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

SUPPLEMENTARY FOUNDING AFFIDAVIT IN TERMS OF RULE 53(4)

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**"). I have previously deposed to CASAC's founding affidavit in this matter. I am authorised to depose to this affidavit on behalf of CASAC

2 The facts contained in this affidavit are both true and correct, and within my personal knowledge unless the context provides otherwise. Where I make submissions of a legal nature I do so on the advice of CASAC's legal representatives.

INTRODUCTION AND SYNOPSIS OF CASAC'S CASE

3 On 23 February 2018, CASAC filed an application seeking to review and set aside the Public Protector's Report. I deposed to the founding affidavit in support of that application.

4 On 8 March 2018, the Public Protector delivered a notice to abide the decision of the Court, reserving her right to file an explanatory affidavit.

5 On 23 March 2018, the Public Protector delivered the record of her decision, in terms of Rule 53(4), together with an affidavit setting out her reasons in which she cited budgetary and capacity constraints.

6 I depose to this supplementary affidavit on behalf of CASAC in terms of Rule 53(4). This affidavit supplements, and should be read together with, CASAC's founding affidavit.

7 The founding affidavit explained that the Public Protector's report is unlawful and invalid on four primary bases:

7.1 First, the Public Protector failed properly to investigate the complaints that were made to her on 12 September 2013 and 28 March 2014.

7.2 Second**,** the Public Protector impermissibly ignored, without sufficient basis, the complaint of 10 May 2016, which included direct allegations against the Office of Premier Ace Magashule.

7.3 Third, the Public Protector was not entitled merely to "*note*" but ultimately ignore the contents of reports regarding the involvement of the Gupta family, and thus of clear corruption.

7.4 Fourth, regarding the Public Protector's remedial action, which places Premier Ace Magashule in charge of disciplinary proceedings and Head of Department Peter Thabethe in charge of training and other measures, the Report failed to devise a remedy that was appropriate, proper, fitting, suitable or effective.

8 In light of the contents of the Rule 53 record and subsequent developments, CASAC:

8.1 persists with, and expands upon each of the grounds of review set out in the founding papers; and

8.2 raises an additional ground pertaining to the Public Protector's attempts to protect officials within the Free State Department of Agriculture (the "**Department**"), in respect of which she acted in bad faith and for an improper purpose.

9 CASAC initially brought this application on the basis that the Public Protector had acted unlawfully, irrationally and unreasonably in failing properly to investigate allegations of maladministration, fraud and corruption in respect of the Vrede Dairy Project (the "**Project**").

10 But the contents of the Rule 53 Record suggest that her transgressions were far graver than that. She did not merely fail to conduct a rigorous investigation. Rather, it appears that she may deliberately have prevented the further investigation of fraud and corruption within the Free State Department of Agriculture (the "**Department**") in an effort to protect the responsible and complicit officials.

11 This affidavit is structured as follows:

11.1 First, I draw attention to two aspects of the Rule 53 record that are of particular significance:

11.1.1 the National Treasury Report on the investigation into the Vrede Integrated Dairy Farm Project, prepared for the Accountant-General (the "**National Treasury Report**"), attached marked "**PN14**"; and

11.1.2 the Public Protector's Provisional Report (the "**Provisional Report**"), attached marked "**PN15**".

11.2 Second, I explain factual developments that have transpired since CASAC launched its application.

11.3 Third, in the light of the Rule 53 Record, I expand on each of the grounds of review relating to the Report and set out the additional ground upon which CASAC relies.

11.4 Fourth, I explain why, notwithstanding the Public Protector's suggestion otherwise, her assertion of budgetary constraints cannot justify the shortcomings of her Report.

11.5 Fifth, I conclude by dealing with the relief CASAC seeks.

IMPORTANT DOCUMENTS IN THE RULE 53 RECORD

The National Treasury Report

12 In CASAC's founding affidavit, I made reference to the fact that National Treasury had investigated the Department's contracts with Estina, but that, to the best of my knowledge, the Accountant-General's report was never published (Founding Affidavit, para 17).

13 The National Treasury report (attached marked "**PN14**") forms part of the Rule 53 Record (albeit absent its annexures). Its findings regarding the conduct of specific officials within the Free State Department are damning. I set out the most relevant of them below.

13.1 The Head of Department, Mr. Peter Thabethe – who, it should be remembered, the Public Protector put in charge of training officials on procurement issues as part of her remedial action – was involved at "*every stage of the identification and appointment of Estina/Paras*", including by signing the 99-year rent-free lease in Estina's favour, and the agreement with Estina.

13.2 The Department of which Mr. Thabethe was head made payment to Estina without any form of oversight, and without verifying how funds were spent.

13.3 Despite the Project having been justified on the basis of the beneficiaries who would benefit from it, the Department paid R114 million to Estina ***before*** identifying any beneficiaries.

13.4 Significantly, the Treasury Report also identified Free State Premier, Mr. Ace Magashule, and former MEC for Agriculture, Mr. Mosebenzi Zwane as involved in various suspicious aspects of the Project.

