IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 13394/18

In the matter between:

COUNCIL FOR THE ADVANCEMENT OF THE

SOUTH AFRICAN CONSTITUTION Applicant

and

THE PUBLIC PROTECTOR First Respondent

FILING NOTICE

SIRS,

KINDLY TAKE NOTICE that the Applicant hereby files its Replying Affidavit.

Dated at Durban on this 5th Day of July 2018.

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and

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REPLYING AFFIDAVIT

I, the undersigned,

PARMANANDA NAIDOO

state under oath as follows:

1 I am the executive secretary of the Council for the Advancement of the South African Constitution ("**CASAC**"). CASAC's offices are at 7 Olympia Court, 85 Durban Road, Mowbray, Cape Town.

2 The facts contained in this affidavit are both true and correct, and within my personal knowledge unless the context provides otherwise.

INTRODUCTION

3 The purpose of this affidavit is to reply to the answering affidavit of the Public Protector.

4 I have, in preparing this affidavit, dealt only with issues that strictly call for a reply. I have also sought to avoid unnecessary repetition. Accordingly, I do not deal with every averment in the Public Protector's answering affidavit paragraph-by-paragraph.

5 My failure to do so does not amount to an admission that any particular factual allegation or legal contention contained in the answering affidavit is well founded, including where it contradicts the founding affidavits.

6 Instead, I deal thematically with those portions of the answering affidavits that call for a reply, and I do not repeat the averments made in the founding papers, by which I stand.

7 At the outset, I draw attention to the peculiar shift in the Public Protector's stance as this matter has progressed.

7.1 CASAC launched its application on 23 February 2018. It sought a declaration that the Public Protector had failed in her statutory and constitutional duties, and an order reviewing and setting aside the Report on the basis that it was unlawful and irrational.

7.2 On 8 March 2018, the Public Protector filed a notice to abide. This was accompanied by a letter, attached marked "**RA1**", indicating that she had decided not to oppose the application to review and set aside the Report, but reserving her right to participate in the proceedings and deliver an "*explanatory affidavit to assist the Court in adjudicating the matter*".

7.3 She thus acknowledged the unlawfulness of her investigation Report.

7.4 On 23 March 2018, the Public Protector delivered the record of her decision, together with an affidavit setting out her reasons for it. She still did not oppose the application. Instead, she cited budgetary and capacity constraints as the reasons for the deficiencies in her Report.

7.5 On 24 April 2018, CASAC filed its supplementary founding affidavit. In light of the contents of the record, it supplemented its grounds of review to include allegations of improper purpose and bad faith. It also sought a personal and punitive costs order against the Public Protector.

7.6 On 7 May 2018, the Public Protector filed a notice of intention to oppose. Given her earlier stance, one might reasonably have expected her to oppose the costs order, and to dispute the claims of improper purpose and bad faith – that is, to resist only the new claims arising from the supplementary founding affidavit.

7.7 Instead, in a complete about-turn, she seeks to defend the lawfulness of her decision in all respects.

7.8 Remarkably, she glosses over this fact towards the end of her answering affidavit (at paragraph 123). Her explanation is that she initially abided out of a fear of being mulcted with personal costs, but decided to oppose after receiving the supplementary founding affidavit. But the explanation is self-evidently inadequate.

7.8.1 No personal costs order was sought against her in the founding papers. The original relief sought simply to review and set aside her report on the basis that it was unlawful and irrational. That was the relief that she did not oppose. As a result, she impliedly accepted the unlawfulness and irrationality of the Report.

7.8.2 It thus remains a mystery why, when she decided to oppose, the Public Protector did not limit her opposition to the new relief CASAC sought in its supplementary founding affidavit. She has not explained why she now also opposes the relief CASAC initially sought, and by which she initially abided.

7.8.3 It is incumbent on any litigant to explain a *volte face* of that kind, which effectively amounts to the withdrawal of a prior admission of unlawfulness. As a public official, the Public Protector bears heightened obligations of candour in the conducting of her litigation.

