IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION (CAPE TOWN)

CASE NO: 2107/2020

In the matter between:

THE PUBLIC PROTECTOR	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Third Respondent
THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES	Fourth Respondent
THE COMMISSION FOR GENDER EQUALITY	Fifth Respondent
THE AUDITOR-GENERAL OF SOUTH AFRICA	Sixth Respondent
THE INDEPENDENT ELECTORAL COMMISSION	Seventh Respondent
THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA	Eighth Respondent
ALL POLITICAL PARTIES REPRESENTED IN THE NATIONAL ASSEMBLY	Ninth to 22nd Respondents

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FIRST RESPONDENT'S ANSWERING AFFIDAVIT
TO THE RELIEF SOUGHT IN PART A OF THE NOTICE OF MOTION

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I, the undersigned

THANDI RUTH MODISE

do hereby make oath and state that:

INTRODUCTION

1. I am the First Respondent in this matter.

2. I am the Speaker of the National Assembly ("**the Speaker**"), which is one of the two Houses of the Parliament of the Republic of South Africa as envisaged in section 42(1)(a) of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"). Following the sixth general election since the dawn of democracy in our country, on 22 May 2019 I was elected as the Speaker for the Sixth Parliament. (In what follows, when referring to the powers and duties of the incumbent of the office, I shall refer to the Speaker in the third person; and when referring to my own actions in that capacity, I shall use the first person.)

3. The facts set out in this affidavit are within my personal knowledge, unless stated or the context suggests otherwise, or have been obtained from documentation under my control. I believe the facts to be true. Where I make legal submissions, I believe them to be correct.

4. I make this affidavit in opposition to the urgent relief sought in Part A of this application only. My response to the relief sought in Part B, which may incorporate or repeat parts of this affidavit, will be delivered once the timetable for the hearing of that part of this application has been fixed.

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5. This affidavit is structured as follows:

5.1. I set out the salient facts in chronological order;

5.2. I describe the procedure for the removal of a person from the office of Public Protector in terms of section 194 of the Constitution and Part 4 of Chapter 7 of the Rules of the National Assembly adopted on 3 December 2019;

5.3. I address each of the ten grounds, set out in the applicant's founding affidavit, on which the relief in Part A is apparently sought;

5.4. I deal with the application for the interim interdict *pendente lite* in paragraph 2 of Part A;

5.5. I deal with the conflict-of-interest related relief sought in paragraphs 3 and 4 of Part A, sought in the alternative to the interim interdict and which I submit is final relief not interim relief;

5.6. I deal briefly with the relief sought in paragraph 5 of Part A;

5.7. I deal paragraph-by-paragraph with those parts of the founding affidavit not covered by what I say earlier in this affidavit and which call for a specific response. The parts of the founding affidavit not specifically traversed in my affidavit but which are incompatible with it, are denied; and

5.8. I address the issue of costs and explain my prayer for condonation of the late delivery of my answering papers.

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FACTUAL BACKGROUND

6. The applicant, the incumbent Public Protector, Adv Busisiwe Mkhwebane ("**PP**"), assumed office on 19 October 2016, a date during the Fifth Parliament constituted after the fifth general election in April 2014.

7. In terms of section 181(5) of the Constitution the PP is accountable to the National Assembly ("**NA**") and must report to the NA on her activities and the performance of her functions at least once a year.

8. The NA has a corresponding obligation, under section 55(2)(b)(i) of the Constitution, to provide for mechanisms to maintain oversight over the PP (an organ of state).

9. To this end, acting in terms of Rule 225 of the general Rules of the NA made in terms of section 57(1)(b) of the Constitution ("**the NA Rules**"), and with the concurrence of the NA's Rules Committee ("**the Rules Committee**"), I, like my predecessor as the Speaker in the Fifth Parliament, Ms Baleka Mbete MP, established a portfolio committee previously called the Portfolio Committee on Justice and Constitutional Development and now called the Portfolio Committee on Justice and Correctional Services ("**Portfolio Committee**").

10. At all times material to this matter:

    10.1. the Portfolio Committee has been responsible for overseeing the Department of Justice and Constitutional Development and other institutions, including the PP, that receive their budgetary allocation under the Justice and Constitutional Development Vote; and

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10.2. the relevant powers of the Portfolio Committee have included requiring any person or institution to report to it in terms of section 56(b) of the Constitution, and monitoring, investigating, enquiring into and making recommendations concerning the institutions within its portfolio in terms of NA Rule 227(1).

11. The members of the Portfolio Committee appointed to it by the political parties represented in the NA in terms of NA Rule 155, have freedom of speech in the Committee (as indeed they also do in the NA itself), subject to the rules and orders of the NA.

12. The Portfolio Committee reports to the NA.

13. Since the incumbent PP's appointment in October 2016, she has appeared before the Portfolio Committee on several occasions. She has also had several engagements with me or my office.

14. In what follows I shall summarise briefly the various engagements that the Portfolio Committee and I or my office have had with the PP since her appointment to office. Additionally, I have canvassed the publication of certain reports by the PP and related court judgments, to the extent that they are relevant to issues that were raised by Members of Parliament (**"MPs"**) at the Portfolio Committee and with my office. While I have personal knowledge of those events following my assumption of the office of Speaker on 22 May 2019, I have satisfied myself as to the accuracy of my description of the events and the associated documentation concerning the NA's dealings with or concerning the incumbent PP before that date. (In what follows, unless stated or the context suggests otherwise, references to the PP are to the incumbent PP.)

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The PP's first substantive briefing to the Portfolio Committee

15. On 30 March 2017 the PP briefed the Portfolio Committee on her office's 2016/2017 Annual Performance Plan and Budget. She highlighted the successes achieved in her first 100 days in Office, spoke to budgetary challenges, expressed the view that there is a misconception in the public and media as to the functions of the PP, and elaborated on a perceived misalignment between the Public Protector Act and the Constitution. I attach a copy of the Portfolio Committee's minutes of 30 March 2017 as annexure "**TRM 1**".

The CIEX PP Report and the litigation in the High Court concerning it

16. On 19 June 2017 the PP published her Report 8 of 2017/2018 entitled "*Report on an Investigation into Allegations of Public Funds and Failure by the South African Government to Implement the CIEX Report and to recover public funds from ABSA Bank*" (**"CIEX PP Report"**). I shall not annex a copy of the CIEX PP Report,[1] as only paragraphs 7.1, 7.2 and 8.1 of the remedial action in terms of section 182(1)(c) of the Constitution taken by the PP (internal page number 55) are relevant.

17. For the present, suffice it to say that the factual findings and conclusions in the CIEX PP Report include that the South African Government had improperly failed to implement the CIEX report which dealt with alleged stolen state funds, after commissioning the report from CIEX and paying for it; the Government and the South African Reserve Bank ("**the SARB**") had improperly failed to recover R3,2 billion

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1 The CIEX PP Report is available on the PP's official website at http://www.pprotect.org/sites/default/files/legislation_report/Report%208%20of%202017%262018%20Public%20Protector%20South%20Africa.pdf

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from Bankorp Limited/ABSA; and that the South African public had been prejudiced by the conduct of the Government and the SARB.

18. Paragraph 7.2 of the CIEX PP Report obliged the Chairperson of the Portfolio Committee to initiate a process that would result in the amendment of section 224 of the Constitution, which concerns the constitutional mandate of the SARB. The PP directed that it be amended to read as follows:

'*224. (1) The primary object of the South African Reserve Bank is to promote balanced and sustainable economic growth in the Republic, while ensuring that the socio-economic well-being of the citizens are protected.*

(2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, while ensuring that there must be regular consultation between the Bank and Parliament to achieve meaningful socioeconomic transformation.'

19. In paragraph 8.1 of the CIEX PP Report, the PP required that the Chairperson of the Portfolio Committee submit an action plan to her office within 60 days of the report on the initiatives taken in pursuit of paragraph 7.2.

20. The SARB instituted judicial review proceedings in the Gauteng Division of the High Court, Pretoria, challenging the CIEX PP Report and remedial action insofar as it pertained to the SARB. The SARB joined the Speaker of the NA (then Ms Mbete) and the Chairperson of the Portfolio Committee (then Dr MS Motshekga MP) as respondents in those proceedings.

21. Given that the Speaker and the Chairperson of the Portfolio Committee also opposed the remedial action in paragraphs 7.2 and 8.1 of the CIEX PP Report described above, the Speaker filed an affidavit on her own behalf and on behalf of the Chairperson

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supporting the application of the SARB and requesting the Court's leave to intervene as co-applicants in the proceedings to review and set aside that remedial action. The basis of the Speaker's and the Chairperson's challenge to the CIEX PP Report was that the remedial action impermissibly intruded into the law-making terrain of Parliament. As the PP did not object to the Speaker and the Chairperson joining as co-applicants, at the hearing they were duly joined as such.

22. Despite initially opposing the application for judicial review of the remedial action in paragraphs 7.2 and 8.1 of the CIEX PP Report, the PP filed an answering affidavit in which she conceded the merits and consented to all the relief sought. She agreed that such remedial action was unlawful in that only Parliament has the power to amend the Constitution and that she had no power to dictate to Parliament.

23. On 17 August 2017 the application for judicial review of the remedial action in paragraphs 7.2 and 8.1 of the CIEX PP Report succeeded before Murphy J in the High Court on the basis raised by the Speaker and the Chairperson of the Portfolio Committee (and conceded by the PP in her answering affidavit), as well as on other grounds not raised by the Speaker and the Chairperson. Murphy J reviewed and set aside paragraphs 7.2 and 8.1 of the remedial action in the CIEX PP Report with costs, up to and including the filing of the PP's answering affidavit. Murphy J's judgment is reported as *South African Reserve Bank v Public Protector and Others* 2017 (6) SA 198 (GP) (**"*SARB v PP I*"**). There was no appeal against Murphy J's judgment or any of his orders.

