

IN THE ELECTORAL COURT OF SOUTH AFRICA

Case no: 0027/24EC

In the matter between:

REYNO DAWID DE BEER

Complainant

and

ELECTORAL COMMISSION OF SOUTH AFRICA

First Respondent

MOSOTHO MOEPYA

Second Respondent

JANET LOVE

Third Respondent

GLEN MASHININI

Fourth Respondent

NOMSA MASUKU

Fifth Respondent

DHAYANITHIE PILLAY

Sixth Respondent

RESPONSE OF COMMISSIONERS OF THE ELECTORAL COMMISSION

I, the undersigned,

MOSOTHO SIMON MOEPYA

do hereby make oath and say:

1. I am a Commissioner and the Chairperson of the Electoral Commission of South Africa ("the Commission"), designated in terms of section 8 of the Electoral Commission Act 51 of 1996 ("the Commission Act").



MSM
KC

2. The facts in this affidavit fall within my personal knowledge (save where the context indicates otherwise) and are true and correct to the best of my knowledge.
3. In relation to other facts, by virtue of my position, I have access to information held by the Commission regarding the facts and issues dealt with in this affidavit and I depose to this affidavit having regard to that information.
4. Where I make legal submissions, I rely on the advice of the Commission's legal representatives, whose advice I believe to be correct.
5. I am authorised to depose to this affidavit on behalf of the Commission and the remaining Commissioners.

OVERVIEW

6. The complainant ("Mr de Beer") has requested this Court to "urgently" investigate what he claims is "misconduct, incapacity or incompetence" of myself and the other Commissioners of the Commission.
7. Upfront, we emphasise that we unequivocally reject Mr de Beer's accusations of misconduct, incapacity or incompetence. His allegations are unsustainable on their own terms. He does not disclose any evidence of misconduct, incapacity or incompetence on the part of any of the Commissioners. The complaint is frivolous and vexatious.
8. The allegations should be rejected by this Court outright on the papers and without any further hearing or inquiry. Mr de Beer has not even made out a *prima*

facie case of misconduct, incompetence or incapacity on the part of the Commissioners. And his very accusations were levelled in the same terms before the Constitutional Court – twice – and on both occasions the highest Court in the land rejected his applications. There is no basis for him to abuse this Court as a third attempt to raise the same allegations.

9. The complaint relates to the recent litigation pertaining to the Commission's decision to conclude that Mr Zuma is ineligible to be a member of the National Assembly, due to his conviction and sentencing by the Constitutional Court for contempt of court, which decision was taken following objections received by the Commission in terms of section 30 of the Electoral Act 73 of 1998.¹
10. The Court is well-aware that the Commission's decision was initially set aside by this Court.² However, on appeal the Constitutional Court unanimously upheld the Commission's conclusion that Mr Zuma is ineligible to be a member of the National Assembly in terms of section 47(1)(e) of the Constitution.³
11. The core of Mr de Beer's complaint is that the Commissioners did not bring to the attention of the Constitutional Court, a process before the African Commission on Human and Peoples' Rights ("African Commission") he claims he has lodged on behalf of Mr Zuma pertaining to his conviction and sentencing by the Constitutional Court. It is contended that the Republic of South Africa has

¹ *Secretary of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* 2021 (5) SA 327 (CC) (Zuma contempt judgment).

² *Umkhonto Wesizwe Political Party and Another v Electoral Commission of South Africa and Others* (0015/2024EC) [2024] ZAEC 5 (26 April 2024).

³ *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others* (CCT 97/24) [2024] ZACC 6 (20 May 2024).

violated Mr Zuma's rights in the African Charter on Human and Peoples' Rights ("African Charter").

12. The fact that we did not address the African Commission process before the Constitutional Court does not amount to misconduct, incapacity or incompetence.

12.1 Our duty as Commissioners was to determine whether Mr Zuma was qualified and eligible to be a member of the National Assembly in terms of the Constitution and the Act.

12.2 We considered the fact that Mr Zuma was convicted by the Constitutional Court of the offence of contempt of court and sentenced by the Court to more than 12 months' imprisonment without an option of a fine as contemplated by section 47(1)(e).

12.3 The process of the African Commission was not relevant to the issues the Commissioners had to determine and which was governed by a final judgment of the Constitutional Court. The Commission had no direct interaction with this process.

12.4 In any event, none of the Commissioners were even aware of the African Commission process until Mr de Beer's applications before the Constitutional Court.

12.5 Whatever the outcome of the African Commission process, the African Commission can only make non-binding recommendations. It is not a court that makes binding determinations. It is certainly not a court of

appeal, that can overturn the conviction and sentencing of Mr Zuma, as Mr de Beer appears to believe.

12.6 Even if they had known about the African Commission process, which is denied, the Commissioners had no duty to disclose the African Commission process to the Constitutional Court. There is no merit to the accusation of misconduct, incapacity or incompetence.

13. There was in any event no suppression of the process.

13.1 On Mr de Beer's own showing, he brought the African Commission process to the Court's attention in his unsuccessful applications before the Constitutional Court that he attaches to the complaint.

13.2 The Court rejected Mr de Beer's intervention / amicus application having considered the arguments raised by him in relation to the African Commission process, the self-same arguments he now repeats before this Court — and found that Mr de Beer did not raise any novel arguments in dismissing his application.

13.3 The Court was thus fully aware of the process, when it unanimously upheld the Commission's decision concerning Mr Zuma's ineligibility.

14. There are also fatal procedural difficulties with the complaint.

14.1 First, Mr de Beer does not have standing to lodge the complaint which pertains to alleged violations of the rights of Mr Zuma and the MK Party. He has not identified any of his rights that are alleged to have been infringed. This cannot form the basis of a cogent complaint against the

Commissioners. He also has not explained on what basis he is entitled to raise the complaint.

- 14.2 Second, Mr de Beer has self-created his own urgency. His applications were rejected by the Constitutional Court on 7 May 2024 and 16 May 2024; he gives no explanation for why he waited to approach the Court with the complaint. The issue is now moot as the 2024 elections have been finalised and the results declared.
15. For these reasons, which are expanded on in this response, Mr de Beer's complaint against the Commissioners is an abuse and should be rejected outright by the Court.
16. Mr de Beer's abusive conduct is far-ranging: he also makes reckless and evidence-free accusations of improper conduct by and conspiracies between various parties – including NGOs, members of the executive, and legal representatives who have represented the Commission, and the Commissioners – which are unsubstantiated. He goes as far as to allege “corruption”, “treason” and “terrorism” without foundation. These conspiracies peddled by him too do not establish misconduct, incompetence or incapacity on the part of the Commissioners. They also fail the warning repeatedly stressed by our highest courts that serious accusations such as fraud and corruption made without substantiation are to be deprecated. They are *pro non scripto* and must be struck from the record – and such conduct, harmful to the integrity of a constitutionally-ordained body, must be deterred by a punitive costs order. This is not the first occasion where our courts have had to deal with Mr de Beer's wanton disrespect for constitutional process, abusive denigration of constitutional office-bearers,

and unfounded accusations ranging far and wide against individuals not connect with the litigation. The Supreme Court of Appeal has had this to say about Mr de Beer:⁴

“No judge, indeed, no person, whatever his or her station is above scrutiny. Our concern in this case, however, is to draw a judicial line in the sand. We have set out in some detail the criticisms levelled against us. Our primary concern however, is the baseless criticism levelled, in the last communication of Mr de Beer and the LFN, against the President of this Court, the deplorable denigration of the Court, and the generalised contempt displayed towards all our colleagues, unconnected though they are to this case. We are concerned too about the scurrilous insults, set out in the communications referred to above, directed at those who serve in the Registrar’s office.”⁵

17. The Court went on to say:

“The last written communication from Mr de Beer and the LFN is crude, gratuitously insulting, clearly contemptuous and intended to denigrate this court. The Constitutional Court has most recently warned that unjustifiable defamatory and scurrilous utterances against judicial officers will not be tolerated. In the present circumstances there seems to us to be no alternative but to refer this judgment to the National Director of Public Prosecutions (the NDPP) for her attention. In doing so we are mindful that Mr de Beer is a layperson. However, even for a layperson the statements are beyond the pale and there is no excuse for his conduct or that of the LFN. The Registrar is thus directed to take the necessary steps to ensure that this judgment is brought to the attention of the NDPP.”⁶

18. Mr de Beer has continued in this complaint in the same vein. The complaint and allegations made in it are vexatious and frivolous. Mr de Beer has initiated the complaint without probable cause and is plainly doing so for the purpose of annoying or embarrassing the Commissioners and in an attempt to undermine the integrity of the Commission during an election cycle. He has forfeited the

⁴ *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* (538/2020) [2021] ZASCA 95; [2021] 3 All SA 723 (SCA) (1 July 2021)

⁵ Para 118.

⁶ Para 119.

protection against an adverse costs order that this Court usually affords to litigants. He is not any layperson – he is a layperson who has conducted himself in a previously reprehensible fashion before the Supreme Court of Appeal, but who now persists in such conduct. His conduct deserves the censure of an adverse and punitive costs order.

PROCEDURAL DEFECTS

Mr de Beer's lack of standing

19. In his written complaint, Mr de Beer claims standing in his personal capacity on the following bases:

19.1 that the Commissioner and Commissioners have infringed or threatened rights in the Bill of Rights with reference to Mr Zuma and the African Commission process;⁷ and

19.2 that he acts in the "interests of the public, which would automatically include the uMkhonto weSizwe (MK) Political Party ('MK Party') entitled to the protection and benefits afforded by the Bill of Rights, together with the members and supporters of both the MK Party and LFN."⁸

20. The first difficulty for Mr de Beer is that he provides no proof to substantiate that he is authorised to lodge a complaint against the Commissioners on behalf of Mr Zuma or the MK Party. (He claims in the applications before the Constitutional

⁷ Para 5.

⁸ Para 6.

Court that he is authorised to represent Mr Zuma in the Africa Commission, but again provides no proof⁹).

21. The allegations of misconduct, incompetence or incapacity against the Commissioners all pertain to Mr Zuma and the MK Party. Mr Zuma and his party are the parties with standing to bring this complaint against the Commissioners.
22. Mr de Beer has not alleged or provided any evidence that he is entitled to represent Mr Zuma – he is not even a legal practitioner on his own version.¹⁰
23. In the absence of Mr de Beer substantiating his standing, the complaint should be rejected outright.
24. Second, while allegations are made that Mr Zuma's and the MK Party's rights in the South Africa Bill of Rights have been violated by the Commissioners, Mr de Beer has not identified what rights have allegedly been infringed and does not substantiate the allegation.
25. This mere assertion that rights have been violated is not a cognisable allegation of misconduct, incompetence or incapacity on the part of the Commissioners. As the person making the assertion, Mr de Beer has not established his standing to raise the allegations.
26. Third, Mr de Beer claims to act in the public interest, but I am advised that the Constitutional Court has stressed that public interest standing is not to be

⁹ Bundle 1 page 10 para 5 and Bundle 2 page 13 para 8.

¹⁰ See Bundle 1 page 11 para 8

assumed and must be properly proven and demonstrated by clear evidence. Mr de Beer has not come close to meeting that standard. The opposite is true: on Mr de Beer's own version the party and person that he asserts rights on behalf of never raised the African Commission process and the complaints associated therewith before the Constitutional Court.

Palpable lack of urgency and self-created mootness

27. Mr de Beer asks the Court to address his complaint and allegations urgently.
28. The sole basis upon which he claims that the Court's urgent attention is required in the matter is that "the elections scheduled for next week, Wednesday, 29 May 2024, will be directly impacted by it."¹¹
29. The matter is now moot. We deny that the National and Provincial elections will be impacted by the complaint.
 - 29.1 The applicant has failed to make a *prima facie* evidential basis for the removal of the Commissioners.
 - 29.2 In any event, at most this Court can make a *recommendation* pertaining to the Commissioners to the National Assembly pursuant to section 20(7) of the Electoral Commission Act.
 - 29.3 The Commissioners could however only be removed under section 7(3)(a) of the Act and section 194(2)(b) of the Constitution, by majority vote of the National Assembly.

¹¹ Complaint page 6 para 4.

29.4 Even if this Court makes a recommendation to this effect, the National Assembly has its own processes that it would have to follow before Commissioners could be removed.

29.4.1 In December 2019, the National Assembly adopted Rules for Removal from office of a holder of a public office in a State Institution Supporting Constitutional Democracy (a copy of the ATC Report containing the Rules as adopted is attached as **EC1**).

29.4.2 Rule 129R provides that a Member of the Assembly can initiate proceedings for the removal of a Commissioner by way of substantive motion.

29.4.3 Importantly, the substantive motion initiating the proceedings “must be limited to a clearly formulated and substantiated charge on the grounds specified in section 194, which must prima facie show that the holder of a public office committed misconduct, is incompetent or is incapacitated, and must provide all necessary evidence.”

29.4.4 The Speaker is then obliged by Rule 129T to refer the motion to an independent panel for investigation. The panel is made up of three fit and proper South Africans appointed by the Speaker (which may include a Judge) (Rule 129V). The panel’s functions include determining whether there is *prima facie* evidence of misconduct, incapacity or incompetence (Rule 129X) and making a recommendation.

29.4.5 The recommendation is considered by the Assembly and will be referred to a Committee if so resolved by the Assembly.

29.4.6 The Committee is empowered by Rule 129AD to conduct an enquiry and make findings and recommendations to the National Assembly.

29.5 All this will take many months (if not longer).

30. In the meantime, the election has already been held and the Commission has declared the results on Sunday 2 June 2024.

31. Therefore, the elections have been declared long before any action against the Commissioners can be taken pursuant to Mr de Beer's complaint.

32. Mr de Beer only lodged his complaint on 23 May 2024. He has not explained why he did not bring the complaint sooner.

32.1 The conduct Mr de Beer complains of occurred many months before he approached this Court.

32.2 For instance, the Commission's application for direct leave to appeal to the Constitutional Court was made on 11 April 2024.

32.3 The application was then heard by the Constitutional Court on 10 May 2024.

32.4 Mr de Beer gives no explanation for why he waited to approach the Court until less than a week before the elections.

32.5 Mr de Beer was on high notice to act with expedition. The Constitutional Court rejected his application for “rescission” (lodged on 13 May 2024) of the Court’s refusal to admit Mr de Beer as an amicus/intervenor. It did so expressly on the basis that “it is not in the interests of justice to entertain it as, from 7 May 2024, until after the hearing on 10 May 2024, the applicant did nothing about the nature of the order issued on 7 May 2024.”¹²

32.6 The Constitutional Court’s conclusion on the “interests of justice” not entitling an urgent hearing applies with even greater force to Mr de Beer’s efforts to belatedly – and without explanation for his lateness – seek this Court’s urgent intervention.

LEGAL FRAMEWORK

33. The Commission is established in terms of sections 181(1)(f) and 190 of the 1996 Constitution. It is a Chapter 9 institution supporting democracy. The Commission is independent of the other branches of State, subject only to the Constitution and the law, and must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice.¹³

34. Section 194 of the Constitution carefully delineates the instances in which Commissioners may be removed from office.

34.1 Subsection (1) provides:

¹² Complaint p 21, Unanimous order of the Constitutional Court.

¹³ Section 181(2) of the Constitution.

“The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on—

- (a) the ground of *misconduct, incapacity or incompetence*;
- (b) a finding to that effect by a committee of the National Assembly; and
- (c) the adoption by the Assembly of a resolution calling for that person’s removal from office.”

34.2 Subsection (2)(b) states that:

“A resolution of the National Assembly concerning the removal from office of ... a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.”

35. Importantly, in terms of the Constitution, Commissioners may not be removed at will by any other person (this is echoed in section 7(3)(a) of the Act).

35.1 This is to protect the Commission’s impartiality and independence (much like Judges are protected from at-will removal).

35.2 A ground of “misconduct, incapacity or incompetence” must first be established with evidence, not mere accusations.

36. Frivolous, vexatious and unsubstantiated complaints cannot be tolerated – if they are given more weight than they deserve, Commissioners (and the heads of other Chapter 9 institutions) may be chilled from exercising their functions and powers in law to support democracy.

37. Mr de Beer’s complaint is premised entirely on such frivolous, vexatious and unsubstantiated accusations made against the Commissioners.

THE CONSTITUTIONAL COURT PROCEEDINGS

38. The core of Mr de Beer's complaint is his allegation that we, the Commissioners, (a) were aware of the African Commission process and (b) failed to draw this to the Constitutional Court's attention in the proceedings concerning Mr Zuma's ineligibility.

39. We were not aware of the African Commission process until Mr de Beer sought to make something of it in his efforts to approach the Constitutional Court. So his complaint falls at the first hurdle.

40. In respect of the allegation that we were all aware of the African Commission process, Mr de Beer's unfounded imputations of our "awareness" also misunderstands and misstates the position of the Commission within the Government of the Republic of South Africa.

40.1 He argues that we must have been aware of the process (and the decision of March 2024) contending that we are "representatives of the state",¹⁴ and speculates that we were "briefed by President Cyril Ramaphosa and his cabinet" in this regard.¹⁵

40.2 The Commission is independent from the Executive, Legislature and Judiciary.

¹⁴ Complaint page 11 para 26.

¹⁵ Complaint pages 10-11 para 24.

- 40.3 It has no role or function pertaining to the Republic's international affairs. The Constitution vests the power with the Executive branch of government to deal with international relations and legal obligations.
- 40.4 The Commission has no role in dealing with complaints made to the African Commission or any other international body or tribunal against the Republic.
- 40.5 It thus the case that none of the Commissioners were aware of the African Commission process until Mr de Beer raised the issue in this applications before the Constitutional Court.
41. It is correct that the African Commission process was not raised by the Commission before the Constitutional Court. But, as I have explained above, there was no obligation or ability on the Commissioners' part to do so – and not having done so is not misconduct, incompetence or incapacity. The Commission was not aware of this process.
42. Even if it had been raised before the Constitutional Court by the Commission, it would have gone nowhere. That is clear from the fact that the Constitutional Court itself had received Mr de Beer's application and was unmoved to admit the application for consideration on 7 May (or re-consideration on 16 May). In the circumstances, the Constitutional Court was fully aware of the African Commission process.
- 42.1 First, in his application for leave to intervene / be admitted as an amicus curiae (intervention / amicus application), Mr de Beer made the same

point he does in this matter: that the Commissioners ought to have raised the African Commission process before the Electoral Court.¹⁶

42.1.1 In his founding affidavit he also addressed the process in detail.¹⁷

42.1.2 His founding affidavit was read and considered by the eight Justices of the Constitutional Court who rejected his application.¹⁸ All eight of these Justices heard the Commission's application on 10 May 2024 (together with Deputy Chief Justice Maya).