7.8.4 It is particularly concerning that she has elected to remain silent on this subject when, in its supplementary founding affidavit, CASAC noted (at paragraph 30) that what had come to light in the Rule 53 record "*calls into question the Public Protector's decision to abide by this Court's judgment*" and that the decision appeared to be an effort "*to avoid having to answer, on oath, important questions that go to her integrity and competence*".

7.8.5 As I explain in this affidavit, she has still failed to answer those questions. She has also failed to explain what motivates the contradictory stances she has adopted throughout this litigation.

8 The remainder of this affidavit is structured as follows:

8.1 First, I explain how the Public Protector misunderstands the nature of these proceedings.

8.2 Second, I demonstrate that the Public Protector has left unrebutted and unexplained the various deficiencies in her Report. The inferences of bad faith and improper purpose that CASAC asked to be drawn in the absence of an adequate explanation must accordingly now be drawn.

8.3 Third, I set out CASAC's basis for persisting in its claim for a personal and punitive costs order against Adv Mkhwebane.

THE PUBLIC PROTECTOR'S MISUNDERSTANDING OF THE NATURE OF THESE PROCEEDINGS

9 The Public Protector's answering affidavit betrays a profound misunderstanding of the nature of the application against her. In this section, I seek to clarify the nature of these proceedings.

10 First, this application is not, as the Public Protector claims (at paragraph 2), "*rooted firmly in what the applicant would prefer [she] should have done*". It is rooted in the Public Protector's failure to comply with her legal and constitutional obligations under the Constitution. Her answering affidavit does little to explain how the investigation and Report complied with those obligations, other than to say that her office lacked resources.

11 Second, while I accept that shortly after CASAC launched its application, the Supreme Court of Appeal determined that the Public Protector's decisions do not constitute administrative action and are not subject to PAJA, the Public Protector is mistaken that this is "*fatal to this application*" (paragraph 3).

11.1 CASAC made clear in both its founding affidavit and its supplementary founding affidavit that it relied also on the constitutional principle of legality. It did not do so "*hesitantly*" as the Public Protector claims (at paragraph 4). On

the contrary, acknowledging that the High Court's prior findings that her decisions are subject to PAJA were questionable, CASAC submitted (founding affidavit, paragraph 60) that whether those findings were correct was "*unnecessary for this Court to decide*".

11.2 That was because the Report is plainly unlawful and irrational. If it is not reviewable under PAJA, it is in any event reviewable under the constitutional principle of legality. Thus, CASAC was careful to explain that each of the four irregularities identified in its founding affidavit, and the fifth irregularity introduced in its supplementary founding affidavit, were reviewable under the constitutional principle of legality on the basis of unlawfulness, irrationality and / or bad faith.

11.3 Quite what the Public Protector means when she says (at paragraph 4) that the principle of legality is "*not a self-standing basis for review*" is unclear. While this is a question for argument and will be addressed as such, I am advised that the statement is entirely mistaken, reveals a profound misunderstanding of the prescripts to which her powers are subject, and stands in stark contrast to nearly two decades of constitutional jurisprudence.

12 Third, the Public Protector says (at paragraph 6) that she cannot be declared to have violated her mandate for failure to investigate a complaint, because section 182(1)(a) of the Constitution mandates her only to investigate conduct.

12.1 In terms of the Public Protector Act 23 of 1994 (the "**Public Protector Act**"), the national legislation passed to give effect to section 182 of the Constitution, while the Public Protector is indeed competent to investigate conduct, she does so either on her own initiative, or pursuant to a complaint, or pursuant to information that comes to her knowledge which points to such conduct.

12.2 CASAC's case is precisely that she failed to investigate and give appropriate remedial action in respect of conduct. Some of that conduct was express in the complaints she received. Other aspects of the conduct were identified following investigation, both by the complaints, and by other material at the Public Protector's disposal, which she simply ignored.