24. It also bears mentioning at this juncture that the SARB also sought judicial review in the Gauteng Division of the High Court, Pretoria, of the further remedial findings in paragraphs 7.1 and 8.1 of the CIEX PP Report requiring, in effect, that the President re-open enquiries by the Special Investigating Unit ("**SIU**") in order to recover R1,125

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billion misappropriated public funds unlawfully given to ABSA Bank and to recover alleged misappropriated public funds given to various institutions as mentioned in the CIEX report; that the SARB must co-operate fully with the SIU and assist it in recovering the misappropriated public funds; and that the SIU and the SARB must submit an action plan within 60 days on the initiatives taken in that regard. Two other sets of legal proceedings seeking similar review relief were launched in the High Court in Pretoria by ABSA, and the Minister of Finance and the Treasury, respectively. The PP opposed all three sets of legal proceedings, which were consequently consolidated and heard by a Full Bench of the High Court in Pretoria. I shall return to the outcome of the consolidated proceedings, insofar as it is relevant to the proceedings in the NA in relation to the PP, in paragraph 31 below.

The first request to remove the PP made by Mr Steenhuisen MP

25. On 13 September 2017 Mr John Steenhuisen MP, the then Chief Whip of the Official Opposition in then NA, the Democratic Alliance ("**DA**"), addressed a letter to the then Speaker, Ms Mbete, a copy of which is attached marked "**TRM 2**". In this letter Mr Steenhuisen requested, in terms of NA Rule 337(b), that proceedings be initiated to remove Adv Mkhwebane from the office of the PP pursuant to section 194 of the Constitution. The grounds on which Mr Steenhuisen sought the removal of Adv Mkhwebane from office were based on certain of the findings adverse to her by Murphy J in *SARB v PP I* and on an allegation adverse to her in the SARB's supplementary affidavit in those proceedings (namely that she had sacrificed her independence and impartiality when she consulted with the Presidency and the State Security Agency ("**SSA**") on remedial action to be recommended in the CIEX PP

Report). Mr Steenhuisen alleged that her conduct over the preceding ten months had demonstrated that she was not fit to hold the office of PP.

26. On 28 September 2017 Mr Steenhuisen's request was announced to the NA. I attach, marked "**TRM 3**", the relevant extract from the Announcements, Tablings and Committee Reports ("**ATC**") No. 133 of 2017. Item 1 of the ATC records that the Speaker had referred Mr Steenhuisen's letter to the Portfolio Committee for consideration and report.

27. In the meantime (i.e. before the Portfolio Committee met to consider Mr Steenhuisen's letter), at a meeting of the Portfolio Committee on 5 October 2017 the PP briefed the Committee on her Annual Report for 2016/2017. I attach a copy of draft minutes of that meeting, marked "**TRM 4**". (I should mention that the Portfolio Committee's normal practice is for a member of the parliamentary staff in attendance at a meeting to prepare draft minutes of the meeting and to circulate them to the members of the Committee, but not to formally adopt the draft minutes at a later meeting of the Committee.) The following concerns and comments raised by members of the Committee are recorded in item 2 of the draft minutes:

'*The Committee raised concerns and comments, which included the following:*

- *The Committee noted the absence of the Deputy Public Protector and the fact that it had received no apology for his absence.*
- *The Committee stressed the importance of the PPSA [i.e. the Public Protector South Africa] receiving a clean audit. It noted that the office keeps shifting the intention to achieve a clean audit to outer years. The core of the PPSA's mandate was to deal with maladministration. It was disappointing that there were instance (sic) of*

fruitless and wasteful expenditure in the office. There was a need to improve consequence management at the PPSA.

- *The Committee remains concerned that the PPSA is not operating as a going concern and that its deficit has increased.*
- *The Committee noted that there was a regression in relation to performance targets. The Committee questioned why the office needed more resources if it could not meet its targets.*
- *The Committee welcomed saving in the office but noted that there were increases in travelling and catering costs.*
- *The South African Reserve Bank case against the Public Protector had affected public confidence and trust in the PPSA.*
- *The Committee was disappointed with the representation of women in the office (32%).*
- *The Committee's observations are contained in its Budgetary Review and Recommendations Report.*'

28. On 25 October 2017 the Portfolio Committee met to discuss Mr Steenhuisen's request that proceedings for the removal of the PP from office be instituted. I attach a copy of the draft minutes of that meeting, marked "**TRM 5**". The following is recorded in item 3 of the draft minutes:

'*3.1* ***Committee deliberations***

- *The Chairperson reminded the Committee that previously he had expressed the view that he felt that there was a conflict, which might require that he recuse himself from this matter. However, after reflecting on the matter carefully, he felt that there was no conflict of interest.*

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- *As the Committee had agreed that it was the right forum to deal with the request, he tabled the matter for discussion. The Chairperson clarified that although some members were of the view that the Committee had agreed previously to conduct an inquiry, in fact the Committee had only agreed that it was the correct forum to deal with the referral.*
- *Clarity was sought on the process. It was suggested that the Committee should identify witnesses to call, as the Committee could not decide the matter based on the referral alone.*
- *It was proposed that the first step would be to look at whether there was a basis for the inquiry, before agreeing on the process/form the inquiry would take. A case should be established before the Committee agreed to call witnesses. It was argued further, that there was no basis for the Committee to conduct an inquiry: the Public Protector had made a mistake and she had acknowledged this.*
- *Some members of the Committee urged the Committee to invite the complainant and the Public Protector to testify before the Committee. It was argued that the Committee would only be able to decide if there was a basis for the inquiry after it had listened to the two parties. It was also argued that the referral from the Speaker contained enough prima facie evidence for an inquiry to be conducted.*
- *It was also argued that the Committee had not received all the attachments referred to in the referral letter. The matter should be held over until the Committee had received these before concluding that there was no basis for an inquiry.*

3.2 ***Voting***

- *After considering the question of whether there was a basis for the Committee to conduct an inquiry, the Committee voted as follows:*

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- *Yes - Four (DA, EFF and ACDP).*
- *No - Six (ANC and NFP).*

The Committee resolved that there was no basis for the request to conduct an inquiry into the fitness of the Public Protector to hold office (Majority decision).'

29. On 15 November 2017 the Portfolio Committee's report in respect of the request in Mr Steenhuisen's letter of 13 September 2017 was presented to the NA. I attach an extract from the relevant ATC, No. 167 of 2017, marked "**TRM 6**". Item 6 (at internal page 126) reads as follows:

*'**6. Report of the Portfolio Committee on Justice and Correctional Services on the request for the National Assembly to institute removal proceedings against the Public Protector in terms of section 194 of the Constitution, dated 15 November 2017***

The Portfolio Committee on Justice and Correctional Services, having considered the request for the National Assembly to institute removal proceedings against the Public Protector in terms of section 194 of the Constitution, reports as follows:

1. *The Speaker of the National Assembly received a letter dated 13 September 2017 from the Chief Whip of the Democratic Alliance, Mr J Steenhuisen MP, requesting the National Assembly to institute removal proceedings against the Public Protector, in terms of section 194 of the Constitution. The letter was referred to the Committee for consideration and report on 28 September 2017 (See ATC No 133-2017).*
2. *In his letter, Mr Steenhuisen MP, submitted that the conduct of Adv. B Mkhwebane over the past ten months demonstrated that she is not fit to hold office as Public Protector. The conduct referred to relates but is not limited to:*

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- *That she grossly over-reached her powers when she recommended, in her report No 8 of 2017/18 (the Absa/Bankorp Report), that the Constitution be amended to alter the mandate of the South African Reserve Bank;*
- *That she grossly over-reached her powers when she sought, in the Absa/Bankorp Report, to dictate to Parliament how and when legislation should be amended. Her actions compromised the independence of Parliament and the effectiveness of parliamentary procedures;*
- *That in doing the above she has shown a poor understanding both of the law as well as her powers;*
- *That she sacrificed her independence and impartiality when she consulted with the Presidency and the State Security Agency on remedial action to be recommended in the Absa/Bankorp Report; and*
- *That the North Gauteng High Court found inter alia that the Public Protector had "unconstitutionally and irrationally" intruded on Parliament's exclusive authority and that she had gone about crafting her recommendations in the Absa/Bankorp Report in a "procedurally unfair" manner.*

3. *On 25 October 2017, the Committee deliberated on the matter. After considerable debate, the Committee concluded that there was no basis to institute an inquiry: the Public Protector had made a mistake and she had acknowledged this. There was enough prima facie evidence contained in the documents that had accompanied the referral for the Committee to come to this conclusion. In addition, the Committee expressed the view that the request to*

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institute removal proceedings was motivated by political considerations and had nothing to do with Adv. Mkhwebane's fitness to hold office.

4. ***Recommendation***

Having considered the request for the National Assembly to institute removal proceedings against the Public Protector in terms of section 194 of the Constitution, the Committee resolved that there was no basis for Parliament to institute removal proceedings against the Public Protector.

Report to be considered.'

30. On 29 November 2017 the NA considered and voted on the Portfolio Committee's report on Mr Steenhuisen's 13 September 2017 request to remove the PP. I attach the relevant extract from of the Minutes of the Proceedings of the NA, No. 52 of 2017, "**TRM 7**". As appears from the minutes, there was no debate on the report. The Chief Whip of the Majority Party moved that the report be adopted. Declarations of vote were made, a division was demanded, and the House divided. The motion was passed by a majority of the members, and the report was adopted. In the result, the NA refused Mr Steenhuisen's first request by a majority vote.

