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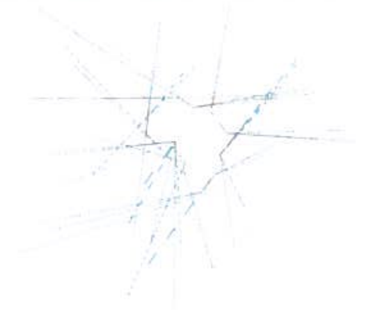

Ms Thandi Modise
The Speaker of the National Assembly
Parliament Building
Room E118
Parliament Street
Cape Town
8000

By Hand

By Fax: 021 403 3880; 021 403 2992; 021 461 9462

By Email: zngoma@parliament.gov.za; mxaso@parliament.gov.za

90 Rivonia Road, Sandton
Johannesburg, 2196

PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa

Docex 26 Johannesburg

T +27 11 530 5000
F +27 11 530 5111

www.webberwentzel.com

URGENT

Your reference	Our reference	Date
	V Movshovich / P Dela / D Cron / D Rafferty / C Bubu / N Qwabe 3024573	26 July 2019

Dear Madam Speaker

Removal of Ms Busisiwe Mkhwebane from the office of the Public Protector

1. This is an urgent call on the National Assembly for an expedited vote for the removal of Ms Busisiwe Mkhwebane from the high office of Public Protector.

2. We address this letter to you on behalf of our client, the Helen Suzman Foundation.

3. This letter is addressed to you, Madam Speaker, in your capacity as representative of the National Assembly, which is "*the embodiment of the centuries-old dreams and legitimate*

Senior Partner: JC Els **Managing Partner:** SJ Hutton **Partners:** BW Abraham RB Africa M Adderley NG Alp RL Appelbaum DC Bayman KL Beilings AE Bennett AP Blair DHL Booysen AR Bowley MS Burger RI Carrim T Cassim SJ Chong A Christie KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland JH Davies PM Daya L de Bruyn PU Dela JHB de Lange M Denenga DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver W Drue HJ du Preez CP du Toit SK Edmundson KH Eiser AE Esterhuizen MJR Evans AA Felekis G Fitzmaurice JB Forman C Gabriel CP Gaul KL Gawith OH Geldenhuys MM Gibson H Goolam CI Gouws PD Grealy JM Harvey MH Hathorn JS Henning KR Hillis S Hockey CM Holfeld PM Holloway AV Ismail ME Jarvis CA Jennings CM Jonker S Jooste LA Kahn ACR Katzke M Kennedy A Keyser MD Kota JC Kraamwinkel M Kyle J Lamb E Louw L Marais S McCafferty MC McIntosh SJ McKenzie CS Meyer AJ Mills D Milo NP Mngomezulu M Moloi LE Mostert VM Movshovich RA Nelson G Niven ZN Ntshona M Nxumalo AN Nyatsumba L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane BA Phillips MA Phillips D Ramjettan GI Rapson Z Rawoot K Rew SA Ritchie NJA Robb DC Rudman WJ Rysbergen G Sader M Sader H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh J Smit RS Smith MP Spalding PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor TK Thekiso PZ Vanda PP van der Merwe SE van der Meulen JP van der Poel CS Vanmali JE Veeran B Versfeld MG Versfeld TA Versfeld DM Visagie EME Warmington J Watson AWR Westwood RH Wilson M Yudaken **Chief Operating Officer:** SA Boyd

aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least-remembered."[1]

4. The Public Protector is an office of critical importance to South Africa's constitutional project, in which immense powers are vested to serve the public interest. To this end, the Constitutional Court has stated:

> "*One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.*"[2]

5. It is the Public Protector (among others), who wields this sword. Accordingly:

> "*The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance.*"[3]

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[1] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) ("**the Nkandla Judgment**") para 22.

[2] The Nkandla Judgment, para 1.

[3] The Nkandla Judgment, para 52. See also paras 48 - 56 generally for a summary of the importance of the Public Protector.

6. This David, champion and crusader has, however, come undone. Our courts have now repeatedly confirmed that the institution of the public protector and its constitutional promise and mission are now being continuously undermined and irreparably harmed by the incumbent bearer of that office.

7. Within the architecture of section 194 of the Constitution, it is the National Assembly which is both empowered and obliged to act to remove errant holders of Chapter 9 offices so as to protect the public and vindicate the principles of constitutionalism, accountability and the rule of law, all of which are in the process of being abrogated by Ms Mkhwebane.

8. Under section 194, the National Assembly is required to act swiftly, lawfully and fearlessly in acting as the guardian of our democracy to remove Ms Mkhwebane on the grounds of misconduct, incapacity or incompetence.

JUDICIAL FINDINGS WHICH WARRANT REMOVAL

9. Based on a number of judicial findings, it is plain that Ms Mkhwebane has – time and again – fallen far short of the constitutional requirements to hold the office of Public Protector. Below only a sample of the relevant judicial findings are traversed. The judgments should, we submit, be read in full.

10. ***Public Protector v South African Reserve Bank***[4]

10.1 This judgment was handed down by the Constitutional Court on 22 July 2019. It alone suffices to ground the removal of Ms Mkhwebane.

10.2 The underlying Report[5] by the Public Protector dealt with the failure of the State (and the Reserve Bank in particular) to recover funds which were allegedly improperly made available as part of the so-called "lifeboat transactions" entered into during the mid-1980s between the Reserve Bank and several banking institutions.