12.3 In fact, as I explain below, it is the Public Protector that insists on referring, in blinkered fashion, to the terms of the complaint that she received, and, quite improperly, to the wishes of the complainant and the Democratic Alliance as to how she ought to have conducted her investigation.

13 Fourth, the Public Protector has attempted to recast her decision in this case. She claims (at paragraph 7) that CASAC is, in effect, reviewing her decision "*to defer the investigation of some conduct for the reasons mentioned in the report*", but without having directly challenged her decision to "*defer*" the investigation.

13.1 At no point in her Report does the Public Protector suggest that she is "*deferring*" some aspects of her investigation. Her Report sets out issues that were <u>not</u> investigated. It did not suggest that they would be re-investigated in

the future. It is precisely her failure to investigate those issues, and others, that forms part of this review.

13.2 Together with the record of her decision, the Public Protector filed a short affidavit titled "*Respondent's Reasons In Terms of Rule 53(1)(b) of the Uniform Rules of Court*" (the "**Reasons**") In her Reasons, she set out the resource constraints under which her Office operates. Again, no mention was made of the fact that she was considering investigating these issues at some later stage, or had "*deferred*" them.

13.3 Instead, the first time that the issue of a re-investigation of these issues arose was when the Public Protector was summoned before the Portfolio Committee in April 2018. As she acknowledges in her answering affidavit (at paragraph 64), she then undertook, at the Portfolio Committee's request, to re-investigate the nature and extent of the involvement of politicians.

13.4 In short, therefore, the Public Protector has conflated her original investigation and Report arising from the decision at issue here with a later decision to re-investigate the alleged involvement of politicians. The latter can, with respect, have no bearing on the lawfulness of the former. Indeed, if anything, the need for the re-investigation only betrays the insufficiency and irrationality of the original investigation.

14 Fifth, a repeated justification for the failure to investigate various conduct is that the incumbent, Adv Mkhwebane, only assumed office in October 2016, once a

Provisional Report had already been prepared by her predecessor, Adv Madonsela. However, in advancing this justification, the Public Protector appears to have lost sight of what she seeks now to defend. That is, now that the Public Protector seeks to defend her Report in its entirety, and not merely to explain and defend her own role in it, it is no defence for her to say that the Report was nearly complete when she came into office. Put differently, given that she no longer abides the Court's decision on the lawfulness of the Report, she is required to explain why the Report itself is lawful, and not only what her role in its production was as opposed to her predecessor's. Her inheritance of a Provisional Report does not explain the contents of the final Report that she issued.

15 Sixth, and perhaps most disturbingly, the Public Protector suggests on various occasions (for example, at paragraphs 122.6 and 127.2), that CASAC has committed a criminal offence in pursuing this litigation, by interfering with the Public Protector's functioning. The suggestion that a public interest organisation, litigating to hold a public official to account, is thereby committing a criminal offence, is highly inappropriate, vexatious and intended to do nothing more than intimidate CASAC.

THE PUBLIC PROTECTOR'S FAILURE TO EXPLAIN THE DEFICIENCIES IN HER REPORT

16 In short, the Public Protector justifies her report, and the issues she failed to investigate, on two separate bases.

17 First, she claims that resource constraints meant that the investigation had to be circumscribed in various respects.

17.1 As I explain in greater detail below, this justification is wholly lacking in specificity, and gives rise to more questions than it does answers. For example:

17.1.1 Why and how would investigating the issues raised by CASAC have required more resources?

17.1.2 If resources were indeed the issue, why could the Public Protector not have referred those issues to another agency as she is empowered to do?

17.1.3 How much would it have cost her to subpoena the relevant individuals and/or to put the necessary questions regarding corrupt conduct to them under oath?

17.2 These questions, and others, are simply left unanswered.

18 Second, the Public Protector says that when she came into office, the Report was nearly complete.

18.1 As explained above, this justification cannot assist in saving the unlawfulness of the Report. The Report must be assessed against an objective standard of lawfulness, irrespective of who was primarily responsible for its production or the occupant of the office of Public Protector.