42.1.3 Important to note is that in dismissing his application, the Constitutional Court found that Mr de Beer did "not raise any novel arguments".¹⁹

42.1.4 Therefore, the Constitutional Court confirmed that his arguments pertaining to the African Commission process were not helpful to its determination of the matter. The Court confirmed that they were not relevant.

42.2 Second, in his rescission application launched after the hearing and dismissed before judgment was handed down, Mr de Beer again refers

¹⁶ Bundle 1 page 14 paras 17-18.

¹⁷ Bundle 1 pages 20-22 paras 38-49.

¹⁸ Bilchitz AJ, Gamble AJ, Madlanga J, Mathopo J, Majiedt J, Mhlantla J, Theron J and Tshiqi J.

¹⁹ The order is attached as annexure A to the complaint page 17.

to the African Commission process.²⁰ This application was dismissed by the same eight Justices who decided the case.

42.3 Third, Mr de Beer claims in his affidavit in the rescission application that he delivered a copy of the African Commission's presently confidential decision from March 2024 to the Constitutional Court on 26 April 2024.²¹ He only attaches a single page of a letter addressed to the Registrar with his stamp dated 26 April 2024.²² It is not apparent from what Mr de Beer has selectively attached whether the African Commission's decision was provided to the Court, but Mr de Beer must be held to his claim that the decision was conveyed to the Deputy Chief Justice – who, on his version, would have been fully cognisant of the arguments he now presses before this Court.

43. Yet, the Court chose to dismiss his application. And despite the Constitutional Court being fully aware of the African Commission process on Mr de Beer's version, it did not address it in its judgment when it upheld the Commission's decision.

44. It is further important to note that Mr Zuma's and the MK Party's counsel did not seek to rely on the African Commission process in their submissions to the Constitutional Court, despite also being fully aware of the complaint after it had been lodged with the Constitutional Court, and despite raising allegations of bias against the Commission.

²⁰ Bundle 2 page 14 para 11, page 16 para 20, page 20 para 34.

²¹ Bundle 2 page 19 para 30.

²² Bundle 2 page 38 annexure RES11.

45. Mr de Beer plainly seeks to resuscitate issues that were dismissed by the Constitutional Court by lodging this complaint against the Commissioners. This should not be permitted, as a matter of finality in litigation, as well as in the interests of justice to avoid abuse of court processes, and particularly where the issues are raised again and again abusively without substantiation.

PROCESS BEFORE THE AFRICAN COMMISSION

46. As I have already explained, the African Commission has limited powers and none in relation to the final court decisions of South Africa's highest Court.

46.1 The Commission is established in terms of Article 30 of the African Charter on Human and Peoples' Rights.

46.2 The African Commission's mandate is to promote the human and peoples' rights in the charter and ensure their enforcement (Article 45)

46.3 It has powers to investigate, report on and make recommendations to the Assembly of Heads of State and Government of the African Union (Articles 52 and 53).

46.4 The Commission has no powers to make binding orders or directives.

47. The Africa Commission does not exercise appellate jurisdiction over the Courts of final instance of member States.²³

²³ I note that neither does the African Court on Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of An African Court on Human and Peoples' Rights (10 June 1998). The Court has held "that it is not an appellate jurisdiction to which decisions by national courts are referred and that, for that reason, the request [to overturn various fines emanating from a criminal conviction] cannot be granted." *Lohé Issa Konaté v Burkina Faso* App. No. 004/2013 Ruling on Reparations (3 June 2016) at para 24. At this

48. This is why no matter its outcome, the African Commission process has no relevance to the issue in dispute in the proceedings before the Constitutional Court. In the *Zuma contempt judgment*, Khampepe ADCJ made similar findings in relation to the analogous power of the United Nations Human Rights Committee to make recommendations.²⁴

49. I wish to make two further observations.

50. First:

50.1 The African Commission has considered the interplay between its role and the role of the South African Constitutional Court in upholding rights in the Republic.

50.2 In *Prince v South Africa*,²⁵ while recognising its role, the African Commission emphasised two doctrines of international human rights law – subsidiarity and the margin of appreciation.

“50. The African Commission notes the meaning attached to these doctrines by the respondent state as outlined in its submissions to the former. The principle of subsidiarity indeed informs the African Charter, like any other international and/or regional human rights instrument does to its respective supervisory body established under it, in that the African Commission could not substitute itself for internal/domestic procedures found in the respondent state that strive to give effect to the promotion and protection of human and peoples’ rights enshrined under the African Charter.

stage, since South African has not made a declaration providing for individuals to petition the Court directly, the Court may receive only cases from the Commission, State Parties, and African Intergovernmental Organisations against South Africa (see Articles 5(3) & 34(6)).

²⁴ At para 120 footnote 106.

²⁵ *Prince v S. Afr.*, Comm. 255/2002, 18th ACHPR AAR Annex III (2004-2005).

51. Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the respondent state in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape its society.

52. Both doctrines establish the primary competence and duty of the respondent state to promote and protect human and peoples' rights within its domestic order. That is why, for instance, the African Charter, among others, requires complainants to exhaust local remedies under its article 56. It also gives member states the required latitude under specific articles in allowing them to introduce limitations. *The African Commission is aware of the fact that it is a regional body and cannot, in all fairness, claim to be better situated than local courts in advancing human and peoples' rights in member states.*"

51. Second, Mr de Beer says that the African Commission has made a decision in relation to his complaint pertaining to Mr Zuma.

51.1 He attaches a redacted letter dated 20 March 2024 from the Executive Secretary of the Africa Commission to his intervention / amicus application before the Constitutional Court.²⁶

51.2 It is correct that the decision is confidential in terms of Article 59 of the African Charter until it is authorised for publication. As far as the Commission is aware, no such authorisation has been made.

51.3 It is nonetheless unclear what decision has been made by the Commission.

²⁶ Bundle 1 page 53 annexure E.

51.3.1 Before the African Commission will deal with the substantive merits of a complaint (or communication) it must decide on whether it is admissible in terms of Article 56 of the Treaty. Under the Commission's Rules of Procedure, admissibility must be decided first before merits and the decision on merits shall be deferred (Rule 118(3)).

51.3.2 Mr de Beer does not explain whether the African Commission has made a decision on admissibility (in terms of Rule 118 of the Commission's Rules of Procedure) or a decision on the merits (in terms of Rule 120).

51.4 It may well be that the decision pertains only to the admissibility of the complaint, which would be separate to any decision on the merits.

51.5 The Republic's response to Mr de Beer's complaint to the African Commission (attached to his intervention / amicus application) addresses jurisdiction and admissibility in detail.²⁷

51.6 The last time that the complaint was referred to in a published Activity Report of the African Commission was its 52nd and 53rd Activity Report (for the period 6 December 2021 to 9 November 2022).²⁸ At that stage, the matter was seized before the Working Group on Communications and no decision on admissibility had been made by the Commission.

²⁷ Bundle 1 pages 73-77 paras 25-37.

²⁸ Available at: <https://achpr.au.int/sites/default/files/files/2023-06/eng-achpr-52nd-53rdactivity-report.pdf>.

- 51.7 The matter was not referred to in the 54th and 55th Activity report (for the period 10 November 2022 to 10 November 2023).²⁹
- 51.8 The most probable inference to be drawn at this stage is that the March 2024 decision pertained only to admissibility and not to merits or reparations.
- 51.9 The Commission and Commissioners are not aware of what the March 2024 decision provides since they are independent from the Executive branch of the State.

THE COMPLAINT SHOULD BE REJECTED ON ITS OWN TERMS AT THE OUTSET

52. Even if this Court retained the jurisdiction to investigate complaints of misconduct, incompetence or incapacity against Commissioners of the Electoral Commission, it ought to reject Mr de Beer's complaint at the outset.
53. At the very least, a complaint must raise a *prima facie* case. The Court must be guided by two considerations:
- 53.1 First, is to ask whether if the allegations made were to be proved that would lead to a conclusion of misconduct, incapacity or incompetence on the part of any Commissioner.
- 53.2 Second, is to ask whether the allegations are substantiated and supported by cognisable evidence.

²⁹ Available at: <https://achpr.au.int/en/documents/2024-03-08/54th-55th-combined-activity-reports>.

54. In this case, the answer to each is No. A full blown inquiry with oral evidence and cross examination of Commissioners is not warranted in this case because the jurisdictional prerequisites for such an inquiry are plainly not met. It should not be entertained any further.

THE COMPLAINT IS VEXATIOUS

55. The complaint, as I have said, is vexatious.

56. The complaint is unsustainable on its own terms: Mr de Beer makes wide-ranging accusations of fraud, corruption and misconduct against the Commission and the Judiciary without one iota of evidence to substantiate this; it is plainly designed to embarrass the Commission and Commissioners; and it is brought – belatedly and without explanation for the delay – during the most important stage of the election period.

57. The Commission asks that Mr de Beer be ordered to pay the costs of the application on the attorney and client scale including the costs of two counsel. In the circumstances of the case, I submit that a departure from this Court's ordinary rule in relation to costs is warranted.

THE COURT'S DIRECTIVES AND CONDONATION

58. In terms of the Court's directives dated 27 May 2024, the answering affidavit was due on 30 May 2024.

59. It was impossible for the Commission and Commissioners to file this affidavit by that deadline.

59.1 The week of 27 May to 2 June 2024 was when the 2024 National and Provincial elections were held, with special voting on 27 and 28 May, and voting day on 29 May 2024.

59.2 The Commission and Commissioners were fully engaged in ensuring that the elections were held in a free and fair and lawful manner during this period.

59.3 Our attorneys therefore requested an extension to file the answering affidavit by today, Tuesday 4 June 2024.

59.4 We have not received a direct response to this request.

59.5 By 4 June 2024, a draft version of this affidavit had been prepared by our counsel and attorneys and was being considered by all of the Commissioners. The affidavit could not be finalised by the date.

59.6 On 4 June 2024 our attorneys addressed further correspondence to this Court (attached as **EC2**) recording that we would “endeavour to be in a position to file the answering affidavit by Thursday, 6 June 2024 and, to the extent necessary, condonation will be sought for any failure to comply with the Court’s directive.”

60. We accordingly apply for condonation for the filing of this affidavit to the extent necessary. With respect, we have shown good cause. It is plainly in the interests of justice that the affidavit and our full response be considered by the Court in

dealing with the complaint and Mr de Beer will suffer no prejudice whatsoever should condonation be granted.

61. Finally, we note that in response to our attorney's request for an extension, the Court's Secretary sent an email on 3 June 2024 stating that "*the matter has been referred directly to the IEC and an outcome is still awaited from which [they] shall proceed.*"

62. Since the complaint is against all the Commissioners, this is not a matter that we can determine ourselves – and this is why we file this comprehensive response to Mr de Beer's complaint.

SERIATIM RESPONSES

63. I now provide sequential responses to Mr de Beer's complaint.

64. To the extent that I do not address any allegation specifically, I ask that it be taken as denied.

Introduction

Ad para 4

65. I deny that the 2024 elections will be impacted by the complaint.

66. The elections have in any event been run, ballots have been counted and results have been declared as of Sunday 2 June 2024.

67. Mr de Beer has only himself to blame for the case being determined after the elections have been decided, given the self-created urgency I discussed earlier.

Ad para 5

68. I have addressed Mr de Beer's claims in this paragraph already.

69. He has not demonstrated his standing to pursue the complaint.

70. He has also failed to identify any rights of Mr Zuma's that he baldly contends have been infringed.

Ad para 6

71. That Mr de Beer simply asserts he acts in the "interests of the public" does not give him standing to pursue a complaint on behalf of the MK Party.

Background

Ad paras 15-16

72. I emphasise that the Constitutional Court dismissed both of Mr de Beer's applications.

73. Mr de Beer, as demonstrated above, seeks in the present complaint to retread arguments he had advanced before the Constitutional Court which the Court rejected not once but twice, and through what the Constitutional Court considered was the "interests of justice". He should not be permitted to raise the same arguments in this process by attacking the Commissioners, and this Court,

like the Constitutional Court, should consider that it would not be in the “interests of justice” for Mr de Beer to be permitted a third attempt.

Ad paras 17-18

74. I deny that Mr de Beer’s intervention / amicus application and rescission application contain any evidence of misconduct, incompetence or incapacity on the part of the Commissioners.

Foundation of complaint

Ad paras 19-22

75. I have addressed what Mr de Beer calls the “crux” of his complaint in detail above.

76. In relation to paragraph 19, the Commissioners and Commission are not involved in the African Commission process as I have explained and were not aware of it until Mr de Beer’s applications before the Constitutional Court (and Mr Zuma, I repeat, did not rely on the African Commission process in challenging the Commission’s decision).

77. In relation to paragraph 20, the Commission took an impartial and lawful decision in relation to Mr Zuma’s eligibility.

78. In relation to paragraph 21, the Commissioners deny:

78.1 that they deprived the Constitutional Court of “all relevant facts necessary for a fair and just judgment”;

- 78.2 that they “have intentionally harmed Mr. Zuma, the MK Party” or harmed them in any way at all;
- 78.3 that they have “deceived the public, particularly the voters, who were denied the opportunity to receive balanced reporting shortly before the elections”;
- 78.4 that the freeness and fairness of the elections is under question “automatically” or otherwise;
- 78.5 that they have “concealed crucial information”;
- 78.6 that they have “violated their oaths of office”; and
- 78.7 that they have “interfer[ed] with the final results of the elections”.
79. In relation to paragraph 22, the Commissioners deny:
- 79.1 that they “conceal[ed] the existence of the ACHPR process from the voters at this late stage”;
- 79.2 that they “have breached the IEC’s independence”,
- 79.3 that they have demonstrated bias”; and
- 79.4 that “they failed to exercise their powers and perform their functions without fear, favour, or prejudice”.
80. These wide-ranging and wanton allegations of improper conduct and bias are made without any evidence of foundation and must be rejected.

Ad para 23

81. None of the Commissioners are aware of the decision of the African Commission from March 2024 – it remains confidential.

Ad para 24

82. Mr de Beer appears to believe that the Commission forms part of the Executive branch of government, or receives briefing from the President (or that its legal representatives do).

Ad para 25

83. The African Commission process was in any event not relevant to the Commission's determination concerning Mr Zuma's eligibility.

84. I again deny that the process was ever concealed by the Commissioner or Commissioners.

85. The Commissioners deny:

85.1 that they have acted in a "grossly negligent" manner or "*mala fide*";

85.2 that any credible "allegations of corruption" have been made against them or that they are in anyway corrupt;

85.3 that there was any "collusion to steer the case before the Constitutional Court towards a predetermined outcome" – the Commissioners applied the law as they were required to do so: the Constitutional Court

confirmed that their interpretation of section 47(1)(e) of the Constitution and its application to Mr Zuma was correct.

86. Mr de Beer again makes wanton and unfounded allegations of improper conduct against the Commissioners that we deny and which must be rejected.

Ad para 26

87. The Commission is an independent organ of state. Neither the Commission nor the Commissioners represent South Africa in international relations or before the Africa Commission.

Ad paras 27-28

88. I again deny that the Commission and Commissioners “intentional[ly] conceal[ed]” the African Commission process, whether before the Constitutional Court or at all.
89. Mr de Beer refers in this paragraph to “proxies”. The Commissioners do not understand what is meant by this reference which is another regrettable example of unproven claims designed to scandalise.
90. I reiterate that the Constitutional Court was aware of the African Commission process because of Mr de Beer’s intervention / amicus application, which the Court found raised no novel arguments, nor founded any basis for reconsideration.
91. Mr de Beer also refers to the recusal application brought by the MK Party and Mr Zuma in relation to the Constitutional Court. The individual members of the Court

declined to recuse themselves and dismissed the application. He argues that the recusal application was dismissed because the African Commission process was concealed (in para 28). His argument is wrong and not founded in fact. The Court's reasons for dismissing the application are fully recorded in its judgment;³⁰ and when it gave those reasons the Justices were fully aware of Mr de Beer's claims about the African Commission process.

Ad para 29

92. The Constitutional Court is the final Court and has the final word on these issues. That is how our judicial system works.
93. Mr de Beer did seek a rescission of the order dismissing his intervention / amicus application, which as I have said was also dismissed.

Ad para 31

94. The Commission and Commissioners have respected, protected, promoted, and fulfilled the rights in the Bill of Rights – particularly the political rights of voters, parties and candidates – by ensuring that it administered the 2024 election in accordance with the Constitution and the law.
95. I do not understand why Mr de Beer takes issue with the Commission making arguments "impartially".

³⁰ At paras 18-27.

Ad para 32

96. The Commissioners deny:

96.1 That Mr Zuma's and the MK Party rights have been violated; and

96.2 That they have lost independence.

97. I emphasise again that Mr de Beer has no standing to claim that Mr Zuma's and the MK Party's rights have been violated.

Ad para 33

98. The contents of this paragraph are denied.

99. The Commission applied for direct leave to appeal against the Electoral Court's judgment to obtain certainty about the proper interpretation of section 47(1)(e) of the Constitution and its application to Mr Zuma.

Ad para 34

100. The Commissioners deny:

100.1 that they have "lost their independence and impartiality";

100.2 that there is "a grave miscarriage of justice" to any person.

Ad para 35

101. The contents of this paragraph are denied.

102. There is absolutely no evidence of collusion amongst the Commissioners or with “outsiders” as Mr de Beer contends.

103. I deny that the Commissioners’ conduct implicates their independence and impartiality.

104. Finally, I deny that the conduct claimed of by Mr de Beer impacts on the freeness and fairness of the election.

Ad para 36

105. It is a matter of public record that Justice Pillay recused herself from the Commission’s decision pertaining to Mr Zuma’s eligibility to hold office as a member of the National Assembly.

106. Justice Pillay denies that “her future participation in the decisions of the IEC, and her influence as the judge sitting on the IEC, overshadowed her initial apparent good intentions.”

107. Mr de Beer makes serious allegations of improper conduct against a Justice of the High Court without any foundation or evidence. The caution by the Supreme Court of Appeal directed against Mr de Beer has been abjured by him – justifying the punitive costs order sought.

Ad para 37

108. Mr de Beer here refers to accusations he has made of improper conduct against Justice Pillay, Justice Unterhalter and CASAC.

109. These allegations are made without foundation and inappropriately and are denied by Justice Pillay.

Ad para 38

110. Mr de Beer here attacks the credibility of counsel briefed by the Commission, Mr Ngcukaitobi SC.

111. He tries to draw links between the Commission and CASAC through Mr Ngcukaitobi SC who sits on the CASAC advisory council. He does so with not a jot of evidence.

112. All of these unfounded conspiracies are irrelevant to the “crux” of Mr de Beer’s complaint about the African Commission’s process.

113. Mr Ngcukaitobi SC is a well-known and well-regarded Senior Counsel who is briefed by a number of different parties in many different constitutional law cases. There is nothing untoward about him being briefed by the Commission and there is no evidence that he acted in any improper or inappropriate manner in doing so.

