IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case _____

In the matter between:

PRAVIN JAMNADAS GORDHAN	Applicant
and	
THE PUBLIC PROTECTOR	First Respondent
BUSISWE MKHWEBANE	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Fourth Respondent
THE MINISTER OF STATE SECURITY	Fifth Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Sixth Respondent
THE NATIONAL COMMISSIONER OF POLICE	Seventh Respondent
VISVANATHAN PILLAY	Eighth Respondent
GEORGE NGAKANE VIRGIL MAGASHULA	Ninth Respondent

FOUNDING AFFIDAVIT

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I, the undersigned,

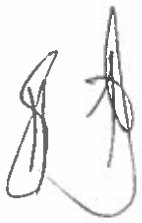
PRAVIN JAMNADAS GORDHAN

make the following statement under oath:

THE DEPONENT

1 I am the Applicant. I am the Minister of Public Enterprises. I was the Commissioner of the South African Revenue Service; the Minister of Finance from 10 May 2009 to 25 May 2014 and again from 14 December 2015 to 30 March 2017; and the Minister of Cooperative Governance and Traditional Affairs from 25 May 2014 to 14 December 2015.

2 The facts to which I depose are within my personal knowledge except where it is evident from the context that they are not. Where I make legal submissions, I do so on the advice of my lawyers.



THE RESPONDENTS

3 The First Respondent is of the Public Protector, the institution established by sections 181 and 193 of the Constitution and by the Public Protector Act 23 of 1994 ("**the PP Act**"), whose head office is located at 175 Lunnon Street, Hill Crest Office Park, Pretoria.

4 The Second Respondent is Advocate Busisiwe Mkhwebane in her personal capacity. Her place of employment is at the Office of the Public Protector located at 175 Lunnon Street, Hill Crest Office Park, Pretoria.

5 I shall refer to the First and Second Respondents jointly as "**the Public Protector**" except where I specifically refer to the one or the other of them.

6 The Third Respondent is the President of the Republic of South Africa, to be served c/o the State Attorney, located at SALU Building, 316 Thabo Sehume Street (Cnr Thabo Sehume and Francis Baard Street), Pretoria.

7 The Fourth Respondent is the Speaker of the National Assembly, located at Parliament Building, Room E118, Parliament Street, Cape Town.

8 The Fifth Respondent is the Minister of State Security, to be served c/o the State Attorney, located at SALU Building, 316 Thabo Sehume Street (Cnr Thabo Sehume and Francis Baard Street), Pretoria.

9 The Sixth Respondent is the National Director of Public Prosecutions, located at Victoria & Griffiths Mxenge Building, (Cnr Westlake & Hartley), 123 Westlake Avenue, Wevind Park, Silverton, Pretoria.

10 The Seventh Respondent is the National Commissioner of Police, located at SAPS Head Office, Wachthuis Building, 231 Pretorius Street, Pretoria.

11 The Eighth Respondent is Mr Visvanathan Pillay, to be served c/o his attorneys, Werksmans Attorneys, The Central, 96 Rivonia Road, Sandton.

12 The Ninth Respondent is Mr George Ngakane Virgil Magashula, to be served c/o his attorneys, Savage Jooste & Adams Attorneys, King's Gate, 5 10th Street, Menlo Park, Pretoria.

INTRODUCTION

13 All are equal under the law according to the Constitution. All must be treated equally under the tax laws. SARS divides people into those that are tax compliant and those that are suspected of evading their tax obligations. Tax evaders conceal their misconduct. SARS reveals this unlawful activity through investigation to ensure compliance with the tax laws. SARS must investigate suspected tax evasion or non-compliance, regardless of the prominence or public profile of those under investigation. There is no legal or other obstacle to SARS establishing and operating a variety of investigation units to strengthen tax compliance and enforcement. This is in accordance with international best practice. That is all that happened more than ten years ago. The investigating unit lawfully established by SARS investigated tax rogues. There is nothing rogue about its establishment.

14 So why is there a persistent claim to the contrary? It is a lie. It is "fake news." It is a falsehood that is repeated and repeated and repeated by some in the hope that someone will believe that there must be something there. It is a baseless, defamatory, scurrilous and false claim made by those who wish to defeat our constitutional project.

It is an attempt to deceive South Africans. It is a fictional "narrative" with a catchy name that was conjured up, exploited politically and is now repeated by those implicated in corruption, malfeasance and state capture.

15 "State capture" is the term that we use in South Africa to denote the deliberate and illegitimate repurposing of state institutions to unlawfully benefit political or private interests. It is the diversion of institutions from their constitutional role, the perversion of their constitutional mandate and the abuse of their constitutionally-granted powers. It is captured institutions that went "rogue."

16 The primary focus of the Public Protector's investigation and the impugned report challenged in this review application appears to join this pattern.

17 The past decade has been characterised by the paralysis of law enforcement agencies to act against corruption, the looting of state coffers, the catastrophic dismantling of the revenue collection and enforcement capacity of SARS, and the rise of a parallel security state, targeting political opponents of the state capture project. Each of these aspects of state capture and the political context is unavoidably relevant to understanding the need for this review application.

18 The renewal and rebuilding of state institutions -- whether law enforcement agencies, the State Security Agency, SARS or other public enterprises -- since the election of President Ramaphosa, and my specific mandate to restore good governance and leadership, and root out corruption within our state-owned companies and all efforts that seek to halt and reverse state capture.

19 This "renewal" project is fiercely resisted by those rogues who seek political advantage, who stand to lose their access to looting opportunities within the state, who are at risk

of criminal prosecution and who seek to return South Africa to the dark path of lawlessness, corruption and securitisation, and away from our journey to accountability and constitutionalism.

20 This "fightback" campaign is waged by, amongst others, my political opponents. They seek to taint me and other leaders who work for a better South Africa for all its people. In doing so, they advance the "factional battles" which sow discord and undermine confidence in our country. I reject this campaign and will continue to repeat the truth as many times as are necessary until it is clear what the facts are: there was no "rogue unit" at SARS.

21 Prominent participants in this campaign, trying to keep alive the lie, are leaders of the opposition party, the Economic Freedom Fighters ("**EFF**").

21.1 The EFF lodged one of the complaints that gave rise to the Public Protector's actions against me here.

21.2 The EFF also is a vocal supporter of the Public Protector when concerned South Africans view her record in office and see incompetence, legal illiteracy and partisanship. This view finds support in the judgments in several other cases, discussed below, where her competence and performance have been criticised and her reports set aside.

21.3 The EFF enthusiastically received the two reports she has recently released, both of which make adverse findings against me and seek to have me disciplined by President Ramaphosa, among other remedial actions against me. The first report is already the subject of pending review proceedings.

21.4 The EFF have re-packaged some of the same allegations that form part of their complaint here in the pending proceedings launched by me against them in the

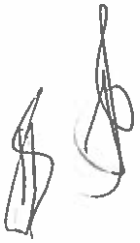
Equality Court. Those proceedings arise from public attacks by Mr Julius Malema, President of the EFF, at an EFF street protest during my testimony before the ongoing judicial commission of inquiry into state capture, chaired by the Deputy Chief Justice.

21.5 Finally, the EFF has become a vocal supporter of former SARS Commissioner, Mr Tom Moyane, in his various legal proceedings against President Ramaphosa and me, where the same allegations were made without success.

21.6 This track-record -- of the EFF repeating baseless allegations against me in umpteen forums -- demonstrates a political motive to the complaint. Yet this motive has been ignored, or, worse, endorsed, by the actions of the Public Protector against me, taken to date. No awareness of the infirmity of or motive for the allegations against me by the EFF is shown by the Public Protector. Rather, she is unquestioning in her acceptance of them. This is the result of incompetence, bias or both.

22 It appears that the Public Protector, whether wittingly or unwittingly, has permitted her office and its extensive powers, to be weaponised in this political war against "unity and renewal." I therefore bring this review application and turn to this Court to ensure that the rule of law is upheld and that the constitutional mandate, and the lawful powers and functions of the Public Protector, are observed and restored.

23 On 5 July 2019, the Public Protector released a "*Report on an investigation into allegations of violation of the Executive Ethics Code by Mr Pravin Gordhan, MP as well as allegations of maladministration, corruption and improper conduct by the South African Revenue Services*" (sic) ("**the Report**") attached marked "**PG1**".



24 The Report purports to be the result of an investigation of two complaints, one said to be lodged by an anonymous whistle-blower on 12 October 2018, and the other lodged by Mr Floyd Shivambu, Deputy President of the EFF, on 9 November 2018.

24.1 There are 14 issues raised in the complaints (para 2.2 of the Report).

24.2 The Report deals with 6 of these, which can be grouped into three categories (para 4.3 of the Report). The remainder are deferred for a further phase of investigation.

25 The Public Protector makes adverse findings and recommends remedial action against me and others, by finding that the following allegations are substantiated:

25.1 An allegation that I violated the Ethics Code by deliberately misleading the National Assembly in failing to disclose that a member of the Gupta family was present at a meeting in 2010 with a potential foreign investor in South Africa.

25.2 An allegation that, during my tenure as SARS Commissioner, I unlawfully established an intelligence unit at SARS in violation of South African intelligence prescripts.

25.3 An allegation that SARS failed to follow correct procurement procedures when allegedly procuring intelligence equipment for gathering intelligence.

25.4 An allegation that SARS failed to follow proper recruitment processes in appointing employees who worked for the SARS investigative unit.

25.5 An allegation that the SARS investigative unit carried out irregular and unlawful operations.

25.6 An allegation that Mr Pillay was appointed to the position of Deputy SARS Commissioner when he did not have the necessary qualifications for that role.

THE PURPOSE OF THIS APPLICATION

26 The purpose of this application is twofold:

26.1 First, on an urgent basis as set out in Part A of the Notice of Motion, to suspend and interdict enforcement of the remedial action set out in paragraph 8 of the Report, pending the final determination of the second part of this application; and

26.2 Second, to review and set aside various decisions of the Public Protector relating to her Report of 5 July 2019 and seek declaratory relief, as set out in Part B of the Notice of Motion.

27 The basis for the urgent and interdictory relief sought in Part A of this application is addressed in the penultimate section of this affidavit. I first address the review.

PART B: REVIEW APPLICATION

28 The Public Protector acted in a manner that was unconstitutional, unlawful, improper and invalid in assuming jurisdiction over the complaints, conducting her investigation in the manner set out below, making the findings contained in paragraph 7 of the Report, and imposing the remedial action set out in paragraph 8 of the Report and the monitoring required by paragraph 9 of the Report.

29 The Report is reviewable under PAJA in terms of :

29.1 section 6(2)(b) for its failure to comply with a mandatory and material procedure or condition prescribed by an empowering provision;

29.2 section 6(2)(c) for being procedurally unfair;

29.3 section 6(2)(d) for being materially influenced by an error of law;

29.4 section 6(2)(e)(ii) for being taken for an ulterior purpose or motive;

29.5 section 6(2)(e)(iii) for taking into account irrelevant considerations or failing to consider relevant considerations;

29.6 section 6(2)(e)(vi) for acting arbitrarily or capriciously;

29.7 section 6(2)(f)(i) for acting in a manner not authorised by the empowering provision;

29.8 section 6(2)(f)(ii) in that the Report was not rationally related to the information before the Public Protector or the purpose of her power to investigate and report;

29.9 section 6(2)(h) in that the failure to investigate properly was so unreasonable that no reasonable person could have so exercised it; and/or

29.10 section 6(2)(i) in that the Report is otherwise unconstitutional or unlawful.

30 The Report is also reviewable under the rule of law and the principle of legality on the grounds of both substantive and procedural irrationality, unfairness and unlawfulness.

30.1 The Public Protector's decisions to assume jurisdiction in the absence of special circumstances, conduct her investigation, make adverse findings, and impose remedial action and monitoring as reflected in the Report contravene section 182 of the Constitution which requires the Public Protector, when exercising her powers and performing her functions to act:

30.1.1 Independently;

30.1.2 In compliance with the Constitution, the PP Act and other law;

30.1.3 Impartially;

30.1.4 Without fear, favour or prejudice;

30.1.5 With dignity; and

30.1.6 With effectiveness.

30.2 The Public Protector has failed to comply with the requirements of the Constitution and the PP Act in the exercise of her powers and performance of her functions in relation to her exercise of jurisdiction, investigation of the complaints and the formulation of her findings and remedial action in the Report.