10.3 During the course of proceedings before the High Court, it emerged that Ms Mkhwebane had misconducted herself to such an extent that she could not rely on

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[4] [2019] ZACC 29.

[5] Report No. 8 of 2017/2018.

the statutory indemnification provided to her when she acts in good faith. As a mark of the High Court's displeasure with her conduct, costs were awarded against her in her personal capacity, which she appealed - unsuccessfully - to the Constitutional Court.

10.4 In a scathing judgment, the majority of the Court found as follows:

10.4.1 Where public officials' action in "*defiance of their constitutional obligations is egregious, it is they who should pay the costs of the litigation brought against them, and not the taxpayer*" (para 153); "*[t]he imposition of a personal costs order on a public official, like the Public Protector, whose bad faith or grossly negligent conduct falls short of what is required, vindicates the Constitution*" (para 158) and "*[p]ersonal costs orders are not granted against public officials who conduct themselves appropriately. They are granted when public officials fall egregiously short of what is required of them*" (para 159).

10.4.2 "*To the extent that the Public Protector conducted herself in bad faith, the potential immunity she may otherwise enjoy under section 5(3) is of no assistance to her. The High Court found that the Public Protector acted in bad faith. This Court has no reason to interfere with this finding*" (para 162). These findings, as set out in 11 below, included that the Public Protector was, essentially, dishonest, misrepresented to Court what material she had relied on, had failed to disclose meetings with the Presidency and other parties, had failed to disclose what was discussed at such meetings, was reasonably suspected of bias and had acted in bad faith and in a one-sided manner. It is further noteworthy that the Constitutional Court found that Ms Mkhwebane's explanations of what was (or was not) discussed at certain meetings were contradicted by her own versions; plainly, thus, she was advancing at least one false version in this regard (see, for example, paras 202 - 205).

10.4.3 These are damning findings - upheld by the highest court in the land - which all strike at Ms Mkhwebane's character, integrity, competence and independence.

10.4.4 The Constitutional Court agreed with the High Court's findings that Ms Mkhwebane was reasonably suspected of bias (paras 169 and 170). This is

contrary to her constitutional duty to act impartially without fear, favour or prejudice (s181 (2) of the Constitution).

10.4.5 The Court also agreed with various damning findings of the High Court that - "*the Public Protector had acted in bad faith; did not fully understand her constitutional duty to be impartial and perform her functions without fear, favour or prejudice; had failed to produce a full and complete record of the proceedings under rule 53 of the Uniform Rules of Court; and had failed to fulfil her obligation to be frank and candid when dealing with the court*" (see para 172, and 176 - 216). It is particularly concerning to see how Ms Mkhwebane misrepresented facts to the court, was not candid in her explanations, sought to change her version and failed to meet her legal obligations, as a litigant and as a constitutional institution;

10.4.6 Ms Mkhwebane was required to provide a full and frank explanation as to:

> "*(a) why the final report did not disclose meetings that she had held with the Presidency shortly before it was issued;*
>
> *(b) why she held meetings with the Presidency and the State Security Agency but not with the parties most affected by her new remedial action;*
>
> *(c) why she discussed amending the Constitution to take away the central function of the Reserve Bank with the Presidency;*
>
> *(d) why she discussed the vulnerability of the Reserve Bank with the State Security Agency; and*
>
> *(e) why she recorded and transcribed other meetings held during the conduct of the investigation, but failed to record or transcribe the meetings with the Presidency and the State Security Agency*" (para 176).

10.4.7 She failed in relation to all of the above:

10.4.7.1 She did not provide transcripts to these meetings (despite the practice being to record meetings (para 175));

10.4.7.2 she failed to provide key explanations regarding the content of the meetings and why they were omitted from the report (paras 180, 183 and 184);

10.4.7.3 where she did provide some explanations, she did so in a manner described as being "*woefully late but also unintelligible*" (para 181) and nonsensical (para 182);

10.4.7.4 she failed to comply with Court requirements and did not make available a proper or complete record of decision before Court (para 185 - 187);

10.4.7.5 she misrepresented that she had filed the entire record when she plainly had not (para 186), "*in stark contrast to her heightened obligation as a public official to assist the reviewing court*" (para 187);

10.4.7.6 she provided false explanations as to what was discussed at certain meetings (paras 188 and 189, 202 and 203) and sought to re-characterise certain meetings (para 193);

10.4.7.7 she provided the courts with contradictory explanations as to what was, or was not, discussed at certain meetings, with some of her denials being contradicted by handwritten notes and the versions of other attendees at such meetings (paras 202 - 205). These contradictions went beyond mere "*innocent mistakes*", leading the Constitutional Court to conclude that Ms Mkhwebane "*has not been candid about the meetings she had with the Presidency and the State Security Agency before she finalised the report*" (para 205).

10.4.8 Ultimately, the Constitutional Court found that she had acted "*in bad faith and in a grossly unreasonable manner*" (para 205), and that Ms Mkhwebane's "*entire model of investigation was flawed. She was <u>not honest</u> 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*" (para 207) (emphasis added).

10.4.9 This theme of dishonesty is compounded given that Ms Mkhwebane lied - or, in the Constitutional Court's words, "*pretended*" - that she had relied on certain

economic advice when this was not the case (paras 208 - 216). For the Public Protector to misrepresent to Court what evidence she in fact relied on in performing her constitutional duties is a further act of dishonesty. Indeed, the Constitutional Court did not hesitate in confirming the imposition of punitive costs against her personally (para 237).