Ad para 39

114. Mr de Beer makes inflammatory allegations against CASAC and Mr Ramaphosa without any evidence to sustain them.

Conclusion

Ad para 40

115. The Commissioners deny that they have acted improperly or inappropriately in any way.

Ad para 41

116. The contents of this paragraph are denied.

117. Mr de Beer has not demonstrated any evidence of the Commissioners violating our oath of office.

118. His accusations that there is a “suspicion of corruption” and that we may be “implicate[d] ... in suspected treason and terrorism against the state itself” have no foundation in fact or reality and must be rejected.

Ad paras 43-44

119. This Court with respect cannot “oversee” the Judicial Service Commission as Mr de Beer suggests here, nor can it be involved in a commission of inquiry, or order any such inquiry where the jurisdictional facts therefor are wantonly absent.

CONCLUSION

120. Mr de Beer’s vexatious and frivolous complaint should be dismissed outright and he should be ordered to pay the Commission’s and Commissioners’ costs on the attorney client scale, including the costs of two counsel on the C scale.


MOSOTHO SIMON MOEPYA

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at CENTURION on 5TH JUNE 2024, the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended by Government Notice No. 1648 of 17 August 1977, as amended having been complied with.


COMMISSIONER OF OATHS
DESIGNATION

KELETSO BOLANI
Commissioner of Oaths
Practising Attorney Gauteng
Moeti Kanyane Attorneys
Second Floor, Building B, Westend Office Park
250 Hall Street, Centurion, 0157
Date:.....Signature:.....

Thursday, 28 November 2019]

No 111 – 2019] FIRST SESSION, SIXTH PARLIAMENT

**PARLIAMENT
OF THE
REPUBLIC OF SOUTH AFRICA**

**ANNOUNCEMENTS, TABLINGS AND COMMITTEE
REPORTS**

THURSDAY, 28 NOVEMBER 2019

TABLE OF CONTENTS

ANNOUNCEMENTS

National Assembly and National Council of Provinces

1. Assent to Bills 2

National Assembly

1. Appointment of whip 2
2. Request for Nomination of Candidates for Appointment to
Agricultural Research Council 2

National Council of Provinces

1. Withdrawal of Ikamva Digital Institute Bill in line with NCOP Rule 241 3
2. Referral to Committees of papers tabled 3

TABLINGS

National Assembly and National Council of Provinces

1. Minister of Cooperative Governance and Traditional Affairs 3

COMMITTEE REPORTS

National Assembly

1. Rules Committee 4
2. Justice and Correctional Services 12
3. Appropriations 36

National Council of Provinces

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ANNOUNCEMENTS

National Assembly and National Council of Provinces

The Speaker and the Chairperson

1. Assent by President in respect of Bills

- (1) **Traditional Leadership and Governance Framework Amendment Bill** [B 8D – 2017] – Act No 2 of 2019
(assented to and signed by President on 20 November 2019).
(Isichibiyelo soMthetho Wobuholi Bendabuko kanye Nohlaka Lokuphatha (IsiZulu)).
- (2) **Traditional and Khoi-San Leadership Bill** [B 23D – 2015] – Act No 3 of 2019
(assented to and signed by President on 20 November 2019).
(Wet op Tradisionele en Khoi-San-leierskap (Afrikaans)).
- (3) **Critical Infrastructure Protection Bill** [B 22D – 2017] – Act No 8 of 2019
(assented to and signed by President on 20 November 2019).
(Umthetho Wokukhuselwa Kweziseko Ezibalulekileyo Ezingundoqo (IsiXhosa)).

National Assembly

The Speaker

1. Appointment of whip

- (1) The following member has been appointed as a whip of the Democratic Alliance in the National Assembly with effect from 22 November 2019:

Macpherson, D W

2. Request for Nomination of Candidates for Appointment as Members of Agricultural Research Council

- (1) A letter, dated 21 November 2019, has been received from the Minister of Agriculture, Land Reform and Rural Development, informing the Assembly that the term of office of members of the Agricultural Research Council expires on 31 March 2020, and requesting the Assembly to submit nominations of candidates to be considered for appointment as members of the Council, in terms of section 9 (3) (a) (i) of the Agricultural Research Act, 1990 (Act No 86 of 1990).

Referred to the **Portfolio Committee on Agriculture, Land Reform and Rural Development** for consideration and report.



National Council of Provinces

The Chairperson

- 1. Withdrawal of Ikamva Digital Institute Bill in line with NCOP Rule 241**
Referred to the **Select Committee on Public Enterprises and Communication** for information.
 - 2. Referral to Committees of papers tabled**
 - (1) The following paper is referred to the Select Committee on Security Justice for consideration and report:
 - (a) Report on the Suspension/Removal from office of Ms I Meyburgh, an Additional Magistrate at Johannesburg, in terms of section 13(4)(b) of the Magistrates Act, 1993 (No 90 of 1993).
-

TABLINGS

National Assembly and National Council of Provinces

- 1. The Minister of Cooperative Governance and Traditional Affairs**
 - (a) Reports and Financial Statements of Vote 4 – Department of Traditional Affairs for 2018-19, including the Reports of the Auditor-General on the Financial Statements and Performance Information of Vote 4 for 2018-19.
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COMMITTEE REPORTS

National Assembly



1. Third Report of National Assembly Rules Committee, 2019

The Speaker of the National Assembly, as Chairperson of the National Assembly Rules Committee, presents the Third Report of the Rules Committee as follows:

A. INTRODUCTION

The National Assembly Rules Committee (Rules Committee) met on 10 September and 26 November 2019, respectively, to deliberate on various rule amendments and determinations as required by the rules. The meeting of 26 November considered proposals and recommendations from the Subcommittee on Review of Assembly Rules on the following matters referred to it by the Rules Committee, namely –

- (1) Statements by Members
- (2) Sequence of Proceedings; and
- (3) New Rules in respect of the Removal of Office-Bearers in Institutions Supporting Constitutional Democracy (including a consequential amendment to Rule 88 dealing with reflections upon judges and certain other holders of public office).

Having now considered these proposals and recommendations the Rules Committee reports as follows:

B. STATEMENTS BY MEMBERS

Rule 132(5) provides that at the conclusion of statements by members, a Minister or Deputy Minister present may be given an opportunity to respond, for not more than two minutes, to any statement. On 26 November 2019, the Rules Committee agreed that the time allocated to Ministers or Deputy Ministers to respond to members' statements should be increased to three minutes. The Rules Committee therefore recommends that the House agree to amend Rule 132(5) as follows:

Rule 132(5)¹

At the conclusion of statements by members, a Minister or Deputy Minister present may be given an opportunity to respond, for not more than **[two]** three minutes, to any statement.

The Rules Committee also determined the number of permissible ministerial responses to members' statements at seven ministerial responses. This is in line with Rule 132(6) which provides that the Rules Committee determines the number of permissible ministerial responses to members' statements.

¹ Words in **bold** type in square brackets indicate omissions from existing rules. Words underlined with a solid line indicate insertions.



C. SEQUENCE OF PROCEEDINGS

In terms of Rule 47 – Sequence of Proceedings – Members’ Statements are scheduled after motions without notice. Over time, however, a concern was raised that to facilitate sufficient opportunity for ministerial responses to members’ statements the sequence of proceedings should be amended to ensure that Members’ Statements are taken towards the start of proceedings on days that they are scheduled. The Rules Committee therefore recommends that the House agree to amend Assembly Rule 47 as follows:

Rule 47. Sequence of proceedings

- (1) Subject to the Constitution and these rules, and unless altered by resolution of the House, the business on each sitting day of the House must follow the following sequence of events:
 - (a) opportunity for silent prayer or meditation;
 - (b) announcements from the Chair;
 - (c) swearing in of new members;
 - (d) formal motions moved by the Chief Whip;
 - (e) when scheduled by the Programme Committee, opportunity for statements by members and responses to statements by Cabinet members;
 - (f) statements by Cabinet members; and
 - (g) orders of the day and notices of motion on the Order Paper, which must be dealt with in sequence; provided that precedence must be given to questions on question days.

- (2) Subject to Subrule (1), and unless altered by resolution of the House, the business on any sitting day of the House may additionally include any event below, after the business under Subrule (1) has been completed and if included during any sitting must follow the following sequence of events:
 - (a) Any other formal motions;
 - (b) motions without notice;
 - (c) **[opportunity for statements by members and responses to statements by Cabinet members];**
 - (c) notices of motion; and
 - (d) petitions.

D. NEW RULES - REMOVAL OF OFFICE-BEARERS IN INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY



Section 194(1) of the Constitution, 1996 states that the office-bearers and commissioners in Institutions Supporting Constitutional Democracy (Chapter Nine of the Constitution) may be removed from office on specific grounds. While the Constitution and the rules do set out a broad framework for Parliament to exercise its functions in terms of Section 194, there was a view that, to ensure clarity and uniformity, specific rules were required in respect of the removal of these office-bearers and commissioners. To this effect, the Committee recommends the insertion of the following new rules:

Part 4: Removal from office of a holder of a public office in a State Institution Supporting Constitutional Democracy

Definitions

For the purposes of Part 4 -

“holder of a public office” means a person appointed in terms of Chapter 9 of the Constitution;

“incapacity includes —

- (a) a permanent or temporary condition that impairs a holder of a public office’s ability to perform his or her work; and
- (b) any legal impediment to employment;

“incompetence” in relation to a holder of a public office, includes a demonstrated and sustained lack of —

- (a) knowledge to carry out; and
- (b) ability or skill to perform,

his or her duties effectively and efficiently;

“member of a commission” means a member of a commission established under Chapter 9 of the Constitution;

“misconduct” means the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office; and

“section 194 enquiry” means an enquiry by the Assembly to remove a holder of a public office in terms of section 194 of the Constitution and these rules.

Initiation of section 194 enquiry

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129R². Initiation of Section 194 enquiry

- (1) Any member of the Assembly may, by way of a notice of a substantive motion in terms of Rule 124(6), initiate proceedings for a section 194(1) enquiry, provided that –
- (a) the motion must be limited to a clearly formulated and substantiated charge on the grounds specified in section 194, which must *prima facie* show that the holder of a public office:
 - (i) committed misconduct;
 - (ii) is incapacitated; or
 - (iii) is incompetent;
 - (b) the charge must relate to an action performed or conduct ascribed to the holder of a public office in person;
 - (c) all evidence relied upon in support of the motion must be attached to the motion; and
 - (d) the motion is consistent with the Constitution, the law and these rules.
- (2) For purposes of proceedings in terms of section 194(1), the term “charge” must be understood as the grounds for averring the removal from office of the holder of a public office.

129S. Compliance with criteria

Once a member has given notice of a motion to initiate proceedings in a section 194 enquiry, the Speaker may consult the member to ensure the motion is compliant with the criteria set out in this rule.

129T. Referral of motion

When the motion is in order, the Speaker must –

- (a) immediately refer the motion, and any supporting documentation provided by the member, to an independent panel appointed by the Speaker for a preliminary assessment of the matter; and
- (b) inform the Assembly and the President of such referral without delay.

Independent panel to conduct preliminary assessment into Section 194 enquiry**129U. Establishment**

² The numbering of the rules would follow Rule 129A-Q, which concern the removal of the President in terms of Section 89 of the Constitution. This would be a temporary arrangement until the rules are re-printed, at which point both would be separate rules and be re-numbered accordingly.

The Speaker must, when required, establish an independent panel to conduct any preliminary inquiry on a motion initiated in a section 194 enquiry.

129V. Composition and Appointment

- (1) The panel must consist of three fit and proper South African citizens, which may include a judge, and who collectively possess the necessary legal and other competencies and experience to conduct such an assessment.
- (2) The Speaker must appoint the panel after giving political parties represented in the Assembly a reasonable opportunity to put forward nominees for consideration for the panel, and after the Speaker has given due consideration to all persons so nominated.
- (3) If a judge is appointed to the panel, the Speaker must do so in consultation with the Chief Justice.

129W. Chairperson

The Speaker must appoint one of the panellists as chairperson of the panel.

129X. Functions and powers of the panel

- (1) The panel –
 - (a) must be independent and subject only to the Constitution, the law and these rules, which it must apply impartially and without fear, favour or prejudice;
 - (b) must, within 30 days of its appointment, conduct and finalise a preliminary assessment relating to the motion proposing a section 194 enquiry to determine whether there is *prima facie* evidence to show that the holder of a public office –
 - (i) committed misconduct;
 - (ii) is incapacitated; or
 - (iii) is incompetent; and
 - (c) in considering the matter –
 - (i) may, in its sole discretion, afford any member an opportunity to place relevant written or recorded information before it within a specific timeframe;
 - (ii) must without delay provide the holder of a public office with copies of all information available to the panel relating to the assessment;
 - (iii) must provide the holder of a public office with a reasonable opportunity to respond, in writing, to all relevant allegations against him or her;
 - (iv) must not hold oral hearings and must limit its assessment to the relevant written and recorded information placed before it by

members, or by the holder of a public office, in terms of this rule;
and

- (v) must include in its report any recommendations, including the reasons for such recommendations, as well as any minority view of any panellist.
- (2) The panel may determine its own working arrangements strictly within the parameters of the procedures provided for in this rule.

129Y. Quorum

The panel may proceed with its business when the chairperson and one other panellist is present.

129Z. Consideration of panel recommendations

- (1) Once the panel has made its recommendations the Speaker must schedule the recommendations for consideration by the Assembly, with due urgency, given the programme of the Assembly.
- (2) In the event the Assembly resolves that a section 194 enquiry be proceeded with, the matter must be referred to a committee for a formal enquiry.
- (3) The Speaker must inform the President of any action or decision emanating from the recommendations.

Committee for section 194 Enquiry

129AA. Establishment

There is a committee to consider motions initiated in terms of section 194 and referred to it.

129AB. Composition and Appointment

- (1) The committee consists of the number of Assembly members that the Speaker may determine, subject to the provisions of Rule 154.
- (2) Notwithstanding Rule 155(2), the members of the committee must be appointed as and when necessary.

129AC. Chairperson

The committee must elect one of its members as chairperson.

129AD. Functions and powers of the committee

- (1) The committee must, when the Assembly has approved the recommendations of the independent panel in terms of Rule 129Z proceed to conduct an enquiry and establish the veracity of the charges and report to the Assembly thereon.

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- (2) The committee must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe.
- (3) The committee must afford the holder of a public office the right to be heard in his or her own defence and to be assisted by a legal practitioner or other expert of his or her choice, provided that the legal practitioner or other expert may not participate in the committee.
- (4) For the purposes of performing its functions, the committee has all the powers applicable to parliamentary committees as provided for in the Constitution, applicable law and these rules.

129AE. Decisions

A question before the committee is decided when a quorum in terms of Rule 162(2) is present and there is agreement among the majority of the members present, provided that, when the committee reports, all views, including minority views, expressed in the committee must be included in its report.

129AF. Report to the National Assembly

The report of the committee must contain findings and recommendations including the reasons for such findings and recommendations.

- (1) The report must be scheduled for consideration and debate by the Assembly, with due urgency, given the programme of the Assembly.
- (2) If the report recommends that the holder of a public office be removed from office, the question must be put to the Assembly directly for a vote in terms of the rules, and if the required majority of the members support the question, the Assembly must convey the decision to the President.

E. AMENDMENT TO RULE 88 – REFLECTIONS UPON JUDGES AND CERTAIN OTHER HOLDERS OF PUBLIC OFFICE

At present, Assembly Rule 88 provides that no member may reflect on the competence or integrity of the holder of a public office in a state institution supporting constitutional democracy whose removal from such office is dependent upon a decision of the House, except upon a motion, which, if true, would in the opinion of the Speaker, *prima facie*, warrant such a decision. Given the proposed Rules 129R-129AF the Rules Committee recommends that the following consequential amendment to Rule 88 should be made as follows –

Rule 88. Reflections upon judges and certain other holders of public office

No member may reflect on the competence or integrity of a judge of a superior court, the holder of a public office in a state institution supporting constitutional democracy referred to in section 194 of the Constitution or any other holder of an office (other than a member of the government), whose removal from office is dependent upon a decision of the House, except upon a separate substantive motion in the House presenting clearly formulated and properly substantiated charges [**which, if true, would in the opinion of the Speaker, *prima facie* warrant such a decision**].



Report to be considered.

MSM
MC

[The following report replaces the Report of the Portfolio Committee on Justice and Correctional Services, which was published on page 10 of the Announcements, Tablings and Committee Reports dated 27 November 2019]

2. Report of the Portfolio Committee on Justice and Correctional Services on whether or not to restore Advocate Nomgcobo Jiba and Advocate Lawrence Sithembiso Mrwebi to their positions of Deputy National Director of Public Prosecutions and Special Director of Public Prosecutions at the National Prosecuting Authority, in terms of sections 12(6) of the National Prosecuting Authority Act 32 of 1998, dated 27 November 2019

The Portfolio Committee on Justice and Correctional Services, having considered the President's decision to remove Advocate Nomgcobo Jiba, Deputy National Director of Public Prosecutions, and Advocate Lawrence Sithembiso Mrwebi, Special Director of Public Prosecutions, from their respective positions at the National Prosecuting Authority in terms of sections 12(6) of the National Prosecuting Authority Act 32 of 1998, reports as follows:

1. Introduction

- 1.1. In a letter to the Speaker of the National Assembly, dated 25 June 2019, the President communicated his decision to remove Adv. Nomgcobo Jiba and Adv. Lawrence Sithembiso Mrwebi from their positions at the National Prosecuting Authority (NPA) of Deputy National Director of Public Prosecutions (DNDPP) and Special Director of Public Prosecutions (SDPP), respectively, in terms of section 12(6)(b) of the National Prosecuting Authority Act 32 of 1998 ("the Act").
- 1.2. Section 12(6)(b) of the Act required the President to communicate his decision to remove Adv. Jiba and Adv. Mrwebi from their positions at the NPA, in a message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session. The President had informed Adv. Jiba and Adv. Mrwebi of his decision to remove them from office with effect from 26 April 2019 in a letter, dated



25 April 2019. At the time, however, Parliament was dissolved ahead of the 2019 General Elections.

1.3. Section 12(6)(c) of the Act provides that Parliament shall, within 30 days after the communication of the message has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not restoration to office at the NPA is recommended.

1.4. On 3 July 2019, the President’s message containing his decision and accompanying documentation was referred to the Committee for consideration and report. The accompanying letter states that the basis for the decision is both reports and submissions, read together.