30.3 In the circumstances, the Report is irrational, unreasonable, unlawful, unconstitutional and invalid.

THE LEGAL FRAMEWORK

31 The Public Protector is an institution created under Chapter 9 of the Constitution to strengthen constitutional democracy independently, impartially, and without fear, favour or prejudice.

32 Section 181(2) of the Constitution requires the Public Protector to be independent and act without fear, favour or prejudice:

> *"These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."*

33 Her functions are set out in section 182 of the Constitution, which provides:

> *(1) The Public Protector has the power, as regulated by national legislation—*

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.

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

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

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

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

34 The Public Protector's mandate is to protect the public from any conduct in public affairs or government that could result in malfeasance, impropriety, prejudice, unlawful enrichment or corruption, to report on her investigations, and to take appropriate remedial action.

35 The national legislation passed to give effect to section 182 is the PP Act 23. Section 6(4)(a) sets out those matters that the Public Protector is empowered to investigate:

(4) The Public Protector shall, be competent-

to investigate, on his or her own initiative or on receipt of a complaint, any alleged-

maladministration in connection with the affairs of government at any level;

abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;

improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money;

improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or

act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person

36 The credibility of the Office of the Public Protector, and the importance of public confidence in the work of that institution, was recognised by the Supreme Court of Appeal in the case of *Public Protector v Mail & Guardian* 2011 (4) SA 420 (SCA). It held that "*[t]he Public Protector must not only discover the truth but must also inspire confidence that the truth has been discovered. It is no less important for the public to be assured that there has been no malfeasance or impropriety in public life, if there has not been, as it is for malfeasance or impropriety to be exposed where it exists*" (para [19] of that judgment)(emphasis added).

37 I bring this review application to vindicate this principle: the Report should be set aside since I have committed no malfeasance or impropriety.

38 The impartiality, credibility and integrity of the Office of the Public Protector also requires that its occupant be beyond reproach. The Public Protector "*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, . . ., 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 who 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.*"

This sentiment was recently expressed by this Court in its decision setting aside the Public Protector's report into the Vrede Integrated Dairy Project in the Free State Province. I return to that judgment below.

39 The Constitutional Court emphasised the importance of the Public Protector and her constitutional mandate in its *Nkandla* judgment in *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 Court held that the Public Protector is "*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*" (para [52] of that judgment).

40 The *Nkandla* judgment related to the work of the previous Public Protector, Adv Thuli Madonsela.

41 Unfortunately, and in stark contrast, Adv Mkhwebane, has already had four of her reports overturned or her process challenged in the Courts in judgments that are scathing of her comprehension of her constitutional role, grasp of the law and ability to act without fear, favour or prejudice.

41.1 **First**, in the case of *Absa Bank Limited and Others v Public Protector and Others* [2018] ZAGPPHC 2, the Court found that

41.1.1 "*[t]he Public Protector acted in a manner inconsistent with the provisions of the Constitution and the Public Protector Act, by placing a duty on the SIU to re-open the investigation and to recover the misappropriated public funds from ABSA. She exceeded the powers entrusted to her by the Constitution and the Public Protector Act*" (para [70])(emphasis added);

41.1.2 The remedial action imposed was unlawful (para [82]);

41.1.3 "*[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*" (para [101]);

41.1.4 "*The Public Protector did not conduct herself in a manner which should be expected from a person occupying the office of the Public Protector. In these proceedings and the Reserve Bank's submissions in this regard are warranted. 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 of her. She failed to explain her actions adequately*" (para [120]); and

41.1.5 "*In 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]).

41.2 **Second**, in the case of *South African Reserve Bank v Public Protector and Others* [2017] ZAGPPHC 443, this Court held that

41.2.1 "*The Public Protector's order trenches unconstitutionally and irrationally on Parliament's exclusive authority*" *(para [43])* and "*[t]he remedial action therefore violates the doctrine of the separation of powers guaranteed by section 1(c) of the Constitution.*" (para [44]);

41.2.2 "*The Public Protector's superficial reasoning and erroneous findings on the issue, as appear in the final report and the answering affidavit, do not provide a rational basis for the remedial action and hence the criticisms of it are well-founded. The remedial action must be reviewed*

and set aside under section 6(2)(f)(ii) and section 6(2)(h) of PAJA" (para [57])

41.2.3 *"Finally, the remedial action should also be reviewed and set aside under section 6(2)(c) of PAJA on the ground that it was procedurally unfair.*

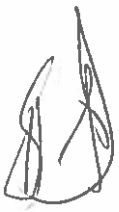
[...]

Section 3 of PAJA obliges the Public Protector to give a clear statement of any remedial action she proposes to take, adequate notice of its nature and purpose, and a reasonable opportunity to affected persons to make representations regarding it. The Reserve Bank was denied an opportunity to explain the importance of its mandate to ensure price stability as an integral part of sustainable and balanced economic growth. In the result the Public Protector's announcement of the remedial action was insufficiently informed" (para [58])(emphasis added);

41.2.4 In conclusion, the Court stated that:

"Suffice it to say, the Public Protector's explanation and begrudging concession of unconstitutionality offer no defence to the charges of illegality, irrationality and procedural unfairness. It is disconcerting that she seems impervious to the criticism, or otherwise disinclined to address it. [...]

However, there is no getting away from the fact that the Public Protector is the constitutionally appointed custodian of legality and due process in the public administration. She risks the charge of hypocrisy and incompetence if she does not hold herself to an equal or higher



standard than that to which she holds those subject to her writ. A dismissive and procedurally unfair approach by the Public Protector to important matters placed before her by prominent role players in the affairs of state will tarnish her reputation and damage the legitimacy of the office. She would do well to reflect more deeply on her conduct of this investigation and the criticism of her by the Governor of the Reserve Bank and the Speaker of Parliament" (para [59])(emphasis added).

41.2.5 It is worth emphasizing that the first and second respondents show no signs in this matter of having taken these admonishments to heart.

41.3 **Third**, in the *Nkwinti v Public Protector* decision, this Court interdicted the release of the Public Protector Report investigating former Minister of Rural Development and Land Reform, Mr Gugile Nkwinti, and preventing the implementation of the Report pending the hearing of the dispute.

41.3.1 No reasons were provided for the order by the Court, however, Mr Nkwinti's legal representative argued that Mr Nkwinti had not been afforded an opportunity to properly respond to the allegations against him, in that the Public Protector had given him just 18 days to respond, but two requests for extensions went unanswered — until the day the report was signed off, when the requests were refused. His legal representative also contended that the Public Protector was unable to answer how affording him more time would prejudice the process. Particularly in light of the allegation that no action had been taken by the Public Protector, in respect of the matter, for two years and two months. The news reports reflecting this judgment are attached and marked as "**PG2**."

41.4 **Fourth,** in the most recent judgment filled with devastating criticism of Adv Mkhwebane and her performance of her functions, this Court held in its decision in the case of *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* [2019] ZAGPPHC 132 that :

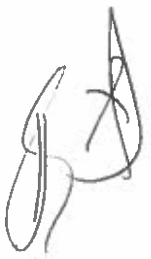
41.4.1 Her actions in regard to the scope of her investigation lacked "*any logical and legitimate explanation*" (para [43]) and were *"irrational as it side stepped all the crucial aspects regarding the complaints and led to a failure on her part to execute her constitutional duty"* (para [47]);

41.4.2 Her conclusion in that report *"points either to ineptitude or gross negligence in the execution of her duties…"* (para [60]);

41.4.3 She reached *"clearly irrational"* conclusions (para [66]); and

41.4.4 Simply failed *"to execute her constitutional duty in this investigation"* (para [92]).

42 **Fifth,** in echoes of these other review applications, as recently as 7 June 2019, the former head of the Financial Sector Conduct Authority ("**FSCA**"), Adv Dube Tshidi has reviewed her Report implicating him. The review application impugns her decision to investigate matters that took place over two years ago with no explanation, he contends that she failed to consider the representations made to her and that her investigation was being driven by a political party – again, the EFF -- which appears as one of the complainants in this matter. Adv Tshidi has publicly expressed the view that the EFF were aided by Mr Simon Nash, who was facing criminal charges in respect of fraudulent conduct exposed by the FSCA's predecessor, the Financial Services Board, and sought to obstruct his prosecution and the civil claims brought against him. These media articles are attached and marked as "**PG3**".



43 All of these cases, of course, do not determine the outcome of this review application. They are relevant since they show a consistent pattern of disregard for the constitutional mandate of the Office of the Public Protector by its current occupant and a stunning incompetence, irrationality and negligence on her part in the performance of her duties. This pattern is also relevant to the costs order sought in this application.

44 These findings also are of significance for two further reasons.

45 The first is that they demonstrate the irrationality of her findings and remedial action in the Report.

45.1 The Public Protector in this Report contends that disciplinary action should be taken against me for my "*violation of the Constitution and the Ethics Code*" (para 8.1.1).

45.2 On an assessment of the sweeping and unsubstantiated findings contained in the Report, and her record of scathing criticism by the Courts in other cases, it is the first and second respondents who ought to be subject to disciplinary action by Parliament. At the very least, this Report should be set aside and she ought to be personally held liable for costs.

46 Secondly, this is the second report by the Public Protector that unlawfully, unfairly and irrationally targets me for which I have had to launch review proceedings.

46.1 The other pending review application relates to adverse findings and remedial action arising from the payment of early retirement benefits to Mr Pillay.

46.2 That report also fell outside of the jurisdiction of the Public Protector as it related to events dating back to 2009/10 and also is alleged to be the product of bias or other ulterior motive, irrationality, unfairness and incompetence on the part of the Public Protector.

46.3 It is even clearer when one considers the two reports together that the Public Protector is seeking to achieve my removal from office as a member of the executive to achieve political objectives. That would only serve to facilitate the state capture project and activities. It also would undermine the renewal of state institutions currently underway, and will promote the interests of political proponents of state capture. Finally, it would "let off the hook" those responsible for corruption and the pocketing of public funds.

47 I set out below the grounds of review in relation to each of the complaints addressed in the Report.

THE GROUNDS OF REVIEW

1 NO JURISDICTION UNDER SECTION 6(9) OF THE PP ACT

48 The Public Protector had no jurisdiction over the complaints by operation of section 6(9) of the PP Act.

49 Section 6(9) of the PP Act provides that the Public Protector may not entertain a complaint more than two years after the event at issue, except where, in special circumstances, the Public Protector exercises her discretion to do so.

50 The Public Protector's letter to me dated 1 April 2019 and the subsequent section 7(9) notice included paragraphs where she purports to set out the special circumstances present here, and the basis for her exercise of her discretion under section 6(9). The generic statements and assertions, without basis, of the existence of special circumstances are repeated in the Report at paragraph 3.5:

> *"The Public Protector may exercise a discretion in terms of section 6(9) of the Public Protector Act to entertain matters which arose more than two (02) years from the date of occurrence of the incident. In deciding the "special circumstances" that may be taken into account in exercising such discretion favourably in accepting complaints, consideration is given to the nature of the complaint and the seriousness of the allegations; whether the outcome of the investigation into the complaint can rectify systemic problems in state administration; whether the matter can be successfully investigated, with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the Complainant persists; whether refusal to investigate the matter perpetuates the violation of section 195 of Constitution and whether the remedial action will redress the imbalances of the past. What constitute "special circumstances" will depend on the merits of each case."*

51 The Public Protector has never complied with her own formulation of the test for "special circumstances" and has never identified the facts or basis on which she relies in this case to assert jurisdiction over the complaints. Indeed, these generic factors identified by her are presumably applicable to most complaints made to the Office of the Public Protector.

52 In the Report, the Public Protector asserts blithely that *"[t]he conduct of SARS amounts to conduct in state affairs, and therefore, the matter falls within the ambit of the Public Protector's mandate"* (para 3.9). No attempt is made by the Public Protector to explain how the historical conduct at issue in the SARS complaint relates to "state affairs" (whatever these may be) so as to warrant the rational exercise of her discretion nor how this creates "special circumstances" here, or in relation to the Ambani meeting complaint.

53 The Public Protector falsely says that her *"power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties"* (para 3.10). I challenged her power and jurisdiction to investigate and take remedial action and disputed the existence of "special circumstances" here in my submissions to her (**"PG4"**). From my perusal of the submissions made by Mr Pillay, it appears that he did as well. So it is simply false to say that no party disputed or objected to her taking up of the SARS complaint.

54 The Public Protector therefore had no lawful, rational or factual basis on which to exercise jurisdiction over the complaints in terms of section 6(9) of the PP Act and the review should succeed on this basis alone.