10.5 It is plain that Ms Mkhwebane has misconducted herself to such an extent that she no longer remains fit to occupy the high office of Public Protector.

10.6 This is particularly so given the power she wields and the effect her unlawful actions have. In this instance, it was not simply that ABSA and the Reserve Bank had to incur legal costs to set aside her findings - instead, "*[t]he release of the final report caused severe harm to the South African economy. This included a significant depreciation in the Rand and a sell off by non-resident investors of R1.3 billion worth of South African government bonds*" (para 142).

10.7 The Constitutional Court further upheld a number of damning findings by the High Court, which are summarised in 11 below.

Comparable scenarios and removal criteria

10.8 At this juncture, it bears mention to stress (as the Constitutional Court found) that the Public Protector "*falls into the category of a public litigant. A higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights*" (para 155; see also paras 180 and 187); and her office is subject to the highest of standards (para 207).

10.9 As stated by the High Court in another recent matter involving Ms Mkhwebane, "*the PP should rise above any political agenda real or perceived and should look objectively at the complaints lodged, irrespective of where it may emanate from, and whatever the political objectives may be. Anyone, including any political party, should feel confident that the PP will investigate any legitimate complaint properly and objectively. The PP, like judicial officers, should transcend criticism and act without fear, favour and prejudice in all matters that come before them. The public*

should rest assured that those that preside over them or investigate their complaints will always execute their duties with due regard to the principles of the Constitution and the Rule of law."[6]

10.10 Any incumbent of this high office must thus be - and be seen to be - beyond reproach. Ms Mkhwebane - as with all incumbents of the office - is thus held to a high standard. Moreover, she is required, in terms of the Constitution, to be fit and proper, which is an objective standard.[7]

10.11 In this regard, it is telling - and dispositive - that lesser officers, owing far less weighty obligation to the public, have been removed for offences less egregious:

10.11.1 Directors of companies - including private companies, who owe relatively diluted obligations to the public - have been declared delinquent and removed from office for far less serious conduct than that of Ms Mkhwebane. Simply by way of example, in *Cape Empowerment Trust Ltd v Druker,*[8] the misconduct which sufficed to declare directors delinquent amounted to a failure to publish audited financial statements of the company in question from 2005 and to hold annual general meetings;

10.11.2 Attorneys - who are officers of the Court - have been removed for but a single act of dishonesty, given that *"[t]he attorney's profession is an honourable profession, which demands complete honesty and integrity from its members*".[9] As such, where there is a finding of misconduct of a serious nature and manifests as a character defect or moral lapse and lack of integrity, an attorney falls to be struck off.[10] Even where there is no dishonesty, attorneys have been struck off for lesser transgressions, such as a failure

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[6] *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* [2019] 3 All SA 127 (GP); 2019 (7) BCLR 882 (GP) (20 May 2019) para 148.

[7] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) paras 14 - 26; *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) para 14.

[8] 2013 JDR 1360 (WCC).

[9] *Malan and Another v Law Society of the Northern Provinces* 2009 (1) SA 216 (SCA) para 10.

[10] *Law Society of the Free State v Radebe* (5293/2015) [2016] ZAFSHC 97 (9 June 2016) para 27.

properly to administer a trust account[11] and touting and not keeping proper books.[12]

10.11.3 Advocates - again, dishonesty may be a ground to strike an advocate from the roll;[13] however, mere transgression of the rules of the profession may also suffice (for example, partaking in double-briefing).[14]

10.12 And, in the realm of service to the public and the Republic, it has been held that the incumbents of high offices must be beyond reproach, must objectively be fit and proper,[15] and cannot have question marks as to their conscientiousness and integrity. By way of example:

10.12.1 The Supreme Court of Appeal found that judicial findings against Lt-Gen. Ntlemeza (finding him, *inter alia*, to lack honesty and integrity, to have misled the Court, to be biased and dishonest and to have made false statements under oath)[16] were dispositive[17] of the question as to whether he was fit and proper for the high office of National Head of the Directorate for Priority Crime Investigations. As stated by the High Court, and upheld by the SCA, "*[t]he judgments are replete with the findings of dishonesty and mala fides against Major General Ntlemeza. These were judicial pronouncements. They therefore constitute direct evidence that Major General Ntlemeza lacks the requisite honesty, integrity and conscientiousness to occupy the position of any public office, not to mention an office as more important as that of the National Head of the DPCI, where independence, honesty and integrity are paramount to qualities. Currently no appeal lies against the findings of dishonesty and impropriety made by the Court in the judgments. Accordingly, such serious findings of fact in relation to Major General Ntlemeza, which go directly to*

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[11] *Ibid*, para 11.

[12] *Cirota v Law Society Transvaal* 1979 (1) SA 172 (A).

[13] Society of Advocates of Natal and Another v Merret 1997 (4) SA 374 (N) 383D-G; see also *General Council of the Bar of South Africa v Matthys* 2002 (5) SA 1 (E).

[14] *General Council of the Bar of South Africa v Geach and Others, Pillay and Others v Pretoria Society of Advocates and Another, Bezuidenthout v Pretoria Society of Advocates* (277/12, 273/12, 274/12, 275/12, 278/12, 280/12, 281/12) 2013 (2) SA 52 (SCA).