1.5. The following documents accompanied the message:

“... ”

- *The decision to remove Advocate Nomgcobo Jiba and Advocate Lawrence Sithembiso Mrwebi from their position in the NPA, which includes the reasons therefor (two separate letters to both Advocate Jiba and Advocate Mrwebi dated, 25 April 2019);*
- *The unabridged version of the Report of the Panel;*
- *The abridged version of the Report of the Panel (the abridged version was, as described by the Panel, compiled to make a more easily ‘consumable’ version); and*
- *The submissions made by both advocates in response to the Report. Advocate Jiba had annexures to her submission (please refer to Annexure A attached).”*

2. **Relevant empowering provisions**

2.1. Section 9 of the Act sets out the qualifications for appointment to the position of National Director of Public Prosecutions, Deputy National Director of Public Prosecutions or Director of Public Prosecutions at the NPA. In addition to possessing the requisite legal qualifications to practice in all courts in the Republic, these must be fit and proper person(s), with due regard to their experience, conscientiousness and integrity to be entrusted with the responsibilities of the office concerned.



- 2.2. The grounds for and process by which a National Director or Deputy National Director may be removed from office are provided for in sections 12(5), (6) and (7) of the Act.
- 2.3. Section 14(3) of the Act provides that the sections of the Act providing for the vacation of office and discharge of a National Director (and Deputy National Director) shall apply, with the necessary changes, with regard to the vacation of office and discharge of a Director.
- 2.4. In terms of section 12(6)(a) of the Act there are four permissible grounds for removing a National Director, Deputy National Director and Special Director from office: Misconduct; continued ill-health; incapacity to carry out his or her duties of office efficiently; or on account thereof that he or she is no longer a fit and proper person to hold the office concerned.
- 2.5. Section 12(5) of the Act provides that “(5) *The National Director or a Deputy National Director shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).*”
- 2.6. Section 12(6)(a) and (b) of the Act provides for the removal of the National Director or a Deputy National Director from his or her office:
- “(a) The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-*
- (i) for misconduct;*
- (ii) on account of continued ill-health;*
- (iii) on account of incapacity to carry out his or her duties of office efficiently; or*
- (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.*
- (b) The removal of the National Director or a Deputy National Director, the reason therefor and the representations of the National Director or Deputy National Director (if any) shall be communicated by message to Parliament within 14 days*



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after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.”

2.7. Parliament’s role in this process is provided for in section 12(6)(c) and (d) of the Act, namely:

“(c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended.

(d) The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.”

3. Overview of the removal process

3.1. Establishment of Enquiry

3.1.1. Adv. Jiba and Adv. Mrwebi were provisionally suspended from office at the NPA by the President on 26 October 2018, in terms of section 12(6)(a) of the Act, pending the completion of an enquiry into their fitness and propriety to hold office. Notably -

- Adv. Jiba served as a Deputy National Director of Public Prosecutions (DNDPP) from 22 December 2010. In December 2011, she was appointed as the Acting National Director of Public Prosecutions and held the position until 4 August 2013, when Mr Mxolisi Nxasana was appointed as National Director of Public Prosecutions, at which point she returned to her position as DNDPP.
- Adv. Mrwebi was appointed as a Special Director of Public Prosecutions (SDPP) and head of the Specialised Commercial Crime Unit (SCCU) on 25 November 2011.

3.1.2. Following their provisional suspension, the President established an Enquiry as required in terms of section 12(6)(a) of the Act to determine the fitness and propriety of Adv. Jiba and Adv. Mrwebi to hold office in their respective capacities.



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3.2. Terms of reference

3.2.1. The Enquiry's terms of reference were gazetted on 9 November 2018 in Government Notice 699 of 2018 (Government Gazette 42029).

3.2.2. The President appointed Justice Yvonne Mokgoro (retired) as chairperson, to conduct the Enquiry, assisted by Kgomotso Moroka SC and Thenjiwe Vilakazi. (Terms of Reference: paragraph 1)

3.2.3. The scope of Enquiry was to look into the fitness and propriety of both Adv. Jiba and Adv. Mrwebi to hold office in their respective capacities. (Terms of Reference: paragraphs 3 and 4)

3.2.4. In relation to Adv. Jiba, and at the Panel's discretion, the Enquiry was to consider evidence arising from the cases referred to in the Terms of Reference, namely:

- *Jiba and Another v General Council of the Bar of South Africa and Another Mrwebi v General Council of the Bar of South Africa* [2018] 3 All SA 622 (SCA).
- *Freedom under Law v National Director of Public Prosecutions & Others* 2018 (1) SACR 436 (GP).
- *General Council of the Bar of South Africa v Jiba & Others* 2017 (2) SA 122 (GP).
- *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP).
- *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA).
- *Zuma v Democratic Alliance* [2014] 4 All SA 35 (SCA).
- *Booyesen v Acting National Director of Public Prosecutions and Others* [2014] 2 ALL SA 319 (KZD).

Due regard was to be had to all other relevant information, which included matters relating to Richard Mdluli and Johan Wessel Booyesen. (Terms of Reference: paragraph 3.1.)



3.2.5. In relation to Adv. Mrwebi, and at the Panel's discretion, the Enquiry was to consider evidence arising from the cases referred to in the Terms of Reference as they related, directly or indirectly, to his conduct, namely:

- *Jiba and Another v General Council of the Bar of South Africa and Another Mrwebi v General Council of the Bar of South Africa* [2018] 3 All SA 622 (SCA).
- *Freedom under Law v National Director of Public Prosecutions & Others* 2018 (1) SACR 436 (GP).
- *General Council of the Bar of South Africa v Jiba & Others* 2017 (2) SA 122 (GP).
- *Freedom Under Law v National Director of Public Prosecutions and Others* [2014] (1) SA 254 (GNP).
- *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA).

Due regard was to be had to all other relevant information, which included matters relating to Richard Mdluli. (Terms of Reference: paragraph 4.1)

3.2.6. The Enquiry was also required to consider the manner in which Adv. Jiba and Adv. Mrwebi had fulfilled their responsibilities as DNDPP and SDPP, respectively, which included considering whether:

- They complied with the prescripts of the Constitution, the Act, prosecuting policy and policy directives, and any other relevant laws, in their positions as senior leaders in the NPA and are fit and proper to hold the position and be a member of the prosecutorial service;
- They properly exercised their discretion in the institution, conducting and discontinuation of criminal proceedings;
- They duly respected court processes and proceedings before the Courts as senior members of the NPA;
- They exercised their powers and performed their duties and functions in accordance with prosecution policy and policy directives as determined under section 21 of the Act;
- They acted without fear, favour or prejudice;
- They displayed the requisite competence and capacity required to fulfil their duties; and



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- They, in any way, brought the NPA into disrepute by virtue of their actions or omissions. (Terms of Reference: paragraphs 3 and 4)

3.2.7. The Enquiry was required to complete its mandate and furnish its report, together with all supporting documentation and recommendations, to the President by 9 March 2019 to allow him to make his decision before the expiry of the six-month time limit for the provisional suspension, namely 25 April 2019. However, the Enquiry Report notes that with indulgence from the Presidency, the Report was in fact submitted on 31 March 2019.

3.2.8. Among the powers delegated to the Chairperson in the Terms of Reference were the powers to determine the Rules by which it would be governed. According to the Report, fairness, particularly to the parties, and reasonableness in the execution of the process were the two basic guiding principles throughout. Notably, the rules of procedure were drafted in the context of an enquiry, rather than a commission, disciplinary process or criminal trial. The procedures adopted were, therefore, inquisitorial as opposed to accusatorial.

3.2.9. The Rules of Procedure, which the Enquiry adopted, were agreed to by the Evidence Leaders and the legal representatives of the concerned parties at a meeting held on 22 November 2018. This included agreement on the status of documents which were to be admitted as evidence.

3.3. Findings and recommendations of the Enquiry

3.3.1. The Enquiry found that, in view of the totality of evidence and in light of the evaluation of that evidence, both Adv. Jiba and Adv. Mrwebi were not fit and proper to hold their respective offices.

3.3.2. The Enquiry, therefore, recommended that Adv. Jiba and Adv. Mrwebi be removed from office.

3.4. President's decision



- 3.4.1. In letters dated 4 April 2019, the President shared the Enquiry Report with Adv. Jiba and Adv. Mrwebi, respectively, and invited them to make representations regarding the findings and recommendations contained in the Enquiry Report, which they did.
- 3.4.2. On 25 April 2019, having regard for the work of the Enquiry, and after receiving further representations from Adv. Jiba and Adv. Mrwebi in respect of the Report, the President decided to remove both Adv. Jiba and Adv. Mrwebi from office at the NPA in terms of section 12(6)(a) of the Act, with effect from 26 April 2019.
- 3.4.3. The President wrote to Adv. Jiba and Adv. Mrwebi on 25 April 2019 to inform them that he had decided to accept the recommendations of the Enquiry Report. The correspondence acknowledges receipt of their submissions in response to his invitation to them to give reasons on why he should not implement the recommendations of the Enquiry Report, as well as documentation filed during the Enquiry, which includes their submissions made to the Enquiry prior to the panellists compiling the Report. He states that he took the Unabridged and Abridged Reports and all their respective submissions into account in making his decision.
- 3.4.4. In relation to Adv. Jiba, the President states that the Enquiry Report deals with the grounds upon which he has based his decision and some of the key reasons are:
- “...
4.1. *That I have come to the conclusion that, contrary to your assertions, everything was done to ensure the Enquiry was held in a fair manner, which included involving your legal representatives in agreeing to the rules of procedure and admissibility of evidence. I have further concluded from reading the Report, that the Panel dealt extensively with all the evidence that was put before it in a fair and methodical manner.*
- 4.2. *That the findings made against you, based on the evidence before the Panel, are of a very serious nature. Your submissions do not offer any response or reason not to accept the Panel’s conclusion on the following matters:*
- 4.2.1. *the Panel found you lied to me. The Panel made this finding after noting in your submissions of 10 August 2018, you indicated that you appointed prosecutors from outside KZN, in the Booyesen matter, on*

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request of the Acting DPP of KZN. However, in your statement under oath before the Panel you said this was not the case.

4.2.2. the Panel concluded that you acted under external pressure in making decisions on charges against General Booysen on the basis of what was indicated to you by IPID officials.

4.2.3. the Panel determined that you failed to review or consider the representations made to review the decision by Advocate Mrwebi to withdraw charges against Mr Mdluli.

4.2.4. the Panel found that you failed to follow legal prescripts in your decisions.

4.2.5. the Panel found that you brought the NPA into disrepute.

4.2.6. the Panel concluded that you lacked the necessary conscientiousness and independence required of your position.

4.3. Your submissions assert that section 42 of the NPA Act precludes your removal through the enquiry process. However, I am advised that this section immunises prosecutors from being held personally liable for damages that may result from the decisions they take in the course of their work. It cannot shield a DNDPP from an enquiry about their conduct, competence or fitness to hold such a position. Section 12(6) is a unique process separate from ordinary labour disciplinary processes created by the NPA Act to protect the independence of the NPA.

4.4. Your request to be appointed in a senior position in the Public Service cannot be acceded to because of the findings of dishonesty made against you in the Enquiry Report. These findings would preclude your appointment to such position as these are qualities that are required of all senior public servants”.

3.4.5. In relation to Adv. Mrwebi, the President states that the Enquiry Report deals with the grounds upon which he has based his decision and some of the key reasons are:

“...
4.1. That I have come to the conclusion that, contrary to your assertions, everything was done to ensure that the Enquiry was held in a fair manner, which included involving your legal representatives in agreeing to the rules of procedure and admissibility of evidence. I have further concluded from



reading the Report that the Panel dealt extensively with all the evidence that was put before it in a fair and methodical manner.

4.2. *That the findings made against you, based on the evidence before the Panel, are of a very serious nature. Your submissions however do not offer any response or reason not to accept the Panel's conclusion on the following matters:*

4.2.1. *The Panel found that there were contradictions in your testimony, which led the Panel to conclude that you lied about the date on which you prepared the consultative note dealing with the withdrawal of charges against Mr Mdluli.*

4.2.2. *The Panel concluded that you were wrong in law about the Inspector General of Intelligence's mandate.*

4.2.3. *The Panel concluded that you accepted representations from members of the Crime Intelligence Unit before your appointment to the relevant position and wrongly factored them into your decision;*

4.2.4. *The Panel found that you lied in the Ledwaba trial under oath.*

4.3. *The Panel noted that you were dishonest before the Enquiry itself. Such conduct cannot be countenanced for a person in your position.*

4.4. *Your request that you be given the opportunity to retire, in light of your age, cannot be acceded to, because of the seriousness of the findings against you."*

3.4.6. The President's letter informs Adv. Jiba and Adv. Mrwebi that their removal from their positions of DNDPP and SDPP, respectively, is effective immediately, as of 26 April 2019. Further, while the Enquiry Report suggests that the removal must await confirmation by Parliament, the President is of the view that section 12(6)(b) of the NPA Act makes it plain that Parliament is not asked to confirm any decision he makes but to confirm whether after removal, they ought to be restored to their respective positions.

4. Committee's process

4.1. On 10 July 2019, at a joint meeting the Portfolio Committee on Justice and Correctional Services and the Select Committee on Security and Justice, the



Committees received a briefing from the parliamentary Legal Advisors on the legal procedure to follow in considering whether or not to restore Adv. Jiba and Adv. Mrwebi to their positions in the NPA. The Committees requested additional legal advice on whether the National Assembly and the National Council of Provinces may hold joint meetings on the matter in terms the parliamentary Rules.

- 4.2. On 19 July 2019, at a further joint meeting of the Portfolio Committee on Justice and Correctional Services and the Select Committee on Security and Justice, the Committees discussed the procedure to be followed when considering the matter of whether to restore Adv. Jiba and Adv. Mrwebi to office. The Committees decided against considering the matters jointly. However, it was agreed that they would write separately to Adv. Jiba and Adv. Mrwebi inviting them to submit written representations to each Committee.
- 4.3. Subsequently, the Committee wrote to Adv. Jiba and Adv. Mrwebi, dated 24 July 2019, informing them that it would be initiating a process to consider the matter of whether or not to recommend their restoration to office.
- 4.4. As was agreed, the Committee also invited both to make any additional/further written representations for consideration and to provide any available documentary or other evidence that may be relied on for the representations. The Committee's deadline for this was 8 August 2019.
- 4.5. The Committee's second term programme reflected that the agenda for the planned meetings of 20, 21 and 27 August 2019 was deliberations on the restoration of Adv. Jiba and Adv. Mrwebi to office.
- 4.6. On 26 July 2019, Adv. Mrwebi submitted his representations to the Committee, supplementing these with a further submission on 29 July 2019.
- 4.7. Although Adv. Jiba received the invitation to make representations to the Committee, she submitted no representations. Instead on 8 August 2019, her attorney, Mr Zola Majavu, wrote to the Speaker to inform Parliament that, on 7 August 2019, Adv. Jiba had initiated a court application in the Western Cape High Court to review and set



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aside the findings of the Enquiry and the decision of the President to remove her from office ahead of the outcome of the parliamentary process.

4.8. The letter goes on to state:

“3. In light thereof and with specific reference to the sub judice rule, we trust that Parliament and its relevant Committees which are currently seized with this matter would accordingly await the outcome of the review proceedings which are now pending before a Court of Law. Needless to say, in the premises, we would not make any submissions as requested in the letter under reply.

4. We would thus be grateful if you could acknowledge receipt hereof and confirm that Parliament and its relevant Committees would consequently await a decision of the High Court in respect of the matter currently under consideration. In our considered view, it could never be sincerely suggested that, notwithstanding the pending review, Parliament can still proceed with its consideration of this matter. Should you hold a different view, kindly indicate so in writing, to enable us to take appropriate action in order to protect our client’s rights [underlining for emphasis].” (paragraph 70

4.9. On 14 August 2019, on the instruction of the Speaker, the State Attorney wrote to Adv. Jiba’s attorneys of record notifying them that the Speaker had given permission for service of the application to take place on the parliamentary precinct. The letter also informed her attorneys that the parliamentary process shall proceed as scheduled unless an order of court was obtained to stop the process.

4.10. On 14 August 2019, Adv. Jiba’s attorneys replied to the letter, requesting the dates of the meetings that the Committee had scheduled to consider the matter in order to apply for an interdict at the very latest by 19 August 2019. The letter requested Parliament not to proceed with its consideration of the matter until 27 August 2019, in order to allow the urgent interdict to be heard on either 20 or 21 August 2019.

4.11. In Part A of her notice of motion, Adv. Jiba sought interim relief pending the hearing and final determination of Part B of the application. The relief sought under Part A included that the parliamentary process in terms of section 12 be stayed, pending the outcome of the applications for orders in terms of Part B.

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- 4.12. The parties agreed that Part A of the application would be heard on an urgent basis. Parliament did not oppose the application and, instead chose to abide by the court's decision. The matter was set down for hearing on 19 September 2019.
- 4.13. On 19 August 2019, Adv. Mrwebi sent a letter requesting that the Committee stay its deliberations on the matter of whether or not to restore him pending the outcome of the interdict and review application by Adv. Jiba, as the issues raised in the application were substantially the same as those that he raised in his submission to the Committee.
- 4.14. The Committee was briefed on these legal developments by the parliamentary legal advisors on 20 August 2019. Consequently, it resolved to stay its deliberations regarding Adv. Jiba and Adv. Mrwebi pending the outcome of the interdict and court application.
- 4.15. On 18 October 2019, the Western Cape High Court in *Jiba v President of The Republic of South Africa and Others* (13745/2019) [2019] ZAWCHC 136 (18 October 2019) dismissed Part A of Adv. Jiba's application, which sought, among others, an order staying the parliamentary process pending the outcome of the application for orders in terms of Part B of the application. The judgement makes a clear distinction between the President's power to remove in terms of section 12(6)(a) of the Act and Parliament's role to restore:

"[54] In coming back to the language and construction of section 12(6) of the NPA Act, it is clear from the wording and the manner in which the entire section has been constructed, that it envisages two distinct and separate procedures when an NDPP or DNDPP is removed from office. The wording in my view is clear. In terms of section 12(5) it is stated that the NDPP or SNDPP, shall not be suspended or removed from office except in accordance with the provisions of sub-sections (6), (7), and (8). In terms of subsection (6)(a) the function to suspend or remove clearly resides with the President and no one else.

[55] This section does not give the power to suspend or remove to any other institution or entity other than the President. The President is charged with the exclusive power to suspend or remove the NDPP or DNDPP. In this particular case, we are dealing



The reasons for my decision are personal. ...”

5. Overview of representations by Adv. Mrwebi

5.1. On 26 July 2019, Adv Mrwebi forwarded the following documents to the Committee for consideration:

- Letter to the Parliamentary Portfolio Committee (Subject: Removal/ Dismissal by the President: Invite to make representations).
- Index to presentation to Parliament.
- Foreword to Presentation.
- Summary of Parliamentary Presentation.
- Presentation to Parliament in terms of section 12 of the National Prosecuting Act, 32 of 1998.
- Possible Grounds for Review: Basis to Challenge the Enquiry in Courts or Other Relevant Fora.
- Supporting Document: Part 1 – Annexure A: Prosecutors Reports.
- Supporting Document: Part 2 – Annexure B: Acting in Consultation; Annexure C: GCB Affidavit; Annexure D: Extract – Prosecution Policy Section 24(3); and Annexure E: City Press Report Powers of the Inspector General of Intelligence (IGI).
- Supporting Document: Part 3 – Annexure F: SCCU Strategy 2012 and Annexure G: Quarterly SCCU Reports 2014/15.
- Supporting Document: Part 4 – Annexure H: 2014/15 Performance Report and Annexure I: OECD Authorisation and Reports.