2 THE AMBANI MEETING

55 The Public Protector finds that I violated the Executive Ethics Code, by deliberately misleading the National Assembly in 2016, for not remembering a 2010 meeting with Mr Ambani at which a member of the Gupta family is said to have been present, and that my inability to remember "*does not seem like a bona fide mistake*" (paras 5.1.15 and 7.1) on the basis that:

> *"7.1.2 Mr Gordhan conceded to not having disclosed that he had actually met a member of the Gupta family and an associate of the family in 2010.*
>
> *7.1.3 He contended that at the time of his response to the Parliamentary question he could not recall as he had forgotten about the meeting at which Mr Ajay Gupta was present.*
>
> *7.1.4 According to his affidavit to the State of Capture Commission Inquiry (the Zondo Commission), that it was only after being reminded by Mr Dondo Mogajane who at the time was his Chief of Staff. I find this rather implausible when one considers the prominence of the subject of state capture in South Africa.*
>
> *7.1.5 I therefore find that his conduct in this regard is in violation of paragraph 2 of the Executive Ethics Code and accordingly amounts to conduct that is inconsistent with his office as a member of Cabinet as contemplated by section 96 of the Constitution."*

56 The undisputed facts regarding the Ambani meeting complaint are as follows:

56.1 I was asked the following written question in Parliament on 11 April 2016:

> *"Has he ever (a) met with any (i) member, (ii) employee and/or (iii) close associate of the Gupta family and/or (b) attended any meeting with the specified persons (i) at the Gupta's Saxonwold Estate in Johannesburg or (ii) anywhere else since taking office; if not, what is the position in this regard; if so, in each specified case, (aa) what are the names of the persons who were present at each meeting, (bb) (aaa) when and (bbb) where did each such meeting take place and (cc) what was the purpose of each specified meeting?"*

56.2 I replied to the question as follows:

"I have not attended any meeting with the Gupta family or anyone else at their Saxonwold Estate. I have encountered one or more members of his family at public events on a few occasions, e.g. a cricket match. I have met one of the Gupta brothers at Mahlamba Ndlovu around 2009/2010 during which a brief discussion on small business finance took place."

56.3 My answer in 2016 was perfectly honest. I had no recollection of any other meeting at which a Gupta is said to have been present.

56.4 It is clear from my response that I had not attended meetings with members of the Gupta family but that I had encountered them at public engagements and in one instance at a meeting with the former President Jacob Zuma.

56.5 The only encounter not recorded in my response to the National Assembly is one of which I was reminded by my then Chief of Staff, Mr Dondo Mogajane, in preparation for my evidence at the judicial commission of inquiry into state capture ("**Zondo Commission**"), during 2018.

56.6 However, this was not a meeting with any member of the Gupta family but rather a meeting with a billionaire Indian businessman, Mr Anil Ambani of the Reliance Group, to discuss his company's interest in investing in South Africa ("**Mr Ambani**"). One of the Gupta brothers may have been present at the meeting.

56.7 At the time of my Parliamentary response on 16 April 2016, I did not recall Mr Gupta's attendance as there was no engagement between me and him at the meeting.

57 In my statement to the Zondo Commission, I described my encounters with the Gupta's and Mr Ambani as follows:

"My interactions with Gupta family members

118. For the record, I have been asked by the Commission's legal team whether I ever met members of the Gupta family.

119. I have never been to the Gupta family compound located in Saxonwold.

120. I was invited to the infamous Gupta family wedding at Sun City, but declined the invitation.

121. I can recall the following further instances where I was in the same place as them.

121.1. I attended a cricket test match also in the 2009 to 2014 period (I cannot recall which year) and one of the Gupta brothers (I cannot recall which one) was present in the Presidential box. We greeted but did not speak to each other.

121.2. Ministers accompanied the former President to various functions, including breakfast briefings following the State of the Nation address. I recall that one or more of the Gupta brothers would be present at such events. I would see them, but not interact with them.

122. I can recall one meeting where the former President introduced me to Mr Ajay Gupta.

122.1. Early on in my first term as Minister of Finance, though I cannot recall precisely when, I went to the Presidential guest-house in Pretoria, Mahlamba Ndlopfu, for a meeting with former President Zuma. When I was called into the meeting room, former President Zuma introduced me to a man who I believe is Mr Ajay Gupta. Mr Zuma introduced him as "my friend" and told me that the man had expertise in regard to small business and finance. I recall us exchanging generalities for a couple of minutes, but I do not recall the details of what was a very cursory exchange. Mr Gupta then excused himself and left me and the former President to continue our meeting.

123. I had forgotten of another instance where one of the Gupta brothers may have been present at a meeting I had with billionaire Indian businessman Anil Ambani of the Reliance group of companies in or about June 2010. I stress that I do not recall the details set out below since it proved to be a meeting of little significance at the time, but have been assisted in this regard by my former Chief of Staff, Mr Dondo Mogajane.

123.1. I am told that the Presidency put Mr Rajesh "Tony" Gupta in touch with Mr Mogajane. Mr Gupta called Mr Mogajane repeatedly, asking for a meeting with me. However, he never advised Mr Mogajane who would be at such a meeting or what the agenda for the meeting was to be. We were even asked to attend the meeting at the Gupta family compound in Saxonwold. I refused to schedule a meeting with the Gupta family, whether at their residence or anywhere else.

123.2. Eventually, Mr Gupta told Mr Mogajane that one of the Ambani brothers, from the Reliance group of companies in India, wished to meet me and that it was concerning a possible MTN transaction. Bharti Airtel had called off merger talks with MTN in 2008 and again in 2009, and Reliance Communications was reported also to have been interested in pursuing the acquisition of MTN during 2009. We were advised that Mr Ambani was in South Africa for the 2010 Soccer World Cup and that he would like to meet me regarding the possible MTN transaction (see Annexure 26).

123.3. I agreed to a meeting with Mr Ambani, who had the potential to be a significant investor in South Africa.

123.4. The meeting was held at a hotel in Pretoria, Villa Sterne, on a Sunday morning.

123.5. I attended the meeting, together with Mr Mogajane, who advises me that:

123.5.1. The meeting lasted less than an hour;

123.5.2. Discussions in the meeting were between Mr Ambani and I;

123.5.3. It commenced with general conversation about the World Cup, the Ambani family's visits to the Kruger National Park, and Indian and global politics;

123.5.4. Eventually, Mr Ambani asked about the legal and regulatory processes that would be required to obtain approval for a transaction such as the purchase of MTN and we spoke in general terms of what processes would need to be followed, and the role of the National Treasury; and

123.5.5. The meeting ended inconclusively and we parted ways and left.

123.6. Mr Mogajane has advised me that he recollects that Mr Ajay Gupta was present at the meeting. I do not recall him being present.

123.7. I wish to refer the Commission to Annexure 27, which is my response to a Parliamentary question from the Democratic Alliance. It is apparent in my written response that I do not make mention of the 2010 meeting with Mr Ambani of the Reliance Group, which a Gupta brother may or may not have attended. This is simply because, at the time of submitting the written response, I had no recollection of the 2010 meeting with Mr Ambani."

58 The only difference between my 2016 written answer to Parliament and my 2018 witness statement to the Zondo Commission was accordingly as follows:

58.1 At the time of my answer to Parliament in 2016, I did not recall that, at my meeting <u>with Mr Ambani</u> some six years earlier, a member of the Gupta family is said by Mr Mogajane to have been present.

58.2 This was perfectly understandable as my meeting was <u>not with any member of the Gupta family</u>. My meeting was with Mr Ambani. A Gupta's presence was entirely incidental to the meeting between myself and Mr Ambani.

58.3 I accordingly gave a perfectly honest answer to Parliament.

58.4 I still do not recall that a member of the Gupta family may have been present at my meeting with Mr Ambani. I have merely been told by my former chief of staff, Mr Mogajane, that a Gupta had been present at the meeting. I accept that he is probably correct and for that reason made the disclosure to the Zondo Commission.

58.5 I did so because I was at all times entirely open and honest about my occasional contacts with the Gupta family.

58.6 There is accordingly no basis for any suggestion that I was at all times anything but perfectly honest.

59 The Public Protector recites my evidence without any challenge or contradiction in paragraphs 5.1.1 to 5.1.7 of the Report. She does not suggest that there is any evidence contrary to mine or indeed any other evidence on this issue at all.

60 But she then concludes in paragraphs 5.1.13 to 5.1.15 (and repeats these "findings" at paragraphs 7.1) that

> *"5.1.13 Mr Gordhan conceded to having not disclosed that he had actually met a member of the Gupta family and an associate thereof in June 2010.*
>
> *5.1.14 He argued that at the time of his response to the Parliamentary question he could not recall or had forgotten about the meeting in which Mr Ajay Gupta was present at such an occasion.*
>
> *5.1.15 It is apparent that he deliberately misled Parliament in responding to the Parliamentary question on 16 April 2016 in that his response is accordingly misleading to Parliament and does not seem like a bona fide mistake. Therefore, he deliberately misled Parliament and thus violated Paragraph 2.3(a) of the Executive Ethics Code."*

61 These are baseless and scurrilous conclusions, not based on any contrary evidence or on a rational and fair assessment of the actual evidence whatsoever.

62 The only reason given by the Public Protector for rejecting my evidence is that she finds it "*rather implausible when one considers the prominence of the subject of state capture in South Africa*" (para 7.1.4).

62.1 This is not a rational, fair or proper conclusion to draw from the evidence.

62.2 State capture was not a prominent subject nearly a decade ago in 2010.

62.3 However prominent "*the subject of state capture in South Africa*" today, I fail to see how it enables the Public Protector to reject my evidence that I do not recall

a member of the Gupta family purportedly being present at my meeting in mid-2010 with Mr Ambani.

62.4 I can only infer that it is the product of the Public Protector's determination to malign me without reason or justification.

63 In sum, the findings against me relating to the Ambani meeting complaint can only be the result of the Public Protector acting in a manner that is:

63.1 arbitrary or capricious;

63.2 irrational and not rationally related to the information before her or to the purpose of her power to investigate and report;

63.3 the result of bias or ulterior motive or purpose; and/or

63.4 contrary to the rule of law and the principle of legality on the grounds of both substantive and procedural irrationality, unfairness and unlawfulness.

3 THE SARS INVESTIGATIVE UNIT

64 The Public Protector makes the following findings against me relating to the SARS investigative unit:

64.1 The establishment of the SARS investigative unit:

"7.2.1 The allegation that Mr Gordhan during his tenure as the Commissioner of SARS established an intelligence unit in violation of the South African Intelligence prescripts is substantiated.

7.2.2 In terms of the national legislation, SARS is not mentioned as one of the National Intelligence Structures established in terms of the NSI Act and can only work with other law enforcement agencies within the principles of co-operative government in achieving it (sic) objectives.

7.2.3 SARS under the guidance and management of Mr Ivan Pillay as General Manager: Enforcement and Risk Division established an intelligence unit without the involvement of NIA.

7.2.4 Evidence indicates that even prior to Mr Gordhan's memorandum to Mr Manuel, SARS had already began operating a unit that gathered information covertly. However, as the Accounting Officer, Mr Gordhan should have been aware, and I believe, was aware that the unit had already stated operating. Mr Pillay reported directly to Mr Gordhan as Commissioner of SARS.

7.2.5 The establishment of the unit with the approval of Mr Gordhan as the erstwhile Accounting Officer was in breach of section 209 of the Constitution in terms of which only the President may establish such covert information gathering unit.

7.2.6 I further noted that Mr Magashula had misrepresented himself under oath by the (sic) denying the existence of an intelligence unit. Even if the unit was never called the rogue unit at SARS, the operations and functions of the CBCU, a unit that he was fully [aware] existed, were similar.

7.2.7 The conduct of Mr Gordhan as referred to in the establishment of the intelligence unit at SARS is improper and in violation of section 209 of the Constitution and therefore amounts to maladministration as envisaged in section 182(1) of the Constitution and abuse of power as envisaged in section 6(4)(ii) of the Public Protector Act."

64.2 The recruitment for the SARS investigative unit:

"7.4.5 The apparent denial of Mr Gordhan of any involvement or participation in the recruitment process of one or more of the unit's employees is improbable. The Sikhakhane report and the Gene Ravele Dossier confirm that Mr Gordhan played a role in the recruitment of Mr van Loggerenberg.

. . .