18.2 In any event, the explanation is wholly inadequate as a justification of Adv Mkhwebane's own role. While she claims that the report was "*almost ready for publication*" when she came into office (at paragraph 49), this is belied by the nearly eighteen-month period between her assumption of office (in October 2016) and the publication of the final Report (in February 2018).

18.3 Indeed, Adv Mkhwebane describes the re-investigation of the involvement of political actors, pursuant to the Portfolio Committee's request, as now being at "*an advanced stage*" (paragraph 64), only four months after undertaking to perform it. Again, this gives the lie to the notion that she could not have investigated the role of politicians in the nearly eighteen-month period between her coming into office and the publication of the final Report.

19 In short, the answering affidavit leaves a great deal unexplained. In this replying affidavit I focus on three issues in particular, being the starkest examples of issues that cannot be justified either by resource constraints or the fact that the Report was already nearly complete when Adv Mkhwebane assumed office, namely:

19.1 the failure to consider public information regarding the Gupta family;

19.2 the failure to use her statutory powers to conduct a proper investigation;

19.3 the alterations to the Provisional Report; and

19.4 the failure to consider evidence implicating then Premier Ace Magashule.

The Public Protector's failure to consider information in the public domain

20 The Public Protector declined to investigate any allegations regarding the Gupta family's alleged involvement in the Vrede Dairy Project (the "**Project**").

21 In its founding affidavit, CASAC illustrated at length that information had been in the public domain since as early as May and June 2013, linking the Gupta family to corrupt activity in relation to the Project, and implicating officials within the Free State Department of Agriculture (the "**Department**").

22 In mid-2017, more than six months before the Public Protector released the final Report, the #GuptaLeaks tranche of emails revealing voluminous evidence of the Gupta family's corrupt business dealings with various state officials and politicians, including in relation to the Project, were reported on in the press. This provided substantial and compelling evidence of the exercise of private control over the Project, and the pilfering of millions of taxpayer Rands.

23 On the Public Protector's own version, she was aware of this information but ignored it. Her explanation for doing so is remarkably scant. In short, she claims that she ignored the information for three reasons.

23.1 First, the issues to be investigated were already identified, and the investigation was nearly complete.

23.2 Second, the Office of the Public Protector operates under resource constraints.

23.3 Third, the Guptas were not mentioned in the complaints that had been submitted to her by the complainant, Dr Roy Jankielsohn, and he and the Democratic Alliance urged her to conclude the investigation.

24 These reasons do not assist the Public Protector. Nearly eighteen months passed between her assumption of office and the publication of the final Report. She cannot complain of insufficient time to investigate this conduct. In any event, if conducting a full and proper investigation required more time, then, simply put, she ought to have taken more time.

25 In addition, she complains of resource constraints in only the most abstract and general terms. She never explains why she could not have broadened the complaint to include conduct involving the Guptas and high-ranking officials, or how much it would have cost her to do so. As I explain below, she also does not explain why she could not have taken even minor steps, such as putting questions to the relevant political officials under oath, or subpoenaing them to testify as to the Gupta family's involvement. None of this would have been resource-intensive.

26 Lastly, I am advised that it is impermissible for the Public Protector to adopt a blinkered approach to the investigation of a complaint. Where widespread evidence exists, which goes to the root of the unlawfulness alleged in a complaint, but which is not expressly mentioned in the complaint itself, the Public Protector remains duty-bound in terms of the Public Protector Act, to investigate that evidence. She cannot

hide behind the narrow terms of the complaint, or the complainant's desire that the investigation be conducted speedily. She owes her primary duty to the public.

The Public Protector's failure to use her statutory powers

27 In respect of both the first and second grounds of review, CASAC detailed in its founding and supplementary founding affidavits the various respects in which the Public Protector had failed to use her statutory powers to investigate the complaints submitted to her (including the third complaint), or to investigate the evidence that was in the public domain.