[15] See the authorities cited in fn 7.

[16] *Ntlemeza*, *supra fn 7*, paras 9 and 15.

[17] *Ibid*, para 15.

Major General Ntlemeza's trustworthiness, his honesty and integrity, are definitive."[18]

10.12.2 Similarly, when considering Mr Simelane's appointment to the high office of National Director of Public Prosecutions, the Constitutional Court noted that indications of dishonesty that could detract from the credibility, integrity and conscientiousness of Mr Simelane[19] plainly were material when considering whether he was fit and proper and capable of occupying this high office. The ineluctable conclusion is that, if Mr Simelane's credibility, integrity and conscientiousness was found to be wanting, he would not be fit and proper and could not occupy the high office of NDPP.

10.12.3 So too, a Full Bench of the Electoral Court, when considering Ms Pansy Tlakula's ability to continue holding office as Chief Electoral Officer,[20] concluded that it had to recommend that a committee of the National Assembly adopts the facts, views and conclusions of the court that Ms Tlakula had committed misconduct warranting her removal from office.[21] In arriving at that conclusion, the Court held[22] that Ms Tlakula was required to comply with the procurement law and its prescripts, and that she stood in a fiduciary duty towards the Commission and owed it a duty to disclose a potential conflict of interest. Significant procedural failures allowed by her resulted in a wholly skewed procurement process for acquisition of new premises for the Commission. The Court found that the skewed procurement process suffered from multiple infringements, which, in turn, favoured her business associate to the detriment of other bidders and at a cost substantially to the detriment of the Commission by causing it to incur unjustified expenditure. In addition, Ms Tlakula failed to abide by the conflict rules that were applicable to her office. The Court concluded that she had to be removed: the conduct of Ms Tlakula was inconsistent with her office and obligations as CEO and accounting

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18 *Helen Suzman Foundation and Another v Minister of Police and Others* 2017 (1) SACR 683 (GP) (17 March 2017) para 36.

19 *Democratic Alliance, supra fn 7*, paras 69, 74, 76 and 86.

20 *United Democratic Movement and Others v Tlakula and Another* (EC 05/14) [2014] ZAEC 5; 2015 (5) BCLR 597 (Elect Ct)) (18 June 2014).

21 *Ibid*, para 161.

22 *Ibid*, para 151.

officer; she had breached the norms that govern her office. It was also unlawful in circumstances where she was imbued with the particular responsibility to ensure proper legal process. According to the Court, Ms Tlakula failed in her constitutional obligations. Her wrongdoing showed that she misconducted herself seriously in dealing with the business of the Commission.

10.13 Bearing the above in mind, it is plain that Ms Mkhwebane falls to be removed. The binding judicial findings against her - which cannot be ignored[23] - suffice to disqualify her from high public office (and are comparable to those in the Major General Ntlemeza and Simelane matters, and the case of Tlakula). Her conduct, moreover, is far more egregious than misconduct which has resulted in the removal of individuals from far lesser offices of trust (such as directors, attorneys or advocates). It is incompatible with our Constitution that any individual remains in the high office of Public Protector given the damning judicial findings against her (by the Constitutional Court, as set out above, and the High Courts, as delineated below).

11. ***Absa Bank Limited and Others v Public Protector and Others***[24]

11.1 This Report is summarised in 10.2 above.

11.2 Ms Mkhwebane's report was reviewed and set aside (with punitive costs to be borne in a personal capacity by Ms Mkhwebane). Some of the Court's findings are summarised or quoted below:

11.2.1 The Court made damning findings against Ms Mkhwebane, finding that she "*did not conduct herself in a manner which should be expected from a person occupying the office of the Public Protector... She did not have regard thereto that her office requires her to be objective, honest and to deal with matters according to the law and that a higher standard is expected from her. She failed to explain her actions adequately*" (para 120). This stemmed from a number of grounds, including that she had failed to disclose meetings with the Presidency and other parties, obscured what was discussed in such meetings,

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[23] See paras 15.1 and 15.2 hereof.

[24] [2018] 2 All SA 1 (GP).

had acted in a manifestly one-sided manner, had pretended that she was acting on certain advice when she was not (ie: was dishonest) and that her versions changed as the matter developed (see paras 32, 87, 104 - 117, and para 128 in particular).

11.2.2 Ms Mkhwebane "*did not disclose that she had also met with officials from the Presidency and representatives of an organisation known as Black First Land First (BFLF)*" (para 32); that she met with the State Security Agency, and failed to inform ABSA or the Reserve Bank of these important meetings (paras 88, 91 and 93); and met with Black First Land First at their request, but refused to meet with ABSA at their request (para 94).

11.2.3 "*The Public Protector's meeting with the SSA and the former Minister of State Security on 3 May 2017 and her discussion pertaining to the Reserve Bank cannot be justified in any manner. She should have engaged directly with the Reserve Bank if she was concerned about the security of the Reserve Bank. She further failed to record these meetings, although it was customary to record all meetings. She cannot supply transcripts of these meetings, nor any minutes of the meetings. She failed to mention the second meeting with the Presidency in her final report*" (para 108). "*The question remains unanswered as to why she had acted in such a secretive manner and she does not give an explanation for doing so*" (para 115).