7.4.8 The conduct of Mr Gordhan in approving the memo for the establishment and invariably recruitment of staff for the intelligence unit in the manner described is improper and thus amounted to improper

conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act."

64.3 The appointment of Mr Pillay:

"7.6.1 The allegation whether Mr Pillay was appointed to the position of Deputy SARS Commissioner and subsequently as SARS Commissioner, whilst he did not possess the necessary qualifications, is substantiated.

7.6.2 The position of Deputy SARS Commissioner was a new title and/or position in SARS formulated through a new business model.

7.6.3 The new business model identified persons holding executive positions through skills and expertise, aligned values and principles as well as behavioural competencies.

7.6.4 The sole use of the new business model as a blanket benchmark for the appointment of Mr Pillay, specifically, to the position of Deputy SARS Commissioner was irregular and in violation of section 195 of the Constitution."

65 These findings are unlawful because they:

65.1 Are materially influenced by an error of law;

65.2 Take into account irrelevant considerations or fail to consider relevant considerations;

65.3 Are arrived at arbitrarily or capriciously;

65.4 Are not rationally related to the information before the Public Protector or the purpose of her power to investigate and report;

65.5 Are the result of a failure to investigate properly that is so unreasonable that no reasonable person could have so conducted an investigation;

65.6 Are the result of bias or ulterior motive or purpose; and/or

65.7 Are contrary to the rule of law and the principle of legality on the grounds of both substantive and procedural irrationality, unfairness and unlawfulness.

66 The facts of the establishment of an investigation unit at SARS are set out below. The law enabled, and, indeed, required, SARS to establish this capability. There is no basis, in fact or law, for the Public Protector to make any finding to the contrary.

The establishment of the SARS investigative unit

67 SARS is established in terms of the South African Revenue Service Act, 34 of 1997 ("**SARS Act**") as an organ of state within the public administration, but as an institution outside the public service. Section 3 of the SARS Act provides that its objectives are "the efficient and effective (a) collection of revenue; and (b) control over the import, export, manufacture, movement, storage or use of certain goods" including those subject to customs and excise duty. SARS is the sole administrator and revenue collecting agency responsible for investigating and enforcing compliance with tax and customs legislation. Any disruption of SARS' capabilities has dire consequences for both the fiscal situation and the compliance culture in South Africa, as evidenced by successive tax collection shortfalls and weaker levels of tax compliance in the post-2014 period.

68 During my tenure as Commissioner of SARS, I authorised the establishment of an investigation unit in about 2007. The unit did not initially have a name but was later successively known as The Special Projects Unit, The National Research Group and The High-Risk Investigations Unit. I shall call it "**the SARS investigative unit**". The Manager of the SARS investigative unit reported to Mr Pillay, in his capacity as General Manager: Enforcement and Risk. Mr Pillay reported to me until May 2009, when I was appointed as Minister of Finance.

69 The Unit was established against the backdrop of government's commitment to crack down on crime generally and on organised crime in particular. Former President Mbeki

mentioned this commitment in his State of the Nation Address of 9 February 2007 when he said that government would, amongst other things:

> *"start the process of further modernising the systems of the South African Revenue Services, especially in respect of border control, and improve the work of the inter-departmental co-ordinating structures in this regard;*
>
> *intensify intelligence work with regard to organised crime, building on the successes that have been achieved in the last few months in dealing with cash-in-transit heists, during drug trafficking and poaching of game and abalone."*

This speech is attached marked "**PG5**".

70 It became apparent that SARS had to enhance its intelligence gathering capacity in respect of combatting organised tax crime and the illicit trade. It elected to set up the SARS investigative unit in February 2007.

70.1 In the South African social and economic context, SARS had developed a compliance approach which consisted of good service to the compliant taxpayers, increased education about the importance of paying tax to those entering the tax system, and different types of enforcement methods used for non-compliant taxpayers, depending on the level of non-compliance.

70.2 The Unit was part of the broader Enforcement Division of SARS. It was very similar to, and modelled on, the enforcement capabilities required in any tax and customs administration in the world.

70.3 Non-compliance could include non-submission of a tax return, incorrect information on a tax return, different types of debt collection, aggressive tax avoidance, abuse of trusts, tax evasion, smuggling across borders of cigarettes, tobacco and other forms of illicit trade, trafficking of drugs, round-tripping to avoid excise duties and VAT and so on.

71 SARS had the power to establish the SARS investigative unit under the following legislation:

71.1 In terms of section 3 of the South African Revenue Service Act 34 of 1997, the objectives of SARS are "the efficient and effective (a) collection of revenue; and (b) control over the import, export, manufacture, movement, storage or use of certain goods" including those subject to customs and excise duty.

71.2 Section 4(1)(a) of the SARS Act provides that SARS must "secure the efficient and effective, and widest possible, enforcement" of the tax laws listed in Schedule 1.

71.3 The tax laws listed in Schedule 1 have always vested SARS with wide powers for the investigation of tax matters including the investigation of crimes with tax implications. The wide scope of these powers is apparent from

- section 4 and 4A to 4D of the Customs and Excise Act 91 of 1954;
- section 74 and 74A to 74D of the Income Tax Act 58 of 1962 (before its amendment by the Tax Administration Act);
- sections 57 and 57A to 57D of the Value-Added Tax Act 89 of 1991 (before its amendment by the Tax Administration Act); and
- sections 40 to 66 of the Tax Administration Act 28 of 2011.

72 SARS has thus always had its own investigation and enforcement units engaged in a wide range of investigations including criminal investigations with tax implications.

73 SARS and the National Intelligence Agency ("**NIA**") had earlier commenced formal discussions with a view to develop a dedicated capacity within the NIA to support SARS in investigating economic crimes with tax implications.

73.1 In September 2002, SARS and the NIA concluded a Memorandum of Understanding agreeing to cooperate to enhance the fulfilment of their mandates. This is attached marked "**PG6**".

73.2 It was originally envisaged that SARS would recruit and train the members of the SARS investigative unit in how to conduct tax and customs investigations, and that they would be transferred to the NIA. This unit would be ring-fenced within the NIA and be dedicated to supporting SARS.

73.3 In a memorandum dated 2 February 2007, Mr Pillay and I sought ministerial approval for the establishment of the SARS investigative unit within the NIA. Ministerial approval was sought and obtained only because the proposal, to establish the SARS investigative unit within the NIA, would have required a transfer of funds from SARS to the NIA. Annexure "**PG7**" is a copy of the memorandum.

73.4 On 8 February 2007, Mr Pillay recommended that SARS create a specialist, internal capability to focus on the illicit economy. On 13 February 2007, this proposal was approved by the Chief Officer for Corporate Services, Mr Magashula. This interoffice memorandum is attached marked as "**PG8**".

73.5 The NIA seemingly lost appetite for this project after the 2 February 2007 memorandum was approved by the Minister and Deputy Minister of Finance.

73.6 As a result, SARS elected to retain the SARS investigative unit within its Enforcement Division, as permitted by the laws applicable to SARS.

73.7 In 2008, SARS adopted a strategy to deal with the illicit economy. A number of units were formed in order to implement this strategy. A presentation illustrating the proposed approach is attached marked "**PG9**".

74 SARS has always had its own legitimate investigation and enforcement units engaging in a wide range of investigations, including criminal investigations with tax implications. The SARS investigative unit was a further manifestation of SARS' long-standing capacity to investigate tax- and customs-related crimes, so as to protect legitimate South African businesses from the illicit trade, and enhance revenue collection and compliance.

75 It had the mandate to take decisive steps to minimise:

75.1 importation, exploitation and manufacturing of drugs;

75.2 Illegal harvesting of abalone and its supply;

75.3 Illegal importation of second hand vehicles; and

75.4 Importation of counterfeit goods; and

75.5 Smuggling of cigarettes.

76 The Unit was responsible for cracking down on organised tax crime and tax evasion, and did so through collaboration with various government departments, such as Home Affairs, Trade and Industry, Environmental Affairs and other law enforcement agencies. This commendable work came under attack in recent years from powerful business persons and politicians whose unlawful gains were being threatened by the work of the SARS investigative unit. Simultaneously, disgruntled former members of the SARS investigative unit spread falsities and rumours about the SARS investigative unit. This became knowns as the so-called "rogue unit narrative."

77 In May 2009, I ceased my work as SARS Commissioner and was appointed Minister of Finance. Events subsequent to that relating to SARS, do not fall within my knowledge but were placed before the Public Protector on her own account of the evidence provided to her during her investigation of the SARS complaint.

78 However, it appears that no account has been taken of any of these developments by the Public Protector and that the Report reaches its conclusions in ignorance or wilful disregard of them.

The "rogue unit" narrative

79 The narrative that there was a so-called "rogue unit" at SARS has been in circulation for several years now as part of a political campaign. The start of this campaign coincides with the tenure of the its former Commissioner, Mr Tom Moyane. This narrative was used to justify the demolition of critical parts of SARS' enforcement capability under Mr Moyane, as detailed in the two affidavits provided to the Public Protector by Mr Pillay during the course of her investigation, attached marked as "**PG10**."

80 It is also now being used to call for my removal as a member of Cabinet on the basis of the Report and the Public Protector's attempted resuscitation of a long-discredited, false and baseless "narrative."

The Sunday Times

81 This "narrative" began with several media reports in the *Sunday Times* newspaper in 2014 that claimed that there was a "rogue unit" operating at SARS.

82 Three complaints were laid by myself, Mr Ivan Pillay and Mr Johann van Loggerenberg with the Press Ombud at the Press Council of South Africa regarding these articles in 2015.

83 All three of these complaints succeeded and the *Sunday Times* withdrew all of its reporting on the SARS investigative unit and issued an apology for them on 3 April 2016, acknowledging that those stories were rife with errors and misinformation (see **Annexures "PG11"**).

84 The label continued to be used by rogue elements and certain organisations, with the intention of undermining the law and Constitution, however.

The Sikhakhane Report

85 The Public Protector relies heavily on the discredited report by the Sikhakhane panel in reaching her erroneous findings.

86 The Sikhakhane panel rendered a report to Mr Moyane, dated 5 November 2014, that misapplied the law and erroneously concluded that the SARS investigative unit was unlawfully established. A copy of the report is attached marked as "**PG12.**"

87 Mr Moyane used the Sikhakhane report to remove several SARS officials and reorganise SARS, thereby gutting its enforcement capability and undermining its ability to ensure tax compliance by prominent political and underworld figures.

88 This action on the basis of the Sikhakhane panel's report enabled, in large part, the recent capture of SARS, as detailed by the Commission of Inquiry into Tax Administration and Governance by SARS ("**the Nugent Commission**") in its interim and final reports. Copies of these reports are attached marked "**PG13**" and "**PG14.**"

89 The Public Protector finds that the establishment of the SARS investigative unit contravened some unspecified provision of the National Strategic Intelligence Act 39 of 1994 ("**NSI Act**"). She puts it as follows in paragraph 7.2.2 of the Report:

> *"In terms of the national legislation, SARS is not mentioned as one of the National Intelligence Structures established in terms of the NSI Act and can only work with other law enforcement agencies within the principles of co-operative government in achieving it objectives."* (sic)

90 This statement is barely coherent. It is not underpinned by any identifiable provisions of the NSI Act, which does not contain any provisions of a kind described in this paragraph.

91 The Public Protector seems to parrot the conclusion of the Sikhakhane report that the establishment of the SARS investigative unit had contravened section 3 of the NSI Act which, it said, *"prohibits the conducting of covert intelligence gathering by structures other than that the National Defence Force, the SAPS or the State Security Agency"*

(see p 47 para 87, p 47 para 89, p 91 para 186, p 93 para 188.1 and p 95 para 190.4.2 of "**PG12**")

92 I am, however, advised by my legal representatives that this conclusion was clearly wrong in law. The establishment of the SARS investigative unit did not contravene section 3 of the NSI Act. Its activities were not subject to the provisions of section 3 at all.

93 The relevant part of section 3(1) read as follows (before its amendment by Act 11 of 2013):

> *"If any law expressly or by implication requires any department of State, other than the (NIA) or the (SASS), <u>to perform any function with regard to the security of the Republic or the combating of any threat to the security of the Republic</u>, such law shall be deemed to empower such department to gather departmental intelligence, and to evaluate, correlate and interpret such intelligence for the purpose of discharging such function: Provided that such department of State-*
>
> *(a) ...*
>
> *(b) ...*
>
> *shall not gather departmental intelligence within the Republic in a covert manner ..."*
>
> (emphasis added)

94 There is no general prohibition in this section. It is merely a restriction imposed on those departments that are required by law to perform functions *"with regard to the security of the Republic or the combatting of any threat to the security of the Republic"*. SARS is clearly not such a department. It was never engaged in national security matters. It is accordingly also not subject to this prohibition.

