application relating to the implementation of the remedial as well as other interlocutory applications. The SARS Unit Report was reviewed and set aside. Subsequent applications for leave to appeal to the SCA and CC were dismissed. The details are reflected in **Table V**. Part of the remedial action directly relied on the IGI report, which the State Security Minister was ordered to '*implement in its totality*'. Whilst Adv Mkhwebane subsequently acknowledged that the IGI Report had been reviewed and set aside (and therefore had no legal status), she did not unequivocally abandon her reliance on, and implementation of, the IGI report in her applications for leave to appeal.

625. The IP found *prima facie* evidence of misconduct on the part of Adv Mkhwebane in the form of an intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a

[86] The following remedial action was directed:

'(a) The President of the Republic of South Africa:

(i) To take note of the findings in this report in so far as they related to the erstwhile Minister of Finance, Minister Gordhan and to take appropriate disciplinary action against him for his violation of the Constitution and the Executive Ethics Code within 30 days of issuing of this report.

(b) The Speaker of the National Assembly:

(i) Within 14 working days of receipt of this Report, refer Minister Gordhan's violation of the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members to the Joint Committee on Ethics and Members' Interests for consideration in terms of the provisions of paragraph 10 of the Parliament Code of Ethics.

(c) The Minister of State Security to:

*(i) Within 90 days of the issuing of this Report, acting in line with Intelligence Services Amendment Act, **implement, in totality the OIGI report dated 31 October 2014**.*

(ii) Within 30 days ensure that all intelligence equipment utilised by the SARS intelligence unit is returned, audited and placed into the custodian of the State Security Agency.

(iii) Within 14 days of the issuing of this report avail a declassified copy of the OIGI report dated 31 October 2014.

(d) The National Director of Public Prosecutions to note:

*(i) That I am aware that there are currently criminal proceedings currently underway against the implicated former SARS officials and that **effective steps should be taken to finalise the court process as the matter has been remanded several times already**.*

(e) The Commissioner of the South African Police Service to:

(i) Within 60 days, investigate the criminal conduct of Messrs Gordhan, Pillay and officials involved in the SARS intelligence unit, for violation of section 209 of the Constitution and section 3 of the National Strategic Intelligence Act including Mr Magashula's conduct of lying under oath.'

holder of a public office, based on the nine grounds justifying the finding of bias against Adv Mkhwebane in relation to Minister Gordhan and Mr Pillay listed in para 290 of the **SARS Unit HC judgment**. In summary these are:

625.1. The investigation and SARS Unit Report fell outside of the jurisdiction of Adv Mkhwebane as it related to events dating back to 2009/2010. No exceptional circumstances were presented by Adv Mkhwebane justifying the investigation after this extraordinary lapse of time. Adv Mkhwebane's predecessor had already, in 2014, received a complaint about the alleged unlawful establishment of the SARS Unit but elected not to investigate the complaint. Adv Mkhwebane nonetheless proceeded with the investigation.

625.2. The manner in which Adv Mkhwebane interacted with Minister Gordhan during the investigation and in releasing the SARS Unit Report: Not only did she fail to engage with Minister Gordhan's attorneys on record, but the s 7(9) notice was publicly posted on YouTube without notice to him or his attorneys. Similarly, the SARS Unit Report was presented to the media without prior notice to Minister Gordhan or his attorneys.

625.3. The reliance on the discredited KPMG report despite it having been disavowed, and the Sikhakhane Panel report despite it having been widely discredited. Adv Mkhwebane also failed to engage with the findings made in the Nugent Report.

625.4. The alleged dishonesty of Adv Mkhwebane regarding the IGI Report and her insistence on ordering the State Security Minister to implement, in totality, the IGI report that she, according to the SARS Unit Report itself, had never seen.

625.5. Adv Mkhwebane's pandering to the 'rogue-unit' narrative and her public reference to it as the 'rogue unit' and 'monster' and her stated desire to 'defeat the monster' display a profound bias towards Minister Gordhan and Mr Pillay. The evidence displays prima facie evidence of a lack of even-handed investigation, demonstrating a lack of impartiality, contrary to the Constitution and the law.

625.6. Adv Mkhwebane's complete disregard of the Sunday Times and Kroon apologies.

625.7. Adv Mkhwebane's scurrilous allegations that Minister Gordhan deliberately misled Parliament.

625.8. Adv Mkhwebane's unwarranted and slanderous attack on Potterill J.

625.9. Adv Mkhwebane's relentless pandering to the untruths of Mr Pillay's qualification.

626. The IP also found that there was *prima facie evidence* of incompetence for the following reasons:

626.1. Releasing responses and notices to Minister Gordhan via media channels and not to him or his attorneys including the failure to provide the IGI Report to Minister Gordhan for his response.

626.2. Failing to consider Mr Pillay's evidence. And as also contended in the Tshidi matter, Adv Mkhwebane was selective in her collation of evidence.

626.3. Failing to interview Messrs Peega and Manyike or Ms Modiane; and failure to interview members of the SARS Unit in contravention of the PPA.

626.4. Inferring, without good reason, that a unit [allegedly] unlawfully established would procure equipment unlawfully. The unlawful, unsubstantiated, and unexplained inference was prejudicial to those against whom the findings were made.

626.5. Making an irrational finding about Mr Pillay's qualifications without a factual basis for such finding.

626.6. Alleging perjury against Mr Magashula without any proper foundation therefor.

626.7. Unlawfully intruding on the competence and responsibility of the NPA and SAPS in her remedial action, by:

626.7.1. Directing the NDPP to expedite the then pending criminal trial against Mr Pillay and other former SARS officials; and

626.7.2. Directing the SAPS Commissioner to investigate, within 60 days, '*criminal conduct*' of Minister Gordhan, Mr Pillay and officials involved in the SARS Unit.

627. Adv Mkhwebane submitted to the IP that the evidence bears no relevance whatsoever to Charge 4. She noted that an application for leave to appeal to the SCA has been lodged against the SARS Unit HC judgment and so it could not be relied upon. The SARS Unit HC judgment has since been upheld by the CC. Adv Mkhwebane did not however challenge the numerous and detailed findings made against her in the SARS Unit HC judgment before the IP.

628. The conduct of Adv Mkhwebane in carrying out her investigation and issuing the SARS Unit Report is considered with reference to some of the aforegoing *prima facie* grounds of misconduct and incompetence considered by the IP.

(ii) <u>The SARS Unit investigation and report fell outside Adv Mkhwebane's jurisdiction as it related to events older than 2 years</u>

629. It is undisputed that the subject matter of the complaints took place some 9-10 years before the complaints were lodged.

630. In terms of s 6(9) of the PPA, Adv Mkhwebane was not permitted to conduct investigations on complaints reported more than two years after the date of the subject matter unless special circumstances were established.[87] The establishment of special circumstances requires Adv Mkhwebane to rationally exercise her discretion.

631. On 8 April 2019, Adv Mkhwebane issued a subpoena to Minister Gordhan in which general circumstances were set out. Minister Gordhan pointed out that these were '*generalised grounds*' and requested that the special considerations which had warranted her investigation in this case be provided, noting that the generic explanation of special circumstances was inadequate.

632. In the s 7(9) notice issued to Minister Gordhan on 3 June 2019 Adv Mkhwebane again only provided a generic explanation of special circumstances. On 20 June 2019, in his s 7(9) response, Minister Gordhan again called on Adv Mkhwebane to furnish full particulars of the special circumstances relied on for the exercise of her discretion.

633. Adv Mkhwebane's responses were as follows:

634. **<u>Before the SARS Unit Report</u>**: On 24 April 2019, Adv Mkhwebane informed Minister Gordhan, that she had been '*reliably informed*' that '*the surveillance equipment illegally acquired at astronomical costs, is still being utilised to intercept communications between people by the unit which was not completely disbanded. So this was a matter of special interest as public funds are still being used for illegal purposes*'.

[87] 'Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector, within two years from the occurrence of the incident or matter concerned.'

635. **In the SARS Unit Report**: Adv Mkhwebane explained the special circumstances in para 3.5, in identical general terms to the aforementioned s 7(9) notice.

636. **In her SARS Unit HC AA**: Adv Mkhwebane defended her report and reasons arguing, based on US law, that she had an '*unbridled discretion*' which could only be set aside on grounds of *male fides* or ulterior motive.

637. She further stated that it was clear from the SARS Unit Report that she found as special circumstances: (*a)* the nature of the complaint involved the conduct of a serving Member of Cabinet; and *(b)* the issues requiring investigation were sufficiently grave to warrant exercising her discretion in favour of investigating.

638. **Before the Committee**: Adv Mkhwebane provided, for the first time, additional reasons to the Committee. She testified that the SARS Unit HC judgment was wrong on the facts, and that:

> 'If there's a complaint that this incident is still ongoing, people's lives are still under threat, or people are being monitored without their knowledge, without the approval by the judge.'

639. More particularly, that she investigated based on the following special circumstances:

639.1. *'I saw the video which I was still trying to trace, which I didn't include here. But the issue was, if the unit is still … those cameras which were installed in 2014 or 2015, they were still there, they were still operational'*;

639.2. *'the complainant even indicated that there was an incident where one of the Acting Directors of Public Prosecutions, it was Doctor Ramaite, yes, I think, he was saying the publication of what he did in the office, in the media, was as a result of what was captured by those cameras'*;

639.3. *'And the indication that some information that was sent to me, which we will also have to show because there were some emails which were shown here blown out of proportion, again, that I'm saying Minister Gordhan is a threat to democracy, are things which were sent to my email which I would copy from either Twitter or my private email, then send it to the investigators to take note of'*;

639.4. *'So others were even saying so and so was killed driving to this particular place; so that's all the information which was coming forward'*; and

639.5. *'to stop ongoing surveillance'* using intrusive equipment.

640. Adv Mkhwebane testified there were special circumstances because at the time the complaint was investigated and her report issued, she believed that the SARS Unit was still operational, based on: (*a)* emails and tweets sent to her and *(b)* a video she had seen but was still trying to trace. Adv Mkhwebane's oral evidence in respect hereof was not relayed in the subpoena, the SARS Unit Report, nor in her affidavits before the SARS Unit HC. The emails and/or video referred to were not contained in the Rule-53 record.

641. The SARS Unit HC found that Adv Mkhwebane was biased as she did not present exceptional circumstances to justify the investigation of the matters complained of after such an extraordinary lapse of time.

642. The evidence before the Committee shows:

642.1. The '*special circumstances*' provided in Adv Mkhwebane's letter of 24 April 2019 were not contained in the subpoena or the s 7(9) notice and only related to the purchase of equipment and not the five other allegations which Adv Mkhwebane investigated, and hence no special circumstances in respect of the other five complaints were provided.

642.2. The subpoena, s 7(9) notice and SARS Unit Report contain identical explanations of '*the special circumstances*' in general terms, not what was considered by Adv Mkhwebane when she exercised her discretion to investigate the six allegations contained in the complaints.

643. During her cross examination, Ms Mvuyana, the investigator in the SARS Unit matter, testified that she had not considered or seen any evidence in respect of the allegations of surveillance equipment still being utilised. When she was referred to her notes of a meeting she had with Adv Mkhwebane just prior to the release of the SARS Unit Report, she confirmed that Adv Mkhwebane had mentioned information she received from '*JM*' that SARS allegedly '*bugged a house in Cape Town*'. '*JM*' elsewhere in her note appears to be Mr Julius Malema of the EFF. However, she never included this information in the SARS Unit Report as she regarded it as a '*passing comment'*.

644. No proof of ongoing surveillance was ever placed before the Committee by Adv Mkhwebane. There is no evidence on record of the continued operation of the SARS Unit, nor did Adv Mkhwebane provide any in her evidence.

645. Adv Mkhwebane's evidence to this Committee does not deal with the SARS Unit HC's criticism that no special circumstances were listed in the SARS Unit Report.

646. The Committee members noted that the reliance on emails and/or allegations made by members of political parties did not rise to the standard expected of a Public Protector. It was further agreed that Adv Mkhwebane had not articulated any special circumstances before the SARS Unit HC and consequently their finding was correct. It was noted that Adv Mkhwebane had investigated the complaints despite the PPSA having declined to investigate an earlier similar complaint.[88]

647. Most of the Committee agreed that there were no special circumstances and Adv Mkhwebane's investigation was therefore irrational and without basis in fact or law.

648. A minority view expressed was that the Minister of Police had admitted that grabbers had been used to gather information and so Adv Mkhwebane's explanation should be accepted.

649. **The prima facie finding of the IP that Adv Mkhwebane committed misconduct when she proceeded to investigate the SARS Unit in the absence of having jurisdiction to do so must therefore be sustained.**

(iii) <u>The manner in which Adv Mkhwebane interacted with Minister Gordhan during the investigation and release of the SARS Unit Report</u>

650. There are three components to this ground, namely:

650.1. Adv Mkhwebane's failure to engage with Minister Gordhan's attorneys on record;

650.2. The publication of the s 7(9) notice on YouTube before Minister Gordhan and his attorneys were given notice thereof;[89] and

650.3. The presentation of the SARS Unit Report to the media without prior notice to Minister Gordhan.

651. In respect of the <u>first component</u>, the evidence before the Committee is as follows:

[88] Adv Mkhwebane was not *functus* in respect of the closing of the previous complaint as it was not the decision of her predecessor. However, she was under the misapprehension that the 2012 complaint related only to HR issues when the closing report indicated otherwise.

[89] The **SARS Unit HC** at para **[43]** stated that on 3 June 2019 Adv Mkhwebane announced *via* a video posted on YouTube that Minister Gordhan would be served with a s 7(9) notice. The reference in paragraph 290 (ii) that the section 7(9) notice itself was publicly posted should be read with paragraph 43 and in the context of the criticism of the Court, which was the manner in which Adv Mkhwebane communicated with Minister Gordhan.

651.1. Minister Gordhan's attorneys addressed 4 letters in 2019 to Adv Mkhwebane on 27 March; 16 April; 17 April and 22 April respectively. The correspondence sought an explanation of the specific special circumstances on which Adv Mkhwebane relied for jurisdiction in the investigation. As already mentioned, this was not forthcoming. The last letter also sought an extension to respond to the subpoena.

651.1. Adv Mkhwebane did not respond to any of these letters. Instead, she issued a subpoena on 8 April 2019 and released a media statement on 23 April 2019 granting the extension and stating that the PPSA had received allegations that shortly after serving subpoenas, SARS held a meeting, attended by other parties on whom subpoenas were served, so that they could coordinate their responses.

651.2. Minister Gordhan's attorneys wrote to Adv Mkhwebane again on 2 May 2019, noting that previous correspondence had gone unanswered; they had been notified in the media that a short extension had been granted, they sought a further extension, and again, requested a response to the substantive issues raised in the letter of 16 April 2019, particularly on the special circumstances.

651.3. Mr Nyembe, the then Chief of Staff, replied stating that a response had been sent to Minister Gordhan's office on 24 April 2019, confirming the extension, and noting further that due to '*the history of the matter*', among other things '*leakages to the media*', Adv Mkhwebane preferred to communicate directly with Minister Gordhan. The letter of 24 April 2019 was not sent to Minister Gordhan's attorneys but purportedly to his Personal Assistant.

651.4. In the letter of 24 April 2019 Adv Mkhwebane expressed her *'displeasure at the attorneys attitude towards my office which I* [she] *consider deplorable and bordering on interference with the functioning of the Public Protector's Office and may be reportable to the Law Society'*. There are no details of precisely what actions resulted in such displeasure.

651.5. The explanation for not communicating with Minister Gordhan's attorneys because there had been leakages to the media failed to consider that it was Adv Mkhwebane who had issued the first press release in which she suggested that Minister Gordhan had colluded with others to prepare his response to the notice.

652. Adv Mkhwebane's responses were as follows:

653. **In her SARS Unit HC AA**: Adv Mkhwebane explained her refusal to respond to correspondence from Minister Gordhan's attorneys stemmed from her viewing the letters as an intention to bully her into ineffectiveness and submission to Minister Gordhan's view that she could not lawfully conduct the investigation against him. (As it turned out, he was correct.)

654. It is undisputed that Adv Mkhwebane elected not to engage with Minister Gordhan's attorneys. The evidence before the Committee is that no satisfactory explanation has been provided and there is no justification apparent from the correspondence in question.

655. In respect of the second component, the Committee is in possession of the YouTube video of 3 June 2019 and the transcript, the content of which is not disputed. Adv Mkhwebane announced that Minister Gordhan would be served with a s 7(9) notice:

> 'Now, the challenge I'm facing is that the report we've recently issued, there was a serious attack on the person of the Public Protector, and this media narrative which I've indicated that I don't own any form of media, so this is my opportunity to communicate to whoever will listen that I'll be issuing a section 7(9) notice relating to the EMEA which I need to finalize within 30 days, which that time has actually lapsed and relating to his meeting with the Guptas, but that is also… part of the of that section 7(9) notice is issues relating to the operations of the rogue unit and I know that one will be faced with a lot of questions, in fact, there will be a lot of questions, there will be allegations that I'm also still persecuting Minister Gordhan, but I'm doing my work. And I understand when it comes to the issue of the rogue unit, people have lost lives, people have been tainted, and I think that it's still going to happen, but I'm doing my work and I will be serving that notice today which is 2 June 2019. In fact, it's 3 June 2019. And I'm ready to receive all the backlash, but I'm doing the work. I am not targeting or harassing any Minister, specifically Minister Gordhan.'

656. The content of the media statement is dealt with below. The YouTube video did not disclose the intention to issue s 7(9) notices to any other persons.

657. Prior to the litigation, Adv Mkhwebane received advice from Mr Ngobeni in relation to the '*public announcement*' regarding the s 7(9) notice and Adv Mkhwebane's use of Social Media in connection therewith. The advisory concluded that:

> 'I can find no authority that publicly announcing issuance a Section 7(9) notice would be unfair under circumstances where a prominent politician is claiming he is being selectively targeted. To expose his false accusations, it may be absolutely necessary to inform the public about the other matters in which he is implicated.' [Emphasis added]

658. In the SARS Unit HC FA, Minister Gordhan took issue with the fact that neither he, nor his attorneys, had been furnished with the s 7(9) notice prior to the media briefing and submitted that he was not only entitled to be informed timeously of any developments in respect of the investigations, as he was the subject of an investigation, but that he had the right not to be informed by the media of notices served on him.

659. Adv Mkhwebane's responses were as follows:

660. **In her SARS Unit HC AA**: Adv Mkhwebane said that her resorting to YouTube must be seen in the context of extensive negative media campaigns and threats from lawyers to diminish the effectiveness, independence, dignity, and impartiality of the Public Protector. The specific '*threats*' were not detailed. No evidence of same has been provided beyond references to the letters seeking the special circumstances Adv Mkhwebane relied on.

661. Adv Mkhwebane failed to inform the Court that she had suggested that Minister Gordhan had colluded with other individuals and SARS on his response to her questions. In his SARS Unit RA Minister Gordhan stated that Adv Mkhwebane's reckless dissemination of false rumours was an attack on his integrity and warranted a public response to correct these falsehoods and inaccuracies.

662. **Before the Committee**: Adv Mkhwebane said that she did not issue a s 7(9) notice on YouTube. She used the '*platform of direct communication to inform the public that I will be issuing the section 7(9)*' because '*they had the support of the mainstream media*'.

663. The undisputed evidence before the Committee is that Adv Mkhwebane announced on YouTube that a s 7(9) notice would be released to Minister Gordhan, prior to the service of such notice on him. In her statement on YouTube, she disclosed details of the nature of the investigation, including that people had been killed. The information relating to such '*killing*' was ultimately not included in the s 7(9) notice or in the SARS Unit Report.

664. The third component, that the SARS Unit Report was publicly released, is not disputed by Adv Mkhwebane.

665. **Before the Committee**: Adv Mkhwebane's oral evidence was that the SARS Unit Report was indeed not sent to Minister Gordhan or his attorneys prior to its publication as it was not the practice to do so.

666. The question is whether by: (*a)* refusing to communicate with Minister Gordhan's attorneys *(b)* publicly announcing the intention to issue the s 7(9) notice and informing the public that Minister Gordhan was implicated, without prior notice to him or his attorneys; and *(c)* publicly releasing the SARS Unit report without notice to him or his attorneys Adv Mkhwebane's conduct was consistent with conduct of an independent and impartial Public Protector. None of this conduct is denied.

667. The Committee noted that Adv Mkhwebane had publicly implicated Minister Gordhan without giving him prior notice, not only in the SARS Unit complaint, but also referring to other complaints against him. The public disclosure that she would be issuing a s 7(9) notice was indicative that Minister Gordhan was implicated. This was unprecedented and was not the way Adv Mkhwebane had worked in other investigations. Adv Mkhwebane should have realised that she wielded enormous power and the impact of public statements that people are implicated in investigations that involved '*people being killed*' is serious.

668. The majority of the Committee was of the view that failing to communicate via the attorneys of record and giving notice of the s 7(9) on YouTube without prior notice to Minister Gordhan or his attorneys showed that Adv Mkhwebane did not act with an open mind or in line with the standards expected of a Public Protector. Issuing such notice on YouTube only in relation to Minister Gordhan reflects a lack of impartiality.

669. The minority view was that there was no '*rogue unit*' and that the office of the PPSA should take responsibility for the media release. Adv Mkhwebane could not be removed from office d because her office had decided to put something in the public domain before notifying the lawyers. The blame was laid at the door of the CEO and the spokespersons (notwithstanding that Adv Mkhwebane herself spoke at the media briefing).

670. The prima facie finding of the IP that Adv Mkhwebane committed misconduct in the manner that she communicated with Minister Gordhan during the investigation is sustained.

(iv) Reliance on the discredited KPMG Report and Sikhakhane Panel Report; failure to engage with the findings in the Nugent Report and complete disregard of the *Sunday Times* and Kroon apology

671. During cross-examination, Adv Mkhwebane's legal representative put to Mr Van Loggerenberg that Adv Mkhwebane referred to eight sources in reaching her findings. These included the Sikhakhane Panel Report; KPMG Report; IGI Report; the Kroon Advisory Panel statement, the Van Rensburg recordings, the closing report; the Lombard and De Waal recording and her own investigation.

672. Firstly, this relates to Adv Mkhwebane's reliance on the KPMG Report and Sikhakhane Panel Report and her failure to engage with the Nugent Report.

673. Secondly, it relates to Adv Mkhwebane's disregard of the apology by Judge Kroon for the Kroon Advisory Board statement that the SARS Unit was unlawful; and the *Sunday Times* apology in respect of a series of articles alleging that there was a 'rogue' unit at SARS.

674. In essence, the complaint was that Adv Mkhwebane relied on discredited opinions and unreliable evidence to reach the conclusion that the establishment and activities of the SARS Unit were unlawful; and she ignored information and retractions which showed that the evidence in question was unreliable and the opinions wrong in law.

675. To understand the evidence related to these grounds, it is useful to look at it chronologically:

675.1. The Kanyane Committee was appointed in June 2014 to investigate allegations made by Ms Belinda Walter against Mr Van Loggerenberg. It concluded in a report dated 12 August 2014 that: '*We are unable to conclude that the evidentiary material presented by Ms Walter in support of the allegations is credible, especially in circumstances where the allegations are denied by Van Loggerenberg*'.

675.2. The Sikhakhane Panel[90] was established on 5 September 2014 to investigate complaints of impropriety against Mr Van Loggerenberg. As reflected in para 57 of the Sikhakhane Panel Report, after it had commenced its work, and due to the escalation in media reports of an alleged covert unit operating at SARS, it unilaterally extended its terms of reference. By this time however, SARS officials, including Mr Van Loggerenberg had already been interviewed.

675.3. On 12 October 2014, the *Sunday Times* published an article titled '*SARS bugs Zuma*' authored by Piet Rampedi, Mzilikazi Wa Afrika, Stephan Hofstatter and Malcolm Rees, introducing the notion of a SARS '*Rogue Unit*'.

675.4. The IGI process commenced in August 2014 and was concluded in October 2014 with the IGI Report.[91]

675.5. On 5 November 2014 the Sikhakhane Panel released its report which, *inter alia*, contained an opinion in relation to the lawfulness of the establishment of the SARS Unit and '*prima facie evidence*' of unlawful recruitment, funding and practices and activities by the SARS Unit. By then the IGI Report had already been finalised.

675.6. The Sikhakhane Panel recommended that the IGI investigate the functions and activities of the SARS Unit, alternatively that the SARS Commissioner recommend to the President to

[90] The Panel comprises of Advocates Sikhakhane SC, Rajab-Budlender and Romano briefed by Mr Mohammed from Logan Lovells Attorneys, who received an instruction from Mr Pillay, to investigate alleged improprieties against Mr Van Loggerenberg.

[91] The IGI Report commenced before the Sikhakhane Panel Report was issued and could not have been as a consequence of the recommendations of the Sikhakhane Panel Report.

establish a judicial commission of enquiry to inquire into the activities, funding, management of the SARS National Research Group ('**NRG**') and its predecessors to determine if there had been improper conduct on the part of senior government officials. The findings of the Sikhakhane Panel are by their very nature not conclusive, merely that there are allegations which warrant further investigation.

675.7. Instead of requesting a judicial commission, former SARS Commissioner, Mr Moyane appointed auditing firm, KPMG on 29 December 2014, to investigate, inter alia, the allegations of the existence of a covert unit within SARS. There were various limitations placed on this investigation which are dealt with below. Suffice to say that it was a desktop investigation. In addition, as Mr Pillay testified, the KPMG Report contained a disclaimer that it could not be:

675.7.1. provided to third parties;

675.7.2. used in draft, part of final form;

675.7.3. used in portion thereof; relied upon for the resolution or disposition of any dispute;

675.7.4. disclosed, quoted or referenced in whole or in part; or

675.7.5. disclosed without the written approval of KPMG for purposes not described. It was not intended for the express of implied benefit of any third party.

675.8. In April 2015, the SARS Advisory Board led by Judge Kroon, issued a media statement that, on the strength of the Sikhakhane Panel Report and other reports, it had satisfied itself that a '*secret unit'* was established within SARS, which *inter alia*, had as its purpose the covert collection of intelligence and that the establishment of, and the application of human and financial resources to the unit were unlawful. Thereafter, the Advisory Board reconsidered the notion that the unit was *unlawfully established* and concluded that they should not have made this finding after all, nor have informed the public of such, as they had done.

675.9. On 1 September 2015, Advocates Trengove SC and Nxumalo provided SARS with an opinion that the establishment of the SARS Unit was not unlawful, disagreeing with the view expressed in the Sikhakhane Panel Report.

675.10. On 3 September 2015 KPMG presented its confidential report to SARS, finding *inter alia*, that SARS, under the guidance of Mr Pillay had established a '*covert and rogue intelligence unit*' which had engaged in various unlawful activities. The KPMG Report was never officially released by SARS. It was leaked to the media.

675.11. The *Sunday Times* published over 30 articles about the *'rogue unit'* over a two-year period from October 2014. In both April 2016 and September 2018, the *Sunday Times* apologised for the publication of the information which it said was fed to it as part of a sophisticated campaign to capture parts of the State.

675.12. In September 2018 Judge Kroon testified at the Nugent Commission[92] that the SARS Advisory Board had wrongly relied on the Sikhakhane Panel Report for its conclusion that the SARS Unit had been unlawfully established, as the Sikhakhane Panel had been wrong.

675.13. The Nugent Commission issued its final report on 11 December 2018, which opined that the establishment of the SARS Unit was not unlawful, endorsed the Adv Trengove SC and Nxumalo opinion, and recorded the testimony of Judge Kroon retracting and apologising.