11.2.4 Her failings were so material that the Court found that "*[i]n the matter before us it transpired that the Public Protector does not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice*" (para 127). Ms Mkhwebane's reasons for consulting the Presidency after changing the focus and remedial action of her investigation - which consultation was never properly disclosed - were "*disingenuous*" (para 95), and the subjects of the report were never afforded similarly consultations with the public protector (para 96). "*This cannot be an administrative oversight as she was clearly aware of the provisions of section 7(9) of the Public Protector Act when she decided to have an interview with the Presidency on 25 April 2017. Furthermore, if it was an oversight, one would have expected the Public Protector to have said so in her answering affidavit*" (para 100).

11.2.5 *"The Public Protector did not disclose in her report that she had meetings with the Presidency on 25 April 2017 and again on 7 June 2017. It was only in her answering affidavit that she admitted to the meeting of 25 April 2017, but she was totally silent on the second meeting which took place on 7 June 2017. She gave no explanation in this regard when she had the opportunity to do so. Having regard to all these considerations, we are of the view that a reasonable, objective and informed person, taking into account all these facts, would reasonably have an apprehension that the Public Protector would not have brought an impartial mind to bear on the issues before her. We therefore conclude that it has been proven that the Public Protector is reasonably suspected of bias as contemplated in section 6(2)(a)(iii) of PAJA*" (para 101).

11.2.6 These are remarkable findings, namely that Ms Mkhwebane had acted in a manner reasonably suspected to be biased and had failed to exhibit the honesty demanded of her office.

11.2.7 Further, there were numerous substantive and procedural failings in the report. The process was not impartial (paras 103 and 101); key documents were withheld from ABSA and the Reserve Bank (para 103); her remedial action "*exceeded the powers entrusted to her by the Constitution and the Public Protector Act*" (para 70), was *ultra vires* (paras 71 - 73) and (on additional grounds) unlawful (paras 81 - 82).

11.2.8 Indeed, so repugnant was Ms Mkhwebane's conduct that the Court was constrained to record as follows: "*Section 5(3) of the Public Protector Act provides for an indemnification with regard to conduct performed "in good faith". The Public Protector has demonstrated that she exceeded the bounds of this indemnification. It will therefore be of no assistance to her. It is necessary to show our displeasure with the unacceptable way in which she conducted her investigation as well as her persistence to oppose all three applications to the end*" (para 128).

12. ***Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector***[25]

12.1 This matter related to Ms Mkhwebane's failure properly to investigate and report on the agreement between the Free State Department of Agriculture and Estina (Pty) Ltd in the Vrede dairy farm matter.[26] Ms Mkhwebane's report was reviewed and it was declared that she had "*failed in her duties under section 6 and 7 of the Public Protection Act and section 182 of the Constitution. The PP's report No 31 of 2017/18 date 8 February 2018 is accordingly reviewed, set aside and declared unlawful, unconstitutional and invalid.*"

12.2 Some of the Court's findings are summarised or quoted below:

12.2.1 Ms Mkhwebane irrationally and dramatically narrowed the scope of the investigation,[27] which "*seems to ignore the issues raised in the report from Treasury, the media reports as well as the complaints lodged. There does not seem any logical and legitimate explanation for the narrowing of the scope of the investigation*" (para 43]).

12.2.2 This "*led to a failure on her part to execute her constitutional duty*" (para 47).

12.2.3 Ms Mkhwebane had, without explanation, deleted findings of irregular expenditure which appeared in the provisional report, which the Court held could lead to one "*justifiably ask[ing] whether this was done for some ulterior purpose*" (para 75).

12.2.4 Ms Mkhwebane had "*missed the point completely*" in relation to the nature of the impugned agreement, and had ignored or failed to recognise the only logical inference to be drawn in relation to such agreement (para 64). This led to irrational conclusions (para 66) and Ms Mkhwebane "*did not enquire any further into the nature of the irregularities committed, or whether the agreement and execution thereof resulted in misappropriation of public funds.*

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[25] [2019] 3 All SA 127 (GP).

[26] Report No. 31 of 2017/2018.

[27] Para 47.

This is inexplicable seen in the broader context of her duties and powers" (para 67).

12.2.5 Ms Mkhwebane misrepresented to Court that she could not obtain certain evidence (which related to market prices), when this material had in fact been supplied by a complainant (para 79).

12.2.6 Further, Ms Mkhwebane failed to exercise her statutory powers properly "*to determine what was paid for, to whom, and what amounts were paid. The failure of the PP to execute her constitutional duties in investigating and compiling a credible and comprehensive report points either to a* ***blatant disregard to comply with her constitutional duties and obligations or a concerning lack of understanding of those duties and obligations***" (paras 82 and 83, emphasis added). This failure to understand or exercise her evidence gathering powers is a repeated theme in the judgment (paras 69, 70, 71 and 94), and the Court remarked that "*[t]he steps taken by her seem wholly inadequate, considering the magnitude and importance of the complaints raised*" (para 49).

12.2.7 Her approach to evidence gathering was further materially flawed as she did not even engage with key witnesses or personnel (paras 51, 91 and 92).

12.2.8 Ms Mkhwebane did not properly understand her constitutional mandate and what was required of her, and improperly refused to investigate a complaint falling within her jurisdiction (paras 97 and 98). She committed further errors of law in assessing powers afforded to executive authorities under the Public Finance Management Act, 1999 (para 113), as well as the role of the Auditor-General under the Constitution (paras 138 - 140) and her own legal powers (paras 142 and 143).