5.2. Subsequently, on 29 July 2019, Adv Mrwebi forwarded an additional document: Annexure to letter: Summary on President’s Decision.

5.3. On 31 October 2019, the Committee received further correspondence from Adv. Mrwebi in which he requested that he be permitted to address Parliament, with the assistance of legal counsel, on a specific matter.



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6. Deliberations

- 6.1. *Committee's mandate:* The Committee is acutely aware that its mandate is confined to section 12(6)(c) and (d) of the Act, which is to make a recommendation to the National Assembly on whether or not to restore a National Director, Deputy National Director or, read with section 14(3) of the Act, a Director to office. The Committee understands that the Act envisages two distinct processes, namely the removal by the President and then parliamentary proceedings to consider restoration to office. It is very clear to the Committee that its mandate is not to remove but to consider restoration once the President has removed a National Director, Deputy National Director or Special Director. The Committee notes also that, in *Jiba v President of the Republic of South Africa and Others* (13745/2019) [2019] ZAWCHC 136 (18 October 2019), Henney J writes that: “*The wording [of the Act] is clear; Parliament's function is not to remove but to restore. Parliament plays no role in the removal of the NDPP or DNDPP. Parliament acts independently in terms of its oversight function of the President in terms of section 55(2)(b) of the Constitution., when it considers whether to restore the NDPP or DNDPP in terms of subsection 6(c) or (d).*” (paragraph 58)

The Committee, therefore, understood that its role in considering whether or not to restore requires it to exercise oversight over the President's decision, generally, in terms of section 55 of the Constitution and, explicitly, in terms of section 12 (6)(c) and (d) of the Act to give effect to protecting the independence of the NPA. Parliament even has the power to overturn a decision of the President to remove one or more senior directors of the NPA. Therefore, the power that Parliament is exercising is more than mere oversight but acts as a check on the powers of the President.

The Committee, therefore, identified the following to guide it in reaching its conclusions:

- Had the President complied with the requirements of section 12(6)(a) and(b) of the Act?
- Was the process leading up to the President's decision fair to Adv. Jiba and Adv. Mrwebi?
- Was the President's decision to remove based on good reason?



- 6.2. *Letter, dated 7 November 2019, from Adv. Jiba withdrawing from the restoration process.* The Committee acknowledges Adv. Jiba's letter to the Speaker dated 7 November 2019, in which she informs that for personal reasons she no longer wished to seek restoration to Office. However, this does not remove Parliament's statutory duty to consider whether or not to restore Adv. Jiba to her position in the NPA in terms of section 12(6).
- 6.3. *Unlawful conduct of President in proceeding with removal proceedings pending the ultimate outcome of the appeal of the GCB judgement.* On 31 October 2019, Adv. Mrwebi wrote again to the Speaker and to the Committee asking that he be afforded the opportunity to address the Committee through his legal representative on the issue of whether the President acted in violation of an order granted by the High Court in *Freedom Under Law v National Director of Public Prosecutions and Others 2018 (1) SACR 436 (GP) ("the FUL matter")*, where *Mothle and Tlhapi JJ* (concurring) and *Wright J* (dissenting) in proceedings where the previous President of this country were directed to institute disciplinary proceedings against the Adv. Jiba and Adv. Mrwebi, issued the following order in paragraph 108.3: "... *The President is directed to institute disciplinary enquiries against Jiba and Mrwebi into their fitness to hold office in the National Prosecuting Authority, and suspend them pending the outcome of those enquiries. It is further ordered that the implementation of this specific order be suspended pending the ultimate outcome of the appeal of the GCB judgment.*"

On Adv. Mrwebi's request to address Parliament in person, the Committee was disinclined to grant him such an opportunity as it had decided from the outset to conduct its deliberations on the papers and was clear that certain deadlines would be followed. Adv. Mrwebi had not raised this point in his original submission.

Nonetheless, the Committee did apply its mind to the contents of Adv. Mrwebi's letter and believes that it has sufficient information before it.

On the merits of the issue, the Committee does not believe this to be material to its decision whether or not to restore. On appeal, in *Jiba and Another v General Council of the Bar of South Africa and Another; Mrwebi v General Council of the Bar of South Africa* (141/17; 180/17) [2018] ZASCA 103; [2018] 3 All SA 622 (SCA); 2019 (1)



SA 130 (SCA); 2019 (1) SACR 154 (SCA) (10 July 2018), the Supreme Court of Appeal drew a clear distinction between the test of fitness required to be an advocate and that pertaining to an official in the NPA. While the one may impact on the other, the two are distinguishable. Removal from the roll as an advocate will certainly impact on the fitness to hold office as an employee of the NPA. However, an advocate in good standing may not necessarily be fit and proper to hold office in the NPA (paragraph 96). The Court, therefore, overturned the High Court judgement to find Adv. Jiba and Adv. Mrwebi to be fit and proper to remain advocates.

When the General Bar Council took the Supreme Court of Appeal's judgement on appeal, the Constitutional Court dismissed the matter on the ground that it raised a question of fact and not a constitutional question over which it had jurisdiction (*General Council of the Bar of South Africa v Jiba and Others* (CCT192/18) [2019] ZACC 23; 2019 (8) BCLR 919 (CC) (27 June 2019))

The Committee also notes that in *Jiba v President of The Republic of South Africa and Others* (13745/2019) [2019] ZAWCHC 136 (18 October 2019), Adv. Jiba raised this point in her replying affidavit as part of her application to Western Cape High Court for interim relief. She contended that the President could not have suspended her, nor could he have instituted an enquiry, nor could he have acted to remove her based on the recommendations of the Enquiry before 27 June 2019, when the Constitutional Court concluded that it did not have jurisdiction to hear the appeal in question.

However, the Western Cape High Court found that the relief that the applicant was seeking in this respect was, in fact, a declaratory order which was final in effect, and not interim relief. The contention properly forms part of Part B of the application or the final review application. Further, the relief being sought on this ground is far-reaching but was raised belatedly in the replying stage of what was initially an application for interim relief. Nor had all the information been properly put before the court. In addition, the opposing respondents had not been given a proper opportunity to answer the point. (The Committee is advised that Adv. Jiba has since withdrawn Part B of her application.)

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Notably, as part of its introduction, the Court reflects at paragraph 3 that Adv. Jiba had raised this matter in a submission to President on whether or not she should be provisionally suspended. In paragraph 4, the Court summarises the President response to these submissions in a letter dated 24 October 2018, namely-

“(i) That he has decided on the basis of the numerous factual and legal issues raised in the various court judgments in which adverse findings were made against the Applicant and her submissions made in response thereof ought best to be dealt with by an enquiry established in terms of section 12(6) of the NPA Act;

*(ii) That he has furthermore decided it is in the interests of the image and integrity of the NPA that the Applicant be suspended pending the finalisation of the enquiry which suspension, in terms of the court order in *Corruption Watch NPC and Others v President of the Republic of South Africa and others; Nxasana v Corruption Watch and others (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018)*, will last a maximum of six (6) months;*

(iii) That he has made his decisions based on the fact that regardless of the Constitutional Court’s decision in the GCB appeal of the SCA judgment on her fitness to be an advocate, the question remains whether or not she is fit to hold senior positions in the NPA. He further said that it is a question that requires an answer urgently in order for the NPA to do its work with the public’s full confidence in his leadership.

(iv) He furthermore stated that he fully appreciates that should the General Council of the Bar (GCB) succeed in its appeal this question would be moot, but believes that it would serve the Applicant and the NPA as a whole to have conclusive findings on her fitness to hold this position in a matter of months. He further stated that he has no way of knowing when the Constitutional Court might make its decision.

(iv) That he has also taken into account the serious nature of the allegations that she is unfit to be in so high an office where the work of our criminal justice system is central to the critical pressing matter of all prosecutions, especially prosecution of corruption cases and safeguard of our public purse;

(v) That she holds a senior position with influence over a large swathe of the NPA and therefore it is in the interests of the NPA’s image as a whole that he considered it.

(vi) She was further informed that the enquiry will investigate whether or not she is guilty of misconduct in the manner in which she dealt with the Mdluli case, especially

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in relation to her attitude towards the courts from a position as a senior leader in the NPA.

(vii) She was further informed that the enquiry will consider whether or not her actions in this case evince any form of incompetence or incapacity. And whether seen as a whole, her actions were indeed the proper exercise of a prosecutorial discretion or more indications of whether she is not being fit and proper to hold these positions. Including whether she brought the NPA into disrepute.” (at paragraph 4) (Underlining for emphasis)

The Enquiry also addressed itself on this point: *“It is pertinent that we express some preliminary views on the GCB cases as they reveal the difference between the question determined by the Courts and that which this Enquiry must respond to. Adv. Jiba’s legal representatives asked that this Enquiry accept that the fit and proper test as it relates the two remaining on the roll of advocates, was determined in the GCB SCA case, is the same test that applies to the fit and proper evaluation in terms of the NPA Act. However, that view is incorrect. Both the SCA and the High Court in the GCB matters established as much. This position was further bolstered by FUL 2018 where the Court explained the difference clearly and at great length.*

In sum, while an official may be removed or found to be not fit and proper to remain in the NPA, they may still remain fit and proper to remain on the roll of advocates. Should an individual be struck from the roll of advocates they will, by operation of the law, also cease to be fit and proper to hold office in terms of the NPA Act.” (see paragraph. 1050-1052):

The Committee also believes that both Adv. Jiba and Adv. Mrwebi had ample opportunity to interdict the President or take his decision on review on this point but did not do so. It was only in August 2019, when Parliament had begun its own separate but related process that Adv. Jiba initiated court proceedings in the Western Cape High Court. As noted above, she raised this ground for the first time in her replying affidavit and not in her founding papers.

- 6.4. *Did the President comply with section 12(6)(a) and (b) of the Act? Sections 12(6)(a) and (b) and section 14(3) of the Act specify the process that the President must follow*



in reaching a decision to remove a Deputy National Director and Special Director. Having considered the relevant provisions of the Act and documentation provided to it, the Committee is of the view that the President indeed followed the prescripts of the law in reaching his decision to remove Adv. Jiba and Adv. Mrwebi from office, respectively.

6.5. *Was the process leading up to the President's decision fair to Adv. Jiba and Adv. Mrwebi?*

6.5.1. In this regard the Committee notes that:

- In August 2018, prior to their provisional suspension and the setting up of the Enquiry, the President invited Adv. Jiba and Adv. Mrwebi to make representations to him on whether or not they should be suspended. After considering their representations, the President provisionally suspended them. In his letters to Adv. Jiba and Adv. Mrwebi, the President noted that he had taken into account the serious nature of the allegations regarding their lack of fitness to be in so high an office. The President stated that the work of the criminal justice system is central to the critical and pressing matter of all prosecutions, especially prosecution of corruption cases and safeguard of the public. Furthermore, Adv. Jiba and Adv. Mrwebi held senior positions with influence over a large swathe of the NPA. It was, therefore, in the interest of the NPA's image as a whole and of the integrity of an enquiry that must result in the clearest and most convincing conclusions about the integrity, and sound leadership of the NPA that they be provisionally suspended.
- The Enquiry was set up with clear terms of reference, which were gazetted on 9 November 2018 in Government Notice 699 of 2018 (Government Gazette 42029).
- Furthermore, the Enquiry was presided over by Justice Yvonne Mokgoro (retired), assisted by Kgomotso Moroka SC and Thenjiwe Vilakazi.
- The Terms of Reference were also clear regarding the scope of Enquiry, which was to look into the fitness and propriety of both Adv. Jiba and Adv. Mrwebi to hold office in their respective capacities.
- According to the Enquiry Report, both Adv. Jiba and Adv. Mrwebi were represented by senior legal counsel.



- The Chairperson of the Enquiry was empowered to determine the Rules by which the Enquiry would be governed. According to the Enquiry Report, fairness, particularly to the parties, and reasonableness in the execution of the process were the two basic guiding principles throughout. Notably, the rules of procedure were drafted in the context of an enquiry, rather than a commission, disciplinary process or criminal trial. The procedures adopted were, therefore, inquisitorial as opposed to accusatorial.
- Further, the Rules of Procedure that the Enquiry adopted were agreed to by the Evidence Leaders and the legal representatives of the concerned parties at a meeting held on 22 November 2018 – this included agreement on the status of documents which were to be admitted as evidence.
- Both Adv. Jiba and Adv. Mrwebi were given opportunities to submit and lead evidence and to cross-examine witnesses during the Enquiry process.
- Following the conclusion of the Enquiry process and before reaching his decision to remove Adv. Jiba and Adv. Mrwebi, the President gave them a further opportunity to make representations on the Enquiry’s findings and report. The President’s letter, dated 25 April 2019, clearly indicates that he considered all their submissions, as well as documentation filed during the Enquiry that included the submissions made to the Enquiry prior to the panellists compiling the Enquiry report. In this regard, he writes that he took the Unabridged and Abridged Reports and all their respective submissions into account in making his decision.

6.5.2. Furthermore, the Committee is of the view that the documents and representations before it does not raise any reason for it to find that the process followed was unfair.

6.5.3. The Committee notes too that Henney J in *Jiba v The President of the RSA and Others* said that: “[63] *The provisions of subsection (6), (7) and (8) [of the NPA Act] are peremptory and protects the NDPP or the DNDPP from arbitrary removal by the President. The Act prescribes that proper due process be followed, which in my view, was complied with in this case. It was done in a manner to protect the independence of the NPA, if regard is to be had to the facts and circumstances of this case as set out earlier in this judgment. These facts are: The applicant throughout was invited to*



make representations firstly, as to whether she should be suspended based on the reasons afforded to her by the President; Secondly, whether the President should institute an enquiry, based on the reasons he once again afforded to her. She was invited to persuade the President not to institute such an enquiry; Thirdly, when the President nonetheless decided to institute the enquiry, he gave his reasons for his decision; Fourthly, after the conclusion of the enquiry, the full report and the record of the enquiry was presented to the applicant with the findings on which the report was based; Fifthly, she was once again invited to make representations to the President as to why the recommendations of the panel, which was that she had to be removed from office, should not be implemented.”

6.6. *Was the President's decision based on good reason/rational?!*

6.6.1. In this regard, the Committee notes that the President's letter, dated 25 April 2019, makes it clear that his decision was based on the findings of the Enquiry and that these findings, which are based on the evidence before the Enquiry, are of an extremely serious nature. Further, the President writes that he had considered their representations to him but that he did not find that they had raised “*any response or reason not to accept the Panel's conclusion*”.

6.6.2. Furthermore, the Committee is of the view that the representations placed before it by Adv. Mrwebi do not raise any reason for it to find that the President did not apply his mind properly to the matter before him.

7. Findings

7.1. In respect of Adv. Jiba, the Committee finds no reason to restore Adv. Jiba to the office of Deputy National Director of Public Prosecutions in that:

7.1.1. The President complied with the provisions of section 12(6)(a) and (b) of the National Prosecuting Authority Act, 1998, in reaching his decision.

7.1.2. The process followed by the President in reaching his decision was fair.



7.1.3. The President applied his mind properly on this matter.

7.2. In respect of Adv. Mrwebi, the Committee finds no reason to restore Adv. Mrwebi to the office of Special Director of Public Prosecutions in that:

7.2.1. The President complied with the provisions of section 12(6)(a) and (b) of the National Prosecuting Authority Act, 1998 in reaching his decision.

7.2.2. The process followed by the President in reaching his decision was fair.

7.2.3. The President applied his mind properly on this matter.

8. Recommendation

8.1. The Committee recommends that the National Assembly resolve not to restore Adv. Nomgcobo Jiba to office of Deputy National Director of Public Prosecutions.

8.2. The Committee recommends that the National Assembly resolve not to restore Adv. Lawrence Sithembiso Mrwebi to office of Special Director of Public Prosecutions.

Report to be considered

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3. REPORT OF THE STANDING COMMITTEE ON APPROPRIATIONS ON ITS OVERSIGHT VISIT TO ESKOM HOLDINGS SOC LIMITED FROM 14 TO 16 OCTOBER 2019, DATED 27 NOVEMBER 2019

The Standing Committee on Appropriations, having undertaken an oversight visit to the Eskom Holdings SOC Limited from 14 to 16 October 2019, reports as follows:

1. Introduction

The Standing Committee on Appropriations (the Committee) is established in terms of section 4(3) of the Money Bills Amendment Procedure and Related Matters Act, No.9 of 2009. The Act requires the Committee to consider and report on:

- Spending issues;
- Amendments to the Division of Revenue Bill, the Appropriation Bill, Supplementary Appropriation Bill and the Adjusted Appropriation Bill;
- Recommendations of the Financial and Fiscal Commission (FFC), including those referred to in the Intergovernmental Fiscal Relations Act, 1997 (Act No. 97 of 1997);
- Reports on actual expenditure published by the National Treasury (section 32 reports); and
- Any other related matters.

Within the current difficult fiscal context and limited resources, the Committee is of the view that all programmes, projects and activities appropriated should be rolled out in an effective and efficient manner, and in compliance with the relevant laws and regulations. This means that all state organs must take active steps to improve operational efficiencies, accelerate the effectiveness of service delivery, and attain value for money.

The Committee undertook an oversight visit to the Gauteng Province in order to visit Eskom Holdings SOC Limited to engage with the leadership as well as organised labour with a view to addressing institutional instability, weak governance, non-compliance with procurement prescripts, liquidity constraints, and cost escalations due to delays and design defects in capital projects (Medupi and Kusile Power Stations, in particular).



2. Delegation

The delegation was as follows: Mr S Buthelezi (Chairperson), Mr XS Qayiso (ANC), Ms D Peters (ANC), Ms C Dikgale (ANC), Mr Z Mlenzana (ANC), Mr OM Mathafa (ANC), Mr D Joseph (DA), Ms RN Komane (EFF), and Mr NLS Kwankwa (UDM). The delegation was accompanied by the following parliamentary officials: Mr D Arends (Committee Secretary), Mr S Magagula (Content Advisor), Mr M Zamisa (Committee Researcher), Ms N Chaso (Committee Assistant), and Ms F Lombard (Parliamentary Communication Specialist).