The second request to remove the PP made by Mr Steenhuisen MP

31. On 16 February 2018 Mr Steenhuisen addressed a second letter to the then Speaker, Ms Baleka Mbete MP, requesting that procedures to remove the PP be expedited.

32. Mr Steenhuisen referred to the judgment of the Full Bench of the Gauteng Division of the High Court, Pretoria earlier that day (now reported as *ABSA Bank Ltd and Others v Public Protector* [2018] 2 All SA 1 (GP)) ("***Absa v PP***") in the consolidated proceedings for judicial review of the remedial action in paragraphs 7.1 and 8.1 of the CPIX PP Report described in paragraph 24 above. In *Absa v PP* the Full Bench (*per*

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Fourie, Mngqibisa-Thusi and Pretorius JJ) made certain findings adverse to the PP, including that she had failed to disclose in the CIEX PP Report that during her investigation she had held meetings with the Presidency on 25 April and 7 June 2017; in her answering affidavit she had admitted only to having held the first meeting; she had acted in a procedurally unfair manner; and in her answering affidavit she said her averments relating to economics were based on advice received from economic experts during her investigation whereas in fact the economic expert's report had been obtained after the final CIEX PP Report had been issued. The Full Bench consequently ordered her personally to pay 15% of the SARB's attorney-and-client costs including the costs of three counsel.

33. In his letter Mr Steenhuisen also referred to a public statement released by the PP, in which she had labelled the DA's criticism of her as '*unpatriotic*' and made what he alleged were '*inappropriate statements about the party's legitimate criticism of her work*'.

34. Finally, Mr Steenhuisen referred to his first complaint dated 13 September 2017, and concluded by alleging that '*[e]vidently, Adv Mkhwebane is unfit to hold office as a result of her gross incompetence*'.

35. I attach, marked "**TRM 8**", a copy of Mr Steenhuisen's letter of 16 February 2018, without the annexures thereto (annexure PPFA6 to the PP's founding affidavit is a relatively poor copy of that letter), as well as a copy of the relevant media statement by PP, which is dated 12 February 2018, marked "**TRM 9**".

36. I deal below with the steps taken in the NA in relation to Mr Steenhuisen's second request.

Portfolio Committee's engagement with the PP regarding the Vrede Dairy report, CIEX PP Report and the litigation in the High Court concerning it

37. On 6 March 2018 the PP appeared before the Portfolio Committee to brief it on her *Report on Allegations against Maladministration Against the Free State Department of Agriculture – Vrede Integrated Dairy Farm Protect* (Report No. 31 of 2017/2018) ("**Vrede Dairy Report**") and on CIEX PP Report and the litigation in the High Court concerning it.

38. The Vrede Dairy Report was the culmination of nearly four years of investigation by the incumbent PP and her predecessor, Adv Thuli Madonsela, into allegations of widespread corruption, maladministration and impropriety in respect of the Free State Province's Department of Agriculture Vrede Integrated Dairy Project, which included the appointment by the Department of Estina (Pty) Ltd ("**Estina**") to manage the project and the payment of substantial sums of money to Estina. The allegations were made in three complaints lodged with the office of the PP by a representative of the DA in the Free State provincial legislature, Dr Roy Jankielsohn MP. The complaints were lodged on 13 September 2013, 28 March 2014 and 10 May 2016.

39. The Vrede Dairy Report received widespread attention, amongst other things because it revealed that the PP had not investigated the third of the complaints (which was far more detailed than the first two) or the roles played and 'kick-back' benefits allegedly received by senior politicians in the Province.

40. The DA and a non-government organisation, the Council for the Advancement of the South African Constitution ('CASAC'), launched proceedings in the Gauteng Division of the High Court, Pretoria, for judicial review of the Vrede Dairy Report. These

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proceedings were pending when the PP appeared before the Portfolio Committee on 6 March 2018.

41. In her founding affidavit the PP, relying on annexure "PPFA 3" thereto, deals at some length with her appearance before the Portfolio Committee on 6 March 2018. Although annexure "PPFA 3" is not the minutes of that meeting drawn up by the parliamentary staff – it is a report on the meeting by a non-governmental organisation called the Parliamentary Monitoring Group ("**PMG**") which monitors the work of Parliament – I have been informed by the former Chairperson of the Portfolio Committee Chairperson, Dr Motshekga, that the part of annexure "PPFA 3" under the heading '*Meeting report*' (starting on the second unnumbered page) is an accurate account of the meeting, but the part of that annexure under the heading '*Meeting summary*' (starting on the first unnumbered page) is not accurate and should not be relied on because it ascribes to the Committee as a whole statements made by certain members during the course of the meeting. I refer to the accompanying affidavit of Dr Motshekga in which he confirms the correctness of this and the other parts of my affidavit recounting or dealing with the events in or in relation to the Portfolio Committee during the period when he was the Chairperson, i.e. for the Fifth Parliament which came to an end when it was dissolved in February 2019 before and with a view to the sixth general election on 8 May 2019.

42. I should also mention that prior to the meeting, the PP had circulated a statement dealing with the items on the agenda. I attach a copy the covering letter and statement as "**TRM 10**".

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Evaluation of Mr Steenhuisen's second request to remove the PP

43. On 8 March 2018 my predecessor as the Speaker, Ms Mbete, received a memorandum from the National Assembly Table ("**NA Table**") regarding Mr Steenhuisen's second request to remove the PP. I attach a copy of the memorandum as "**TRM 11**". (I should mention that the NA Table, which is headed by the Secretary to the NA (the most senior parliamentary official serving the NA), provides procedural and technical advice and guidance to the NA.) After assessing the relevant legislative framework and NA Rules, the NA Table recommended that the Speaker refer Mr Steenhuisen's request to the Portfolio Committee.

44. The Speaker approved the recommendation and on 14 March 2018 her decision was announced in ATC Report No. 28 of 2018. I attach the relevant extracts from that report, marked "**TRM 12**". Item 2 provides:

'Request to expedite procedures to remove the Public Protector

(1) A request has been received from the Chief Whip of the Democratic Alliance, Mr J Steenhuisen MP, that the National Assembly expedite procedures to remove the Public Protector in terms of section 194 of the Constitution read with section 2(1)(c) of the Public Protector Act 23 of 1994.

*Referred to the **Portfolio Committee on Justice and Correctional Services** for consideration and report.'*

PP's briefing to the Portfolio Committee on her Annual Performance Plan and Budget 2018/2019

45. On 17 April 2018 the PP presented her Annual Performance Plan and Budget for 2018/2019 to the Portfolio Committee. She complained of insufficient funding, low staff morale, capacity shortages, increased litigation, security and poor turnaround

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times from state agencies and institutions. She requested additional funding of R870 million over the next three years. I attach a copy of the draft minutes of that meeting, marked "**TRM 13**".

46. The Portfolio Committee's response to the PP's presentation of 17 April 2018 is reflected in the '*Report of the Portfolio Committee on Justice and Correctional Services on Budget 21: Justice and Constitutional Development, dated 8 May 2018*', as published in ATC No. 56 of 2018. I attach a copy of the relevant extracts from this ATC, marked "**TRM 14**". In item 18 of Portfolio Committee's report reads as follows:

'*18.1. The Committee is especially concerned at reports of institutional instability at the PP because of constant turnover and the redeployment of staff, particularly among senior staff. The Committee is unable to comment on the reasons for this but is of the view that this matter should receive urgent attention.*

18.2. The Committee notes too that the Deputy Public Protector was not present at the meeting. It raised its concern that the Public Protector is not making best use of the Deputy, who has an important leadership role to play within the institution. The Committee was informed verbally that the Deputy is delegated the functions of staff training and quality assurance but requests that it be provided with the full list of delegations to the Deputy Public Protector for the record.

18.3. The Committee notes the PP's request for additional funds. While the Committee understands why the request is made and is largely sympathetic, the request is made at a time when all Departments, entities and institutions are being asked to compromise. The Committee did propose in its BRRR that the PP be given additional funding for increased investigative capacity and for the

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increased costs of litigation but was informed by the Minister of Finance that there is simply no money at this time.

18.4. *The Committee is concerned about the legal costs associated with the increased number of the PP's findings that are being taken on review since the Constitutional Court clarified the Public Protector's powers of remedial action. The Committee requests that the PP keep it informed of the number and status of the review applications and the associated costs. The Committee, however, asks that the PP ensure that its reports are of the highest standard to lessen the prospects of a successful challenge for procedural reasons.*

18.5. *The Committee notes that the PP has focused on clearing backlog cases for 2018/19. While this is highly commendable, the Committee is concerned that this may ignore the complexity of some matters and could affect the quality of the final report in such cases.*

18.6. *The Committee asks that the PP look closely at its Rules to ensure that these address informing complainants of the progress and outcome of their cases and, also, the prioritization of matters involving Executive Members so that these are finalized in the shortest possible time.*

18.7. *The Committee repeats it support for the Public Protector's view that the Public Protector Act, 1994, requires revision to bring it in line with the Constitution and requests that this be brought to Parliament as a matter of urgency.*'

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Portfolio Committee's consideration of Mr Steenhuisen's second request to remove the PP

47. On 6 June 2018 the Portfolio Committee met for a briefing by the PP on, amongst other things, Mr Steenhuisen's letter of 16 February 2018. I attach a copy of the draft minutes of that meeting as "**TRM 15**".

48. The PP, however, did not attend the meeting, having circulated an apology at 17h00 the day before citing a family emergency.

49. As appears from the draft minutes, the Portfolio Committee expressed its dissatisfaction that the PP had not forwarded her presentation in anticipation of the meeting or sent her Deputy. The Portfolio Committee then considered the letter from Mr Steenhuisen. It agreed that it should invite the PP to clarify the concerns raised in the letter, only after which would it decide whether there was a need to institute an enquiry into her fitness to hold office.