27.1 The Public Protector's investigatory powers enable her to subpoena individuals, either to testify or to provide sworn statements. These are not costly exercises.

27.2 There is no reason why she could not have subpoenaed witnesses or sent written questions aimed at determining whether fraud and corruption by high-ranking officials were involved in the Project, or regarding the involvement of the Gupta family.

27.3 She did not do so.

27.4 Nor did she interview a single beneficiary to ascertain what, if anything, they had received from the Project.

28 Her failure to explain her decision not to use these powers is fatal to her denial that she acted in bad faith and for an improper purpose to protect implicated officials.

28.1 At paragraphs 64.3 and 65.3 of its founding affidavit, CASAC invited the Public Protector to explain, in respect of her decision to ignore the third complaint of 10 May 2016 (which included allegations implicating the Office of then Premier Ace Magashule), and her decision to ignore the contents of reports regarding the involvement of the Gupta family, "*why she could not, at minimum, have put the allegations to the relevant public officials under oath*".

28.2 Her Reasons provided no such explanation. They merely complained of general resource constraints, without explaining why those constraints precluded her from using those powers that are not resource-intensive.

28.3 Therefore, in its supplementary founding affidavit (at paragraph 53), CASAC reiterated this invitation, explaining that "*what she has not even attempted is, as I invited her to do in CASAC's founding affidavit, to explain 'why she could not, at minimum, have put the allegations to the relevant public officials to answer under oath.*'"

28.4 The Public Protector's answering affidavit is similarly deficient on this score. She explains, only in general terms (at paragraphs 21 to 43), that the Office of the Public Protector operated under resource constraints. In particular, she says (at paragraph 40) that it was "*therefore not possible to investigate any conduct which required additional financial expenditure*", and (at paragraph 41) that if she were fully and properly to investigate every complaint she received, "*a budget of R1 billion would be required*".

28.5 But the question is not what it would cost to investigate every complaint she receives. She never explains why investigating this matter properly, particularly in the ways described above, which she never denies are not resource-intensive, would have required additional resources.

29 In the light of the foregoing, the Public Protector's arguments regarding resource constraints do nothing to save the lawfulness of her investigation or to rebut the inference, which CASAC asks this Court to draw, that she acted in bad faith and for an improper purpose.

The alterations to the Provisional Report

30 In CASAC's supplementary founding affidavit (at paragraphs 20 to 31), I explained that the Public Protector made a series of alterations to the Provisional Report, which exhibited an attempt on her part to protect officials within the Department. I submitted that in the absence of an explanation from the Public Protector, the only possible inference, which the Court should not hesitate to draw, was that she deliberately curtailed the Report's findings and remedial action in an effort to protect Department officials, and thereby acted for an improper purpose and in bad faith.

31 I now ask the Court to draw precisely that inference.

32 The first alteration was in respect of the Report's findings. The Provisional Report, penned by Adv Madonsela, made direct and targeted findings regarding impropriety, abuse of power and maladministration, which it attributed to particular individuals,

particularly the Head of Department and accounting officer, Mr Thabethe, who, in approving a payment of a further R143 million after National Treasury's recommendation, had engaged in *"improper conduct, abuse of power and maladministration"*.

33 Adv Mkhwebane, on the other hand, defined the "*only issue*" narrowly as one of whether the Project constituted a Public-Private-Partnership. Having found that it did not, she failed to investigate the nature of the irregularities or the misappropriation of public funds, and she changed Adv Madonsela's findings regarding the failure to comply with statutory and Treasury requirements to mere "*observations*".

34 The second alteration was that, whereas Adv Madonsela had found, in respect of price inflation, that there had been a lack of proper monitoring and control measures amounting to "*gross negligence, maladministration and resulted in irregular and fruitless expenditure*", Adv Mkhwebane removed these findings from the Final Report, and concluded that it was "*difficult to determine*".