The Committee met with the following stakeholders at the various sites and stakeholder meetings during the oversight visit:

Department of Public Enterprises: Ms M Makololo (Acting Deputy Director-General: Energy), Mr L Tekane

National Treasury: Ms T Moahloli (Acting Deputy Director-General: Asset and Liability Management), Mr R Rajlal (Chief Director: Sectoral Oversight); Mr JZ Quvane (Director), and Ms MBN Mathekga (Director)

Sizwe Ntsaluba Gobodo: Grant Thornton: Mr S Vilakazi (Director); Ms N Ngobese (Director)

Auditor General South Africa: Mr SJ Sybrand Struwig (Senior Manager)

Eskom Holdings SOC Limited: Mr J Mabuza (Acting Chief Executive Officer and Interim Executive Chairperson), Prof T Mongalo (Board Member), Mr J Oberholzer (Chief Operating Officer), Mr C Cassim (Chief Financial Officer), Mr B Nxumalo (Group Executive Generation), Mr S Scheppers (Group Executive Transmission), Mr M Bala (Group Executive Distribution), Mr M Buys (General Manager: Finance), Ms H Tlhotlhemaje (General Manager: Regulation), Ms R Waja (Acting General Manager: Corporate Affairs), Mr A Etzinger (General Manager: Sustainability and Risk), Ms S Pule (Group Executive: Human Resources), Mr J Mthembu (Acting Group Executive: Legal), Mr I Bhowani (Acting General Manager: Assurance and Forensic),



Mr S Tshitangano (General Manager: Procurement), Mr D Mashego (Acting General Manager: Primary Energy), Mr I Bhowani (Acting General Manager: Assurance and Forensics), Mr B Hewu (Acting Group Executive: Governance [Legal]), Mr K Bowan (Middle Manager: Wholesale), Ms N Sigwebela (Senior Manager: Energy Planning), Mr P le Roux (General Manager: Procurement Strategy and Excellence), Mr A Laher (Senior Manager: Compliance),

Eskom Board: Mr J Mabuza (Chairperson), Dr R Crompton, Dr BCE Makhubela, Ms B Mavuso, Dr P Molokwane, Ms S Mabaso-Koyana, Mr M Mvunelwa, and Mr M Tyalimpi (Board Company Secretary)

Financial and Fiscal Commission: Prof D Plaatjies (Chairperson)

National Union of Metalworkers of South Africa: Mr I Jim, Mr N Kgoete, Mr B Kola, Ms W Pram, Ms N Letlape, Mr Z Gqina, Ms P Hlubi-Majola,

Solidarity: Mr T Weddespon, Mr J Fernandez, Mr T Jacobs, Mr D Jennings

National Union of Mineworkers: Ms K Pholoba, Mr P Mashego, Mr K Baloyi

3. Background

Eskom Holdings SOC Limited, herein after referred to Eskom, plays a vital role in the South African economy and contributes massively to infrastructure spending. The power utility is set to spend R134.3 billion on infrastructure over the 2019 Medium Term Expenditure Framework (MTEF). Therefore, it is critical to the achievement of the National Development Plan (NDP) Outcomes, economic growth, skills development and job creation. Whereas Eskom accounts for 70 per cent of South Africa's debt, it faces significant challenges related to leadership instability, weak governance, liquidity constraints, and cost escalations due to delays and defects in construction of capital projects. The Committee has appropriated significant financial resources to Eskom over the past financial years, therefore it is critical to conduct an oversight visit to the power utility in order to come up with sustainable interventions.



The Committee is expected to and has appropriated significant financial resources to support Eskom in the recent past. For instance:

- On 10 September 2019 Eskom appeared before the SCOA for a briefing on the proposed special appropriations amounting to R59 billion for the 2019/20 and 2020/21 financial years.
- Similarly, in 2015 the Committee passed a Special Appropriation Bill through which it allocated a total of R23 billion¹; and
- The Committee also passed the Eskom Subordinated Loan Special Appropriation Amendment Act (2008/09-2010/11 Financial Years) in 2015. The objective of the Bill, which was later enacted into law, was to convert the subordinated loan to Eskom Holdings SOC Limited in the amount of R60 billion over the said financial years into shares for the State².

In the light of the above, it was critical for the Committee to conduct an oversight visit to Eskom in order to gain a deeper understanding of challenges facing the power utility and to come up with sustainable interventions. The following section outlines key objectives of the oversight visit.

3.1 Key Objectives of the Visit to Eskom

The Committee visited Eskom to meet with leadership and Executives as well as other key stakeholders for extensive discussions and comprehensive reports on the following areas:

- Efficient, effective and economic use of financial support that Eskom has received through the appropriation process of Parliament;
- Plans for efficient, effective and economic use of the proposed special appropriation of R59 billion for 2019/20 and 2020/21;
- Expenditure and construction of capital projects including power plants such as Medupi and Kusile;
- Key challenges such as leadership instability, weak governance, weak internal controls, non-compliance with the PFMA and supply chain management (SCM) prescripts, deteriorating financial etcetera;

¹ Parliament (2015)

² Parliament (2015)

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- Comprehensive and sustainable maintenance plan for power stations in order to avoid potential loss of power in the short term and a total system collapse in the long term;
- Plans regarding improvements in achieving performance targets outlined in the shareholder compact, especially those that relate to skills development and transformation;
- Effectiveness of internal controls and risk management systems and strategies;
- Eskom's business model with its suppliers and Independent Power Producers (IPPs);
- Management of contractors involved in the construction of major power plants such as Medupi and Kusile, which have been subject to high project delays, structural defects, huge cost-overruns, and unwarranted costs for maintenance of structural defects;
- Status of compliance with the Public Finance Management Act (PFMA) and related supply chain management prescripts;
- Compliance with prescripts relating to promotion of local content and local suppliers; and
- Plan for effective change management in preparation for the planned restructuring process.

Based on the above objectives, the Committee also held a preparatory meeting with the representatives from the Office of the Auditor general South Africa (AGSA) and National Treasury 14 October 2019 to discuss the key financial matters of Eskom over the past five financial years. The Committee also held a series of meetings with Eskom's Group Executives and the labour representatives at the Megawatt Park in Sunninghill, Johannesburg on 15 and 16 October 2019. The Committee also had a follow-up meeting with the Eskom's Board in Parliament on 29 October 2019.

4 Engagements with invited stakeholders

The Committee had a preparatory meeting with the Auditor General South Africa, Sizwe Ntsaluba Gobodo: Grant Thornton, National Treasury and the Department of Public Enterprises on 14 October 2019 focusing on the key financial aspects and audit outcomes of Eskom. The said invited stakeholders were requested to make presentations followed by questions of clarification by the Committee. The main



observations and findings stemming from the aforementioned discussions will form part of section 7 of the report.

5 Engagements with the Eskom Board

The Committee initially planned to engage with the Eskom Board during the oversight visit; however, the Committee decided that it would meet at a later stage due to the limited number of available Board Members. The meeting was rescheduled to 29 October 2019 in Parliament. The Committee engaged on the follow matters with the Board:

- Eskom's financial performance for the past five financial years;
- Financial management and supply chain management matters at Eskom;
- Operational and financial risks/challenges facing the power utility;
- Human Resources and Labour Relations matters at Eskom; and
- Non-compliance with applicable legislation and regulations and mitigating measures.

6 Engagements with Eskom Group Executives and Senior Managers

The Committee met with the Group Executives for Capital, Generation, Transmission, Distribution, Human Resources, Legal, as well as the General Managers for Finance, Regulation, Corporate Affairs, Sustainability and Risk, and Assurance and Forensics. Presentations were made by the afore-mentioned stakeholders followed by in-depth discussions between the Committee and invited stakeholders. The main observations and findings emanating from these discussions will form part of section 8 of the report. The following areas covered during the engagements with the Executive and Senior Management:

- Eskom's financial performance for the past five financial years;
- Overview of municipal debt;
- Operational and financial risks/challenges;
- HR related challenges within Eskom;
- Eskom employees doing business with Eskom;
- The impact of dismissals, and termination of contracts on Eskom's operations;
- Non-compliance with applicable legislation and mitigating measures;
- State of affairs/business at Eskom regarding procurement;
- Potential risks to procurement and SMC processes and mitigating factors;

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- Cost of IPPs vs contribution to the electricity grid; and
- Challenges and costs associated with evergreen/long term contracts.

7 Engagements with organised labour

The Committee engaged with the National Union and Metalworkers South Africa (NUMSA), National Union of Mineworkers (NUM) and Solidarity around the labour related challenges facing Eskom's staff and the likely impact of the restructuring on employees. The common areas for concern raised by the three unions included:

- The costs and ownership of IPPs within South Africa and its effect on Eskom's revenue generation capacity. The three unions agreed that the costs for the IPPs exceeded the selling price of electricity and that was not sustainable. Furthermore, the unions were of the view that Eskom should also be allowed to participate in renewable energy.
- The three unions stated that they were not in favour of the unbundling of Eskom and was of the view that this would lead to privatisation. From the Union's perspective, this was because cost and benefits of the three units are already available and therefore the reasons for the unbundling are substantiated enough to warrant that activity.
- The unions called on a forensic audit into the reported estimated R450 billion debt of Eskom.
- Concerns were expressed by the unions around the cost overruns at the Medupi and Kusile power stations and suggested that a forensic investigation be conducted in that regard.
- Organised labour also expressed serious concerns at the mooted closure of power stations which have negative socio-economic results for the affected areas. Organised labour feels that the life cycle of the power plants can be extended with available technology and it is therefore a deliberate move to privatise Eskom that results in the closure of Eskom in order to put the institution in crisis.
- The overall challenges facing Eskom put forward by the unions included the cost of IPPs, inadequate training and development of staff, exorbitant cost and poor quality of coal being utilised at power stations, bloated managerial



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structure as a result of settling the business programme often resulting in duplication of work, and the debt owed to Eskom by municipalities and Soweto.

8 Overall Committee Observations and Findings

The observations and findings which were highlighted by the Committee during the deliberations with the various stakeholders and subsequent site visits are outlined below as per the three different themes for the oversight:

8.1 Eskom's Audit Opinion

- 8.1.1 The Committee noted with concerns that the auditors (Sizwe Ntsaluba Gobodo: Grant Thornton (SNG) on behalf of the Auditor General South Africa) were unable to determine the full extent of the irregular expenditure disclosed by Eskom. Furthermore, the auditors were unable to find sufficient appropriate audit evidence to confirm the fruitless and wasteful expenditure. Eskom received qualifications on fruitless and wasteful expenditure for the past three financial years (2016/17 to 2018/19).
- 8.1.2 There are significant internal control deficiencies that resulted in the above-mentioned qualified opinions such as inadequate oversight by the accounting authority related to compliance with legislation and lack of proper procurement and contract management. Furthermore, there was improper record keeping to ensure complete, relevant and accurate information to support financial and performance reporting.
- 8.1.3 The Committee also noted with concern the report from SNG that Eskom's Internal Audit Unit is not effective enough and that its head has been suspended in the previous financial year. Furthermore, the Chief Financial Officer also resigned and this shows the level of instability within the power utility.

8.2 Eskom's Finances

- 8.2.1 During the 2018/19 financial year, Eskom incurred a loss of R20.729 million and its current liabilities exceed its current assets by R44.057 million. Furthermore, the power utility's sales volumes have been in decline whilst the operational and capital expenditure have been increasing.



- 8.2.2 The Committee notes with serious concern that the Medupi power station was initially budgeted at R79 billion however it is expected to cost approximately R146 billion after completion due to delays and other defects. Furthermore, the maintenance costs to address the defects have been estimated at R7 billion.
- 8.2.3 The construction of the Kusile power station was initially budgeted at R81 billion however due to delays and design defects, it is expected to be completed at approximately R161 billion. The maintenance costs to address the defects are estimated at R285 million.
- 8.2.4 The Committee welcomes the report that Eskom has set itself an operational and capital expenditure cost savings target of R77 billion by 2023. This forms part of its strategy towards financial sustainability which also includes the proposal that government take over some debt to alleviate debt servicing costs and the migration of the electricity price to prudent and efficient cost reflectivity.
- 8.2.5 Notwithstanding, the above strategy towards financial sustainability, the Committee remains concerned about the major cost drivers in Eskom which include the exorbitant cost of coal and diesel, the cost of IPPs, and debt service costs. Cost overruns on contracts, especially the Medupi and Kusile power stations, and employee costs.
- 8.2.6 The Committee notes that the cost of IPPs grew from R9.5 billion in 2015/16 to R25 billion in 2019 thus representing an increase of 27.5 per cent over five years. This represents the highest increase over the period under review when compared to other sources of primary energy.
- 8.2.7 Eskom's debt service costs increased by 23.3 per cent from R30 billion in 2015/16 to R69 billion in 2019/20.
- 8.2.8 In terms of government guarantees, Eskom reported that the total government guarantees amounted to R350 billion, from which R291 billion has been utilised as at the end of September 2019 and R43 billion has been committed and would be drawn down in future.
- 8.2.9 The Committee notes with concerns that Eskom is selling electricity at lower than the cost of production which is further compounding the ailing financial position of the power utility.



8.3 Debt owed to Eskom

- 8.3.1 The total debt owed to Eskom was R66.6 billion as at the end of August 2019 from which R41.189 billion or 62 per cent was overdue. The breakdown of the debt to Eskom is: Municipalities (R38.279 billion), Soweto (R15.912), Top customers (R6.769 billion), Other LPU (R2.773 billion), and Other SPU (R2.891 billion).
- 8.3.2 Municipalities (R23.538 billion) and Soweto (R15.663 billion) contributed to R39.201 billion or 95 per cent of the total overdue debt owed to Eskom. The total amount of overdue municipal debt between March 2014 and August 2019 grew from R2.593 billion to R23.538 billion.
- 8.3.3 The Committee noted with serious concerns that the overdue municipal debt owed to Eskom increases by over R1 billion per month. The afore-mentioned amount increased from R22.101 billion in July 2019 to R23.538 billion in August 2019 with the anticipated total by the end of the financial year being R25.900 billion.
- 8.3.4 The Committee noted and welcome the work done by the Inter-Ministerial Task (IMTT) on municipal debt in order to address the issue as set out on 7.6 above. However, the IMTT needs to expedite the process of addressing the issues given the significant increase in overdue debt.
- 8.3.5 The Committee also noted Eskom's proposed changes to its revenue collection strategy to reduce or eliminate the R23 billion in overdue debt. The proposed changes include:
- Incentivised payment arrangements (with conditions);
 - Engagements with National Treasury on the possible direct payment of debt owed through the equitable share allocations;
 - Prioritisation of paying customers for fault repairs;
 - Review of existing supply agreements (restrict, interrupts and terminate supply of electricity and consideration of the takeover of networks and customers); and
 - Attachment and sale of movable and immovable assets.

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8.4 Labour Relations Matters

- 8.4.1 The Committee notes with concern the strained relations and trust deficit between the Executive, the Board and organised labour. The Committee is of view that effective industrial relations are important to the success of the entity.
- 8.4.2 All three unions representing Eskom employees, i.e. NUMSA, NUM and Solidarity, indicated that they are not in support of the unbundling of the power utility. The said unions view the unbundling as another form of privatisation and that it does not fundamental challenges facing Eskom. The said challenges include increase in interest payments, excessively high borrowing levels, and high operating costs in particular for IPPs and coal, and declining electricity sale volumes.
- 8.4.3 The Committee noted the submissions from the organised labour that poor quality coal is being utilised by Eskom thus resulting in maintenance challenges whilst the good quality is being exported. The Committee further notes the submission that coal should be made a strategic asset within South Africa.

8.5 Procurement and Supply Chain Management Matters

- 8.5.1 The Committee notes with concern the report that five contractors have been overpaid in the amount of about R5 billion during the construction of the Kusile power station. Efforts are underway with the Special Investigations Unit (SIU) to recoup the money.
- 8.5.2 The Committee notes the submission that the key challenges confronting Eskom include leadership instability, weak governance, weak internal controls, non-compliance with the PFMA and SCM prescripts, and lack of consequence management. The areas of non-compliance as per the 2018/19 audit opinion include the:
- abuse of single/sole source procurement;
 - tender processes not being adhered to and incorrect tenders processes being applied;
 - incorrect classification as emergency procurement;
 - tender processes not followed ad insufficient delegation of authority;

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- modifications to contracts exceeding allowed amounts;
- tax clearance certificates from suppliers;
- contracts awarded without following the Construction Industry Development Board (CIDB) requirements;
- contracts not in accordance with National Treasury guidelines;
- Internal processes not being adhered to; and
- Breach of commercial requirements.

8.5.3 The Committee notes with concern that one contractor with an open value of R2 billion had 456 months left on five contracts with Eskom. The Committee is of the view that Eskom needs to commence a process of renegotiating some contracts, especially related to coal supply given its current fiscal constraints.

8.5.4 The Committee views the role of the Executive Board, as the accounting authority, as important to the turnaround of Eskom and therefore it should comprise of individuals with requisite skills and experience.

8.5.5 The Committee welcomes the submission from the Department of Public Enterprises that it is looking at hiring additional capacity to assist with the monitoring of Eskom's finances and operations.

8.6 Human Resources Matters

8.6.1 Eskom's staff compliment stood at 45 708 as at the end of July 2019.

8.6.2 The Committee notes with concern that the number of engineers at Eskom have reduced by 823 from 2882 in March 2013 to 2059 in July 2019. The accountants reduced from 71 to 17 during the same period whilst the auditors decreased from 83 to 19.

8.6.3 The senior managerial positions within Eskom have increased significantly (from 80 to 506) since the introduction of the settling of the business programme that was introduced in 2008. However, this number has reduced by 118 to 388 during the period March 2013 and July 2019. The Committee is of the view high number of senior managers also contributes to the financial difficulties being experienced by the power utility.

8.6.4 Eskom reported that there were 117 dismissals per task grade at group level for the period March 2018 to April 2019.



- 8.6.5 In terms of employee relations, the Human Resources Executive reported that there were 19 national disputes at the time of the oversight visit in progress between Eskom and organised labour.

9 Recommendations

The Committee having engaged with Eskom Holdings SOC and the relevant stakeholders, recommends as follows:

- 9.1 That the Minister of Public Enterprises should ensure the following:
- 9.1.1 That Eskom ensures that there is adequate socio-economic benefits derived from the contracts entered into with Independent Power Producers.
 - 9.1.2 That Eskom, as a matter of urgency, find a balance between the requests for higher tariffs and revenue generation.
 - 9.1.3 That Eskom engage in a process of renegotiating contracts especially related to the supply of primary energy such as coal.
 - 9.1.4 That the Eskom Board and Senior Executive comply with the declaration of financial interests regulations and declare their financial interest.
 - 9.1.5 That the filling of all critical vacancies be expedited within a reasonable time at Eskom.
 - 9.1.6 That the oversight capacity over Eskom be strengthened within the Department of Public Enterprises.
- 9.2 That comprehensive investigations be conducted by the Auditor General South Africa into the reasons for the substantial cost overruns during the construction of the Kusile and Medupi power stations. The report on the investigations should be submitted to Parliament within three months of the adoption of this report by the National assembly.
- 9.3 That the Minister of Finance should ensure that that stringent conditions be attached to the special appropriation of R59 billion that will ensure the sustainability and financial viability of Eskom.