675.14. On 19 May 2019 Judge Kroon issued a formal apology, via the Judicial Service Commission, to various persons (current and former SARS officials and their families, including Mr Pillay).

(a) Adv Mkhwebane's alleged independent investigation

676. Before the Committee neither Adv Mkhwebane nor her investigators could point to any independent investigation done at the time beyond the statements obtained from Minister Gordhan and Messrs Pillay and Magashule, documents obtained from SARS and the documentation previously provided to the PPSA and which had informed the closing report that resulted from previously investigating similar claims.

677. In addition, an affidavit deposed to by Mr Luther Lebelo, that had been submitted to the Nugent Commission, was provided to the evidence leaders by the PPSA together with the investigation file. It was apparent that a meeting had been held with him. Neither this meeting, nor the affidavit, is referred to in the SARS Unit Report or the Rule-53 record. This affidavit, according to Ms Mvuyana, had not been provided to her. In addition, an email in which reference was made to Minister Gordhan being a *'threat to democracy and [he] must be stopped before he causes more*

[92] Commission of Inquiry into the Administration and Government Tax Report.

harm under the guise of cleaning up' was also not in the Rule-53 record though Adv Mkhwebane testified to the Committee that she had received it and passed it on to the investigators for noting. According to her evidence it informed her stance that there were special circumstances, but notwithstanding same she did not disclose it in the Rule-53 record. She did not disclose to the Committee where the email originated from.

678. No interviews were conducted with any members from the SARS Unit; Mr Gene Ravele; Mr Van Loggerenberg (who as apparent from the *Noseweek* article was in possession of relevant information); Mr Richer; Judge Kroon; Mr Manyike; witnesses before the Nugent Commission and Sikhakhane Panel; KPMG; and the journalists who wrote the *Sunday Times* articles. There was no endeavour to interview the persons speaking on the recordings on which reliance was placed or any attempt to authenticate the recordings.

679. The difficulty presented by Adv Mkhwebane's lack of independent investigation is that even if she did reach an independent legal conclusion, she was reliant on the discredited reports for <u>factual information</u> on which to base her conclusions as she had not investigated any of the issues herself, beyond conducting a desktop exercise.

680. For example:

680.1. Adv Mkhwebane's findings in respect of the unlawful interception (paras 5.5.34 and 5.5.35) which form the basis of her finding on the SARS Unit having undertaken unlawful activities is contained in the recordings and also appears in the KPMG Report. The Sikhakhane Panel Report reached a contrary conclusion, but this is not recorded in this section of the SARS Unit Report.

680.2. Adv Mkhwebane's allegations in her letter to Minister Gordhan that the SARS Unit continued with its activities after it was disbanded comes from the KPMG Report. There was no other documentation reflecting such included in the Rule-53 record.

(vi) <u>The Sunday Times apology was ignored</u>

681. The proliferation of *Sunday Times* reports triggered the Sikhakhane Panel to extend its mandate to enquire into the SARS Unit and was one of two sources relied upon in the Sikhakhane Panel Report for its view of *prima facie* unlawful activities. This is elaborated on below.

682. There is no mention about the *Sunday Times*' retraction in the SARS Unit Report and no independent investigation was done as to the source of the media articles.

683. In his s 7(9) response, preceding the release of the SARS Unit Report, Mr Pillay pointed out that the *Sunday Times* had apologised twice and repudiated some 30 articles about a '*rogue unit*' as fake news which was part of a harmful '*rogue unit narrative*' aimed at targeting those seeking to eradicate state capture at SARS. The relevance of the *Sunday Times*' retraction is that it constitutes an admission that the Sikhakhane Panel findings were in part based upon '*information fed to them [as] part of a sophisticated campaign to capture parts of the State'*. Messrs Van Loggerenberg and Pillay confirmed this in their oral evidence before the Committee.

684. Ms Mvuyana testified that she was aware of the retraction, but it had not impacted on the SARS Unit Report. The statement by Mr Pillay was not followed up on and there was no attempt to ascertain during the investigation what information informed the *Sunday Times* retraction.

685. Adv Mkhwebane's responses were as follows:

686. **Before the Committee**: Adv Mkhwebane testified that she did not regard the *Sunday Times* reports as relevant. She does not read the *Sunday Times* and did not know whether the investigators saw it. This is contradicted by the fact that Mr Pillay had pointed to it in his s 7(9) notice.

687. The evidence before the Committee indicates that Adv Mkhwebane ignored the *Sunday Times* apology, and her version that she had no knowledge of it is rejected given that it was pertinently brought to her attention by Mr Pillay. Further, the *Sunday Times* withdrawal was indeed relevant in that the *Sunday Times* allegations had informed the Sikhakhane Panel Report's *prima facie* findings and the narrative of a '*rogue unit*', the same Sikhakhane Panel Report, *inter alia*, upon which Adv Mkhwebane relied for her findings and conclusions in the SARS Unit Report. But further, it was not followed up on – to ascertain the basis for the withdrawal.

(vii) Adv Mkhwebane's reliance on the Sikhakhane Panel Report

688. The SARS Unit Report listed the Sikhakhane Panel Report as a key source of evidence.

689. Adv Mkhwebane relied on the Sikhakhane Panel Report for two purposes: to support her finding that the establishment of the SARS Unit violated legal prescripts and as source for her findings of its unlawful activities.

690. In the latter regard, the Executive Summary of the SARS Unit Report attributes the finding in respect of Minister Gordhan's involvement in the recruitment of Mr Van Loggerenberg to the Sikhakhane Panel Report.

691. The SARS Unit Report records that the Sikhakhane panel found *prima facie* evidence that:

691.1. The SARS Unit was engaged in functions that properly belonged to other government agencies and that SARS had no authority to perform; and

691.2. there was a real possibility that the SARS Unit undermined the work of government agencies tasked with investigation of organised crime and the collection of intelligence.

692. The findings of the Sikhakhane Panel Report were overstated. The Sikhakhane Panel used the language of *'may have*', '*real possibility*' and '*suggesting*'.[93]

693. Adv Mkhwebane further recorded that the Sikhakhane Panel Report recommended that the activities and functions of the Special Projects Unit ('**SPU**') be investigated by the Inspector General of Intelligence ('**IGI**'). The actual Sikhakhane Panel recommendations reads as follows:

> '190.4.1 As we understand it, the Inspector General of intelligence is already investigating Mrs Walter complaint. The activities and functions of this unit must be specifically investigated by the Inspector General, alternatively;
>
> 190.4.2 We are of the view that the Commissioner should recommend to the President that a judicial commission of inquiry with powers of compulsion in terms of section 3 of the Commissions Act 8 of 1947 should be appointed. Such Commission, if considered should inquire into the activities, funding, management of the NRG and its predecessors as well to determine if there has been improper conduct on the part of senior officials.' [Emphasis added]

694. It bears noting that in fact, the IGI investigation and the IGI Report, to which reference is made below, given its timing, was not because of this recommendation. Further, that the Sikhakhane Panel had recommended either the IGI or the establishment of a commission to determine if there had been improper conduct. It did not reach the conclusion that there had in fact been improper conduct.

695. Mr Pillay drew Adv Mkhwebane's attention to the flaws in the Sikhakhane Panel Report prior to the release of the SARS Unit Report. These include:

[93] 'There is ***prima facie* evidence that the unit may have** abused its power and resources by engaging in activities that reside in the other agencies of government, and which it had no lawful authority to perform': 'There is ***prima facie* evidence that the existence of this unit had the real possibility** of undermining the work of those agencies tasked with the investigation of organised crime and collection of intelligence'; and 'There is ***prima facie* evidence suggesting** that the activities of the special projects unit **may have** included rogue behaviour that had the potential to damage the reputation of SARS as an organ of state.' Emphasis added.

695.1. The conclusions were reached without affording a hearing specifically on the issue of the legality of the SARS Unit to those alleged to have established the unit and to any members of the SARS Unit.

695.2. The Sikhakhane Panel Report was discredited by SARS in 2018 when they formally notified Adv Sikhakhane SC that they placed '*absolutely no reliance*' on the report.

695.3. The Nugent Commission rejected the Sikhakhane Panel Report, stating that: '*While the National Strategic Intelligence Act prohibits the covert gathering of certain intelligence, that applies to intelligence concerning threats to the safety of the state, which hardly applies to intelligence relevant to collecting tax*'.

695.4. The conclusions of the Sikhakhane Panel Report were contradicted by several historical legal opinions, as well as the opinions of Advocates Trengove SC and Nxumalo (on which Adv Mkhwebane relied for findings of unlawful activities in her evidence), and on which Judge Nugent also relied.

696. In the SARS Unit Report, Adv Mkhwebane did not deal with the substance of Mr Pillay's criticisms of the Sikhakhane Panel Report, nor the various other legal opinions and procedural flaws such as the unilateral extension in mandate and the failure to interview those implicated.

697. Adv Mkhwebane did not set out the reasons why she rejected the SARS submission setting out the conclusions of the Nugent Commission in respect of the Sikhakhane Panel Report.

698. The evidence of Mr Pillay and Mr Van Loggerenberg confirmed the abovementioned flaws in the Sikhakhane Panel Report, and that Mr Pillay had brought these to the attention of Adv Mkhwebane. Moreover, the Courts have since confirmed that the Sikhakhane Panel Report got the law wrong by a misinterpretation of the National Strategic Intelligence Act, 1994 (**'NSI Act**').

699. Ms Mvuyana stated, in respect of the Sikhakhane Panel Report, that '*we were never influenced by their outcomes and conclusions'.* This was contradicted by Mr Mataboge who confirmed that Adv Mkhwebane had regard to it and the SARS Unit Report itself reflects that reliance.

700. Adv Mkhwebane's responses were as follows:

701. **In her SARS Unit HC AA**: Adv Mkhwebane said that the SARS Unit HC had misdirected itself in finding (in Part A) that she had relied on the Sikhakhane Panel's findings that the SARS Unit was unlawful because it contravened s 3 of the NSI Act, as she had in fact relied on s 209 of the

Constitution. She denied that the Sikhakhane Panel Report had been discredited and said that the Nugent Commission '*did not make an authoritative finding on the issue. At best it was non-committal even if it expressed some doubt*'.

702. Adv Mkhwebane said that her report had regard to several opinions that sought to persuade her that there was nothing wrong with establishing a spying unit within SARS. She found the Sikhakhane opinion persuasive but exercised her independent views on the true legal position. Before the Committee she testified that she did not know the Sikhakhane Panel Report had been discredited, '*[w]e used the Sikhakhane Panel Report, like any other report which we had*'. Her conclusions had '*coincided*' with those of the Sikhakhane Panel Report in respect of unlawfulness.

703. Adv Mkhwebane testified that the Sikhakhane Panel Report like others were treated, as '*leads*'. She maintained that even if it had been discredited she would have still reached her conclusion that Minister Gordhan was involved in the recruitment of Mr Van Loggerenberg. The difficulty herewith is that there is no evidence of any independent investigation following up any '*leads*'.

704. Adv Mkhwebane testified that the allegation that the Sikhakhane Panel Report had been discredited was manufactured. To the extent that it was Judge Nugent that discredited the Sikhakhane Panel Report, she did not see why he should '*rank*' above the Sikhakhane Panel. As such, before the Committee Adv Mkhwebane maintained that the Sikhakhane Panel Report had not been set aside and could still be relied on.

705. The **SARS Unit HC (Full Court)** held that the interpretation of the NSI Act, on which the Sikhakhane Panel relied to conclude that the establishment of the SARS Unit was illegal, was based on a material error of law. Both the SCA and the CC refused to grant leave to appeal.

706. Given the submissions by Mr Pillay, prior to the SARS Unit Report being finalised, Adv Mkhwebane should reasonably have been aware of the criticism of the Sikhakhane Panel Report. Before the Committee Adv Mkhwebane did not dispute that she arrived at the same conclusions as the Sikhakhane Panel in respect of the establishment of the SARS Unit being contrary to the NSI Act and unlawful.[94] This is in any event, evident from the report itself. (Adv Mkhwebane alleged that she also found the unit to be unlawful in terms of s 209 of the Constitution).

[94] SARS Unit Report para 5.2.56 and Sikhakhane Panel Report para 87. The provisions of the NSI Act are included in the SARS Unit report under key laws and policies and in the application of legal prescripts to the evidence on the establishment of the SARS Unit.

707. The evidence before the Committee is that the Sikhakhane Panel Report used the wrong version of s 3 of the NSI Act. It should have applied the version of s 3 prior to its amendment in 2013, being the prevailing law at the time that the SARS Unit was established, but instead used a subsequent amended version. To the extent that Adv Mkhwebane relied on this finding, or reached her own independent legal conclusion, without confirming that the legislation she relied upon was the correct, she too made a material error of law.

708. Adv Mkhwebane does not dispute that she relied on the Sikhakhane Panel Report for her findings on the unlawful activities of the SARS Unit, although she referred also to the Trengove SC / Nxumalo opinion and the recordings in her evidence in this regard. The Trengove SC / Nxumalo opinion made no such findings. They had been given a list of activities to consider whether same would be lawful. Indeed, Judge Nugent relied on this opinion when he concluded that SARS is entitled to establish a unit to gather intelligence on illicit trades, even covertly, within limits.

709. It must be concluded that Adv Mkhwebane's reliance of the Sikhakhane Panel Report, having been alerted to the flaws therein and the fact that the legal conclusions were open to doubt, was irresponsible. Her failure to respond to the criticisms of the Sikhakhane Panel Report and explain why she still relied on it are indicative of a lack of open-mindedness, fairness and impartiality. At the very least there should have been an independent investigation and the provisions of the NSI Act should have been verified. In addition, the reliance on s 209 of the Constitution is, as a matter of law, misconceived.

(viii) Reliance on the KPMG Report

710. In her determination of the issue of whether SARS established an intelligence unit in violation of the relevant legal prescripts, Adv Mkhwebane considered and placed reliance on the KPMG Report. The KPMG findings are listed at length in the SARS Unit Report.[95]

[95] SARS Unit Report para 5.2.9. In the SARS Unit Report, the KPMG Report was summarised thus:

1. The covert unit (intelligence unit) existed and varied in its form and shape. Evidence indicated that the NRG, established in 2007, even though reference is made to a covert unit being operational as far back as 1998.
2. During its existence the intelligence unit had numerous names at various stages including but not limited to Special Operations, Special Projects Unit (SPU), National Research Group (NRG) and High Risk Investigation Unit (HRIU).
3. The unit varied in form and shape and could be categorised between the Physical unit and the Virtual unit.
4. The main focus of the unit was for SARS to enhance its revenue collection capability. This meant that the unit needed to gain access to information that was not readily available in the public domain and/or readily acceptable through conventional methodologies. This required specialised skills, equipment and expertise.
5. The information and access thereto implies that the collection methodologies would, to some extent, result in covert operations.

711. The SARS Unit Report did not disclose that KPMG had retracted its conclusions, findings, legal opinions and any implication that Minister Gordhan had known about the alleged unlawful activities of the SARS Unit.

712. Apart from the retraction, the KPMG Report was flawed in several respects. Adv Mkhwebane failed to consider that:

712.1. It was limited to a desktop review of the allegations of the activities of the SARS Unit which were never tested.

712.2. Implicated parties were not given an opportunity to give their versions or respond.

712.3. It was an internal, confidential report, prepared not for circulation or to be relied upon by third parties and contained an express disclaimer to that effect.

712.4. KPMG itself admitted that the process had been flawed and its head of Forensics testified before Parliament and under oath before a panel instituted by the South African Institute for Chartered Accountants that the person who compiled the report was '*lazy'* and '*unprofessional*' and that the report was influenced by outside parties and merely a '*copy and paste*' work.

712.5. The R23 million fee for services rendered to SARS, was repaid to SARS.

712.6. KPMG had not disclosed a conflict of interest involving Belinda Walter Attorneys.

712.7. KPMG South Africa and KPMG International have publicly apologised to South Africa.

713. All the aforegoing was known before the SARS Unit Report was finalised and Adv Mkhwebane was made aware hereof by Mr Pillay even prior to her issuing of the s 7(9) notice.

714. Mr Van Loggerenberg testified that he had not been given *audi* by KPMG. He confirmed Mr Pillay's evidence including that KPMG had testified before the SA Institute of Chartered Accountants '*that*

6. The continuous unit name change was always marked by an event which could result in the possibility of damaging the reputation of SARS. The pattern of name changing included an announcement that the unit had been disbanded, however, it would continue functioning, under a different guise and name. These events were not identified.
7. There was clear evidence that the intelligence unit intercepted private individual communication which was corroborated by Mr Van Loggerenberg's laptop on which was found unexplained emails.
8. The members of the unit were not employed by SARS as they were recruited outside of the SARS acknowledged systems and processes.

some of the findings and recommendations were imposed upon them by external parties, [who] were not part of the process' and that it was a '*copy and paste job*'.

715. It was put to Mr Van Loggerenberg that the whole report had not been withdrawn and that the list of evidence KPMG included as '*interception equipment*' had not been withdrawn, and that this was evidence of '*rogue-ness*'. Mr Van Loggerenberg, while agreeing that only the conclusion had been withdrawn, denied that the evidence on equipment was in any way relevant because '*they did not ascribe the equipment to the unit in question*'. It was ascribed to *SARS*'. A perusal of the KPMG Report confirms this to be so.

716. Mr Pillay testified that Adv Mkhwebane had chosen to uncritically accept allegations about him and to discard almost everything that he had said. Mr Pillay had obtained legal advice and addressed Mr Moyane highlighting the deficiencies in the KPMG report and warning that its release would have serious consequences. These submissions he shared with Adv Mkhwebane.

717. In his evidence Mr Mataboge confirmed that during the investigation they looked at the KPMG Report but did not mention KPMG's retraction in the SARS Unit Report. This notwithstanding that it had been raised in the submissions provided to Adv Mkhwebane by Mr Pillay prior to the SARS Unit Report being finalised.

718. Ms Mvuyana denied that she had '*transplanted*' information from, *inter alia*, the KPMG Report and '*regurgitated*' it into the SARS Unit Report. However, the only evidence of unlawful activities of the SARS Unit referred to by Ms Mvuyana arises from the KPMG and Sikhakhane Panel Reports and the recordings of Mr Lombard and Mr Van Rensburg. When pertinently asked what she had regard to, no evidence of independently procured evidence could be pointed to – that is apart from responses to the s 7(9) notices issued. Ms Mvuyana failed to provide an adequate explanation for why the disavowal of the KPMG report had been ignored, saying that despite that it still existed. Moreover, her evidence confirmed the lack of any independent investigation.

719. In response to questions from the Committee, Ms Mvuyana stated *that 'the reports were used as evidence.'.*

720. Adv Mkhwebane's responses were as follows:

721. **<u>In her SARS Unit HC AA</u>**:

721.1. The prevarication of an organisation on its work would be unhelpful to anyone serious about pursuing constitutional truths.

721.2. The KPMG Report is irrelevant as a source of Minister Gordhan's review application. She stated that she was not bound by the positions of KPMG, and that she acted independently, impartially, with dignity and effectively.

721.3. The recantation should not be simply accepted without more and Adv Mkhwebane was entitled to investigate. (Again, the difficulty arises with a lack of evidence of such investigation. Moreover, it contradicts the '*eight sources*' that Adv Mkhwebane's legal representative indicated were the sources for the SARS Unit Report during his cross-examination of Mr Van Loggerenberg).

721.4. Adv Mkhwebane was not bound by the apology of KPMG. KPMG had no constitutional mandate at all.

722. **Before the Committee**:

723. In her Part A statement to the Committee, Adv Mkhwebane said:

> 'On the KPMG and Sikhakhane Panel Reports, I respond in the following manner. Firstly, I state that both the KPMG and Sikhakhane Panel Reports have not been reviewed and set aside. Having said that, I support the evidence of Ms Mvuyana and Mr Mataboge which again stands uncontested that, as a matter the findings of both reports corroborated and made findings similar to the PPSA findings which shows that the conclusions reached by the public protector's team were not outrages or irrational. Furthermore, both reports made a finding that the establishment of the intelligence unit without a mandate was unlawful and in contravention of section 209 of the Constitution and the relevant statute.'

724. It is to be noted that the Sikhakhane Panel Report did not base its findings on s 209 of the Constitution and KPMG did not have the legal expertise and retracted its conclusions in this regard.

725. Adv Mkhwebane testified that KPMG found that the '*covert unit*' existed and '*varied in its form and shape*'. She referred to para 5.2.35.7 of the SARS Unit Report stating that there was:

> 'clear evidence that the Intelligence unit intercepted private individual communication which was corroborated by Mr Van Loggerenberg's laptop which was found with unexplained emails appearing on his allocated laptop. So, that's what the KPMG finding was. So we just captured as is per their findings.'

726. This confirmed that Adv Mkhwebane captured the contents of a desktop report that was disavowed and prepared under circumstances that KPMG made clear it had been completed at the dictates of third parties. No independent investigation occurred. Adv Mkhwebane did not investigate the laptop, nor did she question Mr Van Loggerenberg. Neither did KPMG.

727. In summary, the evidence before the Committee is thus that Adv Mkhwebane relied on the KPMG Report when she made her findings in relation to the unlawful establishment of the SARS Unit and

the unlawful activities of the SARS unit. This, despite being aware of the flaws and shortcomings in the KPMG Report and the fact that KPMG had retracted it as unreliable.

728. In the absence of any evidence of independent investigation to corroborate the KPMG findings, it can only be concluded that Adv Mkhwebane sought to reach conclusions in respect of unlawfulness that were not sustained by law or fact.

(ix) Kroon apology

729. The statement of the SARS Advisory Board was one of the 8 sources relied on by Adv Mkhwebane according to her legal representative.[96]

730. The SARS Unit Report does not directly mention the Kroon apology. It is however referred to in para 5.2.25 where the Nugent Commission is quoted in the summary of the SARS responses.

731. Mr Pillay drew Adv Mkhwebane's attention to the following:

731.1. The portions of the Nugent report referring to Judge Kroon's evidence that their finding was not a conclusion reached independently by the board, but had been adopted from the Sikhakhane panel, and the Board had come to realise that it was wrong.

731.2. A formal apology was issued by Judge Kroon to various persons (including Mr Pillay) dated 19 May 2019.

731.3. Soon after 28 April 2015, for the period May to June 2015, **the entire board reconsidered the notion that the unit had been '*unlawfully established*' and concluded that they should not have made this finding,** but never informed the public of this.

731.4. Testimony by Mr Ravele before the Nugent Commission in June 2018 which specifically impacts on the intended or provisional findings in the notice. Mr Ravele had retracted the allegations in the dossier relied on in the SARS Unit Report before the Nugent Commission.

[96] 181. The SARS Advisory Board stated as follows:
'3. . . the Board has, on the strength of the Sikhakhane Panel Report and other reports, satisfied itself that:
3.1a secret unit was established within SARS in 2007, which among others had the purpose of the covert collection of Intelligence;
3.2 the establishment of such a unit was unlawful;
3.3 the unlawfulness derives from the fact that SARS does not have and did not have the statutory authority to covertly gather intelligence;
3.4 the application of financial and human resources by SARS to this end had no legal basis, and thus constituted wasteful and fruitless expenditure ...''

732. Mr Pillay called upon Adv Mkhwebane to examine and assess the evidence of Judge Kroon and Mr Ravele before the Nugent Commission.

733. Minister Gordhan similarly pointed out the retraction by the SARS Advisory Board.

734. Minister Gordhan further noted that the record did not contain any evidence that Adv Mkhwebane had taken any steps to interview Judge Kroon or Mr Ravele, or to assess their evidence in full as given at the Nugent Commission, nor to obtain the transcripts of their evidence or their statements. It appears that the only statement she had regard to was that of Mr Lebelo.

735. Mr Van Loggerenberg's evidence was that both before the Nugent Commission in 2018, and via the JSC, Judge Kroon had indicated that the Panel had agreed that Judge Kroon ought not to have issued that portion of the statement in April 2015. When challenged whether the apology was on behalf of everyone, Mr Van Loggerenberg testified that Judge Kroon had '*in no uncertain terms*' testified under oath that the entire Panel agreed that they ought not have issued a statement that the Unit had been unlawfully established.

736. Adv Mkhwebane's responses were as follows:

737. **In her SARS Unit HC AA**: Adv Mkhwebane denied that the Sikhakhane panel was '*legally flawed*'. She did not view the SARS Advisory Panel as having withdrawn its endorsement of the interpretation of the Sikhakhane panel report, stating that '[*t]he fact that Judge Kroon recanted his own endorsement does not amount to a recantation of the SARS Advisory Panel endorsement. In fact, it is of great concern that a judge would behave as Judge Kroon did and the circumstances that forced him to recant are yet to be known*.'

738. Further, she '*was not bound by the findings of the Nugent Commission or the recanted position of Judge Kroon*'.

739. **Before the Committee**:

740. Adv Mkhwebane stated that she does not dispute Judge Kroon's retractions. However, there were 7 members of the Board, and there is no evidence that the other members supported the retraction and whether Judge Kroon was speaking on their behalf. Adv Mkhwebane stated that Judge Kroon's personal apology was a non-issue, and anyway no specific reliance was placed on the '*Kroon report'* by her for purposes of the SARS Unit Report. She confirmed this in her oral evidence. However, this contradicted what her legal representative had stated.

741. Adv Mkhwebane also indicated that there was no reason to prefer Judge Kroon (and Judge Nugent) over Adv Sikhakhane SC.

742. The **SARS Unit HC judgment** held that:

> '184. The Public Protector had further failed to reflect on material and relevant events, facts and evidence relating to the Kroon Advisory Board. Mr Pillay particularly referred to the testimony by Judge Kroon before the Nugent Commission in September 2018 which specifically impacted on the intended or provisional findings in the notice. He referred to the formal apology by Judge Kroon to Minister Pravin Gordhan in 2018 and the formal apology by Judge Kroon to various persons (current and former SARS officials and their families, including Mr Pillay) dated 19 May 2019 as issued by the Judicial Service Commission on his behalf. The Public Protector failed to consider the fact that soon after 28 April 2015, for the period May to June 2015, the entire board reconsidered the notion that the unit was unlawfully established and concluded that they should not have made this finding after all but never informed the public.'

743. The evidence before this Committee is that the Kroon Advisory Board relied entirely on the Sikhakhane Panel Report for its media statement that the SARS Unit was unlawfully established and conducted no independent investigation. In Adv Mkhwebane's investigation there was thus no independent SARS Advisory Board finding which corroborated the findings of the Sikhakhane Panel Report.

744. Minister Gordhan and Mr Pillay drew to Adv Mkhwebane's attention that Judge Kroon had testified that the Board had reconsidered, and that it was mistaken when it said that the SARS Unit was unlawfully established in response to s 7(9) notices. No investigation in relation hereto ensued, nor was an interview conducted with Judge Kroon to ascertain whether the Board conducted an independent investigation or not or on what it based its conclusion.

745. In addition to Judge Kroon's apology for the erroneous statement, the evidence shows, on a balance of probabilities, that the full Board had reconsidered its position. This was also a finding of the SARS Unit HC judgment.

746. Adv Mkhwebane ignored the Kroon apology, despite this having been brought to her attention by Mr Pillay, and insisted that the whole Board had not recanted, despite the evidence of Mr Pillay that this was the case and without obtaining the records of the Nugent Commission or interviewing Judge Kroon as requested by Mr Pillay to confirm his allegations.