95 The prohibition in any event does not prohibit all covert intelligence gathering. It merely prohibits the gathering of *"departmental intelligence"* in a covert manner. The NIA Act defined *"departmental intelligence"* as *"intelligence about any threat or potential threat*

to the national security and the stability of the Republic". The functions of the SARS investigative unit thus fell well beyond the scope of the prohibition because it was never in the business of gathering *"intelligence about the threat or potential threat to the national security and stability of the Republic".*

96 Therefore, the Public Protector's reliance on the discredited and erroneous Sikhakhane panel's report in reaching any finding or imposing any remedial action is wholly misplaced and erroneous.

Judge Kroon's apology

97 A SARS Advisory Board, chaired by Judge Kroon, initially endorsed the legally flawed interpretation by the Sikhakhane panel.

98 Judge Kroon, however, recanted this endorsement in his evidence before the Nugent Commission in 2018. He conceded that there was no reason to contend that the SARS investigative unit had been unlawfully established.

99 Significantly, Judge Kroon has also apologised to the former members of the SARS investigative unit for the injustice done to them by the perpetuation of the "rogue unit" "narrative" and the actions of Mr Moyane. I refer in this regard to media reports of Judge Kroon's evidence and apology, attached as **"PG15"**.

100 The Public Protector conveniently ignores these facts.

The Nugent Commission

101 These allegations were similarly found to be baseless in the Final Report of the Nugent Commission, dated 11 December 2018, which also refuted the Sikhakhane finding. That report (**"PG14"**) reads in relevant part:

> *"(The Unit) was said to be unlawful by a panel chaired by Adv Sikhakhane SC, but I find nothing in its report to persuade me why that was so. Adv Sikhahane was asked if he could elaborate but his reply took it no further than what was*

said in the report. The SARS Advisory Board chaired by Judge Kroon, reported to the Minister, and issued a media statement, saying the unit was unlawful, but in evidence he told the Commission that was not a conclusion reached independently by the Board, but had been adopted from the Sikhakhane panel, and he has come to realise it was wrong. Indeed, he supported the re-establishment of capacity to investigate the illicit trades, which we recommend."

102 Again, the Public Protector ignores this finding of the Nugent Commission and, instead, clings tenaciously to the discredited conclusion reached by the Sikhakhane panel.

KPMG

103 A similarly flawed conclusion to that of the Public Protector was reached by KPMG after they were appointed by Mr Moyane to investigate various allegations at SARS contained in the Sikhakhane report. Yet even this does not assist the Public Protector who relies on the KPMG report in her Report, despite what is set out below relating to its disavowal and withdrawal by KPMG.

103.1 The KPMG report at para 7.34 stated that neither the SARS Act nor the Tax Administration Act recognised SARS as a law enforcement agency and does not vest its employees with the powers of enforcement officers.

103.2 At paragraph 12.1.1 the KPMG report under headings "Executive findings and conclusions" records that under the guidance of Pillay, "*a covert and rogue intelligence unit in contravention of the rule of law was established in SARS.*"

103.3 This report is attached and marked as "**PG16**".

104 However, on 15 September 2017, KPMG International released a media statement in which it stated that the conclusions, recommendations and legal opinions contained in the KPMG report should not be relied upon.

104.1 The firm acknowledged that important quality controls were not performed to the standards of the firm.

104.2 Specifically, the KPMG report was disavowed for referring to legal opinions and legal conclusions as if they were opinions of KPMG South Africa. However, providing legal advice and expressing legal opinions was outside the mandate of KPMG South Africa and outside the professional expertise of those working on the engagement.

104.3 This statement is attached marked "**PG17**".

104.4 So serious was the compromise in quality standards, that KPMG tendered back the R23 million it received in payment from SARS and that it saw its CEO, COO, Chairman and 5 partners leave the board.

105 As with all other evidence that contradicts her desired findings, this too is ignored by the Public Protector.

The Public Protector's errors of law and fact

106 In reaching her findings in the Report, the Public Protector gets the facts and the law wrong.

107 **First**, she finds that SARS unlawfully established the SARS investigative unit (para 7.2.1).

107.1 As set out above, there is no general prohibition in section 3 of the NSI Act. It merely places a restriction on the departments that are required by law to perform those functions "*with regard to the security of the Republic or the combatting of any threat to the security of the Republic.*"

107.2 SARS is not such a department. It is not subject to the prohibition as it never engaged in national security matters.

107.3 Moreover the prohibition does not prohibit any covert intelligence gathering. It prohibits the covert gathering of "*departmental intelligence.*" The Act defines

departmental intelligence as "*intelligence about any threat or potential threat to the national security and the stability of the Republic.*" The functions of the SARS investigative unit did not fall within the scope of the prohibition because it was not engaged in intelligence gathering about any threat or potential threat to the national security and stability of the Republic.

107.4 In the Report, the Public Protector does not engage at all with any of the views which are contrary to those expressed in the complaints and her own. A striking feature of the Report generally is that it fails to reflect any appreciation for or intellectual engagement with the legal and factual submissions made to the Public Protector during the course of her investigation.

107.5 She provides no reason as to why she stubbornly relies on an interpretation of section 3 of the National Intelligence Act that is widely considered to be utterly wrong. She provides no reasons why she supports this doomed interpretation of the law, which raises the further questions as to her motive here.

107.6 The inference is irresistible that she is wilfully blinded by her determination to make an adverse finding regardless of verifiable facts and a clear legal position.

108 **Second**, the Public Protector finds that the unit was established apparently in violation of the National Security Intelligence Act (para 7.2.2) and without the involvement of the NIA (para 7.2.3). For the same reasons as her first finding, this finding is wrong on the law and has no basis on the facts. The NIA was not required to be involved in the establishment of the SARS investigative unit, and its decision not to take the SARS investigative unit forward in partnership with SARS does not render the establishment of the SARS investigative unit by SARS alone unlawful.

109 **Third**, the Public Protector finds that I should have been, or was, aware that the SARS investigative unit operated prior to the memorandum to Mr Manuel (para 7.2.4). This finding is wholly unfounded.

109.1 The Unit employed some 26 people at its height at a time when there were 15 000 people in the employ of SARS. The suggestion that I would have been aware of the details of its activities simply because I was the Commissioner of SARS is patently absurd.

109.2 It also would have been perfectly lawful for the SARS investigative unit to commence operations within SARS even before the consent of the Minister of Finance was sought and obtained. His consent was only necessary for the transfer of funds to the NIA if and when it housed the SARS investigative unit. The Unit accordingly never in fact required the consent of the Minister of Finance for its establishment and operations since it never was funded or housed by the NIA.

109.3 I repeat: it was perfectly lawful for the SARS investigative unit to commence operations within SARS even before the consent of the Minister of Finance was sought and obtained. His consent was only necessary for the transfer of funds to the NIA if and when it housed the SARS investigative unit. The Unit accordingly never in fact required the consent of the Minister of Finance for its establishment and operations since it never was funded or housed by the NIA.

110 **Fourth**, the Public Protector concludes that the SARS investigative unit violated section 209 of the Constitution (para 7.2.5). But this finding is absurd. It is based on a blatant distortion of section 209. This section does not deal with the establishment of *"covert information gathering units"* at all.

110.1 The Public Protector finds in paragraph 7.2.5 of her Report that the establishment of the SARS investigative unit was in breach of section 209 of the Constitution. She puts it as follows:

"The establishment of the unit with the approval of Mr Gordhan as the erstwhile Accounting Officer was in breach of section 209 of the Constitution in terms of which only the President may establish such covert information gathering unit."

110.2 This finding is based on a blatant distortion of section 209. It does not deal with the establishment of *"covert information gathering units"* at all. It reads as follows:

"Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation."

110.3 The section in other words regulates the establishment of *"intelligence services"*. Such a service is one that gathers covert intelligence to protect or advance national security, like the State Security Agency. This understanding is, for instance, illustrated by section 1 of the NSI Act which defines many forms of *"intelligence"* but makes it clear, in its definition of *"intelligence"*, that, what all of them have in common, is the gathering of information *"for the purposes of informing any government decision or policy-making process carried out in order to protect or advance the national security"*. Section 209 is thus confined to the establishment of intelligence services dedicated to the protection or advancement of national security.

110.4 That was never the aim of the SARS investigative unit. Its purpose was to fight tax evasion, illicit trade and organised crime with tax implications. It never had anything whatsoever to do with national security. It was never an *"intelligence service"*.

110.5 The Public Protector's assertion to the contrary is thus baseless and misdirected, and reveals her biased approach to the investigation of the complaints and reliance on errors of law and fact to come to her findings in the Report.

110.6 The establishment of the SARS investigative unit was perfectly lawful. As a result, the Public Protector's proposed findings to the contrary are wholly unjustified, erroneous, and plainly intended to serve a political purpose or other ulterior motive.

111 **Finally**, the Public Protector finds that I have acted improperly and in violation of section 209 of the Constitution, which is said to amount to maladministration in terms of section 182(1) of the Constitution and abuse of power in terms of section 6(4)(ii) of the PP Act (para 7.2.7). For the same reasons as set out above, this finding cannot be sustained.

Procurement by the SARS investigative unit

112 In paragraphs 5.3.34 and 7.3 of the Report, the Public Protector finds that the SARS investigative unit engaged in the unlawful procurement of intelligence equipment.

113 This conclusion is remarkably drawn from the alleged failure by SARS to provide her with records of procurement (para 7.3.2), which begs the question as to how the Report could be released if there was outstanding evidence relevant to her investigation of the SARS investigative unit complaint.

114 The inclusion of the proposed finding that the SARS investigative unit engaged in the unlawful procurement of intelligence equipment is interesting for another reason: no evidence of such equipment or such unlawful procurement has ever been produced, despite these exact same claims being repeated in recent years, including by former Ministers Nkosinathi Nhleko and David Mahlobo at their 2 March 2016 joint media

briefing held to address the 27 questions posed to me by the Hawks during their unsuccessful investigation of the SARS investigative unit.

115 She does not suggest, however, that I was in any way complicit in the alleged unlawful procurement. She does not propose any adverse finding against me in this regard.

116 I was not in any way involved in, and do not know of, any procurement of *"intelligence equipment"* by the SARS investigative unit.

117 I therefore need not elaborate on this issue here because the Public Protector does not make any finding against me.

Recruitment for the SARS investigative unit

118 The Public Protector deals in paragraphs 5.4.1 to 5.4.33 and 7.4 of her Report with alleged irregularities in the recruitment of staff for the SARS investigative unit.

119 I was not involved in the recruitment of staff for the SARS investigative unit at all. As one would expect, the management of the SARS investigative unit were responsible for recruitment within the applicable legal and regulatory framework, and was dictated by its specific needs.

120 Notwithstanding this, the Public Protector states in paragraphs 5.4.31 and 7.4.5 of her Report that my denial of any involvement or participation in the recruitment of the SARS investigative unit's employees is *"improbable"*.

121 This is a mere assertion without any evidentiary underpinning at all. The suggestion that, while and because I was Commissioner of SARS, I must have been personally and directly involved in the recruitment of employees for the SARS investigative unit, also is patently absurd.

122 The Public Protector secondly says in the same paragraph of her findings (para 7.4.5) that *"the Sikhakhane report and the Gene Ravele dossier confirm that [I] played a role*

in the recruitment of" the individual who became the manager of the SARS investigative unit in or about the beginning of 2007, Mr van Loggerenberg. But this is a manifest sleight of hand:

122.1 The Public Protector states in paragraph 5.4.16 that I played a part in Mr van Loggerenberg's recruitment in 1998 when he was appointed Assistant Director: Special Investigations at SARS.

122.2 The Public Protector acknowledges in paragraph 5.4.13 that Mr van Loggerenberg was appointed Head: Special Operations almost a decade later, on 15 June 2007.

122.3 The Public Protector then conflates these two events that occurred a decade apart to conclude that I played a role in the recruitment of Mr van Loggerenberg for his specific role in the SARS investigative unit.

122.4 This is not the truth, and the Public Protector clearly knows that.

122.5 It is also worth noting as an aside that Mr Ravele described as "hogwash" the "rogue unit" "narrative" in his evidence before the Nugent Commission.