10 Conclusion

The responses to the recommendations as set out in section 9 above by the relevant Executive Authorities and the Auditor General South Africa must be sent to Parliament as well as the Committee within 90 days of the adoption of this report by the National Assembly.

Report to be considered.

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National Council of Provinces

[The following report replaces the Report of the Select Committee on Security and Justice, which was published on page 59 of the Announcements, Tablings and Committee Reports dated 27 November 2019]

1. Report of the Select Committee on Security and Justice on whether or not to restore Advocate Nomgcobo Jiba and Advocate Lawrence Sithembiso Mrwebi, to their positions of Deputy National Director of Public Prosecutions and Special Director of Public Prosecutions at the National Prosecuting Authority, in terms of sections 12(6) of the National Prosecuting Authority Act 32 of 1998, dated 27 November 2019.

The Select Committee on Security and Justice, having considered the President's decision to remove Advocate Nomgcobo Jiba, Deputy National Director of Public Prosecutions, and Advocate Lawrence Sithembiso Mrwebi, Special Director of Public Prosecutions, from their respective positions at the National Prosecuting Authority in terms of sections 12(6) of the National Prosecuting Authority Act 32 of 1998, reports as follows:

1. Introduction

- 1.1. In a letter to the Chairperson of the Council, dated 25 June 2019, the President communicated his decision to remove Adv. Nomgcobo Jiba and Adv. Lawrence Sithembiso Mrwebi from their positions at the National Prosecuting Authority (NPA) of Deputy National Director of Public Prosecutions (DNDPP) and Special Director of Public Prosecutions (SDPP), respectively, in terms of section 12(6)(b) of the National Prosecuting Authority Act 32 of 1998 ("the Act").
- 1.2. Section 12(6)(b) of the Act required the President to communicate his decision to remove Adv. Jiba and Adv. Mrwebi from their positions at the NPA, in a message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session. The President had informed Adv. Jiba and Adv. Mrwebi of his

decision to remove them from office with effect from 26 April 2019 in a letter, dated 25 April 2019. At the time, however, Parliament was dissolved ahead of the 2019 General Elections.

- 1.3. Section 12(6)(c) of the Act provides that Parliament shall, within 30 days after the communication of the message has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a Resolution as to whether or not the restoration to office at the NPA is recommended.
- 1.4. On 28 June 2019, the President’s message containing his decision and accompanying documentation was referred to the Committee for consideration and report. The letter states that the basis for the decision is both reports and submissions, read together.
- 1.5. The following documents accompanied the message:

“... ”

- *The decision to remove Advocate Nomgcobo Jiba and Advocate Lawrence Sithembiso Mrwebi from their position in the NPA, which includes the reasons therefor (two separate letters to both Advocate Jiba and Advocate Mrwebi dated, 25 April 2019;*
- *The unabridged version of the Report of the Panel;*
- *The abridged version of the Report of the Panel (the abridged version was, as described by the Panel, compiled to make a more easily ‘consumable’ version); and*
- *The submissions made by both advocates in response to the Report. Advocate Jiba had annexures to her submission (please refer to Annexure A attached). ...”*

2. Relevant empowering provisions

- 2.1. Section 9 of the Act sets out the qualifications for appointment to the position of National Director of Public Prosecutions, Deputy National Director of Public Prosecutions or Special Director of Public Prosecutions at the NPA. In addition to possessing the requisite legal qualifications to practice in all courts in the Republic, these must be fit and proper person(s), with due regard to their experience,

- conscientiousness and integrity to be entrusted with the responsibilities of the office concerned.
- 2.2. The grounds for and process by which a National Director or Deputy National Director may be removed from office are provided for in sections 12(5), (6) and (7) of the Act.
- 2.3. Section 14(3) of the Act provides that the sections of the Act providing for the vacation of office and discharge of a National Director or Deputy National Director, shall apply, with the necessary changes, with regard to the vacation of office and discharge of a Director.
- 2.4. In terms of section 12(6)(a) of the Act there are four permissible grounds for removing a National Director, Deputy National Director and Special Director from office: misconduct; continued ill-health; incapacity to carry out his or her duties of office efficiently; or on account thereof that he or she is no longer a fit and proper person to hold the office concerned.
- 2.5. Section 12(5) of the Act provides that *“(5) The National Director or a Deputy National Director shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).”*
- 2.6. Section 12(6)(a) and (b) of the Act provides for the removal of the National Director or a Deputy National Director from his or her office:
- “(a) The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-*
- (i) for misconduct;*
 - (ii) on account of continued ill-health;*
 - (iii) on account of incapacity to carry out his or her duties of office efficiently; or*
 - (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.*

(b) The removal of the National Director or a Deputy National Director, the reason therefor and the representations of the National Director or Deputy National Director (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.”

2.7. Parliament’s role in this process is provided for in section 12(6)(c) and (d) of the Act, namely:

“(c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended.

(d) The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.”

3. Overview of the removal process

3.1. Establishment of Enquiry

3.1.1. Adv. Nomgcobo Jiba and Adv. Lawrence Sithembiso Mrwebi were provisionally suspended from office at the National Prosecuting Authority by the President on 26 October 2018, in terms of section 12(6)(a) of the National Prosecuting Authority Act 32 of 1998, pending the completion of an enquiry into their fitness and propriety to hold office. Notably -

- Adv. Jiba served as a Deputy National Director of Public Prosecutions (DNDPP) from 22 December 2010. In December 2011 she was appointed as the Acting National Director of Public Prosecutions and held the position until 4 August 2013 when Mr Mxolisi Nxasana was appointed as National Director of Public Prosecutions, at which point she returned to her position as DNDPP.
- Adv Mrwebi was appointed as a Special Director of Public Prosecutions (SDPP) and head of the Specialised Commercial Crime Unit (SCCU) on 25 November 2011.

3.1.2. Following their provisional suspension, the President established an Enquiry as required in terms of section 12(6)(a) of the National Prosecuting Authority Act 32 of 1998 (the Act) to determine the fitness and propriety of Adv. Jiba and Adv. Mrwebi to hold office in their respective capacities.

3.2. Terms of reference

3.2.1. The Enquiry's terms of reference were gazetted on 9 November 2018 in Government Notice 699 of 2018 (Government Gazette 42029).

3.2.2. The President appointed Justice Yvonne Mokgoro (retired) as chairperson, to conduct the enquiry, assisted by Kgomotso Moroka SC and Thenjiwe Vilakazi. (Terms of Reference: paragraph 1)

3.2.3. The scope of the Enquiry was to look into the fitness and propriety of both Adv. Jiba and Adv. Mrwebi to hold office in their respective capacities. (Terms of Reference: paragraphs 3 and 4)

3.2.4. In relation to Adv. Jiba, and at the Panel's discretion, the Enquiry was to consider evidence arising from the cases referred to in the Terms of Reference, namely:

- *Jiba and Another v General Council of the Bar of South Africa and Another Mrwebi v General Council of the Bar of South Africa* [2018] 3 All SA 622 (SCA).
- *Freedom under Law v National Director of Public Prosecutions & Others* 2018 (1) SACR 436 (GP).
- *General Council of the Bar of South Africa v Jiba & Others* 2017 (2) SA 122 (GP).
- *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP).
- *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA).
- *Zuma v Democratic Alliance* [2014] 4 All SA 35 (SCA).
- *Booyesen v Acting National Director of Public Prosecutions and Others* [2014] 2 ALL SA 319 KZD).

Due regard was to be had to all other relevant information, which included matters relating to Richard Mdluli and Johan Wessel Booysen. (Terms of Reference: paragraph 3.1.)

3.2.5. In relation to Adv. Mrwebi, and at the Panel's discretion, the Enquiry was to consider evidence arising from the cases referred to in the Terms of Reference as they related, directly or indirectly, to his conduct, namely:

- *Jiba and Another v General Council of the Bar of South Africa and Another Mrwebi v General Council of the Bar of South Africa* [2018] 3 All SA 622 (SCA).
- *Freedom under Law v National Director of Public Prosecutions & Others* 2018 (1) SACR 436 (GP).
- *General Council of the Bar of South Africa v Jiba & Others* 2017 (2) SA 122 (GP).
- *Freedom Under Law v National Director of Public Prosecutions and Others* [2014] (1) SA 254 (GNP).
- *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA).

Due regard was to be had to all other relevant information, which included matters relating to Richard Mdluli. (Terms of Reference: paragraph 4.1)

3.2.6. The Enquiry was also required to consider the manner in which Adv. Jiba and Adv. Mrwebi had fulfilled their responsibilities as DNDPP and SDPP, respectively, which included considering whether:

- They complied with the prescripts of the Constitution, the National Prosecuting Authority Act, Prosecuting Policy and Policy Directives and any other relevant laws in their positions as senior leaders in the National Prosecuting Authority and are fit and proper to hold the position and be a member of the prosecutorial service;
- Properly exercised their discretion in the institution, conducting and discontinuation of criminal proceedings;
- They duly respected court processes and proceedings before the Courts as senior members of the National Prosecuting Authority;

- They exercised their powers and performed their duties and functions in accordance with prosecution policy and policy directives as determined under section 21 of the National Prosecuting Authority Act;
- They acted without fear, favour or prejudice;
- They displayed the requisite competence and capacity required to fulfil their duties; and
- They, in any way, brought the National Prosecuting Authority into disrepute by virtue of their actions or omissions. (Terms of Reference: paragraphs 3 and 4)

3.2.7. The Enquiry was required to complete its mandate and furnish its report together with all supporting documentation and recommendations to the President by 9 March 2019 to allow him to make his decision before the expiry of the six-month time limit for the provisional suspension, namely 25 April 2019. However, the Enquiry Report notes that with indulgence from the Presidency, the Report was in fact submitted on 31 March 2019.

3.2.8. Among the powers delegated to the Chairperson in the Terms of Reference, were the powers to determine the Rules by which it would be governed. According to the report, fairness, particularly to the parties, and reasonableness in the execution of the process were the two basic guiding principles throughout. Notably, the rules of procedure were drafted in the context of an enquiry, rather than a commission, disciplinary process or criminal trial. The procedures adopted were, therefore, inquisitorial as opposed to accusatorial.

3.2.9. The Rules of Procedure that the Enquiry adopted were agreed to by the Evidence Leaders and the legal representatives of the concerned parties at a meeting held on 22 November 2018 – this included agreement on the status of documents which were to be admitted as evidence.

3.3. Findings and recommendations of the Enquiry

3.3.1. The Enquiry found that, in view of the totality of evidence and in light of the evaluation of that evidence, both Adv. Jiba and Adv. Mrwebi were not fit and proper to hold their respective offices.

3.3.2. The Enquiry, therefore, recommended that Adv. Jiba and Adv. Mrwebi be removed from office.

3.4. **President's decision**

3.4.1. In a letter dated 4 April 2019, the President shared the Enquiry Report with Adv. Jiba and Adv. Mrwebi, respectively, and invited them to make representations regarding the findings and recommendations contained in the Enquiry Report, which they did.

3.4.2. On 25 April 2019, having regard for the work of the Enquiry, and after receiving further representations from Adv. Jiba and Adv. Mrwebi in respect of the Report, the President decided to remove both Adv. Jiba and Adv. Mrwebi from office at the NPA in terms of section 12(6)(a) of the Act with effect from 26 April 2019.

3.4.3. The President wrote separate letters, both dated 25 April 2019, to Adv. Jiba and Adv. Mrwebi to inform them that he had decided to accept the recommendations of Enquiry Report. The correspondence acknowledges receipt of their submissions in response to his invitation to them to give reasons why he should not implement the recommendations of the Enquiry Report, as well as documentation filed during the Enquiry, which includes the submissions made to the Enquiry prior to the panellists compiling the Report. He writes that he took the Unabridged and Abridged Reports and all their respective submissions into account in making his decision.

3.4.4. In relation to Adv. Jiba, the President states that the Enquiry Report deals with the grounds upon which he has based his decision and some of the key reasons are:

“ ...

3.4.4.1 *That I have come to the conclusion that, contrary to your assertions, everything was done to ensure the Enquiry was held in a fair manner, which included involving your legal representatives in agreeing to the rules of procedure and admissibility of evidence. I have further concluded from reading the Report, that the Panel dealt extensively with all the evidence that was put before it in a fair and methodical manner.*

3.4.4.2 *That the findings made against you, based on the evidence before the Panel, are of a very serious nature. Your submissions do not offer any response or reason not to accept the Panel's conclusion on the following matters:*

3.4.4.3 *the Panel found you lied to me. The Panel made this finding after noting in your submissions of 10 August 2018, you indicated that you appointed prosecutors from outside KZN, in the Booyesen matter, on request of the Acting DPP of KZN. However, in your statement under oath before the Panel you said this was not the case.*

3.4.4.4 *the Panel concluded that you acted under external pressure in making decisions on charges General Booyesen on the basis of what was indicated to you by IPID officials.*

3.4.4.5 *the Panel determined that you failed to review or consider the representations made to review the decision by Advocate Mrwebi to withdraw charges against Mr Mdluli.*

3.4.4.6 *the Panel found that you failed to follow legal prescripts in your decisions.*

3.4.4.7 *the Panel found that you brought the NPA into disrepute.*

3.4.4.8 *the Panel concluded that you lacked the necessary conscientiousness and independence required of your position.*

3.4.4.9 *Your submissions assert that section 42 of the NPA Act precludes your removal through the enquiry process. However, I am advised that this section immunises prosecutors from being held personally liable for damages that may result from the decisions they take in the course of their work. It cannot shield a DNDPP from an enquiry about their conduct, competence or fitness to hold such a position. Section 12(6) is a unique process separate from ordinary labour disciplinary processes created by the NPA Act to protect the independence of the NPA.*

3.4.4.10 *Your request to be appointed in a senior position in the Public Service cannot be acceded to because of the findings of dishonesty made against you in the Enquiry Report. These findings would preclude your appointment to such position as these are qualities that are required of all senior public servants”.*

3.4.5. In relation to Adv. Mrwebi, the President states that the Enquiry Report deals with the grounds upon which he has based his decision and some of the key reasons are:

“...

3.4.5.1 *That I have come to the conclusion that, contrary to your assertions, everything was done to ensure that the Enquiry was held in a fair manner, which included involving your legal representatives in agreeing to the rules of procedure and admissibility of*

evidence. I have further concluded from reading the Report that the Panel dealt extensively with all the evidence that was put before it in a fair and methodical manner.

3.4.5.2 That the findings made against you, based on the evidence before the Panel, are of a very serious nature. Your submissions however do not offer any response or reason not to accept the Panel's conclusion on the following matters:

3.4.5.3 The Panel found that there were contradictions in your testimony, which led the Panel to conclude that you lied about the date on which you prepared the consultative note dealing with the withdrawal of charges against Mr Mduli.

3.4.5.4 The Panel concluded that you were wrong in law about the Inspector General of Intelligence's mandate.

3.4.5.5 The Panel concluded that you accepted representations from members of the Crime Intelligence Unit before your appointment to the relevant position and wrongly factored them into your decision;

3.4.5.6 The Panel found that you lied in the Ledwaba trial under oath.

3.4.5.7 The Panel noted that you were dishonest before the Enquiry itself. Such conduct cannot be countenanced for a person in your position.

3.4.5.8 Your request that you be given the opportunity to retire, in light of your age, cannot be acceded to, because of the seriousness of the findings against you."

3.4.6. The President's letter informs Adv. Jiba and Adv. Mrwebi that their removal from their respective positions of NDPP and SDPP is effective immediately, as of 26 April 2019. Further, while the Enquiry Report suggests that the removal must await confirmation by Parliament, the President is of the view that section 12(6)(b) of the NPA Act makes it plain that Parliament is not asked to confirm any decision he makes but to confirm whether after removal, Adv. Jiba and/or Adv. Mrwebi ought to be restored to their positions in its view.

4. Committee's process

4.1. On 10 July 2019, at a joint meeting the Portfolio Committee on Justice and Correctional Services and the Select Committee on Security and Justice, the Committees received a briefing from the Parliamentary Legal Advisors on the legal procedures to follow in reviewing whether to restore or not to restore Advocate Nomgcobo Jiba and Advocate Lawrence Sithembiso Mrwebi to their positions in the National Prosecuting Authority.

The Committees requested additional legal advice on whether the National Assembly and the National Council of Provinces may hold joint meetings on the matter in terms of the National Assembly and National Council of Provinces Rules.

- 4.2. On 19 July 2019, at a joint meeting of the Portfolio Committee on Justice and Correctional Services and the Select Committee on Security and Justice, the Committees discussed the procedures to be followed when considering the matter of whether to restore Adv. Jiba and Adv. Mrwebi to office. The Committees decided against considering the matters jointly but agreed that each would write to Adv. Jiba and Adv. Mrwebi inviting them to submit written representations to each Committee.
- 4.3. Subsequently, the Committee corresponded with Adv. Jiba and Adv. Mrwebi, dated 23 July 2019, informing them that the Committee would be initiating a process to consider the matter of whether or not to recommend their restoration to office.
- 4.4. As was agreed, the Committee also invited both to make any additional/further written representations for consideration by the Committee; and to provide any available documentary or other evidence that may be relied on for the representations. The Committee deadline for this was 8 August 2019.
- 4.5. On 26 July 2019, Adv. Mrwebi submitted his representations to the Committee, supplementing these with a further submission on 29 July 2019.
- 4.6. Although Adv. Jiba received the invitation to make representations to the Committee, she submitted no representations. Instead on 8 August 2019, her attorney, Mr Zola Majavu, wrote to the Speaker of the National Assembly and the Chairperson of the Select Committee on Security and Justice to inform Parliament that, on 7 August 2019, Adv. Jiba had initiated a court application in the Western Cape High Court to review and set aside the findings of the Enquiry and the decision of the President to remove her from office ahead of the outcome of the parliamentary process.
- 4.7. The letter goes on to state:

“3. In light thereof and with specific reference to the sub judice rule, we trust that Parliament and its relevant Committees which are currently seized with this matter

would accordingly await the outcome of the review proceedings which are now pending before a Court of Law. Needless to say, in the premises, we would not make any submissions as requested in the letter under reply.

4. We would thus be grateful if you could acknowledge receipt hereof and confirm that Parliament and its relevant Committees would consequently await a decision of the High Court in respect of the matter currently under consideration. In our considered view, it could never be sincerely suggested that, notwithstanding the pending review, Parliament can still proceed with its consideration of this matter. Should you hold a different view, kindly indicate so in writing, to enable us to take appropriate action in order to protect our client's rights [underlining for emphasis]."