747. The contradiction between what her legal representative put to the witnesses (that the SARS Advisory Panel Report was one of 8 sources relied upon by Adv Mkhwebane in her report) and her evidence that she had not relied on the SARS Advisory panel findings before the Committee places Adv Mkhwebane's version in question.

748. The inevitable conclusion is that Adv Mkhwebane closed her mind to views that contradicted her own in respect of the unlawful nature and activities of the SARS Unit, even when the other proponents of those views admitted that their findings were without substance and were clearly wrong. No explanation was provided for the lack of any independent investigation prior to the SARS Unit Report. If Adv Mkhwebane doubted that the Board had recanted, she should have ascertained this at the time, prior to her issuing the SARS Unit Report.

(x) Adv Mkhwebane's failure to engage with the Nugent Report

749. The Nugent Commission Report is not listed as a key source in the SARS Unit Report nor reflected in the Rule-53 record.

750. The SARS Unit Report quotes the same three paras of the Nugent Report at para 5.2.5 under the heading '*SARS response*' that were raised in the SARS submission to Adv Mkhwebane.[97] The Nugent Commission is also referred to elsewhere in the SARS Unit Report.

751. The Nugent Commission's findings were also brought to the attention of Adv Mkhwebane by Mr Pillay in his affidavit in response to the subpoena.

752. Mr Mataboge testified that '*nothing was considered from the Nugent report*' because its findings were not binding and could not be relied upon. He stated further that '*if we had regard to it. if we used it … it would have been part of the Rule 53 report but it was not used by the investigation team*'.

753. To the contrary, Ms Mvuyana testified that she did, in fact, consider the Nugent Report. She said the SARS Unit Report mentioned a couple of times '*what the findings were and the passing commentary made by the judge*'. SARS had referred Adv Mkhwebane to the Nugent Commission Report. This was again contradicted by Ms Mvuyana's answer to the questions of the committee, when she had said that the Nugent Commission report was not considered because of a '[*v]erbal*

[97] *'[9] Why such a unit was considered unlawful is not clear to me. While the National Strategic Intelligence Act prohibits the covert gathering of certain intelligence, that applies to intelligence concerning threats to the safety of the state, which hardly applies to intelligence relevant to collecting tax . . . I see no reason why SARS was and is not entitled to establish and operate a unit to gather intelligence on the illicit trades, even covertly, within limits.*
[10] Indeed that was the view expressed to SARS in late 2015, which seems not to have been made public by SARS. An opinion was furnished to former Commissioner of SARS in about 1 September 2015, in response to the findings of a panel chaired by Adv Sikhakhane SC, by Adv Trengove SC and Adv Nxumalo, who advised that SARS …
'[11]It was said to be unlawful by a panel chaired by Adv Sikhakhane SC, but I find nothing in its report to persuade me why that was so. Adv Sikhakhane was asked if he could elaborate but his reply took it no further than what was said in the report. The SARS Advisory Report chaired by Judge Kroon, reported to the Minister, and issued a media statement saying the unit was unlawful, but in evidence he told the Commission that was not a conclusion reached independently by the Board, but had been adopted from the Sikhakhane panel, and he had come to realise it was wrong. Indeed, he supported the re-establishment of capacity to investigate the illicit trades which we recommend.'

discussion with PP and investigation team. Reason was that the findings of the Nugent report were not binding and could not be relied on'.

754. Apart from relying on both the evidence of Mr Mataboge and Ms Mvuyana (in their entirety, despite their contradictions), saying it was uncontested, Adv Mkhwebane's responses were as follows:

755. **In her SARS Unit HC AA**: Adv Mkhwebane said that *'the Nugent Commission did not make an authoritative finding on the issue. At best it was non-committal even if it expressed some doubt'.* Further that the Nugent Commission offered no legal analysis, was not binding and its mandate was different. Adv Mkhwebane explained that the Nugent Commission had not analysed the provisions of the NSI Act and that she had nothing to learn about the law from that Commission.

756. Finally, Adv Mkhwebane stated that she was entitled to '*believe*' the IGI Report above the Nugent Commission Report as the former was the appropriate body with the necessary constitutional mandate to investigate.

757. **Before the Committee**:

758. In her statement to the Committee, Adv Mkhwebane said that:

> 'There is a misconception that I also ignored the Nugent report, however the evidence of both Ms Mvuyana and Mr Mataboge which stands uncontested is that we treated the Nugent report in the same way as we treated all the other reports. The court also missed the point that the Nugent Commission had different terms of reference. He never found that the establishment of the Rogue Unit was lawful. He only expressed some doubts about some of the findings which he said were not clear to him.' [Emphasis added]

759. Adv Mkhwebane denied that she had ignored the Nugent Report. She testified that the Nugent Commission had not conducted an investigation. She said that she had referred to it in the SARS Unit Report.

760. The conspectus of evidence before the Committee shows that Adv Mkhwebane did not meaningfully engage with the Nugent Report beyond the three paras brought to her attention by SARS. If she did, she would have concluded that Judge Nugent had concurred with the views of Advocates Trengove SC and Nxumalo. Moreover, to the extent that it was stated that the Nugent Commission's terms of reference did not extend to the SARS Unit, nor was the unit part of their terms of reference, she did not explain why this was a basis for rejection when reliance was placed on the Sikhakhane Panel which unilaterally extended its mandate. The Sikhakhane Panel Report was also not binding, and it had not conducted an intensive investigation, but it was not rejected or excluded.

761. Once again, it must be found that the probabilities favour Adv Mkhwebane ignoring relevant and material evidence and opinions, which is indicative of her determination to hold to her own preconceived views in respect of the unlawful establishment of the SARS Unit and its activities.

(xi) Lawfulness, the SARS memo and the Trengove SC and Nxumalo opinion

762. Before this Committee, Adv Mkhwebane relied substantially on a memorandum originating from Mr Pillay (in his capacity as the then Manager: Enforcement and Risk), approved by Minister Gordhan, (then Commissioner), and sent to the Minister of Finance, Mr Manuel in February 2007 for approval ('**the SARS memorandum**').[98] Adv Mkhwebane argued that the SARS Memorandum was evidence that SARS did not have powers to conduct covert surveillance. The SARS Memorandum was listed as a key source in s 4.4.1 of the SARS Unit Report. It did not, however, feature in the SARS Unit HC.

763. Adv Mkhwebane's evidence in relation thereto was as follows:

764. **Before the Committee**:

765. In her statement to the Committee, Adv Mkhwebane said the following:

> 'My interpretation of section 209 of the Constitution was based on the objective evidence available at the time. It was clear from the evidence analysed that SARS was aware that the unit could only be established if there was a law authorising for its establishment hence there was evidence that they attempted to have the unit housed within the National Intelligence Agency. This was done for obvious reasons as SARS was aware of the lack of legislative powers on its part to carry out the intended activities of the unit including surveillance and interception of communications. Minister Gordhan, the then accounting officer of SARS was central to the establishment of the intelligence unit. He submitted and signed the memorandum that resulted in the establishment of the intelligence unit within SARS. Based on this evidence, it was concluded that the establishment of the intelligence unit was in contravention of section 209 of the Constitution.'

766. Adv Mkhwebane testified that she had served a s 7(9) notice on Mr Manuel because he was '*implicated*' in that he had approved the SARS memorandum.

767. Adv Mkhwebane in her oral evidence said that:

> 'This 2.1 says: 'Collecting tactical intelligence invariably means penetrating and intercepting organized criminal syndicates. This is an activity for which SARS does not presently have capability, including

[98] The Memorandum is headed 'to fund an intelligence capability within NIA in support of SARS'. The purpose of the Memorandum was to seek approval from the Finance Minister to fund a special capability within the National Intelligence Agency (NIA) to supply SARS and law enforcement with the necessary information to address the illicit economy. In short it was a funding request.
152. The Memorandum states: '*Collecting tactical intelligence invariably means penetrating and intercepting organised criminal syndicates. This is an activity for which SARS does not presently have the capability (including the legislative mandate to manage clandestine activity).*'

> the legislative mandate, to manage clandestine activity.' So this paragraph is very clear that SARS and under Commissioner Gordhan, they knew that they don't have the legislative mandate to deal with this, or to establish such a unit with such capabilities.'

768. Adv Mkhwebane also relied on the SARS Memorandum in respect of her findings on the unlawful activities of the SARS Unit. She drew an inference that because the SARS Memorandum sought to set up a unit to conduct interception, that such interception was taking place.

769. Adv Mkhwebane's legal representative, referred to the SARS Memorandum as a '*smoking gun*' and asked Adv Mkhwebane to explain its relevance to her finding that the SARS Unit was unlawfully established. She said:

> 'It is very critical yes. Yes, it's very critical because the Accounting Officer signed on this, the Accounting Officer acknowledged that already the unit is operating and acknowledged that the unit is operating and would want to have an MOU with NIA, because what the unit is doing falls within the mandate of NIA or State Security. So this memorandum was acknowledging or agreeing that we know that this is not falling within our mandate, but we need State Security Agency to collaborate with us. So, hence the comment by Deputy Minister Moleketi when he was noting the matter. Actually, he is not approving, but just noting. But being concerned that you cannot … Or this shows or reflects that it's a mandate of State Security and you want to supplement. Because the memorandum of understanding, says they want to supplement. So, it means the operations were there and… But the key issue is, this is the document which we relied on, which it belongs to SARS.'

770. The SARS Memorandum was the basis of Adv Mkhwebane's findings on equipment. Her reasoning being that because the SARS Memorandum sought approval to establish a unit '*there's no way that it didn't have any equipment*'. The findings on equipment are considered below.

771. Adv Mkhwebane was also of the view that the Trengove SC and Nxumalo opinion was saying that the SARS Unit '*was doing*' the activities that they were asked to advise upon. This is incorrect. The opinion made no such findings, counsel had simply been given a list of activities to consider. Again, no independent investigation ensued to ascertain precisely what informed the opinion.

772. It is clear from the above that Adv Mkhwebane reached several conclusions from the SARS Memorandum based on what her counsel referred to as '*inferential reasoning*':

772.1. That because the SARS Memorandum said '*supplement'* there was already a unit in existence doing the same activities for which approval was sought, namely clandestine activities;

772.2. That because approval was sought for such a unit at the National Intelligence Agency ('**NIA**'), there must have been equipment purchased for the (clandestine) activities by the SARS Unit; and

772.3. That because the authors of the SARS Memorandum did not think that SARS had the legislative mandate to conduct clandestine activities, the establishment of the SARS Unit was unlawful. The latter is based on the assumption that it conducted such clandestine activities, inferred from the SARS Memorandum.

773. Adv Mkhwebane's reasoning is circular and collapses when viewed against the evidence that the SARS Unit was a different entity to the unit proposed in the SARS Memorandum, which never materialised, and her failure to conduct any independent investigation in relation to any alleged clandestine activities.

774. Moreover, the view of the authors of the SARS Memorandum regarding the legislative mandate to conduct clandestine activities cannot be determinative of the law and the interpretation of the statute and s 209 of the Constitution. How the Constitution and legislation is to be interpreted is trite and it is unacceptable to represent that the SARS Memorandum reflects an articulation of the relevant legal position. But this is precisely what KPMG did, and it is noted that Adv Mkhwebane adopted the same interpretation as that contained in the KPMG report, albeit that the legal conclusions in the latter had been withdrawn.

775. Adv Mkhwebane's selective reliance on the opinion of Advocates Trengove SC and Nxumalo must also bring her judgment into question. It is clear from that opinion that there were no findings made in respect of whether unlawful activities were taking place as a matter of fact, yet she interpreted it so, while ignoring the opinion in respect of the findings of lawfulness and the NSI Act.

(vii) <u>The findings of the Committee</u>

776. The Committee notes that Adv Mkhwebane had been in possession of detailed responses to her s 7(9) notices which responses set out that the KPMG and Sikhakhane Panel Reports had been discredited and that the *Sunday Times* had apologised. She disregarded the s 7(9) response and no independent investigation hereof ensued. It supports a conclusion that Adv Mkhwebane entered the investigation with a predetermined outcome in mind. She ignored the Nugent report – which is unacceptable for a diligent and open-minded investigator.

777. The investigation lacked impartiality as Adv Mkhwebane should have realised that the findings in some of these reports should not have been relied on. Further, Adv Mkhwebane's conduct was intentional and constituted a gross failure on her part to be independent and to investigate rather than relying on reports that had been retracted or discredited.

778. In this case the rules of natural justice were ignored by Adv Mkhwebane in that she only considered one side. The manner in which the SARS Unit Report was compiled appears to be more of a desktop exercise than a proper investigation where leads were followed up on. The defective investigation was compounded by the fact that the SARS Unit Report appears to have been issued without following the normal quality control processes at the PPSA. Ignoring relevant evidence must be regarded as a dereliction of duty.

779. **The Committee:**

779.1. The majority view was that the investigation was not impartial, open-minded or independent and it was conducted in an incompetent manner. The evidence pointed to a predetermined outcome and the investigation was flawed.

779.2. The minority view was that Adv Mkhwebane had a number of diverse opinions and different considerations before her which required the wisdom of Solomon to decipher. Under the circumstances her final decision did not merit her removal from office. She had relied on legal opinions of some of the best advocates in the country.

780. **The Committee therefore finds that Adv Mkhwebane committed misconduct in that she failed to carry out an independent, impartial and open-minded investigation. and relied on discredited opinions and unreliable evidence for her findings whilst ignoring information and retractions which showed that the evidence in question was unreliable and the opinions wrong in law. She further demonstrated incompetence in that she misinterpreted law.**

(viii) <u>The blatant dishonesty of Adv Mkhwebane with regard to the IGI Report and her insistence on ordering the State Security Minister to implement, in totality, a report that she has, according to the SARS Unit Report, never seen</u>

781. The complaint against Adv Mkhwebane in relation to the IGI Report must be viewed against the broad conspectus of evidence before the Committee. The evidence before the Committee includes the record before the SARS Unit HC, affidavits made by Adv Mkhwebane in related litigation against the State Security Minister; her affidavit in her criminal complaint against the State Security Minister; correspondence which had been omitted from the Rule-53 record; affidavits made by the State Security Minister in the interlocutory application and Adv Mkhwebane's answers to written questions from members and a legal opinion obtained by her dated 25 February 2019.

782. The determination before the Committee is whether Adv Mkhwebane's conduct in the handling of the IGI Report was dishonest and/or unlawful and whether her reliance on it was without basis in law or fact.

783. The starting point is the SARS Unit Report where the key sources of information do not expressly include the IGI Report. Mr Mataboge testified that para 4.4.1.29 refers to further documents '*blurred and/or not listed due to their nature*' (e.g. information that related to people's ID's and personal information). Adv Mkhwebane relied on the same entry to say that it included the IGI report. This was not previously stated before any of the Courts and is offered for the first time to the Committee.

784. The recordings referred to in para 4.4.2.1 were not recordings that the PPSA made but ones that they had been given in relation to the SARS Unit. This was the evidence of both Mr Mataboge and Ms Mvuyana. In addition, the SARS Unit report refers to correspondence between Adv Mkhwebane and the IGI as well as the State Security Minister. Two material letters, however, are not referred to in either the SARS Unit Report or in the Rule-53 record.[99]

785. The SARS Unit Report under the heading '*Sikhakhane Panel Report*' reads as follows:

> '5.2.25 The report recommended that the activities and functions of the SPU be investigated by the Inspector General of Intelligence. In a meeting held with the Inspector-General of Intelligence, Dr Setlhomamaru Dintwe on 31 January 2019, he confirmed that the Office of the Inspector General of Intelligence had indeed previously investigated allegations of an intelligence unit within SARS and confirmed the existence thereof.
>
> 5.2.26 Apparently the then Inspector-General, Adv. Faith Radebe conducted an investigation on the intelligence unit within SARS and issued a report on 31 October 2014, which I was reliably informed that it was in the custody of the former State Security Minister, Ms Dipuo Letsatsi-Duba from whom I tried to get a declassified copy of the report without success.
>
> Interviews conducted with the State Security Minister and the Inspector General of Intelligence
>
> 5.2.27 In an attempt to determine the veracity of the allegations of the existence and the activities of the intelligence unit, I sought more information from the Inspector General of Intelligence, Dr Setlhomamaru Dintwe. This information was attributed to a report by the former Inspector General of Intelligence, Adv. Faith Radebe dated 31 October 2014 (the OIGI report).
>
> 5.2.28. He stated that the report can be requested on the State Security Minister as the lawful custody and thereof.
>
> 5.2.29. I had also subpoenaed the State Security Minister, Ms Dipuo Letsatsi- Duba, MP, for submission of the report which led to a meeting with her on the 15 February 2019. At the said meeting the Minister undertook to request her DG to avail a declassified copy of the report to my office. I have yet to receive the report as promised.

[99] The key sources (and the Rule-53 Record) do not include two further letters from the State Security Minister dated 22 February 2019 and 27 February 2019 nor are they referred to in Adv Mkhwebane's summary of correspondence in the report. It is also not apparent from the investigative diary that these letters existed or were given to the investigators, nor were they provided when it was requested by the Secretary.

> 5.2.30. And as per my letter dated 25 June 2019, I will be requesting the new State Security Minister Ms Ayanda Dlodlo, MP to avail the declassified report to my office.
>
> 5.2.31 I have opened the criminal case against the former State Security Minister for violation of section 11(3) of the Public Protector Act 23 of 1994.
>
> 5.2.32 I have a since requested President Ramaphosa's assistance in facilitating the availing of the declassified report by the State Security Minister to no avail.
>
> 5.2.33 In light of the above mentioned and in terms of the powers vested in me by section 181(2) and (3) of the Constitution, I have it on good authority that the findings of the OIGI report, inter alia, were that:
>
> (a) SARS created a covert unit utilising covert and intrusive methods which was not in line with the SARS mandate and I violation of section 209(1) of the Constitution which only empowers the President to establish any intelligence service;
>
> (b) The establishment of an intelligence capacity within SARS, a capability exclusive only to legislated intelligence service was illegal.
>
> 5.2.34 The OIGI report recommended, inter alia, that:
>
> (a) Criminal charges be Investigated against Messrs Gordhan, Pillay, van Loggerenberg and Richer for the establishment and involvement in the covert Intelligence unit in SARS:
>
> (b) SARS produce a credible Inventory of all operational equipment which was used over a period by the NRG In the course of Its covert activities.'

786. It bears noting that the IGI Report to which Dr Dintwe, the IGI, referred was not compiled as a result of the recommendation of the Sikhakhane Panel. The IGI process (commenced in August 2014 and concluded in October 2014.[100] The Sikhakhane Panel Report was concluded on 5 November 2014. It is not perplexing why the Sikhakhane Panel thought that the IGI would have jurisdiction to investigate SARS employees to make such recommendation in the first place.

787. In her conclusion in respect of the unlawful activities of the SARS Unit, Adv Mkhwebane says the following in the SARS Unit Report:

> '5.2.62 Evidence obtained during the investigation indicates that State Security report found, amongst other things, that SARS created a covert unit utilising covert and intrusive methods in contravention of the SARS mandate.
>
> 5.2.63 SARS had an interception and monitoring of communications capability which went beyond targeting tax offenders but was also utilised for political purposes as per the documentary evidence in my possession.'

788. The SARS Unit Report recommends, under the heading '*Executive Summary',* the following remedial action:

> '(c) the Minister of State Security to:
>
> (i) within 90 days … implement in totality the OIGI report dated 31 October 2014

[100] The IGI Report commenced before the Sikhakhane Panel Report was issued and could not have been as a consequence of the recommendations of the Sikhakhane Panel Report.

> (ii) within 30 days ensure that all intelligence equipment utilised by SARS intelligence unit is returned, audited and placed in custody of SSA
>
> (iii) within 14 days of issuance of this report avail a declassified copy of the OIGI report dated 31 October 2014.'

789. According to Adv Mkhwebane the IGI Report was dropped at the PPSA offices in early January 2019 by an anonymous source.

790. In her first letter dated 8 January 2019 to the IGI, though at that point she is presumably already in possession of the IGI Report but without disclosing same, Adv Mkhwebane askes for a copy – and not a declassified copy, stating that:

> 'I have been reliably informed that your office conducted an investigation into the establishment and activities of the Special Operations unit and/or other branch within the SSA, which culminated in a report which was issued by Advocate Faith Radebe on 31 October 2014. To assist me in the investigation and expeditious finalisation of the matter, you are kindly requested to furnish me with a copy of the said report.'

791. The IGI responded that it had investigated '*media allegations against the Special Operations Unit (SOU) and/or other branches of the State Security Agency (SSA) in 2014'*; which report was classified and that Adv Mkhwebane should request a copy from the State Security Minister, as the lawful custodian of the report and the only authority to disclose it.

792. Despite this, Adv Mkhwebane issued subpoenas to both IGI (despite being told that the IGI was not the legal custodian or authorised to release the IGI Report) and the State Security Minister to submit the IGI Report by 31 January 2019. As far as can be ascertained, no prior communication ensued with the Minister prior to issuing the subpoena (the so called '*3-strike approach'* did not apply).

793. On 31 January 2019, Adv Mkhwebane met the IGI and Adv Govender, who repeated that she would have to apply to the Minister for it to be declassified and offered to assist her with this.[101]

794. In that meeting for the first time Adv Mkhwebane disclosed that a copy of the IGI Report had been anonymously dropped at her offices. She did not show the document in her possession to the IGI and Adv Govender and hence they could neither confirm, nor deny, whether the document she had was indeed a copy of an authentic IGI Report. The meeting was recorded, and it does not reflect that the report was shown or given to them. This is corroborated by Adv Govender, in her affidavit to the Committee. It is not disputed that the IGI Report was not produced in the meeting. This is also borne out from the opinion obtained from senior counsel to which is referred to below.

[101] Bundle D, D1, item 30. Adv Govender's affidavit. The Committee also heard the recording of the meeting.

795. Adv Mkhwebane met with the State Security Minister on 15 February 2019. Adv Mkhwebane says that the Minister promised to provide her with a declassified IGI Report. The Minister denies this in court papers, instead saying that what was agreed was to commence a declassification process on condition that Adv Mkhwebane surrender the classified document in her possession.[102] No investigators were present and there is no recording of this meeting. It is thus a dispute of fact between Adv Mkhwebane and the Minister that arose.

796. On 20 February 2019 the Minister wrote to Adv Mkhwebane informing her, *inter alia*, that: (*a)* she was unlawfully in possession of a secret report; *(b)* that she had failed to report this to the relevant authorities as she was required to do and *(c)* that she may not disclose the content of the report and *(d)* must surrender the report within three days.

797. The Minister further informed Adv Mkhwebane that the IGI does not have a legal mandate to investigate SARS in terms of the Intelligence Services Oversight Act and the investigation into SARS-related activities could therefore not have been commissioned by the former State Security Minister.

798. On 22 February 2019 Adv Mkhwebane wrote to the Minister (but omitted the letter from the Rule-53 record). Adv Mkhwebane denied that she was in possession of an authentically classified document. She said that she **did not know if the document in her possession was indeed the IGI Report**. Between then and when she used the copy in her possession to inform the SARS Unit Report nothing occurred that would have authenticated it. Adv Mkhwebane denied not bringing it to their attention alleging that *'the subpoena and discussion during our meeting were precisely to bring the matter to your attention*'. If this is so, given the nature of the power of subpoena, if could well constitute an abuse to issue a subpoena to bring a matter to the attention to the subpoenaed person. Adv Mkhwebane further demanded that the Minister retract the letter of 20 February 2019 and awaited compliance with the subpoena, failing which she would initiate contempt proceedings against the Minister. It is also surprising that a subpoena power is alleged to be invoked to suggest reporting possession, when in fact the subpoena *ex facie* sought the IGI Report from both the Minister and the IGI, without having disclosed to either that she had a copy thereof, albeit unauthenticated.

[102] Application under Case No: 24409/19 lodged on 4 April 2019. Bundle E, item 15 to which the correspondence of 22 February and 27 February 2019 were annexed. The State Security Minister stated under oath in her replying affidavit that '7.*1 The [PP] fails to take this Honourable Court into her confidence and is deliberately misleading the Court insofar as she states that I undertook to provide her with a declassified report of the IGI and infers that I failed to honour my undertaking. In this regard, the undertaking to provide the Respondent with a declassified report was conditional upon her returning the classified and 'Secret' report which she claimed to have received anonymously. I undertook to commence a declassification and redaction process on receipt of the report from the Respondent. However, the Respondent failed to provide me with the Report in question*.'

799. Following this exchange, Adv Mkhwebane obtained a legal opinion, dated 25 February 2019, wherein senior counsel was instructed that there was an IGI Report in her possession which **had not yet been authenticated**. No instructions were given to the senior counsel that the IGI had authenticated the report on 31 January 2019, and it is so recorded, contrary to what was represented to the Committee. The opinion notes that it is the document itself that purports to be '*secret*' but nothing in it amounts to confirmation that such classification is indeed authentic or done by the State Security Agency ('**SSA**') in terms of the Minimum Information Security Standards ('**MISS**'). The opinion records that there had been '*no confirmation*' from either the Minister or the IGI verifying the authenticity of the report's classification (at para 5). The advice given was that Adv Mkhwebane was within her rights to first establish whether indeed the document described as '*secret*' is indeed so classified and until confirmed there could be no authentication.

800. At para 22 of the legal opinion it is pertinently stated:

> '22. The Public Protector may well provide the Minister with a copy of the document in the Public Protector's possession and seek confirmation that the document is authentically classified. It is not sufficient for the Minister to merely state that the Inspector General of Intelligence could not have investigated the subject matter of the document in the possession of the Public Protector without seeing the very document. …..'

801. In para 27 the legal opinion further records:

> '27. Once the Minister and the Inspector General of Intelligence have confirmed the authenticity of the document, the Public Protector may then make an election as to how she should cooperate or engage with the State Security Agency and the Inspector General of Intelligence in how to take the matter forward.'

802. On 27 February 2019 the State Security Minister responded to Adv Mkhwebane. This is also not referred to in the SARS Unit Report or included in the Rule-53 record. Herein it was indicated that Adv Mkhwebane admitted to being in possession of a document which purported to be a secret document from the IGI. The Minister pointed out that Adv Mkhwebane was not permitted to keep the IGI Report in her possession while she determined its classification status herself because the Minister was the lawful custodian. Adv Mkhwebane's continued unlawful possession of a classified document, which had been confirmed as unlawful, aggravated her contravention of the law. Consequently, the Minister again demanded the return of the IGI Report immediately and informed Adv Mkhwebane that a criminal docket would be opened to identify the person(s) responsible for the unlawful disclosure of classified documentation.

803. To the Committee, Adv Mkhwebane testified that in her meeting with the IGI and Adv Govender, (also attended by Messrs Nyembe, Mataboge, Kabinde and Ms Mogaladi), the IGI had confirmed

the existence of the IGI Report. She relied, as proof of authenticity, on the date of the report they referred to and the one in her possession, which were the same.

804. In March 2019, the State Security Minister and Adv Mkhwebane respectively laid criminal charges against each other. In her statement, Adv Mkhwebane said that she had met with the State Security Minister on 15 February 2019 and that:

804.1. The Minister undertook to provide her with the Report after the Acting DG declassified it.

804.2. The Minister had not seen the document in her possession which remained in her possession, but of which she was not certain if it indeed is a genuine, classified document.