35 In her answering affidavit, the Public Protector does not even attempt to explain these two alterations. She focuses (for example, at paragraph 118) only on the alterations that she made to the remedial action – which I describe below. She leaves entirely unexplained the alterations to the manner in which the Report framed the issues and the findings it made. To be sure, the removal of damning findings

pursuant to an investigation which, on her own version, was already complete, cannot be explained away by resource constraints.

36 In light of the Public Protector's failure to explain these alterations despite being invited to do so, the only plausible inference, which I now ask this Court to draw, is that the findings were removed in bad faith and for the improper purpose of protecting officials within the Department.

37 Third, I explained in the supplementary founding affidavit (at paragraph 28) that Adv Mkhwebane fundamentally altered the remedial action proposed in the Provisional Report, by removing the specific reference to Mr Thabethe, and omitting the remedy referring the matter to the Special Investigation Unit ("**SIU**") for a forensic investigation, and to the Auditor-General for a forensic and due diligence audit.

38 As noted above, the Public Protector's attempt to explain her alterations is focused entirely on the remedial action. But it is without any substance.

39 In respect of the removal of Mr Thabethe's name as a person against whom disciplinary action must be implemented, the Public Protector claims that she sought to broaden the disciplinary action, so that it was not limited only to Mr Thabethe.

39.1 This is entirely incredible. If Adv Mkhwebane had indeed sought to broaden the remedial action, while ensuring that Mr Thabethe – who was the most clearly implicated official – would be subjected to disciplinary proceedings,

she could have retained his name, and included the phrase "*and any other implicated officials*".

39.2 In addition, this alteration must be understood in the context of her omission of Adv Madonsela's preliminary findings that Mr Thabethe had engaged in improper conduct, abuse of power and maladministration. The failure to explain the omission of those findings colours the Public Protector's omission of his name from the remedial action. In short, they were driven by the same improper motive.

39.3 The fact that Mr Thabethe was ultimately placed on precautionary suspension by the Department (as alleged by the Public Protector at paragraph 61 of the answering affidavit) takes things no further. The fact remains that the final Report itself did not require it, whereas the Provisional Report did.

40 Regarding the omission of the remedial action directing the head of the SIU to conduct a forensic investigation into serious maladministration, improper conduct and unlawful expenditure, as well as the remedial action directing the Auditor-General to conduct a forensic and due diligence audit verifying the expenditure of public money, the Public Protector's explanation is equally flimsy.

41 She claims that the reason that Adv Madonsela referred these matters for investigation to the SIU was to recover irregular and illegal expenditure, and that by the time the final report was finalised that was already underway by the Hawks and Asset Forfeiture Unit (the "**AFU**") and had thus been "*overtaken by events*"

(paragraph 59.8). She also claims that she did not have the power to instruct either the SIU or the Auditor-General to instruct either of them to conduct an investigation (paragraph 59.9).

41.1 As I explained in my supplementary founding affidavit, these remedies were removed from the Provisional Report *before* the section 7(9) notices were sent to the Premier and the Mr Thabethe, among others. They were thus clearly removed before the Public Protector was aware of any parallel investigations. The suggestion, therefore, that the reason for their removal was that parallel investigations were underway is entirely disingenuous.

41.2 In any event, Adv Mkhwebane is mistaken that the SIU investigation was only about recovering irregular and illegal expenditure. While it aimed to secure the recovery of losses, it expressly included a forensic investigation into "*serious maladministration*" and, more importantly, "*the improper conduct by officials of the Department*".

41.3 In other words, the investigation into improper conduct by officials, which the Public Protector claims she could not undertake previously because of financial constraints, would have been referred by Adv Madonsela to the SIU for investigation. Adv Mkhwebane omitted that remedial action.

41.4 I am advised that the Public Protector plainly has the power to direct other state agencies to conduct investigations. Section 6(4)(c) of the Public Protector Act expressly provides her with the power, at any time prior to,

during or after an investigation, to refer any matter to the appropriate public body or authority to make an appropriate recommendation.