- 4.8. On 14 August 2019, on the instruction of the Speaker, the State Attorney wrote to Adv. Jiba's attorneys of record notifying them that the Speaker had given permission for service of the application to take place on the parliamentary precinct. The letter also informed that the parliamentary process shall proceed as scheduled until an order of court was obtained to stop the process.
- 4.9. On 14 August 2019, Adv. Jiba's attorneys replied to the letter, requesting the dates of the meetings that the Committee had scheduled to consider the matter in order to apply for an interdict at the very latest by 19 August 2019. The letter requested Parliament not to proceed with its consideration of the matter until 27 August 2019, in order to allow the urgent interdict to be heard on either 20 or 21 August 2019.
- 4.10. In Part A of her notice of motion, Adv Jiba sought interim relief pending the hearing and final determination of Part B of the application. The relief sought under Part A included that the parliamentary process in terms of section 12 be stayed, pending the outcome of the applications for orders in terms of Part B.
- 4.11. The parties agreed that Part A of the application would be heard on an urgent basis. Parliament did not oppose the application and, instead chose to abide by the court's decision. The matter was set down for hearing on 19 September 2019.
- 4.12. On 19 August 2019, Adv. Mrwebi sent a letter requesting that the Committee stay its deliberations on the matter of whether or not to restore him pending the outcome of

the interdict and review application by Adv. Jiba, as the issues raised in the application are substantially the same as those that he raised in his submission to the Committee.

4.13. The Committee was briefed on these legal developments by the parliamentary legal advisors on 20 August 2019. Consequently, it resolved to stay its deliberations regarding Adv. Jiba and Adv. Mrwebi pending the outcome of the interdict and court application.

4.14. On 18 October 2019, the Western Cape High Court dismissed Part A of Adv. Jiba's application, seeking, among others, an order staying the parliamentary process pending the outcome of the application for orders in terms of Part B of the application. The judgement makes a clear distinction between the President's power to remove in terms of section 12(6)(a) of the Act and Parliament's role to restore:

"[54] In coming back to the language and construction of section 12(6) of the NPA Act, it is clear from the wording and the manner in which the entire section has been constructed, that it envisages two distinct and separate procedures when an NDPP or DNDPP is removed from office. The wording in my view is clear. In terms of section 12(5) it is stated that the NDPP or SNDPP, shall not be suspended or removed from office except in accordance with the provisions of sub-sections (6), (7), and (8). In terms of subsection (6)(a) the function to suspend or remove clearly resides with the President and no one else.

[55] This section does not give the power to suspend or remove to any other institution or entity other than the President. The President is charged with the exclusive power to suspend or remove the NDPP or DNDPP. In this particular case, we are dealing with the exclusive power to remove by the President. In terms of subsection (b) such a removal by the President, the reasons therefore and representations by the NDPP or DNDPP (if any) shall be communicated by message to Parliament within 14 days after such a removal if Parliament is in session or, if Parliament is not in session, within 14 days after the commencement of the next ensuing session.

[56] The Act does not give Parliament such powers and it does not state that the removal is conditional upon the approval of Parliament. ...

[57] It is only after the removal by the President comes into operation or takes effect that Parliament plays a role. The President's function to remove is then completed and he plays no further role. ...

[58] The President does not play any role in terms of the subsection in the consideration whether or not the NDPPP or DNDPP, should be restored to his or her office. The wording is clear; Parliament's function is not to remove but to restore. Parliament plays no role in the removal of the NDPP or DNDPP. Parliament acts independently in terms of its oversight function of the President in terms of section 55(2)(b) of the Constitution, when it considers whether to restore the NDPP or DNDPP in terms of subsection 6(c) or (d). "

4.15. Following the handing down of the judgement, the Committee decided to write to Adv. Jiba to invite her once again to make written representations to the Committee. The deadline for this was 7 November 2019.

4.16. However, on 7 November 2019, the Speaker and Chairperson of the Committee received a letter from Adv. Jiba informing the Committee that she no longer wished to participate in the process due to personal reasons:

"I wish to express my sincerest appreciation for the invite and the manner in which you have approached this matter from the beginning to date.

However, I have taken a decision to move on with my life. I do not seek any restoration by the Parliament back to my position in the NPA. For this reason, I will not make any representations in this regard. Thus, you do not have to consider that option.

The reasons for my decision are personal. ... "

5. Overview of representations by Adv. Mrwebi

5.1. On 26 July 2019, Adv Mrwebi forwarded the following documents to the Committee for consideration:

- Letter to the Parliamentary Select Committee (Subject: Removal/ Dismissal by the President: Invite to make representations).

- Index to presentation to Parliament.
- Foreword to Presentation.
- Summary of Parliamentary Presentation.
- Presentation to Parliament in terms of section 12 of the National Prosecuting Act, 32 of 1998.
- Possible Grounds for Review: Basis to Challenge the Enquiry in Courts or Other Relevant Fora.
- Supporting Document: Part 1 – Annexure A: Prosecutors Reports.
- Supporting Document: Part 2 – Annexure B: Acting in Consultation; Annexure C: GCB Affidavit; Annexure D: Extract – Prosecution Policy Section 24(3); and Annexure E: City Press Report Powers of the Inspector General of Intelligence (IGI).
- Supporting Document: Part 3 – Annexure F: SCCU Strategy 2012 and Annexure G: Quarterly SCCU Reports 2014/15
- Supporting Document: Part 4 – Annexure H: 2014/15 Performance Report and Annexure I: OECD Authorisation and Reports

5.2. Subsequently, on 29 July 2019, Adv Mrwebi forwarded an additional document: Annexure to letter: Summary on President’s Decision.

5.3. On 31 October 2019, the Committee received further correspondence from Adv. Mrwebi in which he requested that he be permitted to address Parliament with the assistance of legal counsel on a specific matter.

6. **Deliberations**

6.1. *Committee’s mandate:* The Committee is acutely aware that its mandate is confined to section 12(6)(c) and (d) of the Act, which is to make a recommendation to the National Assembly on whether or not to restore a National Director, Deputy National Director or Special Director to office. The Committee understands that the Act envisages two distinct processes, namely the removal by the President and then proceedings to consider restoration to office. It is very clear to the Committee that its

mandate is not to remove but to restore. In *Jiba v President of the Republic of South Africa and Others* (13745/2019) [2019] ZAWCHC 136 (18 October 2019), Henney J writes that: “*The wording [of the Act] is clear; Parliament’s function is not to remove but to restore. Parliament plays no role in the removal of the NDPP or DNDPP. Parliament acts independently in terms of its oversight function of the President in terms of section 55(2)(b) of the Constitution., when it considers whether to restore the NDPP or DNDPP in terms of subsection 6(c) or (d).*”. (paragraph 58)

The Committee, therefore, understood that its role in considering whether or not to restore requires that it exercise oversight over the President’s decision, generally, in terms of section 55 of the Constitution and, explicitly, in terms of section 12 (6)(c) and (d) of the Act to give effect to protecting the independence of the NPA.

The Committee, therefore, identified the following to guide it in reaching its conclusions:

- Had the President complied with the requirements of section 12(6)(a) and(b) of the Act?
- Was the process leading up to the President’s decision fair to Adv. Jiba and Adv. Mrwebi?
- Was the President’s decision to remove based on good reason?

6.2. *Applicable standard for fit and proper.* On 31 October 2019, Adv. Mrwebi wrote again to the Speaker and to the Committee asking that he be afforded the opportunity to address the Committee through his legal representative on the issue of whether the President acted in violation of an order granted by the court in *Freedom Under Law v National Director of Public Prosecutions and Others 2018 (1) SACR 436 (GP)* (“*the FUL matter*”), where *Mothle* and *Tlhapi JJ* (concurring) and *Wright J* (dissenting) in proceedings where the previous President of this country were directed to institute disciplinary proceedings against the Applicant and Mr Mrwebi, issued the following order in paragraph 108.3 “... *The President is directed to institute disciplinary enquiries against Jiba and Mrwebi into their fitness to hold office in the National Prosecuting Authority, and suspend them pending the outcome of those enquiries. It is further ordered that the implementation of this specific order be suspended pending the ultimate outcome of the appeal of the GBC judgment.* “

In Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others (89849/2015) [2017] ZAGPPHC 791; 2018 (1) SACR 436 (GP) (21 December 2017), the Supreme Court of Appeal draws a distinction between fitness required to be an advocate and the fitness required to be an official in the NPA by examining the admission of Advocates' Act on the one hand and the NPA Act on the other. While the one may impact on the other, the two are distinguishable. Removal from the roll as an advocate will certainly impact on the fitness to hold office as an employee of the NPA. However, an advocate in good standing may not necessarily be fit and proper to hold office in the NPA (paragraph 96, p 97). The Court, therefore, overturned the High Court judgement to find Adv. Jiba and Adv. Mrwebi to be fit and proper to remain advocates.

When the GCB took the matter on appeal, the Constitutional Court dismissed the matter on the ground that it raised a question of fact and not a constitutional question over which the Court had jurisdiction.

Further, the Committee notes that the Enquiry deliberated on this matter and found the argument that also clearly distinguished between the fit and proper test as it applies to Adv. Jiba and Adv. Mrwebi remaining on the roll of advocates is not the same as that applies to the fit and proper evaluation in terms of the NPA Act.:

“It is pertinent that we express some preliminary views on the GCB cases as they reveal the difference between the question determined by the Courts and that which this Enquiry must respond to. Adv. Jiba’s legal representatives asked that this Enquiry accept that the fit and proper test as it relates the two remaining on the roll of advocates, was determined in the GCB SCA case, is the same test that applies to the fit and proper evaluation in terms of the NPA Act. However, that view is incorrect. Both the SCA and the High Court in the GCB matters established as much. This position was further bolstered by FUL 2018 where the Court explained the difference clearly and at great length.

In sum, while an official may be removed or found to be not fit and proper to remain in the NPA, they may still remain fit and proper to remain on the roll of advocates. Should an individual be struck from the roll of advocates they will, by operation of

the law, *also cease to be fit and proper to hold office in terms of the NPA Act.*" (see paragraph. 1050-1052):

The Committee notes also that Adv. Jiba raised this matter in her replying affidavit as part of her application to Western Cape High Court for interim relief. She contended that the President could not have suspended her, nor could he have instituted an enquiry, nor could he have acted to remove her based on the recommendations of the Enquiry before 27 June 2019, when the Constitutional Court concluded that it did not have jurisdiction to hear the appeal in question. However, the High Court found that the relief that the applicant was seeking in this respect was, in fact, a declaratory order which was final in effect, and not interim relief. The contention properly forms part of Part B of the application or the final review application. Further, the relief being sought on this ground is far-reaching but was raised belatedly in the replying stage of what was initially an application for interim relief. Nor had all the information been properly put before the court. In addition, the opposing respondents had not been given a proper opportunity to answer the allegation.

The Committee applied its mind to Adv. Mrwebi's request to address Parliament through legal counsel on this matter. Although this was a late submission and the Committee was under no obligation to consider Adv. Mrwebi's request, it nonetheless applied its mind in this regard. On his request to address Parliament in person, the Committee was disinclined to grant him such an opportunity given that this issue had already been ventilated in the Western Cape High Court.

The Committee also notes that both Adv. Jiba and Adv. Mrwebi had ample opportunity to raise their objections to their suspension and removal on this ground with the President but chose not do so. Nor did they elect to take the President's decision on review at that stage. It was only in August and October 2019, respectively, that they raised this argument when Parliament had already begun its process.

- 6.3. *Did the President comply with section 12(6)(a) and (b) of the Act?* Sections 12(6)(a) and (b) and section 14(3) of the Act specify the process that the President must follow in reaching a decision to remove a National Director, Deputy National Director and

Special Director. Having considered the relevant provisions of the Act and documentation provided to it, the Committee is of the view that the President indeed followed the prescripts of the law in reaching his decision to remove Adv. Jiba and Adv. Mrwebi from office, respectively.

6.4. *Was the process leading up to the President's decision fair to Adv. Jiba and Adv. Mrwebi?*

6.4.1. In this regard the Committee notes that:

- In August 2018, prior to their provisional suspension and the setting up of the Inquiry, the President invited Adv. Jiba and Adv. Mrwebi to make representations to him on whether or not they should be suspended. After considering their representations, the President provisionally suspended them. In his letters to Adv. Jiba and Adv. Mrwebi, the President noted that he had taken into account the serious nature of the allegations regarding their lack of fitness to be in so high an office. The President stated that the work of the criminal justice system is central to the critical and pressing matter of all prosecutions, especially prosecution of corruption cases and safeguard of the public. Furthermore, Adv. Jiba and Adv. Mrwebi held senior positions with influence over a large swathe of the NPA. It was, therefore, in the interest of the NPA's image as a whole and of the integrity of an enquiry that must result in the clearest and most convincing conclusions about the integrity, and sound leadership of the NPA that they be provisionally suspended.
- The Enquiry was set up with clear terms of reference, which were gazetted on 9 November 2018 in Government Notice 699 of 2018 (Government Gazette 42029).
- Furthermore, the Enquiry was presided over by Justice Yvonne Mokgoro (retired), assisted by Kgomotso Moroka SC and Thenjiwe Vilakazi.
- The Terms of Reference were also clear regarding the scope of Enquiry, which was to look into the fitness and propriety of both Adv. Jiba and Adv. Mrwebi to hold office in their respective capacities.
- According to the Enquiry Report, both Adv. Jiba and Adv. Mrwebi were represented by senior legal counsel.

- The Chairperson of the Enquiry was empowered to determine the Rules by which the Enquiry would be governed. According to the report, fairness, particularly to the parties, and reasonableness in the execution of the process were the two basic guiding principles throughout. Notably, the rules of procedure were drafted in the context of an enquiry, rather than a commission, disciplinary process or criminal trial. The procedures adopted were, therefore, inquisitorial as opposed to accusatorial.
- Further, the Rules of Procedure that the Enquiry adopted were agreed to by the Evidence Leaders and the legal representatives of the concerned parties at a meeting held on 22 November 2018 – this included agreement on the status of documents which were to be admitted as evidence.
- Both Adv. Jiba and Adv. Mrwebi were given opportunities to submit and lead evidence and to cross-examine witnesses during the Enquiry process.
- Following the conclusion of the Enquiry process and before reaching his decision to remove Adv. Jiba and Adv. Mrwebi, the President gave them a further opportunity to make representations on the Enquiry’s findings and report. The President’s letter, dated 25 April 2019, clearly indicates that he considered all their submissions, as well as documentation filed during the Enquiry that included the submissions made to the Enquiry prior to the panellists compiling the Enquiry report. In this regard, he writes that he took the Unabridged and Abridged Reports and all their respective submissions into account in making his decision.

6.4.2. Furthermore, the Committee is of the view that the documents and representations before it does not raise any reason for it to find that the process followed was unfair.

6.4.3. The Committee notes too that Henney J in *Jiba v The President of the RSA and Others* said that: “[63] *The provisions of subsection (6), (7) and (8) [of the NPA Act] are peremptory and protects the NDPP or the DNDPP from arbitrary removal by the President. The Act prescribes that proper due process be followed, which in my view, was complied with in this case. It was done in a manner to protect the independence of the NPA, if regard is to be had to the facts and circumstances of this case as set out earlier in this judgment. These facts are: The applicant throughout was invited to*

make representations firstly, as to whether she should be suspended based on the reasons afforded to her by the President; Secondly, whether the President should institute an enquiry, based on the reasons he once again afforded to her. She was invited to persuade the President not to institute such an enquiry; Thirdly, when the President nonetheless decided to institute the enquiry, he gave his reasons for his decision; Fourthly, after the conclusion of the enquiry, the full report and the record of the enquiry was presented to the applicant with the findings on which the report was based; Fifthly, she was once again invited to make representations to the President as to why the recommendations of the panel, which was that she had to be removed from office, should not be implemented.”

6.5. *Was the President’s decision rational?*

6.5.1. In this regard, the Committee notes that the President’s letter, dated 25 April 2019 makes it clear that his decision was based on the findings of the Enquiry and that these findings, based on the evidence before the Enquiry, are of an extremely serious nature. Further, the President writes that he had considered their representations to him but that he did not find that they had raised “*any response or reason not to accept the Panel’s conclusion*”.

6.5.2. Furthermore, the Committee is of the view that the representations placed before it by Adv. Mrwebi do not raise any reason for it to find that the President did not apply his mind properly to the matter before him.

7. Findings

7.1. In respect of Adv. Jiba, the Committee finds no reason to restore Adv. Jiba to the office of Deputy National Director of Public Prosecutions in that:

7.1.1. The President complied with the provisions of section 12(6)(a) and (b) of the National Prosecuting Authority Act, 1998.

7.1.2. The process followed by the President in reaching his decision was fair.

- 7.1.3. The President applied his mind properly on this matter.
- 7.2. In respect of Adv. Mrwebi, the Committee finds no reason to restore Adv. Mrwebi to the office of Special Director of Public Prosecutions in that:
 - 7.2.1. The President complied with the provisions of section 12(6)(a) and (b) of the National Prosecuting Authority Act, 1998 in reaching his decision.
 - 7.2.2. The process followed by the President in reaching his decision was fair.
 - 7.2.3. The President applied his mind properly on this matter.

8. Recommendations

- 8.1. The Committee recommends that the National Council of Provinces resolve not to restore Adv. Nomgcobo Jiba to office of Deputy National Director of Prosecutions.
- 8.2. The Committee recommends that the National Council of Provinces resolve not to restore Adv. Lawrence Sithembiso Mrwebi to office of Special Director of Public Prosecutions.

Report to be considered.

04 June 2024

Attention: Ms Delisile Nhlapho

Electoral Court of South Africa

Per email: denhlapho@sca.judiciary.org.za

Dear Ms Nhlapho,

**RE: REYNO DAWID DE BEER // ELECTORAL COMMISSION OF SOUTH AFRICA AND
OTHERS (CASE NO: 0027/24EC)**

1. We refer to your email dated 3 June 2024 and Mr De Beer's response thereto dated 4 June 2024.
2. In terms of the Court's directives dated 27 May 2024, the Commission and Commissioners were required to file an answering affidavit to Mr De Beer's complaint by 30 May 2024.
3. This was not possible as the 2024 General Election was held on 29 May 2024. We accordingly requested an extension to file the answering affidavit by today, Tuesday 4 June 2024. We have not received a direct response to this request.
4. Together with counsel, we have prepared a draft answering affidavit which is currently being considered by the individual Commissioners, who we still require instructions from on certain issues. Each Commissioner needs to consider the matter, due to the nature of the complaint made against them individually.
5. As can be expected, the Commissioners have been under immense pressure over the past 10 days, dealing with the elections and related matters, which has led to a slight delay in the finalisation of the answering affidavit.
6. The Commission and Commissioners shall endeavour to be in a position to file the answering affidavit by Thursday ,6 June 2024 and, to the extent necessary, condonation will be sought for any failure to comply with the Court's directive.

7. We trust the above is in order.
8. Our clients' rights are strictly reserved.

Yours faithfully,

Sereeka Ananmalay
Harris Nupen Molebatsi Inc.
(sent electronically, unsigned)