50. On 13 June 2018 the PP appeared before the Portfolio Committee. I attach a copy of the draft minutes of that meeting as "**TRM 16**". The PP explained her failure to attend the Portfolio Committee meeting of 6 June 2018 and briefed the Portfolio Committee on the Public Protector Rules, in respect of which members made certain comments and raised certain concerns. Mr Steenhuisen then briefed the Committee on his request to expedite procedures to remove the PP. Thereafter, the Committee decided that the PP should be given the opportunity to respond in writing to Mr Steenhuisen's letter. In this regard, as reflected in item 4.5 of the draft minutes, members of the Portfolio Committee raised the following issues:

'• *In the recent past, South Africans had accused the judiciary of overreaching. Should there be an enquiry into the judges so accused?*

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- *The SSA was the only organ with capacity to vet people. Was it wrong for Public Protector to have recourse to that department if vetting had to be done?*
- *The Constitution was concise but open to interpretation. Should heads of Chapter Nine institutions who interpret the Constitution differently be disqualified from holding office? People who were unhappy with the remedial action ordered by the Public Protector had the right to subject the report to judicial review.*
- *The Speaker of the National Assembly had made certain statements in her affidavit opposing the remedial action ordered by the Public Protector. Should the Speaker's affidavit be seen as conclusive evidence that the Public Protector was not fit to hold officer?*
- *The request to expedite procedures to remove the Public Protector was based on court judgments. The Public Protector was appealing parts of the judgment(s). Was the any urgency to this matter? Was it not prudent to allow the appeal process to run its course?*
- *It was important to read court judgments thoroughly. The fact that a court made a punitive cost order was a compelling reason for an inquiry. Also, the finding that the Public Protector acted disingenuously was very important. There was nothing wrong in asking the Public Protector to come and answer or refute the allegations.*'

51. I also annex, marked "**TRM 17**", a copy of the PMG report of that meeting, which recorded the discussions and deliberations in more detail and, I am advised by Dr Motshekga, contains an accurate account of the course of events at the meeting (under the heading '*Meeting report*' on page 2) and an adequate summary of those events (under the heading '*Meeting summary*' on page 1).

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52. The following quotation from the meeting summary relates to Mr Steenhuisen's representations to the Portfolio Committee, the engagement on the points raised, and the conclusion reached to afford the PP an opportunity to respond in writing:

'*The DA Chief Whip, Mr J Steenhuisen, made it clear that today was not about determining "the guilt" of the PP and he merely wanted to set out the reasons he believed there was a prima facie case for this Committee or any other committee the Speaker ultimately determined to recommend the commencement of proceedings to examine the fitness of the PP to continue in office.*

For the purposes of today's interactions he wished to focus the grounds of his matter on incompetence. The judgement by Judge Murphy found that the PP grossly overreached her powers when she recommended in her report that the Constitution be amended to alter the mandate of the South African Reserve Bank; when she sought to dictate to Parliament, to whom she was accountable how and when legislation should be amended. Her actions in this regard have compromised the independence of Parliament and the effectiveness of parliamentary procedures. In doing so she showed a very poor understanding of both the law and her powers. The other finding was that she sacrificed her independence and impartiality as revealed in a supplementary affidavit when she consulted in a meeting with the Presidency and SSA on her remedial action that she intended recommending in the report.

He directed the Committee to the affidavit of the Speaker which was also submitted into the case. The Speaker challenged the findings of the PP, the approach of the PP, and rightly 'vigorously protected and defended the dependence of this institution' by not having its powers encroached upon by other arms of government or organs of State.

In his opinion, there are sufficient grounds that existed to allow at the very least, conduct an inquiry into the fitness of the PP to hold office.

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Members questioned Mr Steenhuisen exhaustively on the criteria to assess persons on their fitness to hold office; on the varying interpretations of the Constitution; and the judicial review available to persons unhappy with the PP's remedial actions.

The Committee mentioned that there are quite a number of judgments by senior judges reversed on appeal with damning remarks by the SCA directed at the judge of the court a quo. He asked if that judge would then be assumed not fit and proper.

The EFF agreed that section 194 processes should start with immediate effect.

The Committee concluded that the expressed power of Parliament to inquire into the fitness of the PP to hold office was exclusive and not necessarily dependent on any court finding. The determination of the fitness of the PP to hold office was a factual finding only Parliament can make. There was a rule of natural justice to 'hear the other side'. Mr Steenhuisen was requested to submit a report that will be referred to the PP for her comments in writing and submit it to the Committee. A decision will be taken after.'

53. On 21 June 2018 the Chairperson of the Portfolio Committee wrote to the PP. A copy of the Chairperson's correspondence is annexed to the FA, marked "PPFA 4". The Chairperson informed the PP of my predecessor's request that the Portfolio Committee consider and report on Mr Steenhuisen complaint and request of 16 February 2018. The Chairperson further advised the PP that Mr Steenhuisen had made submissions to the Portfolio Committee in person on 13 June 2018, and that the Portfolio Committee agreed that the PP should be given an opportunity to respond. The letter invited the PP to respond in writing by 6 July 2018, and it indicated that an oral hearing would follow in due course.

54. On 5 July 2018 the PP delivered a 25-page written response to the Chairperson of the Portfolio Committee. A copy of the PP's response is annexed to the FA, marked "PPFA 5". Although the response speaks for itself, it bears mentioning that in it the PP placed considerable emphasis on the fact that '*there is currently an appeal to the SCA and an application for direct access to the Constitutional Court regarding the High Court judgment used as a ground for an enquiry into my competence*' (i.e. ***Absa v PP***). The PP contended that '*[a]ny attempt to pre-empt the said appeal processes or to embark on a parallel process to essentially threaten or punish me for matters pending before the courts is unlawful and amounts to usurpation of judicial authority by members of the Committee and National Assembly*' (see paragraph 38 of annexure "PPFA 5"; see also paragraph 83 thereof).

PP's briefing to the Portfolio Committee on Annual Report 2017/2018

55. On 11 October 2018 the PP presented an overview of her Annual Report for 2017/2018 to the Portfolio Committee. Mr Steenhuisen's request for her removal was not discussed at this meeting. I attach a copy of the draft minutes as "**TRM 18**".

Outcome of Mr Steenhuisen's second request for removal of the PP

56. On 5 December 2018 the Portfolio Committee met to deliberate Mr Steenhuisen's request to expedite procedures to remove the PP. I attach a copy of the draft minutes of that meeting as "**TRM 19**".

57. As appears from the minutes, some members raised concerns about the contents of the PP's written submissions of 5 July 2018, insofar as it was suggested that MPs who had made certain remarks at the meeting of 6 March 2018 were biased and should recuse themselves. The discussion extended to the PP's suggestion that the process for

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removal of judges should also apply to her office. The members also discussed what should constitute serious misconduct. Some Members felt that the judicial review and setting aside of the PP's remedial action in the *Absa v PP* matter was sufficient to warrant instituting an investigation into the PP's fitness to hold office.

58. At the end of deliberations, Mr S Maila MP (ANC) moved that it was premature for the Portfolio Committee to recommend that a removal process be instigated and, consequently, that Mr Steenhuisen's request to expedite proceedings against the PP should not be supported. Mr Tleane MP (ANC) seconded the proposal. Five members (ANC and NFP) voted in favour of the proposal, while the DA rejected the proposal and the Economic Freedom Fighters ("**EFF**") abstained. The proposal was consequently carried by a majority.

59. The Portfolio Committee produced a report containing its evaluation of, and recommendations on, Mr Steenhuisen's letter of 16 February 2018, having taken into account the PP's written submissions.

60. On 27 February 2019, the Portfolio Committee's report was tabled before the NA in ATC Reports No. 21 of 2019. I attach the relevant extracts from the ATC report, marked as "**TRM 20**". Item 2 of the ATC Report provides:

'The Portfolio Committee on Justice and Correctional Services, having considered the request for the National Assembly to expedite proceedings to remove the Public Protector in terms of section 194 of the Constitution, reports as follows:

1. The Speaker of the National Assembly received a letter dated 16 February 2018 from Mr J Steenhuisen, MP, requesting that the National Assembly expedite procedures to remove the Public Protector, Adv. B Mkhwebane, from Office in terms of section 194 of the Constitution read with section 2(1)(c) of the Public

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Protector Act 23 of 1994. On 14 March 2018, the letter was referred to the Portfolio Committee on Justice and Correctional Services for consideration and report.

2. *On 13 June 2018, Mr Steenhuisen appeared before the Committee to motivate the request for Parliament to expedite proceedings to remove the Public Protector. The Committee agreed that the Public Protector also be afforded an opportunity to respond to the allegations in writing, which she did on 5 July 2018.*

3. *The Constitution, in section 194(1) provides the grounds on which the Public Protector may be removed from office, namely misconduct, incapacity or incompetence. Section 194 of the Constitution also regulates the process for the removal of the Public Protector from Office.*

4. *The Committee deliberated on this matter on 5 December 2018. It is of the view that section 194 of the Constitution and section 2(1)(1)(c) of the Public Protector Act, 1994, envisage a factual inquiry into the fitness of the Public Protector. It is the National Assembly that must determine that the Public Protector's conduct renders her unfit to hold office. This discretion cannot be replaced by the court's view, however pertinent. The Committee noted that legal proceedings related to the judgement are ongoing. As such, the Committee believes that it would be premature for removal proceedings to be instituted against the Public Protector.*

Recommendation

5. *The Committee recommends that the House does not support the request to expedite proceedings to remove the Public Protector, Adv. B Mkhwebane from Office.'*

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61. On 20 March 2019 the Portfolio Committee's report was added to the NA's Order Paper as item 26 under the heading '*Further Business*'. I attach the relevant extract from Order Paper No. 14 of 2019, marked "**TRM 21**". This report was not however considered or voted on by the NA before it was reconstituted following the sixth general election on 8 May 2019.