12.2.9 So material were her errors in law that they completely undermined the report, and it resulted in an "*especially inappropriate and irrational*" remedial direction, which was "*absurd and goes against every known princip[le] of law and logic*", as it "*put people who are implicated in wrongdoing in a position to investigate that very same wrongdoing*" (all in para 116).

12.2.10 Perhaps even more concerning, "*The Report by the PP did not address the major issues raised in the complaints, nor the numerous indications of*

irregularities. In this instance the PP did nothing to assure the public that she kept an open and enquiring mind and that she discovered, or at least attempted to discover the truth" (para 109). The concern that the report was a cover-up is simply reinforced by the Court's finding that Ms Mkhwebane was aware that she possessed certain legal powers but deliberately (and inexplicably) elected to exclude certain remedial actions on the basis that she lacked the legal powers to order that kind of remedial action (para 145).

12.2.11 In summary, the report produced by Ms Mkhwebane contained "*irrational and arbitrary findings and material errors of law in the Report, [resulting from] the inappropriate and ineffective investigation executed by her office*" (para 95), was "*unlawful and unconstitutional and ... fails to comply with the requirement of legality*" (para 152), was " *irrational"* and "*there had also not been a correct application of the law* " (para 153). She ignored key evidence which was publicly available (para 154), her remedies were not "*appropriate, proper, fitting, suitable or effective*" (para 155) and she committed "*a profound mistake of law*" in failing to recognise her power to order another organ of State further to investigate the matter (para 156).

13. ***South African Reserve Bank v Public Protector and Others***[28]

13.1 This case flowed from the report dealt with in 11 above, but concerned an urgent challenge to one aspect of the remedial action ordered by Ms Mkhwebane, namely that the chairperson of the portfolio committee be directed to initiate a process that would result in an amendment of section 224 of the Constitution with a view to altering the primary object of the Reserve Bank.

13.2 Unsurprisingly, this unprecedented attempt by a Public Protector unilaterally to instruct an amendment to the Constitution was reviewed and set aside (with costs).

13.3 Ms Mkhwebane's remedial action had devastating consequences when announced - "*[h]er instruction to amend the constitutionally mandated primary object of the Reserve Bank was received with dismay and consternation, and as might reasonably have been predicted, had immediate negative consequences for the*

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[28] 2017 (6) SA 198 (GP).

economy and investor confidence. The currency instantly depreciated by 2.05%; R1.3 billion worth of South African government bonds were sold by non-resident investors; and banking sector shares were negatively impacted. The next day, 20 June 2017, Standard & Poor Global Ratings warned that South Africa's credit rating could be downgraded further if government were to give effect to the remedial action. After this warning, the currency depreciated further. As the Governor of the Reserve Bank, Mr. Lesetja Kganyago, pointed out in the founding affidavit, the ratings agencies have made it clear that the independence of the Reserve Bank and its policy framework are among "the strongest pillars supporting the South African economy and underpinning their rating assessment" " (para 6).

13.4 Ms Mkhwebane ultimately conceded that her remedial action fell to be set aside (para 9). So important were the issues, however, that a substantive judgment was nonetheless handed down. In that judgment, the Court found as follows:

13.4.1 Ms Mkhwebane's remedial action exceeded her jurisdiction, was irrational and she was not authorised by section 182(1) of the Constitution to take such action (paras 40 - 42);

13.4.2 The remedial action violated the doctrine of the separation of powers guaranteed by section 1(c) of the Constitution, in numerous respects (paras 43 - 46);

13.4.3 The remedial action was irrational and so unreasonable that no reasonable person could have taken it. The Public Protector's superficial reasoning and erroneous findings on the issue did not provide a rational basis for the remedial action and demonstrated an ignorance or failure to appreciate financial and socio-economic realities, the intricacies of fiscal policy, the fundamentals of the monetary system and the operations of banking institutions (paras 51 - 58); and

13.4.4 The remedial action was insufficiently informed, released in contravention of an agreement made with the Reserve Bank to make her final report available to the Reserve Bank five days before its release and was the subject of a procedurally unlawful process (para 58).

14. ***Minister of Water and Sanitation v The Public Protector of the Republic of South Africa and Others:***[29]

14.1 In this matter, Ms Mkhwebane failed to afford the impugned Minister the basic legal right of *audi alteram partem*, and this "*refusal to afford the applicant an opportunity to respond is threatening the applicant's aforesaid right to natural justice and fair procedures*".[30] In that context, the High Court interdicted her from further publishing or requiring State bodies to give effect to her findings and remedial action, pending the outcome of review proceedings against her report, investigation and remedial action. The Court noted that "*There are strong prospects of succeeding in the review wherein the applicant will be granted the opportunity to respond to the scathing allegations set out in the report*" (para 36).

15. ***Conclusions regarding judicial findings***

15.1 Ms Mkhwebane has been found, *inter alia*, to be dishonest; to have acted one-sidedly in a biased fashion; to have misrepresented facts to Court; to have committed numerous foundational errors of law; to have failed to understand even her own powers; to have acted in a manner where an inference of ulterior purpose may reasonably be drawn; to have failed to pursue the truth and to have run roughshod over procedural rights of those adversely affected by the exercise of the formidable legal powers of her office. She has not been candid with the Courts; has fallen far short of the standard required of her office; and has operated in a clandestine fashion contrary to the fundamental constitutional requirements and values of transparency and the rule of law. She has been the subject of the severest judicial opprobrium and censure. The findings of the courts are binding on the legislature and Ms Mkhwebane and must be respected and given effect. As established in both the *Nkandla* and *Ntlemeza* judgments, judicial pronouncements must be honoured and given effect to.[31]

15.2 Moreover, section 165(4) of the Constitution states that "*[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the*

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[29] (27609/2019) [2019] ZAGPPHC 193 (31 May 2019).