805. Thus, by March 2019 there was still no confirmation of the authenticity of the report in her possession.

806. In the SARS Unit HC matter, Minister Gordhan pointed out that no mention had been made of the IGI Report in the s 7(9) notice, nor had he ever been lawfully provided with a copy thereof, yet it had been referred to in the SARS Unit Report and Adv Mkhwebane sought its implementation in her remedial action. Minister Gordhan invited Adv Mkhwebane to clarify whether she was in possession of the IGI Report:

> 'It is unclear how the public protector on the one hand insists that the IGI report be implemented (para 8.3.1) and yet still seeks a declassified copy to be available to her (para 8.3.9). In the event that the PP is not lawfully in possession of the IGI report, then there is no basis for directing that it be implemented as she is not lawfully familiar with its contents. In the event that she is unlawful possession of the OIGI report, I invite her to disclose how she came to be in possession of a classified report.'

807. Adv Mkhwebane responded as follows:

> 'I decline the Applicant's invitation to answer his questions on the work I did when I carried out my investigation. The insinuation that I did not have lawful access to government documents is simply inaccurate and wrong.'

808. Mr Pillay, in his affidavit relating to the Part A proceedings, indicated that Adv Mkhwebane appeared to have insight into, but '*coyly denied*' having possession of the IGI Report, that if such a report did exist, her possession or use thereof would clearly constitute criminal conduct on her part given the national security and intelligence legislation.

809. In response to Mr Pillay, Adv Mkhwebane said, in her further answering affidavit:

> '15. It is the Minister of State Security who may request from me the details that appear to trouble Minister and Pillay on whether I am in possession of the office of the Inspector General of intelligence's

> report. Mr Pillay has no such lawful basis to ask me to confirm whether I am in lawful possession of documents in the control of the State Security Agency.'

810. After Adv Mkhwebane had filed the Rule- 53 Record on 27 September 2019 and pursuant thereto, Minister Gordhan's attorneys requested any and all documents: *(a)* relating to the Public Protector being '*reliably informed*, as referred to in para 5.2.26 of the SARS Unit Report and *(b)* relating to the findings and recommendations of the IGI report dated 31 October 2014. Adv Mkhwebane's attorneys stated that they could '*not attach the report of the IGI to the record without seeking direction from the Court first*'.

811. They had made no endeavour to obtain such direction at the time of filing the Rule 53 record. It is noted that a different approach was adopted in respect of the FIC Report and the CR17 matter where it was included in the Rule-53 record, notwithstanding the FIC's request for confidentiality and the President's lawyers' request that it be sealed until the matter could be decided by the Presiding Judge. In response, Adv Mkhwebane's position was that openness and transparency dictated that everything relied on for purposes of the compilation of her report should be disclosed. In fact, in this regard Adv Mkhwebane, when eventually referring to the IGI Report, indicated that she could not attach the report to the record without seeking direction from the Court. Noticeably until its absence from the Rule-53 record was raised by the applicants, there was no mentioned of getting a direction.

812. In respect of the source of the information which Adv Mkhwebane claimed to have been '*reliably informed*' – the response was '*the information requested was provided and sourced from anonymous, therefor is it not readily available and it is the subject of the interlocutory application pending in the High Court.*' The latter being a reference to an application by the Minister to interdict its disclosure.

813. Mr Pillay submitted evidence to the SARS Unit HC in the form of an affidavit attested by Mr Richter, challenging the reliability and credibility of the IGI Report, particularly that:

> '19. It is very apparent to me that the IGI report incorrectly conflated the concept of a certain type of capability considered between the NIA and SARS which was ultimately never seen through or concluded (but was reflected in draft memorandums that the IGI had access to), and the unit that is described in the review application as actually having been established by SARS. They were two completely different concepts.'

814. This was not disputed by Adv Mkhwebane.

815. Minister Gordhan then filed a replying affidavit in the proceedings before the SARS Unit HC in which he pointed out that the position remains that Adv Mkhwebane made findings based on the IGI Report that required the implementation of its recommendations, including criminal investigations, whilst claiming not to have seen or be in possession of it and not including it in the Rule-53 record.

816. The State Security Minister in an affidavit in the interlocutory proceedings stated that:

816.1. The IGI unilaterally extended her terms of reference to include the investigation on the conduct of SARS which allegedly contravened the SARS mandate and thus exceeded her power in terms of the Intelligence Oversight Act.

816.2. The reach of the IGI's powers is circumscribed under s 7(7) of the Intelligence Oversight Act which expressly provides that such powers are limited to '*services*' as defined therein; '*services*' are defined as the State Security Agency, the Intelligence division and the SANDF. The erstwhile IGI was not legislatively permitted to investigate the conduct of the SARS members simply because SARS does not form part of '*services*' as defined in the Intelligence Oversight Act.

816.3. The Minister could not implement the recommendations because: *(a)* she did not exercise jurisdiction over law enforcement agencies, nor does she have a statutory mandate to institute criminal investigations on erstwhile members of SARS; *(b)* she did not enjoy jurisdiction over the SARS and thus cannot enforce recommendations relating to the SARS and its employees.

817. Adv Mkhwebane indicated that the Minister '*was wrong to allege that the Public Protector was illegally in possession of the OIGI Report*'.

818. Adv Mkhwebane refused to accept the Minister's submissions on the unlawfulness of IGI report itself but did not set out any persuasive legal basis. She complained that the Minister had undermined her remedial action by agreeing to set aside the IGI Report. She went so far as to suggest that this was an '*unlawful attempt*' to undermine the remedial action contained in the SARS Unit Report. Adv Mkhwebane did not answer the allegation by the Minister that she had formulated the remedial action without having sight of the IGI Report and thus had not applied her mind. On 8 June 2020, an order was granted reviewing and setting aside the IGI Report.

819. It is not disputed that the IGI and Adv Govender did not have sight of the document which Adv Mkhwebane had in her possession and in fact had not authenticated that particular document. '*Authenticate*' means to '*validate*' or '*verify*', in the same sense as what the senior counsel whose opinion had been obtained subsequent to the meeting of 31 January 2019 had advised. It appears that after the meeting of 31 January 2019, Adv Mkhwebane had taken the stance that the report in her possession was not authenticated and she did not have verification that what she had was the authentic IGI Report. However, it was at that stage that Adv Mkhwebane in her evidence before the

Committee indicated that the copy of the report that was in her possession had been authenticated as the classified IGI Report in the custody of the Minister. Noticeably, the senior counsel engaged in February 2019 for his opinion was not instructed that the report had been so authenticated on 31 January 2019. The highwater mark of this authentication appear to be a common date.

820. Adv Mkhwebane, in her answering affidavit responding to the State Security Minister, alleged:

> '48. The allegations contained herein are denied in so far as they reflect that I apparently sought more information from the IGI, I only sought to be provided with a declassified report to enable me to perform my duties as mandated by the Constitution and the Public Protector Act.
>
> 49. The fact that I had it on good authority what the findings and recommendations of the IG report were does not mean that I was wrong in what the contents of the IGI report are and there is no evidence to indicate that the contents of the IGI report states otherwise.
>
> 50. I have already alluded to the fact that in arriving at my findings, I have considered, inter alia, the IGI report. The IGI report was not the only source of information that informed my findings.' [Emphasis added]

821. In respect of the State Security Minister's allegation that the relief to implement the IGI Report was incompetent, Adv Mkhwebane said:

> 'The allegations contained herein are denied. The remedial actions against the Fifth Respondent are competent in so far as there is no evidence contrary to the fact that SARS created a covert intelligence unit thereby.'

822. Adv Mkhwebane, earlier in her affidavit, stated as follows:

> '5. The IGI report which the [Minister of State Security] conceded should be reviewed and set aside was considered by the Public Protector who had conducted an independent investigation confirming its findings on the unlawful establishment and activities of the SARS intelligence unit. She issued remedial orders in which the findings and recommendations of the IGI report are to be implemented.'

823. Nowhere in the numerous affidavits filed in the SARS Unit HC review application did Adv Mkhwebane expressly state that she was in possession of the IGI Report or even a document that purported to be the IGI Report. That this was referred to in correspondence in the record or that Adv Mkhwebane had told the IGI in a meeting or the Minister in a private meeting that a copy had been dropped off at her office only added to the confusion. When called upon to disclose in terms whether she was in fact in possession of the report, Adv Mkhwebane obfuscated, refusing to admit she was in possession of a classified IGI Report (or one that purported to be such) that she relied on for purposes of her SARS Unit Report.

824. Further, it is evident from the court records that Adv Mkhwebane, until March 2019, had claimed under oath more than once that she was not in possession of an authenticated or verified version of

the IGI Report and even procured an opinion from a senior counsel premised on such. This was months after the meeting with the IGI on 31 January 2019.

825. And yet, Adv Mkhwebane's affidavit in the interlocutory application show that she relied heavily on the IGI Report to make her findings – to the extent that without the IGI Report she claimed that both her findings and her remedial action were undermined.

> '16. The classified IGI report was provided to me by an anonymous source. I needed the relevant minister to declassify the IGI report, not because I am not entitled to access or use a classified one. In law I am entitled to access any document, whether such document is classified or not. **I sought to have the OIGI report in my possession declassified because I wanted to ensure that I could utilise the document for the purpose of conducting my investigation without the constraints of its classification. Having been given the undertaking by the minister of state security that I would receive declassified IGI report, I was entitled to rely on that undertaking for the purpose of conducting my investigation into serious matters involving the complaints**.
>
> 17. I do not know where the EFF obtained a report attached its papers. I have the IGI report which will form Part And parcel of the Rule 53 records. In my report I correctly reflect the findings of the IGI report in paragraphs 5.2.33 and 5.2.34 of my report.
>
> 18. I am aware that Minister Gordhan and Mr Pillay have dared me to explain my reference to the IGI report, in particular how I obtained it. I shall deal with their concerns when I deal with the review application. Suffice for now that I am authorised in terms of my legislative and constitutional powers to have access and regard to any document, or report for the purpose of performing my constitutional functions. The classification of document by the state does not constrain me in the performance of my constitutional function.
>
> 19. If the IGI report is interdicted and expunged from the court record, my report will be stripped of crucial evidence relating to the matters that I cover in my report. Furthermore, the Honourable Court will be deprived of very important evidence on which to reflect on my following findings which are being challenged by Minister Gordhan and Mr Pillay:
>
> (1) that SARS created a covert unit utilising covert and intrusive methods which was not in line with SARS mandate and was in violation of section 209(1) of the Constitution which only empowers the President to establish any intelligence service;
>
> (2) that the establishment of an intelligence capacity within SARS, a capability exclusive only to legislate of intelligence services, was illegal;
>
> (3) that criminal charges be investigated against Minister Gordhan, Mr Pillay, Mr Van Loggerenberg, and Richer for the establishment involvement in the unit; and
>
> (4) that SARS produce a credible inventory of equipment which was used over a period by the NRG in the course of its covert activities.
>
> 20. These are the findings that I made in my report which appear from pages 58 at paragraphs 5.2.56 to 5.2.63. The Honourable Court determining the validity of my report in the review application must determine whether my findings and remedial action was unlawful irrational or biased, by having regard to the content of the OIGI report. To expunge a critical source of evidence relevant to the determination of the review application would be unfair to the Honourable Court, the complainants and the public. It would also be unfair to me in then it would open my report to unjustified attacks.
>
> 21. I was entitled to have regard to the findings of the inspector general as contained in the IGI report for the purpose of conducting my constitutionally sanctioned investigation relating to this matter. This means that the Honourable Court must have regard to their entirety of the record including relevant reports of any other constitutional or legislative body which I considered for the purposes of my report. The Honourable Court must have regard to the legal opinion of Trengrove and Nxumalo; the Sikhakhane Panel Report; the KPMG report, the affidavits of persons who were approached by me; the court

> judgments that I referred to; the legislative and constitutional provisions; the evidence submitted to me by SARS and the submissions made by different persons and entities on the subject matter. To exclude the OIGI report which is directly on point in relation to the issues would be unreasonable, unfair and simply wrong.
>
> 22. The Inspector General's word on matters in dispute in the review application is critical since the office is established for the specific purpose of investigating and monitoring the conduct of intelligence services and their activities. It is a strategic and critical body created to ensure that intelligent services operate within the law and are accountable for their intelligence activities.
>
> . . .
>
> 28. I admit that the IGI report is classified secret. The purpose of the IGI report is to bring to the attention of the court's understanding why I made the findings that I made.' [Emphasis added]

826. In his evidence before the Committee, Mr Van Loggerenberg raised his concerns about Adv Mkhwebane's reliance on the IGI Report, her implementation of the recommendations contained therein and that the IGI Report had not formed part of the Rule-53 record. According to Mr Van Loggerenberg, during the litigation Adv Mkhwebane's version went from saying that she '*merely had something on good authority*' to '*in fact, there was a report but it was mysteriously dropped off in the foyer of the building. But there's no CCTV camera or footage or anything*'. He said that, ultimately, in argument it was conceded that in fact Adv Mkhwebane had been in possession of the report all along.

827. Having listened to the recording of the meeting between Adv Mkhwebane and the IGI, Mr Van Loggerenberg said that it seemed to him that at one point the IGI and Adv Govender were talking about the State Security Agency and '*rogue agents in units there*', whereas Adv Mkhwebane was talking about the SARS Unit. He explained that the conversation seemed to be at cross purposes. The primary content in respect of units, agents and operatives pertained specifically to the SSA and not SARS.

828. Adv Mkhwebane's legal representative asked Mr Van Loggerenberg where in the report it was '*emphatically stated*' that Adv Mkhwebane did not have the report. Mr Van Loggerenberg, who had used the word 'emphatically', agreed that wording in the SARS Unit Report was that Adv Mkhwebane had been '*reliably informed*' that the IGI Report was in the custody of the former State Security Minister. He added that heard been aware that the Public Protector had been '*fighting it out'* with the State Security Minister to get the report declassified.

829. Adv Mkhwebane's legal representative referred Mr Van Loggerenberg to the portions of the SARS Unit HC judgment that said that Adv Mkhwebane had '*explicitly'* (as described by the SARS Unit HC) stated that she had not seen the IGI report, which he said were clearly wrong as Adv Mkhwebane had never used those words. Mr Van Loggerenberg pointed out that the IGI Report had not been part

of the Rule-53 record. He referred further to Adv Mkhwebane's statement at para 5.2.27 in the SARS Unit report that '*in an attempt to determine the veracity of the allegations of the existence and activities of the intelligence unit, I sought more information from the Inspector-General of Intelligence… This information was attributed to a report by the former Inspector-General of Intelligence.'* He explained that this means emphatically that at that point in time, Adv Mkhwebane doubted the veracity of the allegations and sought to determine their veracity.

830. Mr Van Loggerenberg continued, 'If she was [in possession of the IGI report] it would simply have said: I have the report, here's the report, this is what it says'. Instead, she ascribed her knowledge and insight of the report to some kind of 'good authority'.

831. Mr Van Loggerenberg asked if the proposition was that Adv Mkhwebane was indeed in unlawful and illegal possession of the IGI Report. It was clarified that he was being asked about being in possession of something illegal and trying to make it legal. Mr Van Loggerenberg responded that if that was the case then that made the point of what he testified in his evidence in chief about Adv Mkhwebane being in unlawful possession of a classified report. Ultimately, if that was the version of Adv Mkhwebane, then the Committee should adjudicate it, he did not wish to express a view.

832. Mr Van Loggerenberg said that his point was a narrow one. If Adv Mkhwebane was in possession of the report unlawfully and illegally so, she did not say this at any stage, and she used it to impose remedial actions, without providing it to those implicated parties. She also did not provide it to the Court. Mr Van Loggerenberg did not dispute Adv Mkhwebane's legal representative's statement that she had been in possession of the IGI Report and that she had wanted to use it and make it legitimate so that she could rely on it in her findings and remedial actions in the report. However, Mr Van Loggerenberg added that she had issued the SARS Unit Report before she achieved that goal.

833. Mr Van Loggerenberg conceded that he had concluded that Adv Mkhwebane had not emphatically said that she had not seen the report from a '*conspectus of what [he] testified about* and that it was not based on anything that she explicitly said. He reiterated that at the time Adv Mkhwebane relied on the report she was in illegal possession of it. Further, if Adv Mkhwebane had engaged with him and put the IGI Report to him, Mr Van Loggerenberg would have taken it on review. Mr Van Loggerenberg agreed that Adv Mkhwebane would not have known when she issued her report that it would be set aside in future.

834. Mr Pillay testified that he had not been afforded a hearing in respect of the IGI Report or the findings therein. He had not been interviewed for the IGI investigation – the IGI had come to SARS, he had met with her and discussed the way in which SARS would participate in the investigation, yet Adv Mkhwebane went into these issues, but he and others did not have the IGI Report.

835. Mr Pillay confirmed in his affidavit in the Part A proceedings that the IGI Report was not listed as a key source document in the SARS Unit Report or in the Rule-53 record.

836. On 4 January 2019 Mr Mataboge had been informed that during December 2018 Adv Mkhwebane had '*received information*' that there was a report by the IGI dated 31 October 2014. Mr Mataboge became aware of the fact that Adv Mkhwebane was in possession of the IGI Report when they met with the IGI on 31 January 2019, but he did not see the IGI Report and no documents were exchanged in the meeting.

837. Mr Mataboge denied having the IGI Report until he was provided with an email proving the contrary, at which point he was prepared to admit that he had the report soon after the meeting which he had been asked to put in the safe, but then he denied ever having read the IGI Report. This being the first top secret report that ever came into his possession, and the context of an investigation, knowing that only he and Ms Mvuyane were working on the report and she ostensibly was not going to be provided with the IGI report. Ms Mvuyane's evidence in turn was that she did not have the IGI report, never had sight of it, and did not put anything from it into the draft SARS Unit Report. She did not have access thereto. She was told it was because she did not have the requisite security clearance by Mr Mataboge and Adv Mkhwebane.

838. Mr Mataboge confirmed that the earlier draft of the SARS Unit Report contained remedial action requiring that the State Security Minister commission an investigation by the IGI '*on the current status of the unit for any continued breaches of the Act by individuals or organisations and take the necessary appropriate action as provided for by the enabling legislation*'. Mr Mataboge was evasive as to how the remedial action implementing the IGI Report came to be included but could not dispute that it came from Adv Mkhwebane given that he allegedly did not read it and Ms Mvuyana had never seen it.

839. Ms Mvuyana was referred to an earlier version of the s 7(9) notice to Minister Gordhan which stated that Adv Mkhwebane was unable to utilise the IGI Report as she was still waiting for the State Security Minister to declassify it. Ms Mvuyana agreed that it said so.

840. At a meeting on 3 July 2019 between Adv Mkhwebane and Ms Mvuyana, recorded by Ms Mvuyana in her notes, Adv Mkhwebane had told her to insert the remedial action that the State Security Minister implement the IGI Report into the SARS Unit Report.

841. Adv Mkhwebane's evidence **before the Committee**:

842. In her written response to the questions from the Committee arising from the meeting of 15 July 2019, Adv Mkhwebane confirmed that the IGI Report was not listed in the key sources of information that she had relied on during the investigation. She elaborated:

> 'However, I attach the recording that I relied on. Having regard to the fact that the report is classified, I relied on the recording mentioned herein above as a source for information. **As the authenticity of the report was confirmed by the Inspector General and Advocate Govender and it was also available in the public domain, I was entitled to use the relevant information in the report but not to distribute it to 3rd parties until it was declassified'**.

843. In response to a question regarding what Adv Mkhwebane as Public Protector was obliged to do with such a report, she answered as follows:

> 'There is nothing in law that precludes the PP in the performance of her duties to be in possession of any document in any form. In addition, I have a top secret clearance certificate. The Protection of Information Act deals with offences for the possession and disclosing of classified information. I must emphasise that in terms of this legislation, physical position is one thing, however disclosure of such information is an offence.'

844. Adv Mkhwebane was asked whether she had done what was required by law having received the IGI Report anonymously and being in illegal possession thereof. She answered that:

> 'I must state that I was not in illegal possession of the document. As Public Protector, after being in possession of the document and intending to use it, the steps I took were: (1) wrote a letter to the IGI (2) had a meeting with the IGI to discuss and confirm whether the document belongs to them; (per the recording). They advised me that the document is the property of the Minister as per section 7(8) of the Intelligence Services Oversight Act; (3) I approached the Minister to give me a declassified copy to no avail and even issued a subpoena. The Minister failed to honour the subpoena. I then laid a criminal charge against her for failing to adhere to the subpoena, which the NPA declined to prosecute. (4) I then approached Minister Dlodlo, to no avail. Minister Dlodlo only availed a declassified copy as part of my Remedial Actions.(5) I also approach the President for intervention to no avail.'

845. Adv Mkhwebane was asked whether there was any reason why she could not disclose in her report that she had received a classified document anonymously, that the possession of it was illegal, and state what she did with it. She was also asked, if there was no reason not to do that, why she did not do so? Adv Mkhwebane stated that:

> 'in the Report, I mentioned the 'recording' as key source of information. That can be read to include the meeting which was being recorded. The good authority referred to is the confirmation of the existence and authenticity of the IGI report by the IGI himself and his advices as to how it maybe declassified and

> made available. All this comes out clearly from listening to the recording, which was included in the Rule 53 record.'

846. Adv Mkhwebane was asked for an explanation on the '*good authority*' on which she had relied to find that there was a covert unit in SARS utilising covert and intrusive methods. Adv Mkhwebane said that '*I relied on what is contained in the recording'*.

847. It was asked of Adv Mkhwebane whether the fact that the IGI Report was classified was the basis for not referring to it as a key source of information, when it was referred to in the body of the SARS Unit Report. The answer was:

> 'As indicated above, there is no prohibition against using a relevant document, the authenticity of which has been confirmed by the owner thereof and which is in the public domain. The rules which apply to investigations are not the same as in adjudicative or determinative process, although fairness is a general standard in all processes. I could not turn a blind eye to the information given to me. To the extent that I had an objective to have the report not only authenticated but also declassified, I made all reasonable efforts to do so.'

848. In her statement to this Committee, Adv Mkhwebane said that:

> 'The court in its judgment unfairly accuses me of bias based on distorted facts, the court found that I explicitly stated in my report that I had not seen the OIGI report and yet referred to its findings on the basis of the distorted facts, the court made a dishonest finding against me however, during the testimony of Ms Mvuyana and Mr Mataboge it was pointed out, at no stage did I claim that I did not see the OIGI report as repeatedly and wrongly asserted in the High Court judgment. I therefore submit that the dishonesty finding and the charge based on such wrongly distorted and asserted information cannot be used as a ground to impeach me. As such, this charge stands to fail.'

849. Adv Mkhwebane relied on the letters from the IGI stating that she had told them she was in possession of a report and the recording of the meeting with the IGI where she also said that.

850. Adv Mkhwebane explained that she wanted the declassified version because she knew that the version that she had was classified.

851. Adv Mkhwebane referred the Committee to the judgment of Sutherland J, which she said had held that as the IGI Report was already in the public domain there was no point in dealing with it as a classified document. Her point being that '*it should be clear out there that even judges used that particular document*'. The reference to the Sutherland judgment refers to the matter of **Gordhan v Malema** under Case No: EQJHB5/2019 in the Equality Court. Judgment was handed down on 31 October 2019 after the SARS Unit Report had already been issued. In that matter reliance was placed on the IGI Report and an application was brought to strike out its inclusion based on relevance. As is apparent from para [29], Sutherland J's reading of the report that was provided to him reflected that there was '*no agents' identities were disclosed*'. Yet, the IGI Report referred to

in the SARS Unit matter was specifically redacted to remove such names. There is no indication that the report which served before Sutherland J was the same IGI Report, which the Minister redacted.

852. The evidence before the Committee is that Adv Mkhwebane was in possession of the classified IGI Report from January 2019, and such possession was unlawful.

853. Adv Mkhwebane's evidence to this Committee that she relied on the IGI Report as it had been authenticated by the IGI on 31 January 2019 is directly contradicted by her evidence under oath in the SARS Unit HC and in her criminal complaint that she was not aware whether the IGI Report in her possession was authentic. This explains her obfuscation before the SARS Unit HC regarding whether she was in possession of the IGI report or not, relying on wording such as '*good authority*' and '*reliably informed*' and declining to disclose whether she was in fact in possession of the IGI report until her third set of heads of argument.[103]

854. It bears noting that:

854.1. '*Explicitly'* according to the Oxford dictionary means '*in a clear and detailed manner, leaving no room for confusion or doubt*'.

[103] See paragraph 119 of the SARS Unit HC judgment. Further: Para 7 of Heads of Argument dated 26 June 2020.
'The Public Protector started engaging with the SARS Acting Commissioner, Mark Kingon by addressing a comprehensive inquiry dated 3 December 2018 [Rule-53 Record, pp 11 – 12.]. She addressed further inquiries to the Office of the Inspector-General in a letter dated 14 January 2019. [Rule-53 Record, pp. 15 – 19.]
The Office of the Inspector-General immediately responded in a letter dated 15 January 2019.[Rule-53 Record, pp. 20 – 21] confirming having conducted an investigation into media allegations against the Special Operations Unit (SOU) and/or other branches of the State Security Agency (SSA) in 2014. The Inspector-General also confirmed the existence of a report on the investigation but declined to give it to the Public Protector. As a consequence of the Inspector-General's position on the report, the Public Protector issued a subpoena on 18 January 2019 against the State Security Minister for the production of the report. The Inspector-General subsequently undertook to submit the report to the Public Protector after consultation with the State Security Minister. The Public Protector **subsequently** received the report of the Inspector-General of Intelligence through an anonymous source who left it at the offices. Given that **the report had been obtained with its classification of Top Secret, there was a dispute over whether she could lawfully rely on it.** The applicant makes a meal of this in his complaint against the Public Protector, although this must be water under the bridge. The State Security Minister subsequently agreed to give the Public Protector a declassified version of the IGI Report with redactions of sensitive information on it. There was some disagreement on the scope of the redactions with the consequence that the State Security Minister launched legal proceedings against the disclosure of the IGI report. At the time of drafting these submissions, there were two irreconcilable positions that had occurred.
Para 8 of Heads of Argument dated 26 June 2020.
While awaiting judgment on whether the IGI report could lawfully be declassified and published, the Minister conceded an application to review and set aside the classified IGI report whose disclosure she had contested in court and for which a judgment was outstanding. **These events do not necessarily impact on the review application which must be decided on the basis of information that was before the Public Protector and in the review record.** This means that the fact that the Minister has conceded an application by Mr Loggerenberg to review and set aside the IGI Report does not bar this court from evaluating the merits of the review application on the basis of all the information that was before the Public Protector, including the IGI report. To the extent necessary, the status of the IGI Report in these review proceedings will be addressed in supplementary heads of argument depending on the position of the applicants as to its relevance to evaluating the validity of the Public Protector's report.'

854.2. '*Good authority*' means '*to know or believe something because you have been told that it is true by someone you trust*'; [104]

854.3. '*reliably informed*' means '*told by somebody who knows the facts*'. [105]

855. The common thread to the SARS Unit Report and the affidavits attested to by Adv Mkhwebane is that she left the reader in no doubt that she had obtained the information contained in the IGI Report from a source other than the report itself. Her refusal to clarify whether she had a copy of the IGI Report when asked to do so and her reference to her attempts to obtain the IGI Report from the State Security Minister misled the parties and the Court.

856. This failure to disclose was dishonest. Adv Mkhwebane's treatment of the IGI Report, her unlawful possession of it and her contradictory versions leading one to the conclusion that she has been dishonest and misleading about her possession of the classified IGI Report.