The effect of the dissolution of the Fifth Parliament and the establishment of the Sixth Parliament on the Portfolio Committee's report on Mr Steenhuisen second request

62. At the end of the Fifth Parliament upon its dissolution in February 2019, all business that was on the NA's Order Paper under Further Business or before any Committee of the NA lapsed in terms of NA Rule 351, which provides:

'***351. Lapsing of business on last sitting day of annual session or term of Assembly or when Assembly is dissolved***

(1) All motions and all other business, other than Bills, on the Order Paper on the last sitting day of an annual session of the Assembly, lapse at the end of that day.

(2) All business before the Assembly or any Assembly committee on the last sitting day of a term of the Assembly or when the Assembly is dissolved, lapse at the end of that day.'

63. Accordingly, when the Fifth Parliament was dissolved in February 2019, the Portfolio Committee's report on Mr Steenhuisen's letter of 16 February 2018 lapsed, as did his request.

64. Following the general election on 8 May 2019, the Sixth Parliament was established on 22 May 2019 and, as stated, I was elected as the Speaker of the NA. The Portfolio Committee was reconstituted, with Mr Gratitude Magwanishe replacing Dr Motshekga

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as the Chairperson. I refer to the accompanying affidavit of Mr Magwanishe in which he confirms the correctness of the parts of my affidavit recounting or dealing with the events in or in relation to the Portfolio Committee during the period when he has been the Chairperson, i.e. for the Sixth Parliament.

65. The report of the former Portfolio Committee on Mr Steenhuisen's letter of 16 February 2018 has not been revived in the Sixth Parliament, something which can only be done by means of a resolution of the NA.

The third request to remove the PP made by Mr Steenhuisen MP

66. On 23 May 2019 Mr Steenhuisen submitted a third request for the removal of the PP, alleging that '*she is not fit to hold the office she presently occupies*' and '*is not able to properly execute her mandate*'. I attach a copy of the letter, marked "**TRM 22**". The letter was a formal request in terms of Rule 337(b), read with section 194 of the Constitution. Rule 337 provides in its relevant part:

'*The Speaker must table the following instruments without delay, or if the Assembly is in recess, on its first day when the Assembly resumes its sittings:*

. . .

(b) all requests, applications and other written submissions made to the Assembly in terms of legislation to activate a parliamentary process prescribed by such legislation'.

67. The grounds upon which Mr Steenhuisen relied for contending that the PP should be removed from office were as follows:

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67.1. the PP grossly overreached her powers in her CIEX PP Report, in that she (i) recommended that the Constitution be amended; and (ii) sought to dictate to Parliament how and when to amend legislation;

67.2. the PP sacrificed her independence and impartiality, in that she consulted with the Presidency and the SSA on the remedial action to be recommended in the CIEX PP Report; and

67.3. the PP failed to conduct a proper investigation into a complaint by a DA member of the provincial legislature regarding the Vrede Dairy Farm.

68. In support of his request, Mr Steenhuisen relied on:

68.1. the judgment of Murphy J in *SARB v PP I*;

68.2. the PP's CIEX PP Report;

68.3. the supplementary affidavit of the SARB in *SARB v PP I*; and

68.4. the judgment Tolmay J handed down on 20 May 2019 in the judicial review proceedings by the DA and CASAC referred to in paragraph 40 above, which has subsequently been reported as *Democratic Alliance v Public Protector and a related matter* [2019] 3 All SA 127 (GP) ("***DA v PP I***").

69. In *DA v PP I* Tolmay J upheld the challenges to the PP's Vrede Dairy Report, but postponed her decision on the appropriate costs order in the light of the facts the DA and CASAC had asked that the PP be ordered to pay the costs of the proceedings in her personal capacity and that, at that juncture, the Constitutional Court had heard (on 27 November 2018) and reserved its judgment on an application for leave to appeal by

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the PP against the personal costs order made against her by the Full Bench in *Absa v PP* (referred to in paragraph 30 above).

70. On 3 July 2019 Mr Steenhuisen's request was published under item 1(b) of ATC No. 18 of 2019. I attach, marked "**TRM 23**", the relevant extracts from the ATC, which show I had referred this request to the Portfolio Committee for consideration and report.

71. On 5 July 2019 the PP wrote to me contesting the validity of my referral of Mr Steenhuisen's request to the Portfolio Committee. I attach a copy of the PP's letter, marked "**TRM 24**".

72. On 10 July 2019 I replied to the PP's letter. I attach a copy of my reply, marked "**TRM 25**". I directed the PP to the relevant provisions of the Constitution and the NA Rules, as they then stood, which obliged me to table Mr Steenhuisen's request and which empowered the NA to remove the PP from office. I consequently rejected her contention that the process followed was unlawful and unconstitutional.

73. On 10 July 2019 I also wrote to the current Chairperson of the Portfolio Committee, Mr Magwanishe, advising him that: (i) the NA Rules empower the Committee to determine its own working arrangements; and (ii) the Committee was to consider, and report to the NA on, whether grounds exist for the NA to conduct an inquiry envisage in section 194 of the Constitution. I attach a copy of this letter, marked "**TRM 26**".

Events preceding the Portfolio Committee's consideration of Mr Steenhuisen's third request

74. On 10 July 2019 the PP briefed the Portfolio Committee on her Annual Performance Plan and Budget for 2019/2020, but Mr Steenhuisen's letter was not discussed. I attach

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a copy of the draft minutes of that meeting, marked "**TRM 27**", and refer specifically to item 4.

75. On 22 July 2019 the Constitutional Court handed down its judgments and order in the application by the PP for leave to appeal against the personal costs order made against her by the Full Bench in *Absa v PP* (referred to in paragraph 30 above). The Constitutional Court's judgments and order have now been reported as *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) ("***PP v SARB (CC)***").

76. In *PP v SARB (CC)* the majority of the Constitutional Court (Khampepe and Theron JJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Mhlantla J and Petse AJ concurring) upheld the PP's application for leave to appeal but dismissed her appeal. Its judgment contains severe criticisms of the PP's CIEX PP Report and investigation, and of her conduct in the ensuing judicial review proceedings by the SARB, ABSA, the Minister of Finance and the Treasury referred to in paragraph 24 above, including the following:

    76.1. '*In her answering affidavit in the High Court, the Public Protector admitted to the meeting with the State Security Agency and confirmed that Minister Mahlobo had also been in attendance. The Public Protector, however, failed to explain why she discussed the vulnerability of the Reserve Bank at this meeting. In light of the serious adverse inferences which can be drawn from these facts, as well as the Public Protector's heightened duty towards the Court as a public litigant, an explanation was clearly called for*' (paragraph 180);

    76.2. '*The Public Protector's explanation of the meeting with the State Security Agency is not only woefully late but also unintelligible ...*' (paragraph 181);

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76.3. '*It is disturbing that there is no explanation from the Public Protector as to why none of her meetings with the Presidency were disclosed in the final report. This is especially so as the final report contained a section which listed the meetings that she held during her investigation ...*' (paragraph 182);

76.4. '*The record that was produced by the Public Protector was thrown together, with no discernible order or index, and excluded important documents. The Public Protector is wrong when she claims that she "filed the entire record". She did not. She omitted pertinent documents from the record, some of which were only put up for the first time as annexes to her answering affidavit in the High Court, and others, which were disclosed for the first time in this Court*' (paragraph 186);

76.5. '*The Public Protector's failure to include these documents in the record, or to account for this failure, stands in stark contrast to her heightened obligation as a public official to assist the reviewing court*' (paragraph 187)

76.6. '*In this Court, the Public Protector's explanations are contradictory ...*' (paragraph 202);

76.7. '*The Public Protector's dogged insistence that the substance of her remedial action in the final report was not discussed with the Presidency is contradicted by her own confirmation that the handwritten notes of the meeting held on 7 June 2017 reflect what was discussed ...*' (paragraph 203);

76.8. '*The Public Protector's explanation of the meeting of 7 June 2017 with the Presidency was, and still is, woefully inadequate ...*' (paragraph 204);

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76.9. '*In this Court, the Public Protector has contended that the adverse findings made against her by the High Court were based on innocent errors on her part. The Public Protector's persistent contradictions, however, cannot simply be explained away on the basis of innocent mistakes. This is not a credible explanation. The Public Protector has not been candid about the meetings she had with the Presidency and the State Security Agency before she finalised the report. The Public Protector's conduct in the High Court warranted a de bonis propriis (personal) costs order against her because she acted in bad faith and in a grossly unreasonable manner*' (paragraph 205);

76.10. '*The Public Protector's entire model of investigation was flawed. She was not honest about her engagement during the investigation. In addition, she failed to engage with the parties directly affected by her new remedial action before she published her final report. This type of conduct falls far short of the high standards required of her office*' (paragraph 207);

76.11. '*There is no merit in any of the grounds of appeal advanced by the Public Protector to justify this Court's interference in the High Court's exercise of its true discretion to order that the Public Protector pay 15% of the Reserve Bank's costs in her personal capacity*' (paragraph 218); and

76.12. '*Regard must be had to the higher standard of conduct expected from public officials, and the number of falsehoods that have been put forward by the Public Protector in the course of the litigation. This conduct included the numerous "misstatements", like misrepresenting, under oath, her reliance on evidence of economic experts in drawing up the report, failing to provide a complete record, ordered and indexed, so that the contents thereof could be*

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determined, failing to disclose material meetings and then obfuscating the reasons for them and the reasons why they had not been previously disclosed, and generally failing to provide the court with a frank and candid account of her conduct in preparing the report. The punitive aspect of the costs order therefore stands' (paragraph 237).