123 I approved the establishment of the SARS investigative unit. Those responsible in the Enforcement Division of SARS would then properly recruit the appropriate staff. But all of that was lawfully done for the reasons already mentioned. The current complaints are that the staff was employed by irregular procedures. I played no part in procedures of that kind. To say that I was responsible for any irregularities in the recruitment procedures (as set out in paragraph 7.4.8), merely because I approved the establishment of the SARS investigative unit, is patently absurd and a lie.

124 I therefore dispute that my conduct "*is improper and thus amounted to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the [PP Act]*" as found in paragraph 7.4.8.

Operations of the SARS investigative unit

125 The Public Protector considers the lawfulness of the conduct of members of the SARS investigative unit from paragraphs 5.5.1 to 5.5.36 of the Report and makes adverse findings in this regard at paragraph 7.5 of the Report.

126 I played no part in and did not have any knowledge of any of the alleged unlawful operations. I need not elaborate, however, because the Public Protector does not make any adverse findings against me in this regard.

4 MR PILLAY'S QUALIFICATIONS

127 The Public Protector finds that Mr Pillay was not qualified for appointment as Deputy Commissioner of SARS and that his appointment was accordingly irregular and in violation of section 195 of the Constitution (para 7.6).

128 This is an appalling slur on the reputation of a highly skilled and conscientious public servant who has served his country, in the struggle against apartheid and in the reconstruction of a democratic South Africa, with great distinction. The Public Protector owes him an apology.

129 There is no formal qualification in law required for appointment as Deputy Commissioner of SARS. Mr Pillay, like many other South Africans who dedicated their lives to the struggle against apartheid, does not have any tertiary qualification. He has, however, proved himself to be a public servant of great skill and dedication.

130 Mr Pillay joined the public service in January 1995 and served SARS for more than a decade. On 15 April 2009, Cabinet approved Mr Pillay's appointment as one of three Deputy SARS Commissioners. A copy of the SARS media statement relating to these appointments is attached marked Annexure "**PG18.**"

130.1 He held various senior positions in SARS and discharged his functions with commendable success and integrity. He always exceled at his job and made a significant contribution to the establishment and rebuilding of SARS, including the building and refining of its enforcement and investigative capability.

130.2 He also played a leading part in the establishment of the highly successful SARS Large Business Centre.

130.3 These achievements, in which he participated, made SARS the highly respected organisation it was until September 2014 when it was 'captured' by Mr Moyane (as found by the Nugent Commission).

130.4 His knowledge and experience and his leadership as Deputy Commissioner were invaluable assets to the institution. Society owes him a vote of gratitude and not insult.

131 The Public Protector's Report appears to proceed from the mistaken assumption that there is a closed, specific and clear list of qualifications for the position of Deputy Commissioner of SARS. It is only on this premise that one could dismiss Mr Pillay's decades of public service as insufficient to qualify for appointment as Deputy Commissioner. The Public Protector indeed descends to petty, churlish and superficial criticism which has no foundation in fact.

132 There is no fair, rational, factual or legal basis on which to take issue with the appointment of Mr Pillay as Deputy Commissioner of SARS.

133 The Public Protector, at paragraph 5.6.26 states that "*SARS and Mr Gordhan conceded that Mr Pillay did not possess a Degree qualification nor a Matric certificate.*" This is false. I have never made any such concession. Nor could I since I know that Mr Pillay matriculated.

134 At paragraph 5.6.32, the Public Protector states that "*[t]he argument by Mr Gordhan that the decision to appoint Mr Pillay to the position of Deputy SARS Commissioner was based solely on Mr Pillay's previous experience and acquired skill is vague considering the level of the position.*" But what is "vague" is what the Public Protector means by this statement. There are no formal qualifications required for the appointment. I have explained why Mr Pillay was appointed: his unique skills and deep experience in building organisational capacity, and commitment to transforming the ranks of SARS in a challenging and complex environment, was precisely what it needed at the time. For example, in the period 1994 to 1999, Mr Pillay played a role in the amalgamation of the intelligence services which led to the creation of the NIA and the South African Security Service following the transition to democracy.

135 She continues at paragraphs 5.6.32 to 5.6.34 to criticise the "Goodness of Fit" model used by SARS in this process. Whatever her musings on this model, they are not a rational or proper basis to find, as she does at paragraph 7.6.4 that "*[t]he sole use of the business model as a blanket benchmark for the appointment of Mr Pillay, specifically, to the position of Deputy SARS Commissioner was irregular and in violation of section 195 of the Constitution.*"

136 It is not possible to violate section 195 in the manner supposed by the Public Protector. Mr Pillay's appointment was, in fact, entirely consistent with section 195 since it cultivated good human-resource management and career-development practices to maximise his human potential, as that provision requires.

5 THE FLAWED AND UNFAIR INVESTIGATION

137 The next set of facts that are relevant to this review relate to the interactions between myself and the office of the Public Protector during the course of this investigation. They reveal the unlawful, unfair and improper conduct of the investigation that led to the Report and which provide a final ground for this review.

138 The Public Protector first advised me of the complaints against me on 8 April 2019, when a subpoena was hand delivered to the offices of my legal representatives. This is annexed and marked as "**PG19**".

139 The subpoena details that complainants allege that :

> *"[7.1.1] During your tenure as the then Commissioner of SARS, you, Mr Pravin Gordhan, MP (Mr Gordhan) established an intelligence unit in violation of South African Intelligence Prescripts. The establishment and existence of the intelligence unit was confirmed by a SARS Investigation report compiled by Advocate Sikhakhane;*
>
> *[7.1.2] SARS violated section 209 of the Constitution which confers the powers and authority to establish any intelligence service, only on the President as head of the national executive and does so only in terms of the national legislation (sic);*
>
> *[7.1.3] SARS further violated section 41(1)(e) of the Constitution by not respecting the constitutional status, power and functions of the National Intelligence Agency;*
>
> *[7.1.4] SARS irregularly procured intelligence equipment, which the intelligence unit utilised for intelligence gathering;*
>
> *[7.1.5] SARS failed to follow proper procurement processes in appointing employees who worked for the intelligence unit;*
>
> *[7.1.6] The SARS Intelligence Unit irregularly bugged the offices of the National Prosecuting Authority (NPA) and the Directorate of Special Investigations (DSO);*

[7.1.7] SARS, based on an instruction from Mr Gordhan, as the former Minister of Finance, in 2012, pursued the tax affairs of the current Economic Freedom Fighters President, Mr Julius Malema, MP, without a legal basis;

[7.1.8] Mr Pillay was appointed to the position of Deputy SARS Commissioner and subsequently as SARS Commissioner whilst he did not possess the necessary qualifications for the positions;

[7.1.9] SARS failed to follow correct procurement procedures in the appointment of Accenture;

[7.1.10] SARS irregularly extended the SARS IT tender for 12 years resulting in fruitless and wasteful expenditure that has escalated to R8 billion to date; and

[7.1.11] SARS purchased an IT company by the name INTERFRONT at an amount of R72 million whilst the company was worth R2 million at the time of purchase.

[8] Mr Shivambu further alleged that you violated the Executive Ethics Code by deliberately misleading the National Assembly in failing to disclose that you had met with a member of the Gupta family since taking office."

140 In terms of the subpoena, I was directed to submit an affidavit to the Public Protector on 23 April 2019.

141 On 16 April 2019, my legal representative addressed a letter, annexure "**PG20**", to the Public Protector raising various issues :

141.1 Firstly that the investigation related to issues that arose more than two years ago and that section 6(9) of the PP Act required that special circumstances be present. The Public Protector was requested to disclose these special circumstances.

141.2 Secondly seeking an extension of 20 business days to submit my affidavit. It was explained that there was an intervening Easter period and that I had pressing commitments in light of the upcoming elections.

142 On 17 April 2019, my legal representatives directed a letter, annexure "**PG21**", to Mr Kingon, the Acting Commissioner of SARS. They asked him to provide us with copies of documents and access to persons that can assist in responding to the allegations under investigation by the Public Protector.

143 On 18 April 2019, Mr Kingon informed my legal representatives that he was not in a position to accede to the request at the moment pending counsel's opinion. He explained that SARS operated within a legislative framework and that he needed legal certainty regarding the disclosure of private information of third parties and SARS operating procedures, which may be prejudicial. His response is attached and marked "**PG22**".

144 On 22 April, my legal representatives repeated my request for an extension from the office of the Public Protector and attached copies of the correspondence with SARS. This letter is attached and marked "**PG23**".

145 On 23 April 2019, the Public Protector released a media statement granting me an extension only until 3 May 2019.Annexure "**PG24**" is a copy of her statement.

146 In her statement, she said that she had received allegations that "*shortly after the implicated parties were served with subpoenas, SARS held a meeting attended by most of the parties and that, at the meeting concerned, the kind of responses she received from the institution and the Minister were coordinated.* She recklessly insinuated that we sought to act dishonestly and in concert. This insinuation was false and improper.

147 On 2 May 2019, my lawyers again sought clarity on when the Public Protector would respond to the substantive issues raised in the letter of 16 April 2019, particularly what constituted special circumstances. This letter is attached and marked "**PG25**".

148 The Office of the Public Protector answered that a response had already been provided directly to me and that due to "*leakages to the media*", the Public Protector prefers to

communicate directly with the Minister. My legal representatives advised that notwithstanding the preference of the Public Protector, they as my legal representatives were to receive correspondence. These letters are attached marked "**PG26**".

149 In her letter dated 24 April 2019, the Public Protector responded that special circumstances were present as she had "*reliable information*" that the surveillance equipment, acquired at astronomical costs, was still in use. She reasoned that this was a matter of special public interest as public funds were being utilised for illegal purposes. This is annexed and marked as "**PG27**".

150 On 17 May 2019, I submitted an affidavit to the Public Protector in compliance with the subpoena. This is annexed and marked as "**PG28**".

151 On 3 June 2019. The Public Protector, uploaded a YouTube video in which she announced that I would be served with a section 7(9) notice. This video was aired prior to either me or my legal representatives being officially served with the section 7(9) notice. I am advised that as the subject of her investigations, I am entitled to be informed timeously of any developments in respect of her investigations and not be informed by journalists or the media. An electronic copy of the YouTube clip will be provided at the hearing of this matter. These theatrics are not in keeping with the decorum demanded by the important constitutional institution she serves.

152 The section 7(9) notice informed me that the Public Protector intends to split the initial twelve complaints into two reports. It afforded me 10 working days to comment in response to the adverse findings that she intends to make against me. A copy of the section 7(9) notice is annexed and marked "**PG29**".

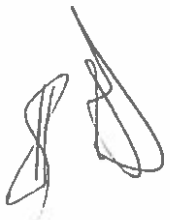
153 My legal representative sought an extension of the deadline to respond to the serious issues under investigation and to properly consider a response. The extension was only granted up to 21 June 2019. This letter is annexed and marked "**PG30**".

154 I responded to the section 7(9) notice on 21 June 2019. A copy of my response to the notice is attached as annexure "**PG31**".

155 The section 7(9) notice is important for this review application since even a cursory comparison of it with the final Report demonstrates that the Public Protector did not consider my submissions, whether meaningfully or at all. The final Report differs from the draft that appeared in the section 7(9) notice only with respect to the inclusion of final findings and remedial action, and the reproduction of excerpts from the submissions received in response to the notice. However, the final Report reveals no sign of any meaningful consideration of or reflection on the contents of the submissions received in response to the notice. It appears, that the outcome of the complaint, and the adverse nature of the findings were to be immune to any influence by my submissions. It was as if the Public Protector merely "went through the motions" and intended to find against me and others come what may. This raises the question of her ulterior motive or purpose and bias.

156 Finally, a mere ten working days later, the Public Protector released the Report at a media briefing on Friday, 5 July 2019, prior to my receipt of it. Not only was this plainly insufficient time to collect the outstanding evidence reflected in the section 7(9) Notice, which was not done it seems, but it also is precious little time to engage with the voluminous and detailed submissions made to her in response to the section 7(9) Notices by various parties.

157 As a result, the Report, its findings and remedial action are plainly the result of an unfair, unlawful and improper process and should be set aside.



6 REMEDIAL ACTION

158 **Finally**, the remedial action formulated by the Public Protector is incompetent, unlawful, improper and not capable of implementation. There are several fatal errors and flaws in the remedial action.

No *audi alteram partem*

159 First, despite my explicit request in my response to the section 7(9) Notice, the Public Protector refused to hear me on the imposition or formulation of any remedial action. The Public Protector at no stage disclosed the proposed remedial action and I was deprived of the opportunity to make representations therein.