857. Adv Mkhwebane's explanation for not including the IGI Report in the s 7(9) notice does not hold water, she was not entitled to hide information upon which she relied, in order to see what the response from the implicated party was first; nor does the suggestion that she had only just received the IGI Report when the notices were sent.[106]

858. There is no explanation provided why Adv Mkhwebane could not wait for the declassification process to unfold before releasing her report in respect of the SARS Unit's establishment and activities. Given that the complaint had been lodged in November 2018, there was no urgency save for self-created urgency in that Adv Mkhwebane decided to put an EMEA complaint in the same report as other complaints but given that the EMEA complaint comprised less than five pages of the SARS Unit Report, it could readily have been excised.

859. To the contrary, Adv Mkhwebane seemed determined to use and rely on the IGI Report regardless of the obstacles in her way.

860. Nevertheless, and without a declassified IGI Report, the SARS Unit Report was released, reliant in large part on the report of the IGI for its findings and remedial action.

[104] Merriam-Webster dictionary.
[105] Merriam-Webster dictionary.
[106] Adv Mkhwebane was vague in explaining why the s 7(9) notice did not refer to the IGI Report. She seemed to suggest that they wanted to go through the response and see whether it was '*also on the IGI report*' or that the IGI Report had just (recently) been dropped in the office.

861. Before this Committee Adv Mkhwebane's attempt to downplay her reliance on the IGI Report is starkly contradicted by her testimony under oath before the Court in the interlocutory application, where she submitted that without it, she would not be able to defend the findings in her report related to the establishment and alleged unlawful activities of the SARS Unit or her remedial action.

862. The explanation why it was not in the Rule-53 record (because it was classified) is rejected – it ought not to have been relied upon in that case. Noticeably a different stance is adopted in relation to the FIC documentation and private bank account information in the CR17 matter.

863. What was not addressed in her oral evidence was why Adv Mkhwebane did not state in terms in the SARS Unit Report that the '*reliable source*' which she had was the IGI Report itself.

864. The Committee notes that there were many inconsistencies, and the Committee was misled in respect of the IGI Report. Both the Committee and the courts had been misled about Adv Mkhwebane's possession and the use of the IGI Report. It was proposed that there should be a comprehensive investigation by the SSA on how the report landed in the hands of people without top security clearance. The majority agreed – the view was expressed that the IGI should investigate how the report was obtained by Mr Shivambu too.

865. Further, it was stated that misleading Parliament was gross misconduct by Adv Mkhwebane.

866. In respect of the investigation the view was expressed that Adv Mkhwebane's conduct in respect of the IGI Report showed that she did not have an open mind as an investigator. It was agreed that Adv Mkhwebane was determined to rely on the classified IGI Report despite any obstacle in her way. There was no basis in law to rely on that report. The use of the words '*good authority*' was problematic.

867. The view was expressed that it was of concern that Adv Mkhwebane never reported her unlawful possession of the classified report to the relevant authorities. This was indicative that she was prepared to break the law to arrive at a particular decision. This was not the standard of conduct expected of a Public Protector. It was also not consistent with the Constitution.

868. The minority view was that this was not an offence that warrants removal from office.

869. **Adv Mkhwebane's conduct in the manner she handled the IGI Report was not only dishonest, but also unlawful. Her reliance on the IGI Report was without basis in law or fact and lacked independence. She had misconducted herself in this regard.**

(x) Adv Mkhwebane's pandering of the rogue-unit narrative and her public reference to the unit as the *'rogue unit'* and as a '*monster*' and her stated desire to '*defeat the monster*' display a profound bias towards Minister Gordhan and Mr Pillay

870. This section deals with the allegation that Adv Mkhwebane was biased in favour of finding that the SARS Unit was '*Rogue*' and conducting her investigation toward that end. The allegation is assessed in two parts:

871. Firstly, the public references to the unit as the *'Rogue unit'* and the comments made at the meeting with the IGI on 31 January 2019 in relation to the unit being a '*monster*' which contributed to the finding of bias contained in the SARS Unit HC judgment.

872. Secondly, the general pandering to the *'Rogue unit'* narrative in the manner that the investigation was conducted in relation to the alleged unlawful activities such as interception, procurement of equipment and unlawful recruitment procedures.

(a) Public comments of 'Rogue unit' and 'monster'

873. Adv Mkhwebane referred to the SARS Unit as the '*Rogue unit*' at a media conference, published on YouTube three times, not by its designated name or even the '*so-called Rogue unit*'.

874. The relevant portions of the transcript read as follows:

> 'I would like to communicate with the South African public about what has been happening in our investigation of the Minister of Public Enterprises. And there were allegations that I'm harassing him, and we issued a subpoena or, yes, to him requesting information about several investigations which we were conducting. The first one was relating to the pension payout to Mr Pillay and he was subpoenaed. He appeared. And that was the complaint which was lodged in 2016 and we wanted his side of the story, because we've conducted our own investigation, and as well to help us in the investigation. Normally, that's what I do with all other Ministers in my investigations, or all other people complained against.
>
> So in this one then, it was all over the media and being portrayed as if I am targeting Minister Gordhan. And secondly, there was also a complaint which was lodged in 2016 relating to the tender processes, or irregular tender processes of a contract which was awarded to BB & D, and also a tender relating to all the purchasing of Interfront. That investigation is in progress, but again the EFF launched a complaint plus an anonymous complainant where they were also lodging a complaint about the involvement of Minister Gordhan. It needs to be clear to the South Africans that I receive complaints. I don't go around and ask people to complain. And therefore, when I received the complaints, I will have to approach the person who's complained against, request their side of the story. And we will all know that the EFF complaint was dealing with the Rogue unit, the processes which have been followed, the recruitment, the procurement of the equipments, their operations. And another complaint was relating to the complaint under the Executive Members Ethics Act where they were alleging that Minister Gordhan lied in Parliament about his meetings with the Guptas. Therefore, I'm coming forward to say there still is a number of interactions which we'll have with Minister Gordhan. There's also another complaint about IFMS at Treasury and under Minister Gordhan's watch. And again, we will still go back to him and request information.

> Now, the challenge I'm facing is that the report we've recently issued, there was a serious attack on the person of the Public Protector, and this media narrative which I've indicated that I don't own any form of media, so this is my opportunity to communicate to whoever will listen that I'll be issuing a section 7(9) notice relating to the EMEA which I need to finalize within 30 days, which that time has actually lapsed and relating to his meeting with the Guptas, but that is also, … part of the of that section 7(9) notice is issues relating to the operations of the Rogue unit and I know that one will be faced with a lot of questions, in fact, there will be a lot of questions, there will be allegations that I'm also still persecuting Minister Gordhan, but I'm doing my work. And I understand when it comes to the issue of the Rogue unit, people have lost lives, people have been tainted, and I think that it's still going to happen, but I'm doing my work and I will be serving that notice today which is 2 June 2019. In fact, it's 3 June 2019. And I'm ready to receive all the backlash, but I'm doing the work. I am not targeting or harassing any Minister, specifically Minister Gordhan.' [Emphasis added]

875. At a meeting on 31 January 2019 between the IGI, Adv Govender, Adv Mkhwebane and PPSA staff, Adv Mkhwebane referred to the unit as '*Rogue unit*' and further referred to having to '*defeat the monster*' with reference thereto.

876. According to the transcript of that meeting, Adv Mkhwebane stated the following:

> 'ADV MKHWEBANE: Wherever we can. You know, our small ways, we will defeat the monster. So, let's also not allow things which we think they will threaten us or they'll stifle our work to allow them to be our key focus. How do we make sure that irrespectively of that that we're moving forward and dealing with It. Because I mean if we still have this monster; because it's another monster that Rogue unit. You cannot have this.' [Emphasis added]

877. Minister Gordhan's attorneys addressed a letter to Adv Mkhwebane about her public utterances in the YouTube video, Facebook posts and at a speech made at a Gala dinner, describing it as '*false and defamatory statements*'. In addition to the reference on YouTube in which the '*Rogue Unit*' was associated with loss of life, Adv Mkhwebane had stated on social media and at the Gala dinner that there had been threats of her arrest for money laundering and poisoning since she started the investigation.

878. The concern raised in the correspondence was that Adv Mkhwebane had publicly prejudged and expressed adverse views and conclusions in respect of the SARS Unit at a time when her investigation was ongoing. The allegations against the SARS Unit and Minister Gordhan were characterised as '*irresponsible, dangerous and extremely damaging to our clients*.' Adv Mkhwebane was informed that her utterances were indicative of bias and a lack of objectivity.

879. The Committee was presented with an email sent by Adv Mkhwebane to Messrs Sithole, Mataboge and Seanego Inc, dated 15 June 2019 in which Adv Mkhwebane responded to the aforementioned correspondence as follows:

> 'Subject: Re: URGENT DEMAND: PUBLICATION OF FALSE AND DEFAMATORY STATEMENTS REGARDING MESSRS IVAN PILLAY AND VAN LOGGERENBERG

> There is proof of threats to arrest for money laundering, threats to poison me and actually my Protector has been poisoned (we have proof from the doctors)
>
> My car tempered with
>
> Witnesses who fear for their lives confirmed two people who died mysteriously when they spoke about the Rogue unit
>
> Peega arrested for rhino poaching after speaking out(set up)
>
> Mokoena charged for non existent tender irregularity and frustrated until she resigned
>
> Busisiwe Mkhwebane'

880. Adv Mkhwebane then instructed: '*Please request Seanego to respond and rebut this. I will not withdraw or apologise*.'

881. In the SARS Unit HC matter, Minister Gordhan reiterated his complaint that Adv Mkhwebane, having not yet completed the investigation, yet she had already decided that the SARS Unit was unlawful, using the term '*Rogue unit*'. In support of these allegations, Minister Gordhan relied on the public utterances raised by his attorneys in their correspondence and the comments made by Adv Mkhwebane at her meeting with the IGI on 31 January 2019.

882. Mr Van Loggerenberg, in his oral evidence, explained that his motivation for deposing to an affidavit was Adv Mkhwebane's reliance in her report on the SARS Unit on '*propagandistic type activities*'. He described such activities as a '*complex orchestrated propaganda campaign*' with the purpose of capturing SARS and removing any opposition thereto. Mr Van Loggerenberg referred to the media briefing aired on YouTube. He explained that Adv Mkhwebane had expressed clear views about the SARS unit, which she referred to as the '*Rogue unit*' in her capacity as Public Protector, and even implicated the SARS Unit in murder. This was false. He was further not aware of any form of physical harm caused to any person by his units or their members. Mr Van Loggerenberg submitted that these public utterances showed that Adv Mkhwebane had not approached the investigation with an open mind, rather that she was biased and prejudiced.

883. Adv Mkhwebane's responses were as follows:

884. **<u>In the SARS Unit HC AA</u>**, Adv Mkhwebane said that:

> '310. When this interview was conducted with the Office of the OIG, I was aware from the preliminary investigations that there was an unlawfully established and Rogue spying unit established within SARS. The OIGI as set out in its report had concluded that the SARS had established an illegal spying unit which was engaged in corrupt and illegal activities. There are recordings of people working in the spying unit detailing how the spying Unit performed its activities which are part of the Record in these proceedings. The content of these recordings demonstrates an abuse of the unit that should make anyone with a constitutional duty to promote, protect, advance and uphold the Bill of Rights cringe. I was

> shocked to learn that SARS had established a spying unit to advance its statutory objectives. More importantly, the spying unit appears not to have operated lawfully but in a Rogue manner.'

885. Noticeably, she does not state that she was referring to the SSA Unit.

886. **Before the Committee:** In a written answer to the Committee's questions Adv Mkhwebane said that she had used the term '*So-called Rogue Unit'* which had also been used by others.

887. Adv Mkhwebane, in her Part A statement, attributed the allegation of bias to her having '*coined the term Rogue Unit'* which was not true. The term was used by the *Sunday Times* and commonly and widely used in the public space by those who believed that the alleged existence of the unit was unlawful or '*Rogue*'.

888. In her oral evidence Adv Mkhwebane said that the word '*monster*' was used by her in the context of the discussion she had had with the IGI about the operations at the SSA, at the end of which Adv Mkhwebane had indicated that the SARS Unit was still operating. These operations were unlawful - Adv Mkhwebane testified that she had evidence that the SARS Unit had conducted interception at the Directorate of Special Operations ('**DSO**'). She continued:

> 'The issue here is the operations and the activities. It's not about individuals. So, I think that is also… The issue of monster was mentioned in that context, and as well the issue of Rogue is mentioned in that context. It has nothing to do with individuals, but the action.'

889. Adv Mkhwebane explained that her comment that '*its another monster that Rogue unit. You cannot have this*' was referring to the way the SARS Unit operated, not any individual.

890. Adv Mkhwebane further submitted that the '*monster comment'* had been '*magnified'.*

891. The evidence before the Committee is that Adv Mkhwebane referred to the SARS Unit as the *'Rogue unit'* and as a '*monster*' which should be defeated. She implicated the members of the SARS Unit in murder, money laundering, poisoning, threats [to her] without any basis other than the historical recordings she had in her possession, the classified IGI Report and '*the facts of its conduct which are everywhere for everyone interested to see them*'.

892. The meeting with the IGI was at the early stages of the investigation. Adv Mkhwebane does not dispute that by then she had formed the view that the operations of the SARS Unit were unlawful. This is the explanation that she provides for having called the unit a '*monster*' that should be defeated. That she had prejudged the issues that she was meant to be investigating is further confirmed by the utterances made in public before the SARS Unit report was even released, in fact, prior to the receipt of the responses to the s 7(9) notices.

(ee) Pandering to the 'Rogue unit' narrative

893. The SARS Unit HC Judgment found the following:

> '[234] The Report must be based on a proper, objectively reasonable, factual basis and if competing evidence is presented to the Public Protector, she must deal with it rationally. Fairness demands that there must be a proper investigation. The Public Protector did not act in the manner required in our law of someone fulfilling this extremely important and responsible position. The Report is indicative of her mindset with which she approached the investigation. She postulated herself as a judge, receiving and dismissing evidence at a whim, and then closed her mind to the actual facts available to her to consider.'

(ff) The recordings

894. The key sources of information in the SARS Unit Report include '*Recordings related to the intelligence unit*'. These are:

894.1. A recording made of Mr Van Rensburg being interviewed by investigators working with Adv Brassey SC. The SARS Unit Report stated: '*In the recording Mr Van Ransburg discussed issues relating to, inter alia, the bugging of the NPA and DSO offices In 2007, by the SARS intelligence unit'*.

894.2. '*Mr Lombard and De Waal submitted during an interview with the former Commissioner of SARS, Mr Tom Moyane and Mr Makwakwa information on the unit activities. In the recordings Mr Lombard and De Waal discussed the intelligence unit and certain operations they had participated in during its tenure'*.

895. In the SARS Unit Report, Adv Mkhwebane concluded that Mr Pillay and Mr Van Rensburg irregularly recruited Mr Lombard and Mr De Waal and /or authorised them to intercept communication at the offices of the DSO and those of the NPA without an interception direction issued by a judge in terms of the Regulation of Interception of Communication and Provision of Communication Act ('**ROICA**'). The aforesaid conduct violated the rights to privacy of those intercepted and amounted to an abuse of power.

896. In the SARS Unit HC Adv Mkhwebane stated that she had made her public utterances regarding the unlawful activities of the SARS unit based on the IGI report and the recordings.

897. Mr Van Loggerenberg testified before the Committee that the SARS Unit never purchased, acquired, used or borrowed any equipment which could be considered to be '*spying equipment*'. The Sikhakhane Panel Report also concluded that it had not found any evidence that the unit had interception capacity.

898. Mr Van Loggerenberg had listened to the recordings relied on by Adv Mkhwebane during her investigation (these were discovered in the Rule-53 record in the **SARS Unit HC** labelled '*Rogue 1*' – '*Rogue 5*'). These were incomplete and out of context. It was further his view that they did not contain admissions of illegal activities.

899. Mr Van Loggerenberg testified that:

899.1. the SARS Unit, in all of its iterations, never used or acquired any sophisticated '*spying equipment*' nor did it unlawfully or illegally spy on any taxpayer, customs trader or SARS subject under investigation, nor did the unit participate in the interception of anyone's communication between March 2007 to October 2014 – which is the period of the unit's existence;

899.2. the SARS Unit, in all of its iterations, never conducted any investigations or lifestyle audit or tracking or spying as publicly alleged; and

899.3. the members of the SARS Unit, in all of its iterations, were never trained by SARS in mail dumps diving, cryptology, interceptions of communication and the like, nor did they use any such methods in any of their investigation.

900. According to Mr Van Loggerenberg's records and his ability to reflect such, the Unit conducted 81 investigations during its lifetime, all of which, as a prerequisite related to tax and/or customs and or excise related organized crime and serious offenses. According to him, in none of these investigations did the SARS Unit rely on unlawful spying on taxpayers or traders, illegal interception of communications of taxpayers and traders, '*sophisticated spy equipment*'.

901. Mr Van Loggerenberg said that the recordings concerned three SARS Unit members out of 26. The NPA refused to prosecute any of the members involved or implicated in these recordings. Furthermore, Adv Mkhwebane had not interviewed any of the persons concerned. He was the witness best placed to tell Adv Mkhwebane about the activities of the SARS Unit but she had never interviewed him.

902. It is common cause that Adv Mkhwebane did not interview Messrs De Waal, Lombard, Van Rensburg and Van Loggerenberg before issuing the report. From the evidence of Ms Mvuyana, no attempts were even made to reach any of them for purposes of an interview.

903. The recordings were relied on selectively and the statements that the SARS Unit had not purchased any equipment as claimed and that Mr Van Loggerenberg would never have countenanced this, were

ignored. Mr Lombard had in the recordings indicated that the equipment referred to had been acquired by a completely different unit at SARS and for a different purpose. Mr Van Loggerenberg knew of no persons who had bugged the offices of the NPA.

904. Mr Van Loggerenberg testified that from time to time the SARS Unit would work together with SAPS, the NPA, the asset forfeiture unit – all the law enforcement and intelligence agencies of the country.

905. Mr Pillay denied that he had asked anybody to bug the NPA. He was aware that the DSO had requested for certain equipment to be put at their premises. This was done by people who worked at SARS who had a private company and did this after hours, rendering the service to the DSO.

906. Mr Mataboge testified that the PPSA relied on the recordings but did not authenticate them. Ms Mvuyana confirmed that the source of the finding that the DSO had been bugged was the recordings. They had not ascertained the veracity of the recordings, which were given to them on a memory stick. They took no steps to interview Mr Lombard or Mr De Waal. They were not in possession of affidavits from any SARS Unit members and did not interview any members of the SARS unit. No attempts were made to do so, save in the case of Mr Van Loggerenberg, where they only requested his contact details from the whistle blower.

907. Adv Mkhwebane's responses were as follows:

908. **Before the Committee:** In her statement to the Committee, Adv Mkhwebane said that there was ample evidence that Mr Pillay irregularly instructed/ permitted a certain Mr Lombard and Mr De Waal to intercept information/communication within the offices of the DSO and the NPO.

909. Adv Mkhwebane testified that '*the facts before me were that when we listened to the audios of the interviews conducted by the former SARS Commissioner, Mr Moyane, interviewing these two individuals, Mr Janse van Rensburg and Mr De Waal, in fact, Lombard and Mr De Waal; it was clear that he way this unit was operating was in such a way that it doesn't comply with the policy of SARS, it doesn't comply with the law, especially the SARS legislation and the Constitution*'. Further, it was the Commissioner of SARS, Mr Moyane, who interviewed the individuals concerned and that she had even discussed the matter with Mr Moyane.

910. Adv Mkhwebane said that the audio recordings of the interview between the two of them and Mr Moyane would be uploaded. The uploaded audio files consist of five files labelled '*Spilling the Beans*'. When pressed about the authenticity hereof, and Adv Mkhwebane's legal representative

relying on Mr Moyane, Adv Mkhwebane testified that she had spoken to Mr Monyane telephonically. This conversation is not recorded or referred to in the SARS Unit Report, the Rule-53 record or in the investigative diary. It appears to have been raised before the Committee for the first time. The precise details of this conversation or how it came about are not known.

911. A comparison of the '*Rogue*' *1 – 5* recordings, being what Adv Mkhwebane had at her disposal at the time, and the five '*Spilling the Beans*' recordings reveals that they are not the same. The former recordings are segments of the Spilling the Beans recordings. The '*Rogue*' audios appear to have been spliced from a bigger interview and not in the correct order, if Mr Moyane's affidavit and the '*Spilling the beans*' audio files submitted by Adv Mkhwebane are used as the comparator. The '*Rogue*' audios are also incomplete. Further, the transcript of the '*Spilling the beans*' recordings contained at least one material error.[107]

912. An article published on *News24* on 13 October 2019 headed '*Moyane knew SARS Unit wasn't Rogue*' claimed that *News24* had obtained pieces of the recordings not contained in Adv Mkhwebane's version of the recordings. The additional recordings are accessible in a link from that article. The alleged additional recordings include the recordings of a meeting on 20 March 2015, which were not part of the Rule-53 record. The additional recordings are also not authenticated. They are referred to simply to illustrate the point that they contained exculpatory evidence.

913. The evidence before the Committee thus shows that Adv Mkhwebane relied on, inter alia, unauthenticated recordings which are incomplete, spliced from other recordings and therefore unreliable for her findings that the SARS Unit conducted unlawful interception of the DSO and/or NPA and/or private individuals. Messrs Van Rensburg, Lombard and De Waal were not interviewed, nor did they give evidence in person and under oath. Finally, the recordings were relied upon selectively, ignoring portions which contradicted the findings in the SARS Unit Report.

914. In this regard, we note the SARS Unit HC judgment, found that:

> '[233] …Much is made of the recordings of Mr Janse van Rensburg, Mr Lombaard and Mr De Waal. The recordings are clearly a contentious issue, but concerns 3-unit members out of 26 employees at the time. The NPA ultimately refused to prosecute any of the members involved or implicated in these recordings. The Public Protector did not conduct any investigations of her own to verify the recordings and did not conduct any interviews with any of the people concerned. Of all the 'witnesses', the person best suited to tell the Public Protector what the unit did, was Mr Van Loggerenberg. She failed to interview him. And when he filed an affidavit in the review proceedings, she simply ignored his evidence.

[107] At p. 1002 of **'SC2'** it says '*[t]he Commissioner never did something about it*', yet according to the recording it should read *'[the] Commissioner never did something wrong*' (1:35:16).

(xi) Mr Van Loggerenberg: subpoena and evidence

915. In her SARS Unit Report, Adv Mkhwebane said that she 'tried to subpoena information and documentation from Mr Van Loggerenberg but to no avail as his last known residence has new occupants allegedly having relocated some years ago'. The earlier drafts of the report make no mention of Mr Van Loggerenberg. This sentence first appears in the 5 July 2019 draft.

916. One of the recommendations of the SARS Unit Report is that the IGI Report be implemented in totality. The IGI Report recommended that criminal charges be investigated against, *inter alia*, Mr Van Loggerenberg, Mr Pillay and Minister Gordhan for their '*criminal conduct'*.

917. Prior to issuing the SARS Unit Report, Mr Pillay had, in April 2019, submitted the charge sheet in the criminal matter, which contained the address of Mr Van Loggerenberg. He also referred Adv Mkhwebane to books authored by Mr Van Loggerenberg in relation to the SARS Unit.

918. Moreover, in June 2019, Webber Wentzel Attorneys wrote to Adv Mkhwebane indicating that they acted on behalf of Mr Van Loggerenberg.

919. In the SARS Unit HC, Mr Pillay raised Adv Mkhwebane's failure to consider documentary evidence provided to her office by Mr Van Loggerenberg during August 2016, which evidence was material to her investigation. Adv Mkhwebane denied this. She did not, however, clarify whether she had indeed considered the 2016 complaint and, if so, why she had then not been aware of Mr Van Loggerenberg's contact details contained therein or why this material information had not been referred to in her SARS Unit Report.

920. Mr Van Loggerenberg, in an affidavit attached to Mr Pillay's SFA in the SARS Unit HC, pointed out that he was directly and adversely affected by the remedial action in the SARS Unit report. He explained that he was the person most capable of confirming the accuracy and factual position relating to the HRIU (formerly known as the SPU between March 2007 to May 2008, renamed NRG from May 2008 to October 2009) as he oversaw and managed this unit from April 2008 until its closure on 10 October 2014. He also placed before the Court the comprehensive detail of the information that he had submitted to the PPSA in 2016. This information explained the '*Rogue unit'* narrative and the various attempts, using fake dossiers, to target persons opposed to the capture of SARS.

921. In addition to having his email contact details on record at the PPSA, which had been used to correspond with him by that office, Mr Van Loggerenberg drew attention to the various additional

methods that could have been used to contact him: *(a)* the Webber Wentzel letter referred to above; *(b)* his active social media accounts including Facebook; *(c)* a simple internet search would have shown his account on LinkedIn; (*d)* SARS could have been asked to provide his contact details; *(e)* he had authored two books which had been well publicised between 2016 and 2018 – his publishers could have been contacted to obtain his contact details; *(f)* he had often 'featured' in the media and the media had always been able to contact him telephonically or by email; *(g)* an internet search would have reflected at least 4 law firms who had acted for him and who could have been asked to make contact with him; *(h)* the Hawks and NPA could have been asked to provide his address; *(i)* Mr Julius Malema, the Commander in Chief of the EFF, had instructed his attorney to contact Mr Van Loggerenberg to seek his advice in 2015 and 2016 and so one of the complainants could have provided his details on request.

922. Mr Van Loggerenberg's affidavit was not disputed before the SARS Unit HC. Mr Van Loggerenberg elaborated on his HC affidavit in an affidavit submitted to this Committee. He concluded that:

> 'There was no way that she would have been able to conclude that investigation without having considered what I had already provided her office in 2016, in detail, and certainly not by having not interviewed me or asked me to respond to her in any manner on oath. Her claims not to have been able to contact me ring hollow. At best she displayed profound incompetence and lack of effort and elementary skills to conduct investigations and to do even the most basic thing to contact me, or at worst, she was deliberately dishonest and arguably may well have acted fraudulently by omission.'

923. In his oral evidence, Mr Van Loggerenberg reiterated that he was the person who would best have known about the activities of the SARS Unit.

924. He explained that he had approached the office of the PPSA in 2016 in respect of '*state capture at SARS*'. He then emailed the relevant documentation in support of his allegations to the email address provided to him by the staff of the PPSA. In a nutshell, the PPSA was already in possession of sufficient evidence to refute the allegations. The interview had been recorded. The documents in the possession of the PPSA contained his email address and mobile number.

925. Mr Van Loggerenberg confirmed that he had resided at the same address since 2010 and that Adv Mkhwebane could have used her powers to find him. He had checked with three Credit Bureaus and all had his home address. His phone number had been the same since the early 2000s and had been legally registered. In addition, Adv Mkhwebane could have also asked him to come in when making one of her public statements, including the YouTube statement. Adv Mkhwebane had his bank account details, and the bank had his contact details.

926. Mr Van Loggerenberg did not accept Adv Mkhwebane's version that she had been told by the investigators that they could not find him as this did not explain why she did not simply contact his lawyers who had written to her three weeks prior to concluding the investigation (or taken any of the steps referred to above).

927. In the PPSA responses to the Committee regarding what steps had been taken to trace Mr Van Loggerenberg, the investigators indicated:

> '1. In response to paragraph 3.2 of your letter- Supervisor or PP called a SARS employee who provided us with the address. There was no contact number for Mr Van Loggerenberg as all documents removed from Personnel file at SARS.'
>
> 2. At the time Investigator did not have full access to methods of tracking an individual.'