77. On 15 August 2019 Tolmay J handed down her judgment on costs in the judicial review proceedings by the DA and CASAC for judicial review of the Vrede Dairy Report referred to in paragraphs 40, 68.4 and 69 above, which has subsequently been reported as *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* [2019] 4 All SA 79 (GP) ("***DA v PP II***"). Tolmay J ordered that the PP, in her personal capacity, pay 7.5% of the attorney-and-client costs of each of the DA and CASAC including the costs of two counsel.

78. Tolmay J's judgment contains severe criticisms of the Vrede Dairy Report and investigation, and of her conduct in the ensuing judicial review proceedings by the DA and CASAC, including the following:

78.1. '*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*

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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' (paragraph 25);

78.2. '*The Public Protector attempted to justify her limited investigation mainly due to an alleged lack of resources. In the judgment on merits this Court dealt extensively with the lack of merit in this argument. In this instance she indeed tried to defend the indefensible and should have realised that her defences were hopelessly without merit*' (paragraph 26); and

78.3. '*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. 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*' (paragraph 29).

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Portfolio Committee's recommendation regarding Mr Steenhuisen's third request to remove the PP

79. On 27 August 2019 the Portfolio Committee provided me with its report on Mr Steenhuisen's third request to remove the PP. I attach a copy of the report, marked "**TRM 28**". The Portfolio Committee noted that no rules were in place to regulate the removal of office bearers of Chapter 9 institutions. It was of the view that rules were necessary to ensure the fairness of the process. It said it appreciated the importance of the matter and the urgency with which it should be addressed. It therefore requested that I urgently refer the matter to the Rules Committee, which I duly did.

The formulation and adoption of the New Rules

80. On 2 September 2019 Mr Steenhuisen submitted to my office a set of draft rules for the removal of the head of a Chapter 9 institution. I attach a copy of Mr Steenhuisen's covering letter and his set of draft rules, marked "**TRM 29**".

81. On 10 September 2019 the Rules Committee met to consider the Portfolio Committee's recommendation that it develop rules governing the process of removing office-bearers of Chapter 9 institutions. I attach a copy of the draft minutes of that meeting, marked "**TRM 30**". I was the Chairperson of that meeting and confirm the correctness of the contents of those minutes.

82. The Rules Committee decided to delegate the issue to a Subcommittee on Review of the NA Rules ("**Subcommittee**"). I refer in this regard to the following extract from the draft minutes:

'*Mr Xaso [the Secretary of the NA] presented the discussion document prepared by the National Assembly Table, related to the removal of office bearers of institutions*

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supporting constitutional democracy. He gave an overview of the discussion document, in which he outlined the grounds for the removal of an office-bearer in terms of section 194 of the Constitution. The document also outlined four stages to be considered for the removal process. The stages were: (1) the initiation of a process; (2) the preliminary assessment of evidence (prima facie); (3) an inquiry by a committee; and (4) a decision by the House.

Mr Xaso highlighted that in terms of Rule 88 in respect of substantive motions, the responsibility to assess whether there were sufficient grounds for a process of this nature to be initiated rested with the Speaker. However, in terms of the rules developed in relation to section 89 of the Constitution, that responsibility was vested with an independent panel. He said that the Rules Committee should make a determination on how the assessment of evidence should be dealt with. He added that clarity should also be given on the role of the Speaker, the role of the committee and whether there was a need for an independent panel. He also highlighted that there was a need to consider whether a special committee, an ad hoc committee or the relevant portfolio committee should conduct the inquiry if it was found that such an inquiry was warranted. He also made reference to the submission made by the Democratic Alliance on the same matter.

Mr Steenhuisen indicated that most of what had been highlighted was also captured in the proposal submitted by the Democratic Alliance. He said that the process under consideration was not one that should be entered into lightly, as the institutions were in place to guard against abuse of state power, and as such they may from time to time make uncomfortable findings against the state. The process to remove such an office bearer should therefore be a rigorous one. He also stated that the Constitution had envisaged that the National Assembly should be able to remove an office-bearer of these institutions in terms of section 194, and therefore the House should have a

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procedure developed to determine whether the grounds for removal warranted such a decision. He added that the process should guard against arbitrariness. He drew a parallel to the Section 89 process and indicated that the criticism received by Parliament for not having rules in place was unfounded, as the rules, like the Constitution, had evolved over time. He proposed that the Democratic Alliance submission be used as a basis for discussion. He cautioned that the process of formulating rules should not be unduly delayed, as there was an issue with the current incumbent in the office of the Public Protector that required a resolution. The rules should provide for a fair, open and transparent process that was beneficial to democracy.

The Deputy Chief Whip of the Majority Party agreed that the rules in their current form did not provide a process for the removal of an office-bearer of a chapter 9 institution and that such rules were indeed required. She proposed that the review of evidence be done by an independent panel, which could be led by a retired judge or persons with a legal background. She added however, that the Subcommittee on Review of Assembly Rules would consider the matter in greater detail.

Mr Dyantyi cautioned that the 'removal' of the office-bearer was not a forgone conclusion, and that the matter could end up being litigious if this clarity was not pronounced from the outset of the process to be developed.

The Chief Whip of the Majority Party said that it was not the intention of the meeting to discuss the finer details of the process, but she also agreed with Mr Dyantyi, in that the process should be fair and not pre-empt the outcomes. She drew the Rules Committee's attention to the fact that the Speaker had submitted a request from the Democratic Alliance to initiate procedures to remove the Public Protector to the Portfolio Committee on Justice and Correctional Services for consideration, but that

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the Committee had reverted back to the Speaker, to request a formal formulation of a process in terms of the rules, as there were no clear mechanisms in place. She cautioned that the Rules Committee should focus on the process it was requested to develop and not on any extraneous matters that may have brought this matter to the Rules Committee.

Mr Ngwezi engaged with the submission of the Democratic Alliance and sought clarity on whether the House would be bound to agree with the findings of the panel proposed therein.

The Speaker said that the process to be clarified should enable the House to fulfil its constitutional obligations. She added that the test of 'fitness to hold office' should also be conducted when the House considered candidates to fill the position, instead of when there were complaints and calls for their removal. This would assist the shortlisting processes committees conducted before candidates were even called for interviews.

The Deputy Chief Whip of the Majority Party recommended that an independent panel be enlisted so as to ensure objectivity and fairness of the process. Dr Koornhof added that there were institutions contained in other chapters of the Constitution, and requested that this process also take those institutions into consideration for the procedures to be developed. He also said that section 194(1) of the Constitution made a distinction between the Auditor-General, Public Protector and commissioners of other bodies. This distinction should be factored in when considering procedures to remove an office bearer. He further added that the Constitution provided for the involvement of civil society when a person was being nominated for one of these bodies, and requested that civil society should therefore also be involved in the removal procedures, even if it was just an opportunity to make a representation.

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Mr Xaso indicated that the motion that would initiate the process would need to comply with section 194, in that the grounds listed would need to form part of the motion. The Deputy Speaker cautioned that it was important for the process to provide certainty to the office-bearers and the general public, and emphasised that the process should be prioritised and completed as expeditiously as possible.'

83. I also a copy of the discussion document as presented by Mr Xaso, marked "**TRM 31**".

84. On 20 September 2019 the Subcommittee held its first meeting. I attach a copy of the draft minutes of that meeting, marked "**TRM 32**". I refer to the accompanying affidavit of Mr Xaso, who attended the meetings of the Subcommittee.

85. As is apparent from the draft minutes of this meeting, which was chaired by Ms D Dlakude MP (of the Majority Party), after Mr Xaso had presented the discussion document again and Mr Steenhuisen had presented the DA's proposals (as they both had done at the meeting of the Rules Committee on 10 September 2019), a discussion ensued during which, amongst other things:

85.1. Mr Matiase MP (EFF) stressed that the procedures for removal of the President could not be identical to those for the removal of the head of a Chapter 9 institution;

85.2. Ms Marawu MP (African Transformation Movement) requested that political parties be given additional time to make detailed proposals, and she supported the involvement of legal experts. She also agreed that it was necessary to define the grounds for removal of an office-bearer;

85.3. Mr Dyantyi MP (ANC) highlighted that the rules were meant to cover officer bearers of all Chapter 9 institutions and not just the PP. He agreed that it was

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imperative to define the grounds for removal. In principle, he supported the proposal for an independent panel for conducting a preliminary assessment of evidence, as well as a special committee for an inquiry. He, however, suggested that membership of the committee should be proportional;

85.4. The Subcommittee Chairperson requested that the Secretariat draft the rules for presentation to the Subcommittee, having regard to the deliberations; and

85.5. It was resolved that the parliamentary administration would prepare a draft set of rules and present them at the next meeting of the Subcommittee.

86. On 18 October 2019 the Subcommittee held its second meeting. I attach a copy of the draft minutes of that meeting, marked "**TRM 33**". I also attach the draft rules prepared by the NA Table for consideration by the Subcommittee, marked "**TRM 34**".

87. As appears from the minutes, at the meeting several issues concerning the draft rules were raised. Following a presentation on the draft rules by Mr Xaso and members of Parliament's Legal Services, members of the Subcommittee made various proposals and comments, including the following:

87.1. Mr Steenhuisen MP (DA) proposed several amendments, including that a member may submit additional evidence to the independent panel before the panel reported. He suggested that the panel be empowered to reach conclusions of fact and law, that the panel should elect a chairperson and should table its report. In the event that the NA adopts the panel report, should the matter proceed to a committee for an enquiry; but if the NA did not accept the panel report, the committee would not convene. He proposed alternative definitions,

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recommended that the Speaker appoint the panel and that the committee should be proportionally represented.