160 All of the remedial action ought to be set aside as a result.

The President

161 Second, given that there is no basis to make any adverse findings against me, for the reasons set out above, there is no reason for the President "*to take appropriate disciplinary action against [me] for [my] violation of the Constitution and the Executive Ethics Code within 30 days of issuing of this report*" (para 8.1.1).

162 In addition, the meaning of "*appropriate disciplinary action*" is unclear and impossible to implement since I am not employed by the President in any traditional sense, I serve at his pleasure.

163 The remedial action also is evidence of overreach by the Public Protector in prescribing the President's response to her findings.

164 Finally, no proportionality is observed in the remedial action imposed and the alleged conduct said to be worthy of sanction. Nor is there any rational connection between the two.

The Speaker

165 Third, given that there is no basis to make any adverse findings against me, for the reasons set out above, there is no reason for the Speaker to refer me to the Joint Committee on Ethics and Members' Interests "*for consideration in terms of the provisions of paragraph 10 of the Parliament Code of Ethics*" (sic).

166 This remedial action is unnecessary and inappropriate.

The Minister of State Security

167 Various remedial orders are imposed upon the Minister of State Security, which may relate to me. For the record, I was never afforded the opportunity to engage with the OIGI on any matter investigated by it in 2014.

168 Nowhere in her initial section 7(9) notice to me and subsequent engagement with me was any mention made of the remedial action directed at the Minister of State Security and relating to a classified Inspector General of Intelligence Report. I have not been lawfully provided with a copy of this report, as part of the Public Protector's investigation, and neither have I been provided with an opportunity to comment on it. Her sudden last-minute inclusion of this aspect in the Report, and the insistence that it be implemented in her remedial action, is unfair, unlawful and improper.

169 It also is unclear how the Public Protector, on the one hand, insists that the IGI Report be implemented (para 8.3.1) and yet still seeks a declassified copy to be availed to her Office (para 8.3.3). In the event that the Public Protector is not lawfully in possession of the IGI Report, then there is no basis for directing that it be implemented as she is not lawfully familiar with its contents. In the event that she is in unlawful possession of the OIGI Report, I invite her to disclose how she came to be in possession of a classified report.

170 In either event, remedial action that may impact on me cannot be upheld in these circumstances.

171 This is procedurally irrational, unfair and contrary to the prescripts of the rule of the law and PAJA.

The Commissioner of SAPS

172 In paragraph 8.5.1 of her Report, the Public Protector directs the Commissioner of SARS to "*within 60 days investigate the criminal conduct of Messrs Gordhan, Pillay and officials involved in the SARS intelligence unit, for violation of section 209 of the Constitution and section 3 of the National Strategic Intelligence Act, including Mr Magashula's conduct of lying under oath.*" This remedial action is unlawful and incompetent. Neither section 209 nor section 3 creates a criminal offence. The investigation will thus be incompetent and unlawful

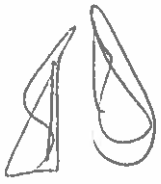
173 Again the Public Protector intentionally violates the institutional independence of the SAPS. She can only refer a matter to the Police Services for investigation. She cannot direct that an investigation be commenced.

174 This is a further show of the lack of comprehension of the applicable law and facts, and bias that underlies this Report.

175 In sum, all of the remedial action is unlawful, unfair, disproportionate or otherwise improper and impossible to implement. It should be set aside.

7 BIAS AND ULTERIOR PURPOSE

176 Finally, the Public Protector is biased, or at least subject to a reasonable perception of bias.



177 Her decision to exercise jurisdiction over the SARS complaint can only be explained by bias, ulterior motive or purpose.

178 Similarly, it is evident that she was determined to make adverse findings and impose remedial action against me and other implicated persons regardless of the facts or law placed before her in the investigation.

178.1 The Report shows that she did not critically consider the submissions made to her and weigh them against applicable legal provisions in order to reach a finding.

178.2 In considering her Report, this Court will note that she simply catalogues the evidence collected during her investigation, replicates the submissions made to her during the investigation of the implicated persons and then makes an adverse finding that the allegations at issue are substantiated, warranting remedial action.

178.3 A striking feature of the Report is that it is devoid of any reasoning and critical engagement with the information placed before her.

179 There is no possible explanation for this conduct other than that the Public Protector is biased against me and others, and/or that she acts for an ulterior motive or purpose.

180 I am emboldened in this submission because in the afternoon of 5 July 2019, shortly after the Public Protector released this Report to the media (but not to me or the others implicated by it), Mr Pillay publicly released his submissions made to the Public Protector during her investigation and in response to the section 7(9) notice of the Public Protector ("**PG9**" and "**PG10**"). In these affidavits, Mr Pillay demonstrates the Public Protector's complete lack of understanding of SARS as an institution and the material errors of fact that constitute her findings. Due to his position as General Manager of Enforcement and Risk at SARS, his exposition is detailed and I believe of great assistance to this Court.

181 By way of example, Mr Pillay explains that :

181.1 The Public Protector confuses the Customs and Border Control Unit ("**CBCU**"), which falls under the Customs Division, with the NRG, which fell under the separate and distinct Enforcement and Risk Division of SARS; and

181.2 Fails to appreciate that the Special Projects Unit, a predecessor of the NRG, was a sub-unit of CBCU and then transferred out to an entirely different division namely Enforcement and Risk.

181.3 She appears to wilfully refuse to comprehend the structure and institutional history of SARS and the life of the SARS investigative unit. Her blinkered approach, impervious to facts or law, reveals a miscomprehension of the origins, powers and location of investigative units within SARS.

182 Mr Pillay further demonstrates in his affidavits that the Report of the Public Protector is undermined by the failure of the Public Protector to address critical issues:

182.1 Mr Pillay interrogates why the Public Protector doggedly pursues an investigation that has been viciously and unsuccessfully pursued by the National Prosecuting Authority and the Directorate for Priority Crimes since May 2015 to date. He concludes that law enforcement agencies have been unable to charge and prosecute the persons implicated in her Report, because the establishment of the SARS investigative unit was lawful; and

182.2 Mr Pillay importantly criticises the failure of the Public Protector to test the veracity of complaints and documents submitted to her and to determine the motives behind their actions. Mr Pillay sets out in studious detail the origins of the slanderous term "*rogue unit*". He explains that this is part of a long running series of attacks against SARS, as perpetrated by politically connected persons and business associates who were under investigation by SARS, disgruntled

former SARS employees, institutional rivalry and fears from, amongst others, the tobacco industry and other high risk industries, of serious criminal offences that SARS had uncovered and which implicated them.

182.3 Mr Pillay explains that this campaign was waged in the media and was used by architects of state capture to destabilise the institution of SARS.

182.4 Mr Pillay thereafter lists prominent investigations that were stalled as a result of this campaign.

183 The failure of the Public Protector to acknowledge and consider the above considerations is a further indication of her bias and narrow mindedness in addressing the complaints here.

184 A further illustration of bias is that the Report is based on grave and egregious errors of law. I discussed in detail above why her finding that the establishment of the SARS investigative unit violated intelligence prescripts is incorrect.

184.1 Yet the Public Protector persists with this erroneous understanding of the law without regard to the evidence before her and ignoring the fact that the legal position she adopts has been considered and already found to be incorrect by several bodies, most notably the Nugent Commission.

184.2 It is this same flawed understanding of the law that is relied upon by persons engaged in state capture who sought to destroy state institutions, including SARS.

184.3 There is no other conclusion that can be drawn other than that the Public Protector has devoted public funds to pursuing a case against me and others that is malevolent, politically motivated and, most importantly, wrong on the facts and wrong in law.

185 I do not make the above statements lightly. I acknowledge that as a committed constitutionalist, proud South African and member of the Cabinet, I must respect the Office of the Public Protector. However, my position similarly enjoins me to make this Court aware of bias on the part of the current occupant of that office and her abuse of its powers for political objectives in the Report under review here.

PART A: URGENT INTERDICT

186 The purpose of the urgent relief sought in Part A of the Notice of Motion in this application is to interdict enforcement of the remedial action against me contained in the Report, pending the finalisation of the review application set out above.

FACTUAL BACKGROUND

187 In paragraph 8 of her Report, entitled "Remedial Action", the Public Protector directs that I be subjected to the following :

187.1 At paragraph 8.1.1 of her Report, she directs that President Ramaphosa "*take appropriate disciplinary action against [Minister Gordhan] for his violation of the Constitution and the Executive Ethics Code within 30 days of issuing of this report.*"

187.2 At paragraph 8.2.1 of her Report, she directs the Speaker to "*within 14 working days of receipt of this Report, refer Mr Gordhan's violation of the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members to the Joint Committee on Ethics and Members' Interests for consideration in terms of the provisions of paragraph 10 of the Parliament Code of Ethics.*"

187.3 At paragraph 8.3.1 of her Report, she directs the Min of State Security to "*within 90 days of the issuing of this Report, acting in line with Intelligence Services Amendment Act, implement in totality the OIGI report dated 31 October 2014.*"

187.4 At paragraph 8.5.1 of her Report, she directs that the SAPS Commissioner "*within 60 days investigate the criminal conduct of Messrs Gordhan, Pillay and officials involved in the SARS intelligence unit, for violation of section 209 of the Constitution and section 3 of the National Strategic Intelligence Act, including Mr Magashula's conduct of lying under oath.*"

187.5 At paragraph 9 of her Report, she directs President Ramaphosa, the Speaker, the Min of State Security and the Inspector General of Intelligence to submit, for her approval and within 30 days from the date of issuing the Report, Implementation Plans in respect of the respective remedial action that she directs them to implement.

188 Paragraphs 8.3.2, 8.3.3 and 8.4.1 of the Report set out other remedial action involving other respondents in this application, which require the NDPP, amongst others to undertake certain action.

188.1 I have cited them all in this application since I submit that it would be convenient, appropriate and effective for this Court to interdict all of the remedial action set out in paragraphs 8 and 9 of the Report, rather than to engage in piecemeal litigation on this issue.

188.2 Of course, the other respondents will have to urgently assist the court by filing the necessary affidavits and required applications to ensure that the Court is able to deal with all of the remedial action in one hearing.

URGENCY

189 This application is inherently urgent.

190 If this matter is enrolled on the ordinary roll and not heard on an urgent basis, I will not only be prejudiced, but the relief I seek in Part B relating to the review application will be

rendered nugatory and impotent. By the time the review is heard, I will have already been subjected to the punitive processes contemplated in the remedial action, and will continue to suffer baseless, but engineered, reputational damage.

191 I have taken the above steps at the earliest opportunity and this urgency is not self-created.

192 In the period subsequent to the release of the Report, I prepared this application under considerable time pressures and constraints. It was launched on 10 July 2019, three working days after its release by the Public Protector.

193 The Respondents will be afforded an opportunity to file answering affidavits until Monday, 15 July 2019 at 12h00.

194 I undertake to file my replying affidavit on Wednesday, 17 July 2019 so that the application may be filed with the Registrar by 12h00 on Thursday, 18 July 2019, as required by section 13.24 of the Practice Manual of this Court regulating urgent applications.

195 The remedial action of the Public Protector –

195.1 Requires compliance with its terms within prescribed time frames, the earliest of which as it relates to me is "14 working days of receipt of [the] Report", which is 25 July 2019 (para 8.2.1); and

195.2 Is binding until set aside in the pending review application.

196 I am advised that, given the formulation of the remedial action in the Report with defined time periods and certain deadlines, it is not sufficient for me to simply institute review proceedings in respect of the impugned Report, but that I should obtain an order suspending and interdicting the enforcement of the remedial action set out in the Report prior to 25 July 2019.

197 It is for this reason that I bring this part of the application on an urgent basis, and in compliance with the applicable provisions of the Practice Manual.

198 Although different and longer time frames apply in respect of the other remedial action set, I simultaneously seek to suspend and interdict the enforcement of the other remedial action for the sake of judicial convenience and to prevent piecemeal litigation.

199 I seek to suspend and interdict the enforcement of the remedial action so as to challenge the Report in the review proceedings, the grounds of which are set out at length above and which include that:

199.1 The Public Protector acted *ultra vires* her empowering statute by exercising jurisdiction over the majority of the matters addressed in the Report;

199.2 In assuming jurisdiction over the complaints in the circumstances here, conducting her investigation in the manner set out in the review, making the findings contained in paragraph 7 of the Report, imposing the remedial action set out in paragraph 8 of the Report and the monitoring required by paragraph 9 of the Report, the Public Protector acted in a manner that was unconstitutional, unlawful, improper and invalid;

199.3 Specifically, the review is brought on the basis of the PAJA, and, if not under PAJA, then in any event under the constitutional principle of legality and a review based on the rule of law.