[30] *Ibid*, paras 35 and 36.

[31] The Nkandla judgment, paras 74, 94 and 97; *Ntlemeza*, *supra fn 7*, para 15.

independence, impartiality, dignity, accessibility and effectiveness of the courts."[32] The State - in all its guises - is required to "*do right, and it must do it properly*".[33] The National Assembly therefore has no choice but to act in light of the judicial findings made to date.

15.3 In conducting herself in the fashion that she did, Ms Mkhwebane caused immeasurable harm to the economy, devastating the reputations of innocent parties, allowing potential wrongdoers to escape detection and failing the public as a bulwark against corruption and public maladministration by perpetrating the very type of abuse against which she is expected to protect the State.

15.4 Any of the above findings, it is submitted, should suffice to warrant her removal in terms of Section 194 of the Constitution. Cumulatively, however, the case is irresistible - she has misconducted herself and acted with a pronounced lack of integrity and competence. The office of the Public Protector and the important constitutional work it has to perform on a daily basis should not be held hostage to or sabotaged by someone unfit to occupy it.

APPREHENSION OF BIAS

16. Ms Mkhwebane's removal from office is justified by the facts set out above on their own. Whilst it is therefore not necessary to speculate about her political motives, it has become apparent that her motives and independence are questionable. Her approach and methodology fortify the inference in this regard, as noted by at least three courts, set forth above.

17. This perception alone suffices to create the reasonable apprehension of bias. Such perception is a basis to set aside rulings on review. As noted already, in finding Ms Mkhwebane to be personally liable for punitive costs, the Constitutional Court most recently in *Public Protector v South African Reserve Bank*[34] agreed with the High Court's findings that Ms Mkhwebane was reasonably suspected of bias (paras 169 and 170). This is contrary to her constitutional duty to act impartially without fear, favour or prejudice

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[32] See also *Nyathi v MEC for Department of Health, Gauteng and another* 2008 (5) SA 94 (CC) para 43.

[33] *MEC for Health, Eastern Cape, & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC) para 82.

[34] [2019] ZACC 29.

(s181 (2) of the Constitution). This bears directly on Ms Mkhwebane's ability properly to discharge the requirements of her office in future. In addition to integrity and competence, this is relevant to Ms Mkhwebane's capacity to fulfil her role.

18. The Constitutional Court held, in *Glenister*, that when determining the adequate independence of the Directorate for Priority Crime Investigation, the public perception of independence was an additional factor to consider beyond the actual structural and operational autonomy of the institution. To this end, the Court held that "*public confidence that an institution is independent is a component of, or is constitutive of, its independence*," and that "*public confidence in mechanisms that are designed to secure independence is indispensible*."[35]

19. The Electoral Court, in the *Tlakula* matter, held that "the conduct of the respondent, which is of the nature described herein, risks the impairing of public confidence in the integrity and impartiality of the Commission. The applicants' disquiet that the independence of the Commission has been tainted, is justified. It is conduct of such a nature, that had it been known at the time of the respondent's appointment as commissioner, would in all probability have played a role in the decision whether or not to appoint her."[36]

20. Ms Mkhwebane has compromised the integrity and independence of her office in violation of a requirement that such integrity and impartiality must be above suspicion and beyond question. This view finds its basis in the Constitutional Court's decision in *New National Party of South Africa v Government of the Republic of South Africa and Others*:[37]

> "*independent institutions are an important structural component of our constitutional democracy. The Constitution obliges such institutions to be impartial and to perform their functions without fear, favour or prejudice. Other organs of state are obliged to assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness. It is clear that both constitutional obligations should be scrupulously observed.*"

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[35] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 207 citing *S and Others v Van Rooyen and Others* 2002 (5) SA 246 (CC) at para 32.

[36] *Tlakula, supra fn 20*, para 153.

[37] 1999 (3) SA 199 (CC) at para 162.

21. And in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* the Constitutional Court pronounced this principle as follows:[38]

> "*They perform sensitive functions which require their independence and impartiality to be beyond question, and to be protected by stringent provisions in the Constitution.*"

22. As the Electoral Court held in *Tlakula*: "*These considerations apply particularly strongly where the head of an institution is concerned.*"[39]

23. The fact that Ms Mkhwebane, the head of the Office of the Public Protector, may reasonably be suspected of impartiality, or a lack of independence, is fatal. It undermines public confidence in all of her actions. No public confidence as to the independence of Ms Mkhwebane can exist and her continued tenure as Public Protector will further erode public confidence not just in that office but in the administration of justice as a whole.

ACCOUNTABILITY

24. Ms Mkhwebane's statements on accountability also appear to betray a fundamental misconception of the nature and place of her high office. Without limitation, she claims to be accountable only to God,[40] in clear defiance of her mandate to serve the people of the Republic and to account to them, and in disregard of the National Assembly's oversight role.