41.5 Indeed, the Public Protector would do well to have regard to her own final Report, where (at paragraph 3.4.3) she cited authority for the trite proposition that:

> "*There is nothing in the Public Protector Act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act*".

41.6 To the extent that she believed that she lacks such a power, the Public Protector self-evidently committed a material error of law, which is itself fatal to the legality of her Report. In truth, however, she was apparently and clearly aware that she possesses the power, but elected nevertheless to omit such remedial action.

The Public Protector's failure to consider evidence implicating the Premier

42 In CASAC's founding affidavit (at paragraph 66), I explained that the proposed remedial action was deficient in that it placed Premier Ace Magashule in charge of overseeing disciplinary proceedings, and failed to investigate any information regarding his complicity in the Project's unlawfulness.

43 On 6 March 2018, the Public Protector made the startling claim to the Portfolio Committee (set out in paragraph 124.2 of her answering affidavit) that "*the only issue*

implicating the Premier was the failure to take disciplinary action against the Head of Department of Agriculture."

43.1 This constitutes yet another respect in which the Public Protector appears to have attempted to mislead the Portfolio Committee.

43.2 As I explained in my supplementary founding affidavit, she at no stage informed the Committee that she had altered the findings and remedial action in Adv Madonsela's Provisional Report. She is unable to deny that in her answering affidavit.

43.3 It appears now that she also failed to inform the Portfolio Committee of the true nature of the findings against Mr Magashule, which arose from the National Treasury Report.

44 For example, as I explained in CASAC's supplementary founding affidavit (at paragraph 13.6), the National Treasury Report found that:

44.1 Mr Magashule was involved in concluding the highly suspect 99-year rent-free lease with Estina;

44.2 Mr Magashule delegated his authority for the conclusion of the rental agreement, which was ultimately delegated to Mr Thabethe; and

44.3 the Provincial Executive Committee, which Mr Magashule headed, approved Mr Thabethe's request to implement the Project, and supported the sourcing of additional funding of R84 million from the province.

45 The Public Protector's only answer to this (at paragraph 117.4) is that the National Treasury Report did not make a specific "*recommendation*" concerning the former Premier. But this is unsurprising. Because of its mandate, it was concerned primarily with the accounting officer, Mr Thabethe, who is accountable to National Treasury. But it cannot be denied (and indeed, is not denied by the Public Protector), that the findings contained in the Report regarding Mr Magashule were nevertheless damning.

46 Moreover, the third complaint of 10 May 2016, which the Public Protector improperly ignored, certainly implicated Mr Magashule as complicit. In addition to his failure to take disciplinary action against Mr Thabethe, the third complaint alleged that those who had approved the Project (which included the Office of the Premier, which approved the contract) could not possibly have overlooked Estina's misrepresentations.

47 Lastly, CASAC explained in its supplementary founding affidavit (at paragraph 59) that, before the Public Protector released her final Report, news had already broken that the Premier's office had been raided by the Hawks in connection with the Project. The Public Protector does not deny this in her answering affidavit. In other words, despite learning that the Premier was being targeted for potentially criminal links to the Project, she concluded that he was not implicated in any way.

48 To be clear, CASAC does not ask this Court itself to make any finding against Mr Magashule. Its submission is more modest: it is only that he was, at minimum,

implicated in allegations of wrongdoing related to the Project, which required further investigation, and which made it inappropriate that he should oversee subsequent disciplinary action.

PERSONAL AND PUNITIVE COSTS

49 The Public Protector claims (at paragraph 96) that she should not bear personal costs because it inhibits her work if she always operates in fear of such orders. She also objects (at paragraph 95) on the basis that she has not been cited in these proceedings in her personal capacity.

50 While this is a matter for argument, and will be addressed as such, I make the following submissions at this stage:

50.1 It can hardly be suggested that the work of public officials is constrained by personal costs orders, where such orders are imposed pursuant to findings of bad faith and acting for an improper purpose. On the contrary, they play an important role in disciplining public officials, and preventing them from relying on state coffers where they have acted in flagrant disregard of constitutional norms.