200 The review is brought against the Report under PAJA in terms of :

200.1 section 6(2)(b) for its failure to comply with a mandatory and material procedure or condition prescribed by an empowering provision;

200.2 section 6(2)(c) for being procedurally unfair;

200.3 section 6(2)(d) for being materially influenced by an error of law;

200.4 section 6(2)(e)(ii) for being taken for an ulterior purpose or motive;

200.5 section 6(2)(e)(iii) for taking into account irrelevant considerations or failing to consider relevant considerations;

200.6 section 6(2)(e)(vi) for acting arbitrarily or capriciously;

200.7 section 6(2)(f)(i) for acting in a manner not authorised by the empowering provision;

200.8 section 6(2)(f)(ii) in that the Report was not rationally related to the information before the Public Protector or the purpose of her power to investigate and report;

200.9 section 6(2)(h) in that the failure to investigate properly was so unreasonable that no reasonable person could have so exercised it; and/or

200.10 section 6(2)(i) in that the Report is otherwise unconstitutional or unlawful.

201 Alternatively, the Report is reviewable under the rule of law and the principle of legality on the grounds of both substantive and procedural irrationality, unfairness and unlawfulness.

201.1 In addition, the Public Protector's decisions to assume jurisdiction in the absence of special circumstances, conduct her investigation, make adverse findings and impose remedial action and monitoring as reflected in the Report contravene section 182 of the Constitution which requires the Public Protector, when exercising her powers and performing her functions to act:

201.1.1 Independently;

201.1.2 In compliance with the Constitution, the PP Act and other law;

201.1.3 Impartially;

201.1.4 Without fear, favour or prejudice;

201.1.5 With dignity; and

201.1.6 With effectiveness.

202 I am advised that the review has prospects of success and that it is therefore likely that no remedial action will be required to be taken against me. For this reason, it is necessary to urgently suspend and interdict the enforcement of the remedial action set out in the Report.

203 I am further advised that the requirements of an interim interdict are satisfied here and address each in turn below.

***PRIMA FACIE* RIGHT**

204 I have a *prima facie* right to the interdict sought in this application, flowing from the findings and remedial action set out in the Report of the Public Protector. I am, among others, the subject matter of the investigation, and the target of the findings and remedial action in the Report of the Public Protector.

205 The remedial action of the Public Protector subjects me to a wide range of serious, punitive and prejudicial processes. In sum :

205.1 she directs President Ramaphosa to institute disciplinary proceedings against me;

205.2 she directs the Speaker to refer me to the Joint Committee of Parliament so that I may be investigated for a breach of the Executive Ethics Code; and

205.3 she directs the Min of State Security and SAPS Commissioner to subject me to criminal investigations.

206 These are all serious, punitive and prejudicial processes that will have a permanent and detrimental impact on me if they proceed prior to the determination of the review application.

207 I am entitled to, and should be afforded the opportunity to, challenge the lawfulness, propriety and veracity of her findings and remedial action before a review court before being subjected to them.

208 The Report implicates my rights under the rule of law and principle of legality, as well as my constitutional right to administrative action that is lawful, reasonable and procedurally fair (section 33 of the Constitution), all of which have been violated by the unreasonable and irrational findings contained in her Report.

209 As set out in the review, the Public Protector violated her own empowering statute, the PP Act, in investigating complaints that pertain to events that occurred two years ago in the absence of any special circumstances. This glaring illegality is an egregious breach and I am advised that her conduct is *ultra vires* and unlawful.

210 The manner in which the Public Protector has publicly maligned my character on the basis of the findings and remedial action in the Report has adversely affected my dignity, standing and public character (section 10 of the Constitution).

211 Finally, in reviewing the Report and bringing this interdict against the remedial action, I also seek to enforce my right of access to Courts (section 34 of the Constitution).

212 I conclude that if my *prima facie* rights as discussed above are not protected by an interdict until such time as the review application is finally determined, I will endure irreparable harm.

213 I now turn to discuss this second requirement for an interim interdict in detail below.

IRREPARABLE HARM

214 The erroneous findings and remedial action imposed by the Public Protector have had an enormous personal and political impact on me. They have detrimentally affected perceptions of my character, maligned my reputation and adversely affected my standing as Minister of Public Enterprises. They attempt to distract me in an effort to prevent me from doing my job effectively. I am entitled to challenge them on that basis alone.

215 Should this Court not grant the interdict, I will be subjected to the prescribed disciplinary process and possible criminal investigation based on an unlawful Report and will thereby suffer irreparable harm since these will be unlawful themselves. As explained above, "disciplinary action" against a member of the executive is not something that the Public Protector can lawfully, properly or appropriately prescribe and impose here.

216 The grant of the urgent relief sought in Part A would ensure that the review is legally viable and not moot.

216.1 In the event that I am subjected to a disciplinary process and criminal investigations are made in respect of me, any eventual order of the review court would essentially be rendered moot and academic.

216.2 This is because the remedial action would have already been implemented.

216.3 Even if the review court ultimately vindicated me, that order would have no practical impact and be rendered nugatory.

216.4 Such a situation would be very prejudicial to me, and the rule of law, and cannot be countenanced by this Court.

217 Any implementation of the remedial action imposed by the Public Protector cannot be cured *ex post facto*.

217.1 I am advised that even in the labour or employment law context, disciplinary proceedings brought on unlawful and invalid grounds are interdicted from proceeding because a remedy in terms of the Labour Relations Act will not undo the harm incurred by the subject of the proceedings, even if the review court ultimately vindicates that person.

217.2 Similarly, the impugned remedial action should be interdicted here so that the review court may assess its lawfulness, prior to me being unlawfully subjected to disciplinary conduct from my political principal prematurely and to avoid me being subjected to parliamentary process and criminal investigations were no basis in law or fact may exist for those actions.

218 Accordingly, I am advised that I have demonstrated that I will suffer irreparable harm if this urgent relief is not granted pending the finalisation of the review application.

BALANCE OF CONVENIENCE

219 The balance of convenience also favours the grant of the interdict.

220 There will be no prejudice to the Public Protector and the other respondents should the urgent relief be granted. They will be afforded an opportunity to respond to the review application and mount full defences. I on the other hand, stand to be seriously prejudiced should Part A of this application be dismissed.

221 This is because, in the event that I am subjected to disciplinary proceedings and criminal investigations, but later vindicated by the review court, that relief will be nugatory as the remedial action would already have been implemented against me.

222 The suspension order and interdict also allows the review court to pronounce itself on the merits of my case, vindicating my right to access justice and upholding the rule of law.

223 It also prevents a parallel process, in which I am pursuing the review application and simultaneously being subjected to a disciplinary process and criminal investigations. A parallel process would be an unnecessary waste of public resources, particularly judicial resources and public funds. All of which are already scarce and are better utilised in more deserving circumstances than this.

NO OTHER SATISFACTORY REMEDY

224 I am advised that there is no suitable alternative remedy available to me.

225 I am further advised that –

225.1 A litigant in my position must act to prevent enforcement of the remedial action before the review is decided;

225.2 Both of these possible applications essentially involve the consideration of the same legal question and either are appropriate in this instance. A stay is granted where it is in the interests of justice to do so and the considerations that arise in an application for an interdict are relevant.

226 Further, I am advised that an interdict preventing enforcement of the remedial action pending the outcome of a review is routine in these circumstances.

226.1 This relief was granted by this Court in *Minister of Water and Sanitation v the Public Protector and Others* [2019] ZAGPPHC 193 wherein Minister Nkwinti successfully obtained an interdict prohibiting the release of the Public Protector's Report No. 20 of 2019/2020 pending the finalisation of a review application.

226.2 An interdict was also obtained by the former Premier of the Western Cape who successfully obtained an interdict prohibiting the release of the Public Protector's Report No 31 of 2019/2020 pending her review application.

PROSPECTS OF SUCCESS

227 I am advised that the review application also bears strong prospects of success. As explained above regarding the review application:

227.1 I firstly demonstrate that the Public Protector has no jurisdiction over the majority of the complaints which were investigated and which underpin the remedial action, in terms of section 6(9) of the Public Protector Act. This is because there are no special circumstances present, nor any other basis on which the Public Protector could rationally exercise her discretion in terms of section 6(9) of the PP Act to entertain these complaints since they overwhelmingly relate to events that commenced more than two years ago.

227.2 Second, I contend that the Report is riddled with numerous errors of law, material errors of fact and patently irrational findings. All of which are fatal and dispose of the review application in my favour. The Report reveals the failure of the Public Protector to apply her mind to the conspectus of facts before her and the applicable law.

227.3 Finally, I assert in the review application that the Public Protector is biased and is determine to make adverse findings even where there is no basis for doing so. I describe in detail how the Report is undermined by factual errors, a miscomprehension of SARS as an institution and no appreciation for context.

IMPROPER MOTIVE

228 Finally, whilst I have great respect for the Office of the Public Protector I doubt the competence, integrity, legal literacy and constitutional grasp of its incumbent of her powers, duties and functions.

229 Whilst it is unfortunate that these sentiments must be expressed, I maintain that the suspension and interdict will be in the overall interests of justice because I strongly doubt the *bona fides* of the Public Protector in investigating and issuing the Report. The Public Protector has confirmed that I am the subject of three ongoing investigations by her office, I am not aware of anyone who has been singled out and pursued by her Office in this way.

230 It is a matter of public record that the Office of the Public Protector has severe backlogs and faces considerable financial constraints. Its latest Annual Report confirms that it had a caseload of 18 356 in the 2017/18 financial year, of which 4390 complaints were rolled over into the next year. The Auditor General concluded that, as at 31 March 2018, the institution's current liabilities exceeded its total assets by R25 952 064. This is attached and marked as "**PG32**."

231 Instead of dealing with the pressing complaints of citizens, she is using the office for ulterior motives or the political motives of others. My belief is that the resources of this esteemed office are best employed doing what it was constitutionally envisioned to do

i.e. protect the public from ongoing maladministration and not abused for improper and blatantly political motives.

232 The competence and credibility of the Public Protector and her understanding of the Constitution have already been negatively pronounced on by Courts. Above, I discuss in detail the adverse costs order that has been made in respect of her, the scathing critique by the Courts made against her and the applicants who have successfully interdicted the release of her reports, because she denied them procedural fairness, or have had those reports set aside on the basis that her findings were unconstitutional and unlawful.

233 On the basis of the above considerations, I am entitled to have these issues adjudicated upon by a court of law in the pending judicial review before being compelled to endure the prejudicial and punitive processes required by the remedial action.

COSTS

234 In light of what is set out above, Adv Mkhwebane should be ordered to pay the costs of this review application personally and on a punitive scale.

234.1 Once again, she has demonstrated that she is unfit to hold the Office of Public Protector.

234.2 She continues to ignore her constitutional mandate, act without regard to the provisions of the law and seemingly in service to some other motive or agenda.

234.3 Her conduct is the latest example of her now lengthy history of acting incompetently, unlawfully, unconstitutionally, unfairly and unjustifiably.

234.4 An adverse costs order would be one way for this Court to join in those earlier efforts to correct her approach to her important work.

234.5 Indeed, her seeming lack of reflection on her role and powers in light of those other decisions is a further basis for the costs order against Adv Mkhwebane.

234.6 The taxpayers of South Africa should not have to continue to fund her unlawful conduct.

CONCLUSION

235 I ask for the relief sought in both parts of my Notice of Motion.

DEPONENT

The deponent has acknowledged to me that he knows and understands the contents of this affidavit which was signed and sworn to before me in my office at CAPE TOWN on this the 10TH day of JULY 2019 in accordance with Regulation No R1258 dated 21 July 1972 as amended by Government Notice R1648 dated 19 August 1977, as further amended by Government Notice R1428 dated 11 July 1980, and by Government Notice R774 of 23 April 1982.

SOUTH AFRICAN POLICE SERVICE
UNIT COMMANDER PARLIAMENT
PROTECTION AND SECURITY SERVICES
WESTERN CAPE
2019 -07- 10
PRIVATE BAG X1, STALPLEIN 8015
CAPE TOWN
SOUTH AFRICAN POLICE SERVICE

BEFORE ME: 7011706-3 W/O

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