25. Further, her conduct in calling for any investigation into her competence to hold office to be quashed and that Parliament cannot remove her[41] is high-handed, betrays yet a further misunderstanding of the law, and is a transparent attempt to evade accountability.

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[38] 1997 (2) SA 97 (CC) at para 142.

[39] *Tlakula, supra*, para 157.

[40] It is reported that, at a recent event of the South African Sheriff Society in Mpumalanga, the Public Protector proclaimed that "*...I strongly believe I was placed in this position by the God that I serve and I believe that only He can remove me if He is of the view that I have failed*" - https://www.news24.com/MyNews24/the-public-protector-and-god-quo-vadis-20190618.

[41] https://www.news24.com/SouthAfrica/News/mkhwebane-tells-parliament-to-back-off-threatens-court-action-report-20190721.

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26. If the public protector were to lose one case on review, on a technical point, then perhaps little may turn on that.

27. However, in the infancy of her tenure, Ms Mkhwebane has already been severely rebuked by multiple courts, including our highest court. The bases on which censure has been meted out and the reviews succeeded plainly illustrate misconduct, incapacity and repeated incompetence by the Public Protector. She has eviscerated and abused her constitutional mandate and the public trust that is meant to repose in her office.

URGENCY AND CONCLUSIONS

28. The Constitutional Court has held that:

> "*Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude.*"[42]

29. The Republic could now face such a constitutional crisis.

30. As set out above, quite apart from acting unlawfully (as repeatedly found by our Courts), Ms Mkhwebane is wreaking far-reaching political and economic damage and is threatening the rule of law. She shows no remorse for her conduct, and an inability or unwillingness to learn from her multiple mistakes.

31. She has been found to be dishonest; to have (knowingly) withheld information from Courts and affected parties; to have grossly exceeded her jurisdiction; to have committed numerous grave errors of law; to have disregarded critical evidence; to have breached her constitutional duties; to have failed to understand basic precepts of law and her powers; to have acted unlawfully, irrationally and unreasonably and to failed to pursue the truth.

32. This is quite apart from the inference of ulterior purpose and the apprehension that Ms Mkhwebane is acting without the requisite independence.

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[42] The Nkandla judgment, para 1.

33. Ultimately, it is plain that Ms Mkhwebane is not fit to remain in office. She lacks integrity; is incompetent and / or incapable of fulfilling her constitutional mandate; is no longer fit and proper for the high office of public protector; is no longer independent or perceived to be independent (either suffices); and there are clear and binding judicial findings of misconduct.

34. Our client, acting in the public interest, implores the National Assembly urgently to do its constitutional duty and to remove Ms Mkhwebane from office as Public Protector.

35. Given the importance of the office she holds, the immense power vested in such office and the public trust reposed in such office, every day that Ms Mkhwebane remains in office damages the integrity of such office. Similarly, the failure urgently to act on the relevant judicial findings damages the integrity of the National Assembly and is contrary to its duty to the Republic. The intolerable damage done to the institutional integrity and public confidence in such circumstances has been underscored by our courts in the *Ntlemeza* judgments: "*The public perception of, and its trust in the DPCI, will be compromised. The public will have very little respect for the office of the DPCI if Ntlemeza continues to occupy that office despite the lingering reports.*"[43] The courts concluded that Maj-Gen Ntlemeza cannot continue to occupy his high office as head of the Directorate for Priority Crime Investigation for one moment longer, given the scathing judicial findings against him.

36. Given the judicial findings made against Ms Mkhwebane, it is critical that pointed action be taken to remove her from office as a matter of great urgency. Our young constitutional democracy deserves no less. Of the *Ntlemeza* case, the Supreme Court of Appeal said the following: "*The proper functioning of the foremost corruption busting and crime fighting unit in our country dictates that it should be free of taint. It is a matter of great importance. The adverse prior crucial judicial pronouncements and the place that the South African Police Service maintains in the constitutional scheme as well as the vital role of the National Head of the DPCI and the public interests at play, are all factors that weighed with the court in its conclusion that there were exceptional circumstances in this case.*"[44] The Supreme Court of Appeal held that the public and the public interest will suffer

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[43] *Helen Suzman Foundation and Another v Minister of Police and Others* [2017] 3 All SA 253 (GP), para 27.

[44] *Ntlemeza, supra fn 7,* para 45.

irreparable harm if immediate action were not taken to stop Lt-Gen Ntlemeza from occupying his office.[45]

37. The potential damage in not acting expeditiously to remove the public protector is even more pronounced, given the public protector's constitutional role. When it comes to institutions of that nature, what is of primary importance is the integrity of the institution, not the parochial interest of a tainted individual seeking to hold onto authority which does not befit him or her.

38. It appears from media reports that the Justice Committee is only going to start looking into the complaints against Ms Mkhwebane in September 2019 at the earliest. We respectfully submit that the matter should receive more urgent review and action by Parliament, given the gravity of the situation and the scope for Ms Mkhwebane doing untold damage to the country, on a daily basis. *Post hoc* review of an actor's unlawful, irrational or otherwise delinquent actions are no substitute for prevention, as has been held by the Constitutional Court.[46]

39. We respectfully submit that this matter is of the utmost importance and urgency, given the above circumstances, and requires the National Assembly's urgent attention, well before September. We would be grateful for your response as to how you intend to proceed in this situation.

Yours faithfully

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

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45 *Ibid*, para 47.

46 *Glenister, supra fn 35*, para 247.