87.2. Ms NV Mente MP (EFF) suggested that the panel should make findings and not merely recommendations to the NA, that it should include a judge, and that the definitions should be clarified.

87.3. Mr QR Dyantyi MP (ANC) also thought that the definitions could be more precise. He proposed that the appointment of a judge as a panellist should be the prerogative of the NA and not the Speaker. The Speaker should appoint the chairperson and that a quorum of two would suffice. He suggested that the panel should table its report to the NA, after which it should be referred to a proportionally constituted committee. He concluded that head of the Chapter 9 institution in question, and not his or her legal representative, should answer to the committee.

88. The Subcommittee resolved that the Secretariat would prepare a further draft of the rules based on the inputs of members.

89. On 9 November 2019, the Subcommittee considered amended draft rules prepared by the Secretariat, along with a revised proposal by the DA, a proposal by the EFF and a submission by the Organization Undoing Tax Abuse. I attach a copy of the draft minutes of that meeting, marked "**TRM 35**".

90. As appears from the minutes, at the meeting:

90.1. members of Parliament's Legal Services gave a briefing about the amended definitions of '*incapacity*', '*incompetence*' and '*misconduct*'

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90.2. Mr Xaso gave a briefing about the other draft rules, highlighting the amendments;

90.3. all members of the Subcommittee present contributed to the ensuing discussions, during which certain further amendments were suggested and agreed to; and

90.4. the Subcommittee resolved to agree to the draft rules, taking into account the views expressed.

91. On 26 November 2019 Parliament issued a media statement, indicating that the NA Rules Committee had agreed to draft rules for the removal of heads of Chapter 9 institution to give effect to section 194 of the Constitution. It also briefly explained the contents of the draft rules. I attach a copy of the media statement, marked "**TRM 36**".

92. On 28 November 2019 the New Rules were tabled in the NA as part of the Third Report of the NA Rules Committee for 2019. I attach the relevant extracts from ATC No. 111 of 2019, marked "**TRM 37**". The New Rules appear on pages 5 to 10 of that document (the contents of which, as far as I can tell, are the same as annexure "PPFA 7" to the founding affidavit). I shall describe the process for the removal of a person from the office of the PP, as provided for in the New Rules, later in this affidavit.

93. On 3 December 2019 the Third Report of the NA Rules Committee of 2019, which included the New Rules, served before the NA and was adopted by it. I attach an extract from the Minutes of Proceedings of the NA from that day, marked "**TRM 38**". Item 5 provides:

'*SECOND ORDER [15:38]*

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Consideration of Third Report of National Assembly Rules Committee (Announcements, Tablings and Committee Reports, 28 November 2019, p 4).

The Deputy Chief Whip of the Majority Party, as a member of the Committee, introduced the Report.

There was no debate.

The Chief Whip of the Majority Party moved: That the Report be adopted.

A majority of members being present in terms of Rule 4(4), the question was put: That the motion by the Chief Whip (sic) of the Majority Party be agreed to.

Motion agreed to.

Report accordingly adopted.'

The first request to remove the PP made by Ms Mazzone MP

94. On 6 December 2019 the new Chief Whip of the Official Opposition, Ms NWA Mazzone MP, withdrew Mr Steenhuisen's request of 23 May 2019 (incorrectly stated to have been sent to me on 22 May 2019) and submitted a new request to institute the process for the removal of the PP, this time in terms of the New Rules. I attach a copy of Ms Mazzone's letter, marked "**TRM 39**".

95. As is apparent, Ms Mazzone's letter of 6 December 2019:

95.1. repeated the grounds for the PP's removal set out in Mr Steenhuisen's letter of 23 May 2019;

95.2. added a further ground, namely that '*the Constitutional Court (case CCT 107/18) found in July 2019 [a reference to the majority of the Court in PP v SARB (CC)] that Adv Mkhwebane acted in bad faith by not being honest*

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regarding her investigation processes, upholding a personal cost order made against her by the North Gauteng High Court [a reference to Absa v PP]';

95.3. alleged that these grounds demonstrate '*that the Public Protector is too incompetent to properly execute her mandate, as she lacks the knowledge to carry out and ability to perform her duties effectively and efficiently*';

95.4. stated that '*for this reason I initiate proceedings for a section 194(1) enquiry in order that removal proceedings may be instituted against her*'; and

95.5. attached copies of the documents referred to in paragraph 68 above and of the Constitutional Court's judgments in *PP v SARB (CC)*.

96. Attached to Ms Mazzone's letter was a notice of substantive motion, a copy of which I attach, marked "**TRM 40**". It reads as follows:

'*I hereby move on behalf of the Democratic Alliance that the House:*

1. *Notes that the National Assembly passed new Rules pertaining to the removal of office-bearers in institutions supporting constitutional democracy on 3 December 2019;*
2. *Further notes that office-bearers may be removed from Office on a finding of misconduct, incapacity or incompetence following a finding of a committee of the National Assembly and the subsequent adoption of a resolution on said removal;*
3. *Acknowledges that the conduct of the Public Protector, Adv B Mkhwebane, since the beginning of her term in October 2016 has amply demonstrated that she is not fit to hold the Office she currently occupies;*
4. *Further acknowledges that various courts made findings against Adv Mkhwebane, stating inter alia that she grossly over-reached her powers when she recommended that the Constitution be amended to alter the mandate of the SARB, and when she*

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sought to unconstitutionally and irrationally dictate to Parliament – to whom she is accountable – how and when legislation should be amended; and failed to properly investigate a complaint in relation to the infamous Estina Dairy Farm;

5. *Recognises that the Constitutional court also found in July 2019 that Adv Mkhwebane acted in bad faith by not being honest regarding her investigation processes, upholding a personal cost order made against her by the North Gauteng High Court;*
6. *Further recognises that Adv Mkhwebane is therefore incompetent to occupy her Office as she has demonstrated that she lacks the knowledge to carry out the ability to perform her duties effectively and efficiently;*
7. *Resolves to initiate a section 194(1) of the Constitution enquiry to remove Adv Mkhwebane from Office.'*

The activation of the process under the New Rules and the PP's challenge to the process

97. I considered Ms N Mazzone's request and substantive motion to decide whether they complied with the requirements for motions of this sort laid down by New Rule 129R. On 24 January 2020 I was satisfied that the motion satisfied the requirements of the Rule.

98. On 24 January 2020 I therefore announced to the NA my receipt of Ms N Mazzone's motion and invited political parties to nominate candidates to serve on the Independent Panel. In this regard, I attach a copy of ATC 4 of 2020, marked "**TRM 41**".

99. On the same day, I caused a memorandum to be circulated to the Chief Whips and all Representatives of political parties represented in the NA, requesting that the political parties each submit a list of nominees for appointment to the independent panel, along

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with motivations for their appointment, before 7 February 2020. I attach a copy of the memorandum, marked "**TRM 42**".

100. On 24 January 2020, the Secretary to the NA, Mr Xaso, advised Ms Mazzone in writing that I had accepted her motion and that I had requested parties to submit nominees to serve on the independent panel to conduct a preliminary assessment of the evidence presented. I attach a copy of Mr Xaso's letter, marked "**TRM 43**".

101. On 25 January 2020 Parliament released a media statement indicating that I had accepted Ms Mazzone's motion as being compliant with the New Rules; I had invited political parties represented in the NA to propose nominees for appointment to the independent panel; the political parties had until 7 February 2020 to do so; and the independent panel had to finalise its preliminary assessment of the motion and make its recommendation within 30 days. I attach a copy of the media statement, marked "**TRM 44**".

102. On 28 January 2020 I received a letter from the PP's attorneys of record, a copy of which is attached, marked "**TRM 45**" (it is also annexure "PPFA 9" to the founding affidavit). The PP's attorneys' letter, amongst other things, disputed the validity of the New Rules and their '*purported retrospective application*' to the PP, complained about my allegedly unlawful conduct '*in making a public announcement of the process to remove [the PP] without even informing her of the decision*', complained about statements attributed by the PP to Dr Motshekga while speaking on behalf of the Portfolio Committee and made several demands:

102.1. First, the PP demanded a copy of the DA's motion, written reasons for my approval of the DA's motion, written reasons my decision '*that a prima facie case had been made out*', confirmation that the requirements of Rule 129R had

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been met, an indication as to which rule authorises the Speaker to make public announcements regarding the approval of such a motion, and a detailed statement on any mechanisms in place to protect the PP from a process of removal that may be '*tainted by the participation of individuals, too many to mention by name at this stage, who will have a lot to gain from [the PP's] unlawful removal, as well as those who have long prejudged the issues under investigation*'.

102.2. Second, the PP demanded an undertaking that '*the grossly unfair process which has been unlawfully instituted in terms of the impugned rules be temporarily suspended until all the above issues have been adequately dealt with, either amicably between the parties or, failing which and if needs be, by a court of law*'.

102.3. Thirdly, the PP demanded a written undertaking that I '*refrain from taking any further steps in the purported impeachment process until the resolution of the issues raised herein*'.

103. On 30 January 2020, I replied to the PP's attorneys. I attach a copy of my reply, marked "**TRM 46**" (it is also annexure "PPFA 10" to the founding affidavit). My letter stated that:

103.1. Parliament had met its constitutional obligations, specifically those imposed by section 181 of the Constitution, by enacting legislation and rules, including those rules for the removal of heads of Chapter 9 institutions pursuant to section 194 of the Constitution.

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103.2. The Constitutional Court had certified that section 194 serves as a mechanism to ensure the effective execution of the duties associated with the independent office of the PP.