928. Ms Mvuyana, in her statement, said that Adv Mkhwebane played no part in tracing witnesses. She added that '*a decision was taken to proceed with the investigation into the alleged conduct of Messrs Gordhan, Pillay and Magashula*' and the '*the final report did not implicate him because we were acutely aware that he had not been successfully traced so as to properly afford him his right to put his side of the story. His name was only referred to in so far as the evidence referred to him as a participant but not as a perpetrator.*'

929. In respect of the evidence submitted by Mr Van Loggerenberg in 2016, she said that '*I have still not been able to find such alleged 'reams' of evidence. Nobody knows about such evidence or its whereabouts.*'

930. Mr Linda, the PPSA messenger, filed an affidavit regarding the service of the subpoena on Mr Van Loggerenberg. He said that he had tried to verify the address which had been provided on Google Maps before he went out. His search revealed that there was no Leadhood Crescent as stated on the subpoena, but rather Leadwood Crescent in Moreleta Park. He then proceeded to that address where he was informed by a caretaker at the property that Mr Van Loggerenberg no longer resided at that address. On his return to the PPSA offices, Mr Linda did an internet search and established that Mr Van Loggerenberg was a former employee of SSA, SARS and that he was appearing in court in Pretoria.

931. Mr Linda reported to Mr Mataboge that that he had been informed by the caretaker that 'it would be difficult to find Mr Van Loggerenberg and that as Mr Van Loggerenberg would be appearing in Court that would be the best place to find him for the purposes of service'. Mr Linda advised Mr Mataboge that he had been told that Mr Van Loggerenberg had lived there previously. In

November 2022 Ms Mvuyana asked Mr Linda for the return of service but it was not in the file in which the returns were kept in his office.

932. Mr Mataboge testified before the Committee that when a subpoena was issued and served/not served this ought to be recorded in the investigation diary. However, there was no recordal in the very sparse investigative diary in this case. Mr Mataboge had not been aware that prior to the SARS Unit investigation, Mr Van Loggerenberg had communicated with the PPSA and submitted documentation.

933. Mr Mataboge said that he knew that Mr Van Loggerenberg had been the head of the unit that he was investigating. He had not interviewed any of the members of the SARS Unit.

934. Mr Mataboge accepted that the subpoena contained a non-existent address. He had known that Mr Van Loggerenberg had been facing criminal charges and, since as the investigator in the Pillay pension investigation, he was in possession of the charge sheet in the criminal case which contained Mr Van Loggerenberg's address on the front page.

935. Mr Mataboge said that he thought that Ms Mvuyana got the address from SARS, then when informed that Ms Mvuyana said it came from him or Adv Mkhwebane, he said he would have to check. He did not remember making the call to obtain the address. He denied that Mr Linda had told him that Mr Van Loggerenberg could be found at court. He said Adv Mkhwebane told him about Mr Van Loggerenberg's pending court appearance when he informed her that Mr Van Loggerenberg was no longer at the address they had.

936. After the subpoena had not been successfully served, Mr Mataboge '*didn't do anything'*. He accepted that Adv Mkhwebane had wide powers under the PPA to access this information through a number of government bodies.

937. Further, although he initially denied knowledge of the letter from Mr Van Loggerenberg's attorneys, Mr Mataboge changed his version when shown an email, copied to him, from Adv Mkhwebane giving instructions on her response to that letter.

938. Ms Mvuyana, in her oral evidence said that Mr Mataboge called 'Mr or Ms Anonymous', the whistle-blower who was employed at SARS, and got the address from them. During cross examination she confirmed that in answer to the Committee's questions, she had said it was Mr Mataboge or Adv Mkhwebane and she then said that '*it was either one of the two, because I did not*'.

939. Ms Mvuyana said there was definitely no deliberate non-service of Mr Van Loggerenberg. She confirmed that '*once [she] or Mr Mataboge informed the Public Protector that [they] had done everything in [their] power to trace Mr Van Loggerenberg and failed*' Adv Mkhwebane was entitled to take their word for it. They did not have access to Facebook, YouTube or LinkedIn. During cross-examination, Ms Mvuyana conceded that when she did her internet search Mr Van Loggerenberg did '*pop up as an author*'. There were lots of stories about him.

940. Ms Mvuyana confirmed that Mr Linda told her that Mr Van Loggerenberg was appearing in court and that the subpoena could have been served at his next appearance or that she could have called the NPA to see if they could assist her in locating him. There were lots of things they could have done but '*with hindsight, none of them were done.'*

941. Adv Mkhwebane's responses were as follows:

942. **Before the Committee:** In her written answers to questions from the Committee, Adv Mkhwebane said that the complaint focused on Minister Gordhan and Mr Pillay and that '*Mr Van Loggerenberg was not an implicated person*'. Adv Mkhwebane answered that Mr Van Loggerenberg was not a '*prominent or primary person in the issues being investigated. To the extent that he was a member of the unit, he was not only entitled to be heard but the investigators wanted to interview him as well*'.

943. She had been '*assured by trusted officials that they had failed to locate him*.' Adv Mkhwebane said that she depended on the investigation team to trace people. According to Adv Mkhwebane, all efforts to trace him were actually undertaken.

944. Further, that Mr Van Loggerenberg would have been given an opportunity to state whether he committed any crime by the SARS officials who carried out the investigation in her remedial action.

945. In response to a question why she had not served the documents on Mr Van Loggerenberg's attorneys, Adv Mkhwebane said that they had not known that his attorneys had a mandate to receive subpoenas. Mr Van Loggerenberg could also have come forward of his own accord.

946. In her oral evidence, Adv Mkhwebane explained that she had split the investigation into two parts and that she only saw Mr Van Loggerenberg as an implicated party in the second part. They couldn't serve the subpoena but said '*Anyway, because there's part 2. We will still have to trace and find him so that he can give us his side of the story, especially on the money's paid and everything yes'*.

Adv Mkhwebane viewed Mr Van Loggerenberg as an '*affected party'* not an '*implicated party'* in part one of her investigation.

947. Adv Mkhwebane said that there was a stage during the criminal proceedings where, '*I said to Mr Mataboge, maybe, if you wanted to check on the availability or where we can find Mr Van Loggerenberg. But then later that was stopped because we said anyway we'll find him with this 'Part B' of the investigation. So 'Part A' for now let's keep it*'.

948. The conspectus of the evidence shows an address which did not exist was obtained from an anonymous whistle-blower who used to work at SARS. Neither of the investigators, nor Adv Mkhwebane, take responsibility for making the call that resulted in this address being used. Adv Mkhwebane claims, in her statement, that the information came from the SARS Human Resources. The investigators contradict this. No official attempt was made to obtain the address from SARS.

949. No attempt was made to obtain the address from other government departments. No attempt was made to contact Mr Van Loggerenberg through his attorneys, despite Adv Mkhwebane and Mr Mataboge being aware of their representation of him. No attempt was made to ask the NPA to assist by providing Mr Van Loggerenberg's address and no one looked at the charge sheet in their possession that had his address on. The investigators and Adv Mkhwebane were aware that Mr Van Loggerenberg was appearing in court on criminal charges and no attempt was made to serve the subpoena there. Ms Mvuyana and Mr Mataboge finally conceded that nothing had actually been done to trace Mr Van Loggerenberg, despite the many ways he could have been found.

950. Ultimately, Adv Mkhwebane conceded that she had made a decision not to find Mr Van Loggerenberg and to leave it for part two of the investigation. The reason for this decision, according to Adv Mkhwebane, was that Mr Van Loggerenberg was an implicated person in part two but only an affected person in part one of her investigation.

951. This explanation cannot be accepted in light of the fact that findings were made that the unit he headed conducted unlawful activities such as unlawful interception of DSO, NPA and other private individuals and the remedial action recommended that Mr Van Loggerenberg be investigated for '*criminal conduct'*.

952. Mr Van Loggerenberg indisputably had a large amount of information that may have exonerated the SARS Unit, or not, and gone towards proving that the SARS Unit was not involved the unlawful interception and in fact did not have the equipment to do so, or not. As such he was a crucial witness.

953. The SARS Unit HC judgment described Mr Van Loggerenberg as '*the person best suited to tell the [PP] what the unit did'. Yet 'she failed to interview him. And when he filed an affidavit in the review proceedings, she simply ignores his evidence.*'

954. The SARS Unit HC judgment finding in relation to the subpoena was that:

> '[188] This statement [that the PP was unable to subpoena Mr Van Loggerenberg is most surprising because, as the record now shows, the Public Protector had in her possession reams of evidence and documents already provided by Mr Van Loggerenberg. In addition, the address appearing on the subpoena is non-existent and, despite communication from Mr Van Loggerenberg's attorneys, the Public Protector made no attempt to contact him or his attorneys.'

955. Further, in relation to Mr Van Loggerenberg's 2016 complaint, the SARS Unit HC judgment said:

> '191. The office of the Public Protector therefore has been in possession of evidence in relation to the activities of the unit for a number of years but, despite the fact that it formed part of the record, the Public Protector failed to consider it at all. No mention is made of this evidence in the Report. This clearly shows that the Public Protector adopted a one-sided approach to the investigation. She conducted an imperfect investigation that does not meet the high yardstick of reasonableness that is set in law. Her approach to the investigation was fallacious.'

(xii) <u>Alleged procurement of illegal intelligence equipment</u>

956. The SARS Unit Report found that procurement processes had not been followed when acquiring intelligence equipment which the intelligence unit utilised for gathering intelligence, which amounted to maladministration.

957. The following sources of evidence are listed in respect of this finding:

957.1. The quote from the Nugent Commission report drawn to Adv Mkhwebane's attention by SARS that '*members of the unit <u>might at times</u> have acted unlawfully, that SARS employment policies <u>might have been breached</u>, that members <u>might unlawfully</u> have acquired and used equipment, all of which came later to be alleged*.' [Emphasis added]

957.2. The KPMG Report, particularly that:

957.2.1. Concerns had been raised about the requirement to motivate an upgrade request for cell phones for the NRG team.

957.2.2. During 2006 to 2014 there were attempts to gather information on and procure listed equipment for and by SARS. There were also instances where SARS acquired surveillance equipment.

957.2.3. Most of the members of the unit had an intelligence background therefore required specialised equipment and skills to perform their tasks especially in instances of covert operations. The possibility could not be excluded that the equipment and software was availed to them.

957.3. Independent evidence sourced in the form of a '*Request for exemption from procurement processes in terms of Treasury Regulation 16A6.4*' dated 6 October 2011 and submitted by Mr Clifford Collings, the Executive: Anti-Corruption and Security ('**ACAS**'), with subject '*confidential exemption request to acquire specialised security solutions and services from sole supplier – Scapecom Solutions*'.

957.4. Evidence submitted by SARS including procurement documents in relation to technical security support including the supply and installation of technical equipment (the redacted list) and procurement request forms for the purchase of equipment.

957.5. In the category '*evidence submitted by SARS*', the report states:

> '5.3.17 It is unclear what the equipment was utilised for, except where laptops for employees were purchased.
>
> 5.3.18 I have also noted that SARS failed to provide to the purchasing of equipment for the NRG, SPU and the CBCU.
>
> 5.3.19 What I can confirm, from independent evidence obtained is that the Unit had an internal process of procuring goods for investigation purposes. At the reorganisation from CBCU to NRG, a document detailed that team members would contact Eddie, who in turn would contact Karen should the team members require various equipment and vehicles etc.'

957.6. The (redacted) list of equipment which Adv Mkhwebane said that it had been '*purchased and utilised by SARS*' at a cost of R1 684 131.18 between July 2009 and July 2014. The report states that the equipment was kept at SARS premises and was the latest Technical Surveillance Counter-Measures equipment that could be utilised for video and audio recording as well as tracking devices.

957.7. The notice of disciplinary hearing of Mr Pillay dated 5 February 2015, in particular, stated:

957.7.1. Charge 3 – that Mr Pillay '*caused, endorsing or approved exorbitant expenditure in … acquisition of equipment used by the unit without following SARS Procurement Policies and the TA Act …'* and that he '*solicited and acquired … intelligence equipment's for use by the unit*'.

957.7.2. Charge 5 – that Mr Pillay sought and obtained funding via the SARS Memorandum and that: '*you misdirected the funds so approved and caused to be purchased various equipment's (some of the items being acquired illegally) to be used in furtherance of the covert activities of the unit.*'

957.8. Minister Gordhan's affidavit in which he stated that he had never in any way been involved in the procurement of intelligence equipment by SARS for any of its investigative units; and Mr Pillay's provision of a list of equipment which he stated was a PowerPoint presentation listing certain equipment submitted to the then State Security Minister, Mr David Mahlobo, which equipment had not been procured by or utilised by the SPU, NRG and the High Risk Investigation Unit throughout its existence.

958. From the above, Adv Mkhwebane concluded that:

> '5.3.31 SARS failed to provide me with documents relating to the procurement of equipment for the CBCU, NRG and subsequently the SPU. Such conduct is in violation of section 181 (4) of the Constitution.
>
> 5.3.32 It is extremely unlikely that a unit carrying out investigations on behalf of SARS would not procure equipment necessary for the fulfilment of its duties and functions.
>
> 5.3.33 It is unclear why SARS and/or its former employees would keep the procurement of equipment such a guarded secret. Without proper explanation, I can only infer that the proper procurement processes were not adhered to.
>
> 5.3.34 The existence of the unit is a **non-disputable fact** and therefore the buying of equipment is an obvious consequence of that. I am of the view that the failure and blatant refusal of SARS and its former employees to provide me with records of SARS procurement and whereabouts of the said equipment is unwarranted and undermines my ability to perform my constitutional functions.
>
> 5.3.35 The failure by SARS and denial by the former officials of the existence and purchasing of the equipment by SARS is a clear indication that such equipment was utilised for activities falling outside the SARS investigative mandate.' [Emphasis added]

959. In Mr Pillay's response to the subpoena, he not only indicated that the list of equipment in the PowerPoint presentation had not been procured or used by the SARS Unit, but also provided Adv Mkhwebane with a report from the CFO of SARS indicating that no such procurement was made. Mr Pillay also provided a list of the equipment that had in fact been procured by the SARS Unit which was '*limited to standard, commercially available equipment, none of which had any facility to intercept communications'*.

960. Mr Pillay informed Adv Mkhwebane that the equipment referred to in the s 7(9) notice related to ACAS, a different unit under Mr Collings, and the internal memo dated 12 December 2014 '*relating to a procurement process*' referred to by her was generated after the SARS Unit had been disbanded. Moreover, this interception equipment was commercially available and solely intended to assist

ACAS, to safeguard SARS' property, assets, officials, records, facilitate security at ports of entry and warehouses under control of SARS and conducting anti-corruption investigations within SARS. This has absolutely nothing to do with the by then disbanded unit. In addition, the claim that the '*CBCU'* became the '*NRG*' was false.

961. Notably, while drafting the s 7(9) notice, on 30 May 2019 Ms Mvuyana commented to Mr Mataboge:

> 'Mr Mataboge issue number 14.3, I believe, does not have a common cause issue as we have no evidence indicating that the equipment was purchased. Every respondent is denying this fact.' [Emphasis added]

962. The uncontested evidence of Minister Gordhan, Mr Pillay and Mr Van Loggerenberg was that the SARS Unit, in all its iterations, never used or acquired any sophisticated '*spying equipment'*, nor did it unlawfully and/or illegally spy on any taxpayer, customs trader or SARS subject under investigation. Nor did the SARS Unit participate in the interception of anyone's communications during the period of its existence.

963. Mr Van Loggerenberg explained that the equipment listed in the SARS Unit Report appeared to fall into three categories:

963.1. The set of equipment shown on a PowerPoint slideshow by the then State Security Minister and the then Minister of Police, reflecting that it was acquired and used by ACAS. Whilst Adv Mkhwebane redacted equipment from her report, the list was in the public domain, as was the slideshow.

963.2. Second, equipment offered to SARS by the USA Customs and Border Control services, such which were never delivered to SARS nor accepted until 2017. In this regard he attached a news article which sets this out, as well as photos from the website displaying that these were only accepted by SARS then. This equipment is standard equipment used by Customs authorities worldwide and can be obtained commercially.

963.3. Third, these relate to acquisitions by ACAS and SARS in general at a time when former SARS Commissioner Tom Moyane was the accounting officer and the Unit had by then already been shut down by him.

964. Before the Committee, Mr Van Loggerenberg confirmed that the equipment referred to in the SARS Unit Report had nothing to do with the SARS Unit and that the SARS Unit never purchased, acquired, used or borrowed equipment which could be considered to be '*spying equipment*'. During

cross-examination he explained that the equipment referred to in the KPMG Report was not ascribed to the SARS Unit but to '*SARS*'. The equipment that SARS had been storing in its basement due to Adv Mkhwebane's investigation was not equipment that belonged to the so-called '*Rogue unit'*. None of the people in the HRIU had ever seen that equipment in their entire life, let alone used it.

965. Ms Mvuyana said that there was a long list of equipment in the SARS Unit Report. She had the documents provided by SARS and had also looked into the 2014 matter which was finalised in 2017. That file also had list of equipment that had been purchased. She had relied on the SARS '*memorandums requesting deviations to procure or appoint service providers that would then procure what was termed 'security equipment' for the unit'*.

966. Ms Mvuyana could not comment on the *'denial of equipment'* and she had verified the equipment when SARS had moved it in February 2021. She said that the '*kind of equipment'* listed in the SARS report was the '*kind of equipment'* that she had verified at SARS when they moved.

967. Ms Mvuyana said that they made adverse findings in respect of the equipment because SARS did not come back and provide the '*necessary evidence'* to refute the allegations in the notice. When asked by the Committee what '*direct evidence'* linked the equipment to the SARS Unit, Ms Mvuyana referred only to a *'particular memo'* which had been approved and the list of equipment.

968. The responses of Adv Mkhwebane were as follows:

969. **<u>In the SARS Unit HC</u>** AA, Adv Mkhwebane said that the Rule-53 record disclosed '*clear record of information supportive of the Public Protector's finding in her Report. On whether equipment was procured to support the unit under investigation there is ample evidence*.'

970. She referred to documents in the Rule-53 record, including the KPMG Report and Mr Lebelo's Note on Mr Pillay.

971. Further, that '*the [PP] has ample sources of information on the establishment of the unit, its activities and the capability, its resources and equipment. The Rule 53 record amply demonstrates the vastness of these sources, which included anonymous and whistle-blowers. It cannot, with reference to the Rule 53 record be contended that the Public Protector did not have access to information on the resources of this illegal spying unit within SARS.*'

972. **<u>Before the Committee</u>:**

973. In her statement Adv Mkhwebane said that '*equipment in question is listed in the report and depicted in a slide show which forms part of the record of this enquiry*'. Further, '*[d]uring the investigation, there was no evidence that the spying equipment was purchased through a lawful procurement process.*' It was her evidence that the equipment stored by SARS included '*devices for the interception of telephonic conversations and the well-known signal jamming device used in the intelligence world*'.

974. In her oral evidence Adv Mkhwebane noted that SARS failed to provide her with documents relating to the procurement of equipment for the '*CBCU, NRG and subsequently the SPU'*, concluding that the procurement processes had not been adhered to because SARS had not provided her with any documentation relating to procurement of equipment for the SARS Unit. The complaint and '*evidence independently acquired'* by the PP showed that equipment has been procured and it existed so, when no documentation was provided Adv Mkhwebane inferred that the proper processes had not been followed in its acquisition.

975. Adv Mkhwebane explained her approach in respect to equipment as follows:

> 'That's the same equipment because remember there's somewhere in the report where we are saying it was clear that the unit was already operational even when they were approaching the Minister to approve. And then the documents which we had, which were SARS documents, where there were issues of the spending of 40 million or requesting for deviation – the procurement of the equipment. And the charge sheet, as well, where they mentioned, and the photos of those equipments. So, it was very clear that its equipment which is of a specialised nature and its equipment which is only supposed to be utilised by SSA and under very much guarded and responsible way per within the limits.'

976. The evidence before the Committee shows, on a balance of probabilities, that the equipment listed in the report either did not exist or had been procured for ACAS, which was a different unit within SARS. The documentation in the record Rule-53 record referred to ACAS, which equipment was in any event not '*wiretapping*' or '*interception*' equipment. There was no evidence in the Rule-53 record that demonstrated any procurement of any equipment by the SPU, NRG or HRIU from 2007 to 2014. Except for the list provided by Mr Pillay of commercially available and mainly office equipment, none of which had any facility to intercept communications.

977. The references to the Nugent Report and the KPMG Report do not sustain the finding that the SARS Unit procured '*spy equipment'* for use by the SARS Unit. Further, the Sikhakhane Panel Report contradicted this finding. In any event, as discussed above, these reports were not evidence in and of themselves.

978. Adv Mkhwebane could easily, by invoking her powers of subpoena, have obtained further documents and *viva voce* evidence from various persons. She did not do so. She also did not follow up with Mr Collings to confirm the equipment was for ACAS.

979. Further, in relying on what documentation there was, Adv Mkhwebane ignored the distinction between the units. She did not attribute equipment to ACAS, or Customs, or to the CBCU even when the documentation showed this. It was all attributed to the SARS Unit. This was explained by saying the unit was the same but used different names - ignoring the repeated evidence of Mr Pillay that the ACAS and CBCU were different units.

980. Ultimately, Adv Mkhwebane based her findings that the SARS Unit had procured '*spy equipment*' on: *(a)* undisclosed and/or unverified and/or unauthenticated sources and *(b)* on an inference drawn from the fact that SARS did not provide any procurement documentation for equipment for the SARS Unit. The former was unreliable and unacceptable and the latter a *non sequitur*. There was evidence of what equipment was procured for the SARS Unit provided by Mr Pillay. It just did not include '*spying equipment'*. Adv Mkhwebane looked to equipment procured for another unit (which also does not appear to include '*spying equipment'*) and attributed it to the SARS Unit, thus concluding that because some equipment existed and she had not been provided with documentation in respect thereof, it was unlawfully procured by the SARS Unit.

981. The SARS Unit HC judgment findings made the following findings in relation to equipment:

> '203. The Public Protector further finds that 'It is extremely impossible that a unit carrying out investigations on behalf of SARS would not have procured equipment for the fulfilment of its duty and functions, as admitted to in so many instances and at so many levels. The only contention by SARS being that it was not conducting illegal operations.' This is a peculiar statement to make. How does no evidence become evidence?
>
> …
>
> 204. The reasoning adopted by the Public Protector in coming to these findings, in light of the evidence available to her at the time of the Report, is illogical and clearly fallacious. For the Public Protector to conclude that the unit was in possession of equipment capable of being used to conduct clandestine activities in the absence of SARS providing the office of the Public Protector with such a list of 'spying equipment' is astonishing.'

982. The SARS Unit HC judgment noted that Adv Mkhwebane ignored Mr Pillay's evidence under oath before her but failed to interview a single member of the unit about the equipment, '[*m]oreover, she did not interview any member of ACAS, or finance, or a service provider about the equipment'*, despite being in possession of the information of the service providers as reflected in the purchase orders contained in the Rule-53 record. The SARS Unit HC concluded that the '*findings and*

recommendations of the Public Protector in relation to equipment issue of the unit is accordingly the product of a fatally flawed and incompetent investigation.'

983. Similarly, the conclusion to be reached on the evidence before the Committee is that the findings of Adv Mkhwebane in respect of the '*spying equipment'* were without basis in law or fact and are likely a deliberate attempt to reach adverse conclusions against Mr Pillay and Minister Gordhan.

(xiii) Recruitment

984. The SARS Unit Report finds that SARS failed to follow proper recruitment processes in appointing employees who worked for the '*intelligence unit'*.

985. Adv Mkhwebane reasoned that '*[a]lthough SARS failed to provide me with a Policy regulating the transfer of staff within SARS branches as well as Policy which regulates headhunting of for positions at SARS, evidence at my disposal point to some irregularity in the recruitment of personnel for the intelligence unit.*'

986. This was, according to Adv Mkhwebane, supported by: (a) information provided to the PPSA by SARS during an investigation into staff complaints by certain employees within the *'intelligence unit'* in 2014; (b) the failure to advertise the positions externally; (c) the Sikhakhane Panel Report confirmation that '*Minister Gordhan played a role in the recruitment of Mr Pillay' (*making his denial thereof *'improbable')*; (d) Mr Magashule's approval of a memorandum from Mr Pillay seeking approval for the transfer of employees to form the CBCU which rendered his denial of the existence of the unit and recruitment of employees a '*foul misrepresentation'*); (e) her own finding that Mr Pillay had begun recruiting members prior to the submission of the SARS memorandum; and (f) the approval of the SARS memorandum by Minister Gordhan.

987. In her report, Adv Mkhwebane relied on the following documents:

987.1. a 2002 memorandum from Mr Mbongwa to Messrs Ravele and Pillay;

987.2. an internal memo, dated 8 February 2007, from Mr Pillay to Mr Oupa Magashula, titled '*Specialised Capability to Focus on the Illicit Economy*' in which the need for the employment of resources (i.e. employees) with specialised capabilities was outlined.

987.3. A '*motivation for transfer and salary increase of current enforcement and risk employees to increase the specialised capabilities in the customs border control unit*' dated 9 February 2007.

987.4. Employment agreements, transfer forms from the National Research Group to the Illicit Economy Research all dated 23 October 2009.

987.5. '*Further evidence'* that Mr Van Loggerenberg applied for employment at SARS on 13 January 1999 for the position of Assistant Director: National Special Investigations subcomponent: Intelligence. He was appointed to the position of Head: Special Operations on 15 June 2007 (8 years later).

987.6. The Gene Ravele Dossier.

988. Mr Pillay's s 7(9) response detailed many documents that Adv Mkhwebane failed to have regard to and which she could have obtained from SARS, including the original employment contracts (half the members of the unit were existing SARS officials for many years when transferred to the unit at inception). Mr Pillay informed the PP that attached to a letter dated 26 August 2014 addressed by him to the PP, in the investigation at the time, he had provided '*copies of the post advertisements, shortlisting, interview documentation and other relevant evidence, facts and descriptions of the recruitment of staff for the unit'*. The Policy referred to by Adv Mkhwebane was amongst these documents. The events at issue had taken place more than 10 years previously and Mr Pillay was no longer employed by SARS, he did not have access to the records in question.

989. Mr Pillay also explained that the unit that was mooted in the SARS Memorandum was not '*the SPU that was later formed in March 2007 in any manner or form. It is an entirely different unit and concept*'.

990. Minister Gordhan indicated before the SARS Unit HC that he was not involved in the recruitment of staff for the SARS investigative unit at all. He rejected Adv Mkhwebane's conclusion that because he was the Commissioner of SARS he '*must have been personally and directly involved in the recruitment of employees for the SARS Investigative unit'*.

991. He pointed out that the SARS Unit report stated that the Sikhakhane Panel Report and the Gene Ravele dossier confirmed that Minister Gordhan had played a role in the recruitment of the individual who became the manager of the SARS Unit in or about 2007, Mr Van Loggerenberg. This was a conflation of two events listed in the report – the recruitment of Mr Van Loggerenberg to SARS in 1998 as Assistant Director: Special Investigations and the appointment of Mr Van Loggerenberg as Head: Special Operations almost a decade later on 15 June 2007. From this Adv Mkhwebane concluded that Minister Gordhan played a role in the recruitment of Mr Van Loggerenberg for his

specific role in the SARS Investigative unit. This was untrue. Minister Gordhan also noted that Mr Ravele had rejected the '*Rogue unit'* narrative before the Nugent Commission.