50.2 Moreover, it is not always required to cite state officials in their personal capacity when personal costs orders are sought against them.

50.3 I am advised in this regard that Adv Mkhwebane was not personally cited in *Absa Bank Limited and Others v Public Protector and Others* [2018] 2 All SA

1 (GP), where personal costs were awarded against her. Nor was President Jacob Zuma personally cited in *President of the Republic of South Africa v Office of the Public Protector* 2018 (2) SA 100 (GP), where personal costs were awarded against him.

50.4 Citation of parties in their personal capacity has been required only where the public official has not been joined to the proceedings at all, or where the relevant public official has not herself had an opportunity to respond, on affidavit, to the claim for personal costs.

50.5 Neither applies here. Adv Mkhwebane has had every opportunity to explain her conduct. She is herself the deponent to the answering affidavit in which the personal costs order is resisted. She can point to no prejudice arising from her personal non-joinder. In the circumstances, citation in her personal capacity would be superfluous.

51 However, to the extent that the Court considers it necessary that the Public Protector be joined in her personal capacity, CASAC asks, in the alternative, that the Court grants an order reserving costs, and directing that the Public Protector, within two weeks of the Court's judgment, files an affidavit to show cause why:

51.1 she should not be joined in her personal capacity; and

51.2 she should not pay the costs of the application from her own pocket.

CONCLUSION

52 In the circumstances, CASAC prays for the relief set out in the Amended Notice of Motion filed together with the supplementary affidavit.

Naidoo

PARMANANDA NAIDOO

THUS SWORN TO AND SIGNED before me at RONDEBOSCH on this the 05 day of JULY 2018 by the deponent who acknowledges that he/she knows and understands the contents of this affidavit and he/she has no objection to taking the prescribed oath and that he/she considers the oath as binding on his/her conscience.

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RASMANI CONST

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STASIEBEVELVOERDER
2018 -07- 05
STATION COMMANDER
POLICE SERVICE

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PUBLIC PROTECTOR
SOUTH AFRICA

Accountability • Integrity • Responsiveness
Justice • Good Governance

CEO's Office
175 Lunnon Street
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Toll Free: 0800 11 20 40
Tel: 012 366 7134/7039
Fax: 086 720 1446
Email: ceo@pprotect.org
pa@pprotect.org

Our Ref: Mr N Nemasisi
Your Ref: S Samuel

Date: 08 March 2018

LEGAL RESOURCES CENTRE
275 Anton Lembede Street
Durban
Per Email: sharita@lrc.org.za

Dear Sirs

RE: COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION // PUBLIC PROTECTOR SOUTH AFRICA, PRETORIA HIGH COURT, CASE NO: 13394/2018

1. We refer to the above matter and confirm that the Public Protector South Africa ("PPSA") has decided not to oppose your client's application to review and set aside the Public Protector's report no: 31 of 2017/2018, *on an investigation into complaints of maladministration against the Free State Department of Agriculture in respect of non-adherence to treasury prescripts and lack of financial control in the administration of the Vrede Integrated Dairy Project.*

2. Please note that PPSA hereby abide the decision of the above honourable Court, but reserves its right to fully participate in the proceedings, and to deliver an explanatory affidavit to assist the Court in adjudicating the matter and/or to advance oral argument.

3. A copy of PPSA's Notice to Abide is attached hereto, the original will be delivered shortly.

4. Considering that your client's aforesaid application is unopposed, kindly confirm if your client will now abandon its prayer for costs order against PPSA.

5. As you may be aware, the Democratic Alliance has instituted the similar application in the above honourable Court under case number: 11311/2018. In order to save costs for rule 53 records and to ensure proper and efficient administration of justice, we propose that you approach the Judge President for consolidation of the two applications.

6. We thank you and await your urgent response to paragraph 4 and 5 above.

Yours faithfully

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Mr N Nemasisi
Senior Manager- Legal Services
PUBLIC PROTECTOR SOUTH AFRICA