103.3. The requirement of independence for the PP, in terms of section 181, cannot be read as excluding the power to remove an incumbent PP in terms of section 194.

103.4. Ms Mazzone's substantive motion of 6 December 2019 complied with the form requirements of the Rules.

103.5. No decision had been made as to the required *prima facie* assessment, as the independent panel was yet to be established.

103.6. After the independent panel is established, the members must invite the PP to comment on the substance of the motion and must conduct and finalise a preliminary assessment.

103.7. The NA Rules and the Joint Rules safeguard against any risk of abuse of power or unfairness, including in the inquiry process outlined in the New Rules.

103.8. Parliament's processes and the NA Rules adhere to the rules of natural justice, including the *audi alteram partem* rule, and are informed by the relevant constitutional principles of fairness, transparency and accountability.

103.9. Accordingly, at that stage, there was no reason to suspend the implementation of the New Rules.

104. On 31 January 2020, the PP's attorneys responded, stating that the PP was of the view that my letter of 30 January 2020 did not 'substantially address' all the issues raised in their letter of 28 January 2020 and consequently the PP would be instituting legal

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proceedings. I attach a copy of this letter, marked "**TRM 47**" (it is also annexure "PPFA 11" to the founding affidavit).

105. On 2 February 2020 Parliament issued a media statement stating that the PP had written to me, contending that the New Rules were unconstitutional and unlawful. It explained that the PP's letter followed my announcement that the motion complied with the relevant rules and that I would refer the DA's motion to an independent panel, which was yet to be established. It further explained the role of the independent panel, its powers and its obligation to report its findings and recommendations to the NA, for a committee of the latter potentially to conduct an inquiry. It further explained that I had called on political parties to submit nominees for the panel by 7 February 2020. Lastly, it drew attention to the fact that the parliamentary rules would ensure the fairness of the process. I attach a copy of the media statement, marked "**TRM 48**".

106. On 4 February 2020 the PP issued the present application. The notice of motion and founding affidavit were served on my office on 6 February 2020. It sought relief in two tranches, namely the urgent relief set out in Part A (which the PP unilaterally enrolled for hearing in this Honourable Court on 17 March 2020 and in respect of which the PP unilaterally required that answering papers be filed by 17 February 2020) and non-urgent relief set out in Part B (which mainly related to the constitutionality and lawfulness of the New Rules and in respect of which no hearing date or date for the delivery of answering papers was specified).

107. On 5 February 2020 the President of the African Transformation Movement, a political party represented in the NA, requested that I extend the time period for making nominations for the independent panel. I attach a copy of that letter, marked "**TRM 49**".

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108. On 7 February 2020 I circulated a further memorandum to all Chief Whips and Political Party Representatives, in which I advised that, pursuant to requests for extension of the deadline for submission of nominees for appointment to the Independent, I had extended the deadline to 16h00 on 12 February 2020. I attach a copy of the memorandum, marked "**TRM 50**".

109. On 10 February 2020 Parliament issued a media statement indicating, among other things, that I had extended the deadline for nominations. I attach a copy of that media statement, marked "**TRM 51**".

110. On 10 February 2020 my attorneys of record delivered a notice of my intention to oppose the relief sought by the PP in the present application.

111. On 11 February 2020 I wrote to the Chief Whips of the IFP, Mr N Singh MP, and of the DA, Ms Mazzone MP, to request that they provide a brief motivation for their nominees to the Independent Panel, so as to comply with my original invitation of 24 January 2020. I attach a copy of my correspondence, marked "**TRM 52**" and "**TRM 53**" respectively.

112. At this juncture I should mention that although various political parties submitted nominations to my office, it was ultimately not necessary for me to appointment an independent panel, pursuant to Rule 129U, as the process was overtaken by the events on 21 February 2020 described in the section of my affidavit starting at paragraph 119 below.

113. On 13 and 14 February 2020 my attorneys of record wrote to the PP's attorneys requesting an extension until 24 February 2020 of the period within which I could file my answering affidavit. I attach a copy of this correspondence, marked "**TRM 54**".

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As appears from this correspondence, it was not practically possible for me to prepare this answering affidavit between 6 and 17 February 2020 because that is a particularly busy time of year in the Parliamentary calendar in which I am heavily engaged. As is well known, in addition to the President's State of the Nation Address (mentioned in my attorney's correspondence) and the ensuing NA debate on it, there is the Minister of Finance's budget speech and the debate on that as well.

114. On 17 February 2020 my attorneys of record received a response from the PP's attorneys, dated 14 February 2020, a copy of which is attached, marked "**TRM 55**". In essence, the PP refused the requested extension unless I agreed to put the process for her removal from office on hold until such time as the courts had pronounced on the constitutionality of the New Rules.

115. On 17 February 2020 the President (who is the Second Respondent in the current proceedings and is abiding the decision of this Honourable Court) delivered an explanatory affidavit in which he referred to an application he had instituted against the PP in the Gauteng Division of the High Court, Pretoria, under case number 5578/2019, for judicial review of her report No. 37 of 2019/20 issued on 19 July 2019 entitled '*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*'. (It bears mentioning that although I was cited as the second respondent in that matter, in my capacity as the Speaker, I applied for and was granted admission as the second applicant in that matter because I too seek judicial review of that report, though only insofar as it concerns the Speaker and the constitutional mandate of the NA. I shall deal with the grounds on which I seek that relief later in this affidavit.) Returning to the President's affidavit, he said that

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because he was involved in that litigation, he accepted that a potential conflict of interest had arisen as he may be called upon to suspend the PP under section 194(3) of the Constitution while the litigation is pending – the matter was argued on 4 and 5 February 2020 and judgement was reserved. Accordingly, he said, if the need for him to consider whether or not to exercise the power of suspension were to arise, he would delegate the exercise of the power under section 194(3) of the Constitution to another member of the Cabinet who does not have a similar conflict of interest.

116. On 18 February 2020 the PP's attorneys of record sent a letter to the Judge President of this Honourable Court, a copy of which is attached, marked "**TRM 56**".

117. On 18 February 2020 Webber Wentzel Attorneys, acting on behalf of CASAC and Corruption Watch, requested permission that they be admitted to the proceedings as *amici curiae*. I attach a copy of this letter, marked "**TRM 57**".

118. On Friday 21 February 2020, acting on my instructions, the State Attorney representing me responded affirmatively to their request. I attach a copy of the State Attorney's letter to Webber Wentzel of 21 February 2020, marked "**TRM 58**".

The withdrawal by Ms Mazzone of her first request to remove the PP and its replacement by Ms Mazzone with a second request

119. On Friday 21 February 2020 I received from Ms Mazzone a letter formally withdrawing her notice of substantive motion of 6 December 2019 and simultaneously submitting a new substantive motion for the removal of the PP, in terms of Rule 129R. I attach a copy of Ms Mazzone's letter, marked "**TRM 59**".

120. Attached to her correspondence was a notice of motion, dated 21 February 2020, the body of which provides:

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'I hereby move on behalf of the Democratic Alliance that the House:

1. *Notes that on 3 December 2019, it passed new Rules pertaining to the removal of office-bearers in institutions supporting constitutional democracy, to give effect to section 194 of the Constitution;*
2. *Further notes that, in terms of section 194(1) of the Constitution, office-bearers may be removed from office only on the ground of misconduct, incapacity or incompetence following a finding of a committee of the National Assembly and the subsequent adoption of a resolution on said removal;*
3. *Resolves to initiate an inquiry in terms of section 194(1) of the Constitution to remove Adv. Busisiwe Mkhwebane from the office of the Public Protector on the grounds of misconduct and/or incompetence in the SARB, Vrede Dairy and other matters, charges of which are set out and substantiated in Annexure A attached hereto .'*

I attach a copy of Ms Mazzone's new notice of motion, along with Annexure A thereto, marked "**TRM 60**".

121. I shall describe the contents of Annexure A when explaining the reasons for my decision that Ms Mazzone's new notice of motion met the requirements of Rule 129R.

122. On 25 February 2020, in response to an enquiry from the PP's attorney as to whether or not I would be filing an answering affidavit in this matter, the State Attorney representing me advised the PP's attorneys that there had been a material development in the matter and she would revert with my instructions as soon as I had provided them. A copy of this letter is attached, marked "**TRM 61**".

123. On 25 February 2020 the Secretary of the NA, Mr Xaso, wrote to Ms Mazzone, acknowledging receipt of her notice of motion of 21 February 2020 and of her request

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to withdraw her motion of 6 December 2019. Mr Xaso indicated that the matter had been brought to my attention. I attach a copy of Mr Xaso's letter, marked "**TRM 62**".

124. Shortly thereafter on 25 February 2020, the NA issued the following media statement, which included the following:

'*National Assembly Speaker Ms Thandi Modise has received correspondence from the Chief Whip of the Democratic Alliance, Ms Natasha Mazzone, advising of the withdrawal of her motion proposing that proceedings be started to remove the Public Protector from office. Ms Mazzone has submitted a new motion on the same matter on 21 February 2020.*

Section 194 of the Constitution and the rules of the National Assembly permit any member of the National Assembly to submit a substantive motion to initiate a procedure to remove the holder of a public office. Rule 128(1) of the National Assembly Rules allows a member who has given notice of a motion to withdraw it at any time before being called upon to move the motion in the National Assembly.

The withdrawal of the DA's motion, which was tabled in December 2019, means that the attendant process that subsequently ensued, which includes the establishment of an external panel of experts to conduct a prima facie assessment of the motion, falls away. Before the withdrawal of the earlier motion, the Speaker was in the process of selecting qualified persons to serve on the panel and was due to announce their names by the end of this month.

The Speaker will now apply her mind to the new motion, to determine if it meets the requirements provided for in the rules of the Assembly, and make a fresh decision.

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