992. Minister Gordhan said that he approved the establishment of the SARS investigative unit. The responsible staff carried out the recruitment.

993. In his replying affidavit Minister Gordhan pointed out that Adv Mkhwebane quoted from the Manyike complaint in her report. Despite how heavily she relied on the evidence of Mr Peega and Mr Manyike she failed to interview them and assess the veracity of the documents provided to her by them.

994. In his affidavit in the SARS Unit HC, Mr Pillay added that Mr Ravele had reported to him that '*he had been approached by the then legal advisor to President Zuma, namely Advocate Boniswe Makehene, and her husband, Mr Monde Gadinl, a State Security Agency operative*' regarding preparation for the appointment of a new SARS Commissioner and this included Ravele providing '*information that would lead to the removal of Pillay*'. Ravele declined these approaches and requests and reported them to SARS. Further, at another private meeting Mr Ravele had told Mr Pillay that '*he was being unduly pressurised by Moyane, with threats of suspension or being dismissed from SARS, to provide him with some sort of 'report' to 'implicate' Minister Gordhan and [Mr Pillay]… In essence, Moyane required Ravele, under great threat, to draft lies about the unit and [Mr Pillay]*'.

995. Mr Pillay noted that Adv Mkhwebane failed to consider the evidence given by Mr Ravele at the Nugent Commission in June 2018.

996. Mr Pillay confirmed that Minister Gordhan did not participate in the recruitment process of persons employed in the SPU in March 2007. Mr Van Loggerenberg was not an employee of the SPU between March 2007 and April 2008. He took over as manager on 1 April 2008

997. Mr Pillay in oral evidence confirmed that he had previously provided the PPSA, both Adv Mkhwebane as well as her predecessor in 2014, with the information in relation to complaints regarding the SARS Unit. The predecessor had elected not to further investigate the complaint in relation to recruitment for the SARS Unit. The documentation filed with the PPSA in 2014 was attached to his SFA.

998. Mr Mataboge initially testified that he did not have sight of the 2012 file. He confirmed that Ms Mvuyana had sent him a copy of the closing report but he said that he did not look at it. He was

referred to an email sending it to him, with a '*snapshot*' of what was in it, but Mr Mataboge said that he had not read it.

999. Adv Mkhwebane had commented on the draft s 7(9) notice that he should look in the '*file closed by Madiba*' for '*proof of the payments to suppliers and to staff*'. He said that he would check '*again in the other arch-lever file for proof of payments to the suppliers*'. Adv Mkhwebane then sent him an email stating:

> 'Rodney I perused the 2012 complaint and there is all the evidence of recruitments and payments and contracts of the people who worked for rogue unit. Include them in the notice. All these happened when pg was the AO. Will send the file back and Mvuyana should use this information.'

1000. When confronted with this, Mr Mataboge then stated that he had looked at the evidence in the closed file but not the '*narrative*' of the closing report. More importantly, he said that they would not have looked at all the evidence in the file, only what Adv Mkhwebane had referred to.

1001. Mr Mataboge said that they had asked for the Policy which SARS had failed to provide in a general inquiry letter where they listed all the things they wanted to access including the policies, HR, personnel records and so forth.

1002. Ms Mvuyana said that '*there was no recruitment process followed in this instance. Posts were not advertised. There was headhunting, but the headhunting was not formalised. I believe there wasn't even at a policy on how employees would be appointed, and what expertise. So the finding then was therefore, that recruitment procedures had not been followed*'.

1003. Adv Mkhwebane's responses were as follows;

1004. **<u>In the SARS Unit HC</u>:** Adv Mkhwebane denied that the Manyike complaint dealt with the existence, recruitment and operations of an allegedly covert unit at SARS. She said that the complaint of Manyike was imprecise and broadly raised the issues of ghost employees and the illegal unit and was different from the complaint that she had investigated in this matter.

1005. She did not dispute the content of Mr Pillay's affidavits.

1006. **<u>Before the Committee</u>:** In her oral evidence Adv Mkhwebane confirmed that it was a simple question of whether the people they wanted to employ had been employed in terms of the HR policies.

1007. Adv Mkhwebane pointed out that the people who had been recruited were former intelligence, law enforcement and tax professionals. These were '*red flags'.*

1008. Adv Mkhwebane went through the memo from Mr Mbongwa to Mr Ravele and Mr Pillay which she said contained an acknowledgement of deviation in that it said that '*the recruitment did not follow the conventional procedures for recruitment in SARS*'. This also raised red flags. A deviation would have to have been done in terms of the policy, and they had not been provided with a policy, Adv Mkhwebane concluded it must mean there was a contravention.

1009. Adv Mkhwebane rejected the SARS Unit HC judgment's statement that Minister Gordhan was not implicated in the recruitment of any other employee other than Mr Van Loggerenberg - she said that if one read the report, it was very clear that they mentioned the fact that Minister Gordhan signed the memo and so it did not only refer to Mr Van Loggerenberg. Adv Mkhwebane held Minister Gordhan responsible in his capacity as Accounting officer, resources were used to pay *'these individuals'*.

1010. Adv Mkhwebane said that her conclusions would have been the same even if there had been no Sikhakhane Panel Report, because SARS had not supplied her with a policy.

1011. In summary, Adv Mkhwebane's finding that the recruitment policy was not followed was based on the fact that she was not provided with the policy in place at the relevant time. It does not seem that the effluxion of time was ever considered as a reason for no policy having been found. Nor was an attempt made to locate the Policy in the closed file. This despite Mr Pillay having informed Adv Mkhwebane that he had provided the policy and relevant documentation at the time of the previous investigation and inviting her to examine her own records. Mr Mataboge testified that he looked only at selective parts of the evidence in the closed file, namely those that Adv Mkhwebane told him to look at, which inexplicably did not include the Policy.

1012. The SARS Memorandum relied on by Adv Mkhwebane related to a different unit – the SARS Unit was an entirely different unit and concept. Adv Mkhwebane had used the Ravele dossier but ignored the evidence of Mr Pillay of the circumstances in which it had been produced and his retraction before the Nugent Commission. She did not interview Mr Ravele or obtain the records of his evidence before the Nugent Commission.

1013. Mr Van Loggerenberg was recruited in 1998, almost a decade before becoming the manager of the unit and years before Minister Gordhan even became the Commissioner of SARS. Minister Gordhan was not involved in the recruitment of the members of the SARS Unit. Adv Mkhwebane's conclusion regarding Minister Gordhan' s involvement cannot be sustained.

1014. In respect of Adv Mkhwebane's reliance on the Mr Ravele's evidence the SARS Unit HC judgment said:

> '216. Apart from the fact, as already pointed out, that any reliance on the discredited Sikhakhane Panel Report is irrational, the Public Protector on the one hand relies on Mr Ravele's evidence when it supports her findings on the employment issue, but on the other hand states that his evidence before the Nugent Commission in relation to the lawfulness of the unit, which does not support her findings, was irrelevant and not binding on her. This is a clear example of the Public Protector fallacious approach to the evidence and is indicative of the mindset with which she approached the investigation.'

1015. In respect of the lack of a Policy, the Court concluded:

> '219. It is clear that the Public Protector had plainly refused to have regard to any of these records and evidence and seemingly made no effort to obtain any records from SARS. As with the evidence relating to the establishment of the alleged rogue unit and the equipment, the Public Protector simply ignored the evidence relating to the recruitment of SARS officials and employees. There is no rational basis for her findings in this regard.'

1016. On the evidence before the Committee, it must be concluded that the findings in respect of recruitment were made without basis in law or fact. Again, these are likely a deliberate attempt to reach adverse conclusions against Mr Pillay and Minister Gordhan.

(xiv) <u>The Committee</u>

1017. The Committee noted that the Adv Mkhwebane did not fully investigate the allegations of the *'rogue'* nature of the SARS Unit. She did not interview all the relevant people involved, notably the members of the SARS Unit and that had consequences in terms of impartiality.

1018. Adv Mkhwebane had thus not been impartial, had not conducted an independent investigation.

1019. **Adv Mkhwebane misconducted herself in that her public reference to the unit as the 'rogue unit' and as a 'monster' and her stated desire to 'defeat the monster' displayed a profound bias towards Minister Gordhan and Mr Pillay and pre-determined the issue.**

1020. **Adv Mkhwebane misconducted herself by pandering to the 'rogue unit narrative' which displays a profound bias towards Minister Gordhan and Mr Pillay.**

1021. **Adv Mkhwebane committed misconduct in that she failed to carry out an independent, impartial and open-minded investigation in that she selectively relied on unauthenticated recordings which are incomplete, in a deliberate attempt to reach adverse conclusions against Minister Gordhan and Mr Pillay.**

1022. **Adv Mkhwebane committed misconduct in that she failed to carry out an independent, impartial and open-minded investigation in that she failed to interview a material witness, Mr Van Loggerenberg.**

1023. **Adv Mkhwebane was grossly incompetent in the manner that she carried out her investigation in that she failed to ensure that diligent and adequate attempts were made to find Mr Van Loggerenberg.**

1024. **Adv Mkhwebane committed misconduct her findings in respect of 'spying equipment' were without basis in law or fact and a deliberate attempt to reach adverse conclusions against Mr Pillay and Minister Gordhan.**

1025. **Adv Mkhwebane committed misconduct in her findings in respect of recruitment were without basis in law or fact and a deliberate attempt to reach adverse conclusions against Mr Pillay and Minister Gordhan and Mr Magashula.**

(xv) The Public Protector's unwarranted and slanderous attack on Potterill J

1026. This was described by the SARS Unit Full Bench HC as a scandalous and unfounded attack on Judge Potterill.

1027. In **the judgment** in Part A of the **SARS Unit HC** matter, **Potterill J** referred to the correct version of the Executive Ethics Code. Judge Potterill explained that Minister Gordhan's defence was that he had not wilfully misled Parliament. She concluded that an innocent mistake, as submitted by the EFF, was not sufficient as it was contrary to the wording of the Executive Ethics Code.

1028. In her SARS Unit HC AA para 95 Adv Mkhwebane said that the Court had '*committed a gross misinterpretation of the applicable the Executive Ethics Code*'. Further *'[i]nexplicably the High Court chose to rewrite the said provisions of the Code and adopted Mr. Gorhan's view that Code only prohibits 'wilfully'' misleading 'the Legislature to which they are accountable*.' Adv Mkhwebane accused the High Court of '*deliberately omitting*' the words '*inadvertently mislead' form the Code in 'a grossly misplaced interpretation of the Code*'.

1029. It is common cause that Adv Mkhwebane used an unpromulgated and incorrect version of the Code in the SARS Unit Report. The EMEA Code is one of the laws that Adv Mkhwebane is legislatively mandated to enforce yet she seemingly failed to check whether the Code that she relied upon was correct, even after this was pointed out by Potterill J.

1030. After the Potterill Judgment was taken on appeal, Adv Mkhwebane gave an instruction that Adv Masuku SC be briefed with a junior <u>on condition</u> that Mr Ngobeni's services are additionally used in the background. It appears to have been Mr Ngobeni, who was seemingly engaged to draft the argument in the appeal of the Potterill Judgment who repeatedly and erroneously relied on the 2007 Code, on whom Adv Mkhwebane relied. Adv Mkhwebane received a memo from Mr Ngobeni, stating:

> "Gordhan's own evidence shined a bright light on his intent and made pellucid that his written statements to Parliament were calculated to conceal from Parliament or downplay the extent of his dealings with the Gupta family."[108]
>
> **From:** Paul Ngobeni
>
> **Date:** Thursday, 15 August 2019 at 08:24
>
> **To:** >, Sibusiso
>
> Nyembe <SibusisoN@pprotect.org>, Sibusiso Nyembe Oupa Segalwe [redacted], "Advocate Busisiwe Mkhwebane (Public Protector)" <MkhwebaneB@pprotect.org>
>
> **Subject:** APPEAL IN GORDHAN VS PUBLIC PROTECTOR
>
> Herewith is my draft of the appeal argument in the above matter shared with the attorney and relevant advocates. In a normal well-functioning judicial system I would predict a clear-cut victory but now in the face of the political mobilization of the judiciary I am just no sure.
>
> Clear-cut legal issues on which the Public Protector must win are the following:
>
> 1. Judge Potterill deliberately misread the Executive Meers Ethics Code and claimed that it only prohibits "willful" misleading of Parliament. See, paragraphs 22 – 24 of the judgment. Her judgment even shows she purposely omitted the part where even "inadvertent misleading" is mentioned. Ordinarily this alone would render her entire judgment vulnerable on appeal."

1031. Adv Mkhwebane relied on the advice of a legal team that includes Mr Ngobeni, who clearly proposed a strategy of using *ad hominem* attacks against Judge Potterill in the media.

1032. The Potterill Judgment was handed down on 29 July 2019. On 31 July 2019, Mr Ngobeni sent an article that he had written to, *inter alia*, Adv Mkhwebane. The email was headed '*Judge Potterill's unethical and incompetent judgment*' and attached an article bearing a similar name.

1033. Mr Van der Merwe confirmed that the article started off with:[109]

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[108] The memo provided by Mr Ngobeni follows on the emails and appears to be a draft ."*Pellucid*" means translucently clear.

[109] The article includes commentary such as:

a) *'Preliminarily, the judgment portrays a judge who is either ignorant of basic judicial ethics or is blithely insouciant about ethical judicial opinion writing.'*
b) *'Sadly Potterill's judgment is replete with false and dishonest conclusions and lacks candor, respect, honesty, and professionalism.'*
c) *'In her haste to get on the 'Pro-Pravin' bandwagon, Potterill overreached.'*[109]

> 'Judge Potterill's ruling in **Gordhan v Public Protector and others** is emblematic of an overwhelming miasma of fake law untethered to the record.'

1034. The email correspondence evidences that Adv Mkhwebane approved of the personal and professional attack on Judge Potterill and requested that it be incorporated in her answering papers. In fact, she stated that:

> 'The article is perfect Adv, though the language used in very complex for her to understand Should have used simple language so she can get the message.'

1035. Although Adv Mkhwebane's condition for the appointment of Adv Masuku SC was the engagement of Mr Ngobeni, there is no documentation in our possession that reflects that the PPSA concluded an arrangement with Mr Ngobeni for payment of his services rendered pursuant to Adv Mkhwebane instruction or that Adv Masuku SC should pay for Mr Ngobeni's services. We do note that the email reflects that Mr Ngobeni provided the work product directly to Adv Mkhwebane and the persons in the PPSA who were presumably aware of his involvement - being the late Mr Nyembe and Mr Segalwe. Mr Ngobeni did so directly, though had given it the previous day to Adv Masuku SC and Mr Seanego. Adv Mkhwebane further gave the instruction that the comments of Mr Ngobeni with reference to Potterill J be incorporated in the arguments.

1036. Adv Mkhwebane did not deal with the allegation of the content that her affidavit was an unwarranted and inappropriate personal attack on the Judge.

1037. The SARS Unit Full Court found that Adv Mkhwebane had '*instead of merely recording her disagreement with the court's interpretation, … launched into a scathing, unwarranted and personal attack on the integrity of the learned Judge*'. The '*personal attack*' was found to be '*shockingly inappropriate and unwarranted*'. The Full Court instructed Adv Mkhwebane to apologise and her counsel during the leave to appeal hearing informed the Court that this had been done.

1038. The Committee pointed out that this was the second incident in which Mr Ngobeni was involved and, in this case, it went directly to the impugnment of character of judges. Adv Mkhwebane had

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d) 'A judge who uses abusive and contumacious language against the head of a Chapter 9 institution and characterises her rulings as 'nonsensical' fails to follow the law, treats litigants inappropriately, and publicly displays contempt for the judicial system,'

e) 'Sadly a careful perscrutation of Potterill's judicial record exposes her inveterate bigoted behaviour and incompetence?'

f) 'Potterill is a white woman and her gross incompetence does not bother the frenzied white mob baying for Advocate Mkhwebane's blood. A different yardstick is applied depending on the race of the person targeted.'

g) 'The litany of gross errors Potterill routinely makes in her judicial decisions also highlight that she does not observe the principle that in reversing the opinion of a lower court or quasi-judicial tribunal such as the Public Protector she must not insult the hallowed rule that the function of her Court is to see that justice is done according to law.'

directly commissioned and authorised the release of an article by Mr Ngobeni which attacked a judge. This was unacceptable for a person in the office of the Public Protector and an officer of the court. More so because Adv Mkhwebane was in fact the one who had misinterpreted the law. It would have behoved Adv Mkhwebane to accept that she had been wrong, yet she insisted that she was correct.

1039. The majority view was that it was gross misconduct, showed lack of independence and impartiality and was intentional.

1040. The minority view in the Committee was that this issue was not gross enough to remove a Public Protector. Judges are criticised all the time.

1041. **Adv Mkhwebane grossly misconducted herself in scathing, unwarranted and personal attack on the integrity of Judge Potterill.**

(xvi) The Public Protector's relentless pandering of the untruths of Mr Pillay's qualification: 'Mr Pillay was appointed to the position of Deputy SARS Commissioner and subsequently as SARS Commissioner whilst he did not possess the necessary qualifications for the position, and if so whether such conduct amounts to maladministration' ('ground 9')

1042. The SARS Unit HC judgment found that Adv Mkhwebane's '*relentless pandering*' to the untruths of Mr Pillay's lack of a matric certificate constituted bias on her part.

1043. Adv Mkhwebane investigated the appointment of Mr Pillay to the position of Deputy Commissioner of SARS on 15 April 2009. Given the time lapse, Adv Mkhwebane was required to demonstrate special circumstances under s 6(9) of the PPA, in order for her to do so. The SARS Unit Report reflects no special circumstances in relation to this complaint.

1044. In the SARS Unit Report, Adv Mkhwebane concluded that Mr Pillay was appointed to his positions at SARS without the '*necessary qualifications*'. Her finding is premised on **(a)** that Mr Pillay does not have a degree and **(b)** that Mr Pillay did not even have a matric qualification. It appears from the evidence that neither was a requirement for appointment.

1045. On 3 December 2018 Adv Mkhwebane sent Mr Kingon at SARS a s 7(1) request, asking him to respond to the following complaint:

> '3.10 Mr Pillay was appointed to the position of Deputy SARS Commissioner and subsequently as SARS Commissioner whilst he did not possess the necessary qualifications for the position.'

1046. Mr Pillay's human resource file was not sought, nor were details of his matric certificate or professional qualifications requested.

1047. Mr Kingon from SARS responded: '*Mr Pillay's appointment was duly approved by Cabinet and SARS has no records of Mr Pillay being appointed Commissioner for SARS.'*

1048. Despite this, para 5.6.4 of the SARS Unit Report concluded that *'SARS, in their response dated 5 February 2019, did not dispute that Mr Pillay did not have a degree and that he did not possess a matric certificate.'* [Emphasis added]

1049. Mr Pillay was also not asked to provide his matric certificate. In fact, the s 7(9) notice issued to him states as a matter of fact that he had a matric certificate.

1050. The first time it was alleged that Mr Pillay did not have a matric was in the draft of the SARS Unit Report was a 21h14 version the night before it was released.

1051. In his FA in the SARS Unit HC Mr Pillay pointed out that the s 7(9) notice dated 3 June 2019 sent to him indicated that he possessed a matric certificate.

1052. In the SARS Unit HC SFA, Mr Pillay attached a transcript of a meeting he had with Adv Mkhwebane in the context of the investigation conducted in the '*Pillay Pension matter*' on 25 March 2019. At that meeting Mr Pillay had told Adv Mkhwebane when he obtained his matric, and which school he had matriculated from. This meeting took place only two and a half months before the SARs Unit report was released. Mr Pillay stated as follows:

> 'It is clear from the extract quoted above that the Public Protector well knows that I have a Matric certificate. Her conclusion in the Report that I do not hold even that basic qualification, notwithstanding the fact that on 25 March 2019 when I testified before her on oath she plainly accepted that this was a matter of public record and was within her knowledge, is demonstrable of the lengths she is prepared to go to violate my rights. In doing this she has manifested clear bias against me and material irrationality in arriving at her findings'.

1053. Minister Gordhan set out in his SARS Unit HC FA that: (a) there was no formal qualification required in law for the appointment of Deputy SARS Commissioner; (b) Mr Pillay had served at SARS for more than a decade with great skill and dedication; (c) Mr Pillay held various senior positions in SARS and discharged his functions with commendable success and integrity; (d) Mr Pillay had played a leading role in the establishment of a highly successful SARS Large Business Centre; and (e) his knowledge, experience and leadership were invaluable assets to the institution.

1054. Minister Gordhan further noted the SARS Unit Report stated that '*SARS and Minister Gordhan conceded that Mr Pillay did not possess a Degree qualification nor a Matric certificate'*. This was untrue – and he would never have done so as he was aware that Mr Pillay had matriculated.

1055. In his replying affidavit in the SARS Unit HC, Minister Gordhan noted that Adv Mkhwebane had not denied that she was incorrect in finding that Mr Pillay did not have a matric certificate. He said that she had failed in her investigative process and instead of taking responsibility for this, she sought to blame Mr Pillay and Minister Gordhan. He confirmed that the facts presented to Adv Mkhwebane were that:

1055.1. Mr Kingon of SARS had explained that Mr Pillay was not appointed by SARS as the Deputy SARS Commissioner but by the Cabinet and so they did not have any records on 15 April 2009.

1055.2. There was no fixed criteria set for appointment as a Deputy Commissioner of SARS. SARS utilised the '*Goodness of Fit'* model to determine succession and identify leadership traits.

1055.3. Mr Pillay has a matric certificate.

1055.4. At the time of his appointment as Deputy Commissioner, Mr Pillay had gained considerable skills, expertise, and experience including setting up a world-class Business Centre.

1056. Mr Pillay confirmed to the Committee that he had not been asked about his qualifications in the s 7(9) notice. He further stated that at the time that the SARS Unit Report had been released, Adv Mkhwebane had known that he had a matric certificate based on the aforestated meeting he had with Adv Mkhwebane where he confirmed that matric was his highest qualification. He confirmed that he had submitted the transcript of the meeting at which he had told Adv Mkhwebane in express terms that he had matriculated.

1057. Mr Pillay testified that he got where he did because of hard work and not political connections. He entered SARS at mid-level and worked there for 15 years before becoming Deputy Commissioner. Mr Pillay said that his rise in SARS was not because he had been a comrade of Minister Gordhan's for 40 years. In this regard, Mr Pillay's experiences was not disputed.

1058. During cross examination, Adv Mkhwebane's legal representative said that Adv Mkhwebane would testify that she had asked for Mr Pillay's matric certificate, either from him or SARS. she did not

however, do so. There is also no indication in the Rule-53 record that anyone was asked to provide the matric certificate at any time.

1059. Ms Mvuyana was asked whether, if there had been a matric certificate submitted, the conclusion that Mr Pillay was not qualified to be commissioner for SARS would have been different. She said that this was not the case because besides the qualification, the manner in which SARS went about it did not sit well. SARS had emphasised competencies rather than qualifications with the '*goodness of fit*' model. Ms Mvuyana did not confirm the proposition that Minister Gordhan had said that Mr Pillay deserved the position, despite not having any formal education, because he had made a good contribution to the *struggle*'. She said that Mr Pillay had mentioned that he was a long serving member of the public service and confirmed that he had also stated that he had contributed to the transformation of SARS.

1060. Adv Mkhwebane's legal representative put it to Ms Mvuyana, who agreed, that Adv Mkhwebane had made no finding that Mr Pillay had no matric. This is, however, not consistent with Adv Mkhwebane's own version under oath nor the content of the SARS Unit Report.

1061. Ms Mvuyana said that the error was discovered after the report had been issued, after she had double checked the response of Minister Gordhan and SARS. She said that it had been an '*error'*, maybe because of a *'misinterpretation*' of the response received from SARS which stated that Mr Pillay did not have any formal qualification, as a formal qualification could include a matric certificate. This too is inaccurate, as SARS had responded that Cabinet made the appointment and they did not have <u>any</u> records.

1062. Ms Mvuyana confirmed that there was a regulatory body where one could check whether people have matric certificates. They had not checked if Mr Pillay had a matric certificate. Ms Mvuyana was not aware of Adv Mkhwebane ever directly asking Mr Pillay for a copy of his matric certificate. Further, Ms Mvuyana was not aware that Mr Pillay had told Adv Mkhwebane under oath during the Pillay Pension matter. She was not involved in that investigation.

1063. Adv Mkhwebane's response were as follows:

1064. **<u>Before the SARS Unit HC</u>** in her AA, Adv Mkhwebane did not deny that she was incorrect in stating that Mr Pillay did not have a matric certificate but blamed Mr Pillay and Minister Gordhan for the inaccuracy indicating that the *'information about Mr Pillay's qualification should have been given to her when it was pertinently sought'* and *'[a]ssuming that Mr Pillay or Minister Gordhan or*

SARS had been candid with the Public Protector on Mr Pillay, it would be justified to criticise me if I got anything factually wrong'.

1065. Adv Mkhwebane said that 'Minister Gordhan cannot seriously contend that someone without the requisite academic qualifications to head SARS should be appointed. Those in the opinion of the Public Protector should be uncontentious matters'. Even if Mr Pillay had disclosed that he had a matric certificate, her reasoning that he lacked formal qualifications would be reasonable taking into account the nature of the position and the responsibilities attached to it.

1066. **Before the Committee:**

1067. Adv Mkhwebane emphasised that what she was investigating was whether Mr Pillay '*qualified to be a deputy Commissioner of SARS*', referring to the responses from Mr Magashule who stated that Mr Pillay met the requirements for the position and Minister Gordhan who had submitted that Mr Pillay was amply qualified for the position by his knowledge, dedicated service, experience and leadership at SARS. On the basis hereof, Adv Mkhwebane said that they had confirmed that Mr Pillay did not have a '*formal qualification'*.

1068. Adv Mkhwebane rejected that Mr Pillay could be appointed without a formal qualification as the position was a high ranking one and that she did not think this was fair to others in the public service. She thus rejected their reliance on a leadership competency model review accompanied by a '*Goodness of Fit*' assessment which had confirmed the value that Mr Pillay brought to SARS, stating that this suggested that '*irrespective of the qualifications, we can appoint any person based on their experience*'.

1069. According to Adv Mkhwebane the nature of the position at SARS would require someone with a matric certificate. However, she also said that even if Mr Pillay had disclosed that he had a matric certificate, her reasoning that he lacked formal qualifications would be reasonable taking into account the nature of the position and the responsibilities attached to it.

1070. Adv Mkhwebane said that if they had been provided with a policy saying that someone with a matric could rise to any level then the conclusion would have been different. However, 10 years after the fact there was either no policy or none existed.

1071. Adv Mkhwebane's legal representative asked her whether her understanding of a '*formal qualification*' was a '*formal matric*' and she responded '*exactly*'. Further Adv Mkhwebane testified that she had not seen a matric certificate because '*according to the investigators, his file was empty*

at SARS, so we don't have that'. Adv Mkhwebane's legal representative described the statement that Mr Pillay did not possess a matric certificate as a '*red herring'*, '*faux pas, or a misprint, or a mistake*'

1072. Adv Mkhwebane did not dispute that Mr Pillay had told her in person that he had matriculated when they met on 25 March 2019. She sought to suggest that the '*reports were far apart*' and in the context of different complaints, presumably implying that she had forgotten.

1073. The SARS Unit HC Court at [236] found that:

> 'Her conclusion in the Report that Mr Pillay does not hold even that basic qualification, notwithstanding the fact that on 25 March 2019 she accepted that this was a matter of public record and was within her knowledge, is astounding. In doing this she has manifested clear bias against Mr Pillay and material irrationality in arriving at her findings. In her answering affidavit, the Public Protector has put up no evidence supporting her findings in this regard. We submit that this further demonstrates that the Public Protector closed her mind and adopted a process of irrational reasoning.'

1074. Adv Mkhwebane's response to this was:

> 'There's no justification to that because what I did was that, relying on what the investigators or the evidence before us, Chairperson, because evidence before us is very clear. I mean, if we go back to the report, I've shown again that here is the information which is clear from our report that, firstly, when this matter was investigated SARS's response dated 5 February, they did not dispute that Mr Pillay did not have a degree, and in this paragraph, also we said he did not possess a matric certificate. Then again it's Mr Magashule who said Mr Pillay, the only thing which was done is this Goodness of Fit. So, that's the information which was before me. Thirdly, Minister Gordhan in his affidavit he says there is no formal qualification required for the appointment is Deputy Commissioner. Mr Pillay proved himself amply qualified for the position by his dedicated and service in this process. So there is nowhere where I'm given the qualifications, I'm given the certificates about this matter.'

1075. The undisputed evidence before the Committee shows that neither of the bases for Adv Mkhwebane's finding that Mr Pillay lacked the necessary qualifications are justified. Firstly, there was no requirement for the applicant for the SARS Commissioner position to hold a professional qualification, or even matric. Secondly, as a matter of fact Mr Pillay did have a matric and it was ultimately conceded that the finding to the contrary, although never adequately explained, was wrong.

1076. The SARS Unit Report does not consider the nature of the position and what it entails, yet determines what qualifications are required to fill the post.

1077. Mr Pillay's experience, competencies, achievements, and skill were not disputed. The nub of Adv Mkhwebane's defence was that SARS had not provided her with a policy that allowed for someone with a matric to rise to the level of Commissioner or Deputy Commissioner of SARS. She

rejected their reliance on a leadership competency model review accompanied by a '*Goodness of Fit'* assessment which had confirmed the value that Mr Pillay brought to SARS. This despite not disputing that there was no formal qualification required by law. Adv Mkhwebane does not say what should be made of the evidence from Mr Magashule and Minister Gordhan that there is no official qualification necessary for the SARS Commission post, and that using the tool that they employed to select Mr Pillay he emerged the strongest; and why this was ignored.

1078. The findings against SARS do not consider the fact that the appointment as made by Cabinet and not by SARS. It was further unreasonable to expect the record and policy to be available some ten years after the event. No attempts were made to obtain same from Cabinet. Significantly, Adv Mkhwebane failed to set out any special circumstances why she was investigating Mr Pillay's qualifications in the first place.

1079. Adv Mkhwebane's attempt to explain away her meeting with Mr Pillay cannot be accepted. Even though the complaint in Pillay Pensions matter was lodged in 2016, the interview that Adv Mkhwebane had with Mr Pillay occurred on 25 March 2019, some 3 months before she issued the report. The s 7(9) notice was issued on 3 June 2019, correctly stating that Mr Pillay had a matric certificate, only a month before the report was released. The change to the draft report was only made the day prior to its release. If this was indeed an innocent mistake, it begs the question why this was not simply admitted. Instead, attempts were made to blame SARS, insist that Mr Pillay should prove something that was not in dispute, and which he was never asked to prove, and to suggest that this finding was not relevant in any event.

1080. Moreover, the suggestion that the Pillay pension matter and the SARS Unit matter were undertaken by different investigators was somewhat misleading. At that time the investigation into both the SARS Unit complaint and Pillay Pension matter were ongoing with different investigators – but both reported to Mr Mataboge who reported directly to Adv Mkhwebane. Documentation before the Committee indicated that Mr Mataboge was involved in both, rendering the Pillay Pension Report directly to Adv Mkhwebane.

1081. The **majority of the Committee** agreed that Adv Mkhwebane's findings were based on a material irrationality and indicative of bias against Mr Pillay.

1082. The minority view in the Committee was that this was not the case.

1083. **Adv Mkhwebane committed misconduct in that she failed to carry out an independent, impartial and open-minded investigation. Adv Mkhwebane closed her mind to material**

evidence and deliberately seeking to reach conclusions that were adverse to Mr Pillay without any basis in law or fact.

(xvii) Summary of findings of the Committee: 11.3 and 11.4

1084. **Adv Mkhwebane is found to have committed misconduct and demonstrated incompetence in *(i)* performing her investigation and making decisions reflecting a '*lack of independence and impartiality*' and *(ii)* deliberately seeking to reach conclusions of unlawful conduct and impose far-reaching remedial action without basis in law or fact as concluded above.**

1085. **The Committee, in light of the aforegoing, conclude that Charge 11.3 and 11.4 are substantiated to the extent that it reflects the extraordinary steps that were taken by Adv Mkhwebane to impugn both the President and Minister Gordhan in a manner that reflects a lack of independence and impartiality and which do not meet the standards expected of a Public Protector.**

1086. The findings of misconduct in relation to the SARS Unit matter and paras 11.3 and 11.4 of Charge 4 was not supported by Al-Jama-ah who did not view the conduct of Adv Mkhwebane in the SARS Unit matter as raising to the level of misconduct.

1087. Adv Mkhwebane misconducted herself:

1087.1. By investigating the SARS Unit without having established special circumstances on which to found her jurisdiction.

1087.2. In the manner that she communicated with Minister Gordhan during the investigation by unjustifiably refusing to engage with his attorneys of record and instead using methods such as her YouTube media statement.

1087.3. By failing to carry out an independent, impartial and open-minded investigation. She misinterpreted law, found that the complaints were unsubstantiated and relied on discredited opinions and unreliable evidence for her findings and ignored information and retractions which showed that the evidence in question was unreliable and the opinions wrong in law.

1087.4. In the manner she handled the IGI Report which she unlawfully received and perused and her dishonesty in respect of her reliance thereon thereby demonstrating a lack of independence.

1087.5. By publicly referring to the SARS Unit as the *'rogue unit'* and as a '*monster*' and her stated desire to '*defeat the monster*' she displayed a profound bias towards Minister Gordhan and Mr Pillay and unduly implicated the members of the SARS Unit in murder, money laundering, poisoning, threats to her without any basis.

1087.6. By pandering to the '*rogue unit narrative'* she displayed a profound bias towards Minister Gordhan and Mr Pillay.

1087.7. By failing to carry out an independent, impartial and open-minded investigation in that she:

1087.7.1. selectively relied on unauthenticated recordings which are incomplete, in a deliberate attempt to reach adverse conclusions against Minister Gordhan and Mr Pillay; and

1087.7.2. failed to interview material witnesses including Mr Van Loggereneberg.

1087.8. By making findings in respect of '*spying equipment'* without basis in law or fact in a deliberate attempt to reach adverse conclusions against Mr Pillay and Minister Gordhan.

1087.9. By making findings in respect of recruitment in the SARS Unit without basis in law or fact in a deliberate attempt to reach adverse conclusions against Mr Pillay and Minister Gordhan.

1087.10. By conducting in a scathing, unwarranted and personal attack on the integrity of Judge Potterill with the advice of Mr Ngobeni who proposed a strategy of using *ad hominem* attacks on Potterill J.

1087.11. By failing to carry out an independent, impartial and open-minded investigation and closing her mind to material evidence and deliberately seeking to reach conclusions that were adverse to Mr Pillay without any basis in law or fact.

J. SARS SUBPOENA MATTERS

1088. The SARS Subpoena matter related to a dispute between Adv Mkhwebane and SARS regarding whether, in the light of the Tax Administration Act 28 of 2011 ('**TAA**'), SARS was legally obliged to release confidential tax information of individuals. Litigation ensued as a result thereof.

1089. In **Commissioner of the South African Revenue Service v Public Protector and Others**,[110] ("**SARS subpoena matter**") The HC ruled that the Public Protector did not have the power to subpoena personal information from SARS ordering costs against Adv Mkhwebane in her personal capacity. In **Public Protector v Commissioner for SARS, the CC** the appeal was dismissed on the merits. The personal costs order was overturned, however the PPSA still had to pay the costs of the court below.

1090. **The Committee did not conclude that there was any substantiation to the complaints in relation hereto as the litigation concerned a question of law that, for all intents, required clarity.**

K. GEMS

1091. The GEMS matter formed part of the supplementary evidence submitted to the IP under cover of a letter dated 11 December 2020 as further evidence relied upon in support of Charges 3 and 4 in the Motion. The IP had before it the GEMS SCA judgment and order and the appeal record.

1092. The investigation of a complaint led to a dispute with the Government Employees' Medical Scheme (**GEMS**). GEMS asserted that the PPSA lacked jurisdiction to investigate the complaint. The PPSA issued a subpoena to produce documents.

1093. GEMS challenged both the PPSA's jurisdiction and the subpoena and the HC ruled in favour of the PPSA and ordered GEMS to pay costs. On appeal the SCA upheld that the Public Protector had no jurisdiction, The complaint being in respect of conduct that was more than two years old, and despite GEMS having raised this issue, "*no special circumstances as contemplated in s 6(9) of the PPA were raised by the Public Protector.*" This is similar to what was raised in the Lifeboat case / Pillay Pension matter, and SARS Unit matter relating to s 6(9) of the PPA.

1094. The SCA concluded that it "*is manifest that the Public Protector's stubborn and irrational insistence on continuing with her investigation could hold no benefit for the public at large, or for that matter even [the complainant] himself. In other words, it is not aimed at, nor is there any need to protect the public against the conduct which informed the complaint.*" The SCA upheld the appeal, overturned the HC's decision, declared that Adv Mkhwebane was not empowered to investigate the complaint and ordered the PPSA to pay GEMS' costs on appeal and its HC costs.

[110] [2020] ZAGPPHC 33; 2020(4) SA 133 (GP).

1095. The Committee did not hear any evidence to conclude that there was any substantiation to the charges in respect hereof. However, the Committee notes the findings of the SCA as expressed above.

L. FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

1096. The 21st September 2023 marks 17 years since the NA established a multi-party *ad hoc* Committee to review Chapter 9 Institutions. That Committee, chaired by the late Prof. Kader Asmal, released a detailed report on 31 July 2007 ('**the Asmal Report'**).[111] The Asmal Report noted that Chapter 9 Institutions were designed and established to –

> *'protect, promote and enhance the rights of citizens. The institutions are expected to assist people to vindicate their rights. The effectiveness and efficiency with which the institutions discharge their duties have a direct bearing on the quality of life of all South Africans, but particularly the poor, marginalised, rural and previously disenfranchised.'*

1097. The Asmal Report further eloquently captured how our Constitutional drafters envisaged the way in which Chapter 9 Institutions would support our constitutional democracy by, among other things, helping to:

1097.1. Restore the credibility of the State and its institutions in the eyes of the majority of its citizens;

1097.2. Ensure that democracy and the values associated with human rights and democracy flourished in the new dispensation;

1097.3. Ensure the successful re-establishment of, and continued respect for, the rule of law; and

1097.4. Ensure that the State became more open and responsive to the needs of its citizens and more respectful of their rights.

1098. Some almost two decades later the importance, particularly, of the office of the Public Protector cannot be gainsaid. This much was clear from the evidence before the Committee, which during its hearings, heard from ordinary citizens affected by the work of the Public Protector (both positively and negatively so) as well as staff of the PPSA who shared their challenges and the importance of the work they do. The importance of the Public Protector in the fabric of our democracy has also

[111] Ad hoc Committee on the Review of Chapter 9 and Associated Institutions. Report available at https://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf

been strongly expressed by the Constitutional Court and other judicial authorities in the judgements that the Committee has considered.

1099. Thus, the Committee's task of assessing whether Adv Mkhwebane, who was appointed to support, protect, and promote our democracy, has failed to meet the standard of conduct expected of her or has demonstrated incompetence in the performance of her functions as alleged in the Motion was an unenviable and challenging one. Unlike the Asmal Report which sought to provide the NA with its findings on whether the design of Chapter 9 Institutions are fit for purpose, this Committee was essentially engaged with the question of whether the office bearer herself is fit for purpose.

1100. The Committee has remained cognisant of the importance and independence of the Public Protector, as well as the challenges that the PPSA faces. However, at the heart of this Enquiry is whether Adv Mkhwebane has acted in a manner that demonstrates that she is unfit for office. This entails serious allegations that Adv Mkhwebane has contravened the Rule of Law and the democratic values that underpin our Constitutional Democracy. It therefore falls on the NA to determine whether Adv Mkhwebane's conduct, as established by the Committee, would lead ordinary South Africans to question her competence and her ability to perform her functions independently, impartially, effectively and efficiently.

1101. The Report makes serious adverse findings of misconduct against Adv Mkhwebane across a range of investigations, reports and her handling of subsequent litigation, as well as matters related to the expenditure of public funds. The Committee is confident that these findings have been arrived at with due regard to established facts considered against the definition of misconduct as provided for in the Removal Rules.

1102. There is ample evidence, as set out in this draft report, giving rise to several grounds of misconduct from the charges as set out in both Part A and Part B of this report and which span from the findings made in respect of the Lifeboat, Vrede, SARS Unit and CR17 matters. Whilst each individual finding rises to the evidence of intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office this threshold is undoubtedly reached when the instances are considered cumulatively with one or more of the misconduct charges.

1103. In relation to the charge of incompetence, an assessment of the evidence must reflect a demonstrated and sustained lack of knowledge to carry out; and ability or skill to perform the duties of the Public Protector effectively and efficiently. In other words, an individual instance of incompetence will not be enough to meet the threshold set in section 194 of the Constitution read with the Removal Rules but the cumulative effect may do so.

1104. In its assessment of the cumulative effect, with reference to incidents detailed in the Committee's draft report, the conclusion reached by the Committee is that the charge of incompetence is sustained.

1105. The Committee finds that the misconduct committed and incompetence shown by Adv Mkhwebane is of an extremely serious nature and includes such acts as unconstitutionally entrenching on the jurisdiction of Parliament, the NPA and SAPS; repeated material errors of various laws and legal instruments including PRECCA, the Executive Ethics Code; Parliamentary Code and even the Public Protector's own powers under the PPA; the repeated failure to give *audi*; the selective reliance on evidence to achieve a particular outcome and to ignore relevant evidence and to assess evidence in order that reports reflect why certain evidence is rejected; the patently incorrect manner of substantiating complaints based on an inferential reasoning not supported by evidence; a failure to appreciate her heightened duty towards the Court as a public litigant and taking wholly inadequate steps when investigating.

1106. The Committee notes that three clean audits have been achieved by the PPSA during Adv Mkhwebane's tenure (and notably for the first time in the history of the PPSA), and though her office obtained less complaints than her predecessors, Adv Mkhwebane made significant inroads into the backlog of cases at the PPSA – a situation which Adv Mkhwebane inherited and was committed to improving. It also acknowledges that certain members of the public – some of whom testified in person, others who made written submissions – expressed appreciation for some of Adv Mkhwebane's work. Adv Mkhwebane also issued significantly more investigative reports albeit that a number have been set aside on review serious adverse findings made against her. However, whilst laudable, these matters do not negate the numerous and serious findings of misconduct and incompetence – several of which are, on their own, sufficient to justify a conclusion that Adv Mkhwebane cannot remain in office as Public Protector. In any event the test for misconduct and incompetence is related to the evidence which establishes same and is not concerned with conduct which is not the subject of the Motion.

1107. The Committee notes further that the Constitution does not mandate the automatic removal of the Public Protector in the wake of findings of misconduct or incompetence. Even where same has been established, the NA has an election on whether to remove a Chapter 9 Institution office bearer or not. As such it may be that whilst a Chapter 9 Institution office bearer has committed an act of misconduct as defined, that such misconduct, when looked at holistically does not warrant the extremely serious step of removal. On the converse, as earlier stated, removal does not require that there be multiple events of misconduct and therefore even one act of misconduct may be serious enough to warrant removal.

1108. The Committee is satisfied, that having followed a lengthy fact finding enquiry, in a manner that has been fair to Adv Mkhwebane, that the findings it has reached are rational and that its processes have been conducted in accordance with the Removal Rules.

(i) Consensus

1109. The Committee, having regard to s194 of the Constitution, has satisfied itself, based on the evidence before it and the submissions it has received, that Adv Mkhwebane has misconducted herself on multiple occasions and in the most egregious manner to the extent that, in its view, any of the three misconduct charges standing alone – or indeed even certain of the sub-charges – would warrant removal. In addition, Adv Mkhwebane has also demonstrated an unacceptable and debilitating level of incompetence and, for that reason too, the Committee recommends that the NA remove her from the office of the Public Protector.

(ii) Minority views and abstentions

1110. It is recorded that Al Jamah'ah did not support the removal from office of Adv Mkhwebane stating she should be allowed to conclude her term in office.

1111. The EEF did not object to any findings of the Committee during deliberations or the consideration of the draft report. However, it noted its very serious concerns about the fairness of the process and to this extent stated that any adoption of a draft report would be premature. The EFF noted that the proceedings have been grossly unfair and procedurally flawed; conducted in a hurried nature; constituted a frivolous political process with a preconceived outcome and is not fair in light of Adv Mkhwebane not having legal representation since 31 March 2023. The conduct of the Committee to continue with the adoption of the draft report is therefore not reasonable and is grossly unfair to Adv Mkhwebane. The EFF indicated further that it intends to review the report of the Committee.

(iii) Recommendation

1112. **The Committee for s194 Enquiry, having duly considered the Motion recommend that the National Assembly, based on the Committee's findings of both misconduct and incompetence, resolve to remove Adv Busisiwe Mkhwebane from the office of Public Protector as provided for in s194 (1) (c) of the Constitution.**

REPORT TO BE CONSIDERED

TABLE IV: CR17 COURT PROCEEDINGS

	Date	Case Name	Judges	Order	Counsel & Attorney
1.	09-03-22	**PP v President of the Republic of South Africa** CCT 62/20 CR17 CC rescission	Kollapen J; Madlanga J; Majiet J; Mathopo J; Mhlantla J; Theron J; Tshiqi J and Unterhalter AJ	Rescission application dismissed with costs as no case made out for rescission.	Seanego Inc.
2.	01-07-21	**PP v President of the Republic of South Africa**; 2021 (6) SA 37 (CC) (1 July 2021) CR17 CR17 CC judgment	Jafta J (Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring) Mogoeng CJ partially dissenting	1. Leave to appeal is granted. 2. Save to the extent mentioned below, the appeal is dismissed. 3. No order as to costs.	M Sikhakhane SC & F Karachi Seanego Attorneys Inc.
3.	10-03-20	**President v PP** [2020] 2 All SA 865 (GP) (10 March 2020) (CR17) CR HC judgment	Mlambo D, Matojane K E, Keightley R	1. The PP's decision to investigate and report on the CR17 election , is reviewed, declared invalid and set aside. 2. Report number 37 of 2019/20 of 19 July 2019, including the findings and remedial orders in paras 7.1; 7.2; 7.3; 8.1.1; 8.1.3; 8.2.1; 9.1; 9.3 and 9.4, is reviewed, declared invalid and set aside. 3. The PP is ordered to pay the costs of second applicant and the third respondent on the party and party scale , including the costs of two counsel. 4. No order as to costs is made in respect of the fourth, fifth and six respondents, and the *amicus curiae*.	M Sikhakhane SC &F Karachi Seanego Inc.

TABLE V: GORDHAN/SARS RELATED MATTER

No.	Date	Case Name	Judges	Order	Counsel & Attorney
1.	29-07-2019	**Gordhan v Public Protector and Others** [2019] ZAGPPHC 311; [2019] 3 All SA 743 (GP) (29 July 2019)	Potterill J	Part A of this application is dealt with as one of urgency. The applicant's failure to comply with the Rules of this Court is condoned. The remedial orders in para 8 of the Public Protector's report 36 of 2019/20 of 5 July 2019 are suspended pending the final determination of Part B of this application. The Public Protector or the office of the Public Protector are interdicted from enforcing the remedial orders pending the final determination of Part B. 4. The first, second and tenth respondents are ordered, jointly and severally, to pay the applicant's, eighth respondent's and ninth respondent's costs, which costs will include the costs consequent upon the employment of two counsel.	Seanego Inc. T Masuku SC & T Mankge
2.	29-05-2020	**Economic Freedom Fighters v Gordhan and Others**; **Public Protector and Another v Gordhan and Others** 2020 (6) SA 325 (CC) (29 May 2020) – this was the appeal from the interlocutory order to suspend remedial action – the PPSA, Adv Mkhwebane and the EFF applied for leave to appeal directly to the CC against Potterill J judgment	Khampepe ADCJ (Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring)	In CCT 232 /19 The application for leave to appeal against the merits is dismissed. Leave is granted against the costs orders. To the extent that the High Court of South Africa, Gauteng Division, Pretoria, ordered costs against the Economic Freedom Fighters, that costs order is set aside and replaced with: 'The Public Protector is ordered to pay Mr Pravin Jamnadas Gordhan, Mr Visvanathan Pillay and Mr George Ngakane Virgil Magashula's costs, including the costs consequent upon the employment of two counsel.' 4. Each party is to pay their own costs in this court.	Seanego Inc. T Masuku SC & B Matlhape
				In CCT 233/19 The application for leave to appeal against the merits is dismissed. Leave is granted against the costs orders.	

				To the extent that the High Court of South Africa, Gauteng Division, Pretoria, ordered personal costs against Ms Busisiwe Mkhwebane, that costs order is set aside and replaced with: *'The Public Protector is ordered to pay Mr Pravin Jamnadas Gordhan, Mr Visvanathan Pillay and Mr George Ngakane Virgil Magashula's costs, including the costs consequent upon the employment of two counsel.'* 4. Each party is to pay their own costs in this court.	
3.	07-12-2020	**Gordhan v Public Protector and Others** [2020] ZAGPPHC 743; [2021] 1 All SA 428 (GP) (7 December 2020) **(SARS Unit HC judgment)**	S Baqwa J, L Windell J, A C Basson J	The application to strike out The application to strike out is granted in respect of paras 228 and 232 of Minister Gordhan's founding affidavit with costs. The counter-application The counter-application by the first and second respondents is dismissed with costs. Part B of the review application (i) The Public Protector's decision in terms of section 6(9) of the Public Protector Act 23 of 1994, to entertain the complaints upon which she reported in the Report, is reviewed, declared unlawful and set aside; (ii) The Report is reviewed, declared unlawful and set aside; (iii) The Public Protector and Advocate Mkhwebane are ordered, jointly and severally, to pay Minister Pravin Jamnadas Gordhan, Mr Visvanathan Pillay and Mr George Ngakane Virgil Magashula's costs on the scale between attorney and client such costs to include the costs of two counsel where so employed. It is further ordered that Advocate Mkhwebane shall pay such costs personally with her liability limited to15% of those costs.	Seanego Inc. Adv T Masuku SC & Adv BH Matlhape
4.	06-11-2020	**Minister of State Security v Public Protector and Others** [2020] ZAGPPHC 622 (6 November 2020) – relates to the IGI report	Mngqibisa-Thusi J	That an interdict against the release publication and/or public access of the Report by the Inspector General of Intelligence dated 31 October 2014 titled '*Report of an Investigation into media allegations against the Special Operations Unit and/or other branches of the State Security Agency*' ('*the I-G's report*') is granted. That any reference to the I-G's Report in para 37 of the founding affidavit of the tenth respondent, the Economic	Seanego Inc. T Masuku SC & B Matlhape

				Freedom Fighters ('*the EFF'*), marked **'JMS2'** in the main review application is struck out. That the EFF is ordered to pay the costs of this application. That the EFF's counter application is dismissed. 5. That no order as to costs is made with regard to the EFF's counter application.	
5.	09-10-2021	**Public Protector v Gordhan & others** (SCA 651/21)	Wallis J & Mothle J	Condonation sought granted with PP to pay costs of condonation. Application for leave to appeal dismissed with costs on grounds there no reasonable prospects of success on appeal and no compelling reason why an appeal should be heard.	Seanego Inc. Mpofu SC & Motlwenya
6.	28-01-2022	**Public Protector v Gordhan & others** (SCA 651/21)	Maya JP	Application in terms of s 17(2)(f) of Act 10 of 2013 dismissed with costs for the reason that no exceptional circumstances warranting reconsideration or variation of the decision refusing application for leave to appeal been established	Seanego Inc. Mpofu SC & Motlwenya
7.	28-09-2022	**Public Protector v Gordhan & Others** (SCA 464/21)	Petse J & Unterhalter AJA	Leave to appeal dismissed with costs on the grounds that there is no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard. Condonation granted and PP to pay for costs thereof. Outcome renders it unnecessary to determination conditional application for leave to appeal and no order as to costs.	Seanego Inc. Mpofu SC & Motlwenya

TABLE VI: VREDE

No.	Date	Case Name	Judges	Order	Counsel & Attorney
19	20-05-2019	**Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector** [2019] ZAGPPHC 132; [2019] 3 All SA 127 (GP); 2019 (7) BCLR 882 (GP) (20 May 2+C29019)	Tolmay, J	1113. It is declared that in investigating and reporting on the Vrede Dairy Project for purposes of her report No 31 of 2017/18, dated 8 February 2018, the PP failed in her duties under section 6 and 7 of the Public Protection Act and section 182 of the Constitution. 1114. The PP's report No 31 of 2017/18 date 8 February 2018 is accordingly reviewed, set aside and declared unlawful, unconstitutional and invalid. 1115. The costs order is postponed *sine die*.	Tshisevhe Gwina Ratshimbilane Inc. T Bruinders Replaced by Ngalwana (SC) Karachi Rakgwale Assisted in CASAC Platt (SC) *et* C Dauds *et*
20	15-08-2019	**Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector** [2019] ZAGPPHC 349; [2019] 4 All SA 79 (GP) (15 August 2019) (Vrede Dairy)	Tolmay, J	1116. The PP in her official capacity is ordered to pay 85% of the costs of the DA on an attorney and client scale, which costs will include the costs of two counsel. 1117. PP in her official capacity is ordered to pay 85% of the costs of the CASAC of the Constitution on an attorney and client scale, which costs will include the costs of two counsel. 1118. The PP in her personal capacity is ordered to pay 7.5% of the costs of the DA e on an attorney and clients scale, which costs will include the costs of two counsel. 1119. The PP in her personal capacity is ordered to pay 7.5% of the costs of the CASAC of Constitution on an	Tshisevhe Gwina Ratshimbilane Inc. V Ngalwana (SC) F Karachi Rakgwale A Platt (SC) C Dauds

				attorney and clients scale, which costs will include the costs of two counsel.	
21	13-12-2019	**Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector** (11311/2018; 13394/2018)	Tolmay, J	Application for leave to appeal dismissed with costs.[112]	Seanego Inc. Botes Karachi
22	21-06-2020	**Public Protector v Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution** (092/20)	Wallis & Schippers	Application for leave to appeal dismissed with costs.	Seanego Inc. Botes Karachi
23	26-08-2020	**Public Protector v Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution** (133/20)		Dismissed the PP's application to appeal the High Court judgment with costs, on the grounds that "*it bears no reasonable prospects of success*".	Seanego Inc. Sikhakhane SC Maisela

[112] Adv Mkhwebane persisted with all the grounds of appeal set out in the notice of application and supplementary notice of application for leave to appeal, but the leave to appeal was argued on a limited basis, the main argument being that the Court erred in its interpretation of Adv Mkhwebane's discretion in the result that the Court found that Adv Mkhwebane is not vested with a discretion in determining which complaints to investigate. In so doing, came to the incorrect conclusion.