13.5 I explained in my founding affidavit that a cloud surrounded Mr. Magashule, whose office was allegedly used for the Gupta's benefit, and whose son was a director in a Gupta-owned company (Founding Affidavit, para 30.9). I also

explained that Mr. Zwane allegedly drove the adoption of the Project, and subsequently went on a Gupta-funded, all-expenses paid trip to India (Founding Affidavit, para 30.1).

13.6 The National Treasury Report suggests even more direct involvement by both of these high-ranking officials in the unlawful aspects of the Project. In particular, it suggests that they enabled, authorised and encouraged Mr. Thabethe to carry out the implementation of the Project:

13.6.1 Both Messrs Magashule and Zwane were involved in concluding the 99-year rent-free lease agreement with Estina.

13.6.2 Mr. Magashule signed a delegation of authority to Mr. Zwane to conclude a rental agreement between the Department and the municipality. Mr. Zwane then delegated authority to Mr. Thabethe.

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

13.6.4 Mr. Zwane, as MEC for Agriculture, personally contacted the MEC for Finance to request an urgent, expedited R30 million payment to Estina.

14 In light of these damning findings, the National Treasury report recommended that disciplinary action be taken against:

14.1 Mr. Thabethe for concluding the unlawful agreement on behalf of the Department, and for committing funds to the Project on the Department's behalf when they were not available; and

14.2 the Chief Financial Officer, Ms. Dhlamini, failing to put in place proper financial oversight and controls.

15 As far as I am aware, this disciplinary action has never been undertaken. This is a failing which the Public Protector simply ignored in her Report.

16 The National Treasury Report also recommended that steps be taken to reassess the Project's viability, and that, because government would not receive value for money, the Project should not proceed in its current form.

The Provisional Report

17 In CASAC's founding affidavit, I indicated that I was unaware of the Public Protector having published a provisional report, as is her custom. No mention of it was made in the final Report (Founding Affidavit, para 40).

18 The Rule 53 Record illustrates that a provisional report was indeed prepared by Advocate Busisiwe Mkhwebane's predecessor as Public Protector Advocate Thuli Madonsela (attached marked "**PN15**").

19 Advocate Mkhwebane has always maintained publicly that she cannot be blamed for the inadequacy of the Report, because by the time she took office, the investigation into the Vrede Dairy Project was already at an advanced stage. I attach in this regard marked "**PN16**" a news report titled "*Public Protector: Controversial Vrede dairy report completed before Mkhwebane took office*", in which precisely this justification is reported. The implication seems to be that she had limited time or capacity to investigate the matter herself.

20 Despite this, however, it appears that Advocate Mkhwebane *altered* the Provisional Report in fundamental ways, in what is difficult to understand as anything other than a deliberate attempt to protect officials such as Mr. Thabethe and Mr. Magashule, among others, from further investigation and sanction.

21 Three alterations to the Provisional Report are particularly troubling:

22 **First**, I note that I described it as "*curious*" in CASAC's founding affidavit that Advocate Mkhwebane had framed the question whether the Project was a Public-Private-Partnership ("**PPP**") as the "*only issue*" in determining whether that agreement was improper (Founding Affidavit, para 44.3). Advocate Mkhwebane found that it was not a PPP, and listed her conclusions regarding maladministration and impropriety as mere "*observations*".

23 Having now had sight of the Provisional Report, it appears that Advocate Madonsela, on the other hand, made direct and targeted findings regarding

impropriety, abuse of power and maladministration, and attributed such conduct to particular individuals. In particular, she found that "*the conduct of the accounting officer in concluding the agreement amounts to improper conduct, abuse of power and maladministration*".

24 Precisely why Advocate Mkhwebane sought to sanitise the findings against officials in the Department is unclear. In the absence of an explanation from her it can only be presumed that she sought deliberately to protect them against serious incrimination.

25 **Second**, regarding the alleged inflation of prices in the Project, Advocate Madonsela made the damning finding in her Provisional Report that the "*lack of proper monitoring and control measures to ensure value for public money expended is the reason for the discrepancies and this amount to gross negligence, maladministration and resulted in irregular and fruitless expenditure*". However, due to the Department's "*contradictory*" evidence, and the inadequacy of the financial statements that had been provided, Advocate Madonsela found that a proper accounting forensic investigation and audit was necessary.

26 Again, Advocate Mkhwebane's final Report sanitised this conclusion significantly. She removed the findings relating to inflated prices, concluding instead that it "*is difficult to determine"* because of, *inter alia*, her resource constraints.

27 Why, if it was indeed "*difficult to determine*", she did not also refer it for a proper accounting forensic investigation and audit – which would not have been a resource-intensive exercise for the Public Protector's office – frankly beggars belief. Instead, she removed the adverse findings and, as I explain below, she removed the remedial action referring the matter for forensic financial investigation.

28 **Third**, and most disturbingly, Advocate Mkhwebane fundamentally altered the remedial action proposed in the Preliminary Report in the following material respects.

28.1 Advocate Madonsela required the Premier and MEC to ensure that an investigation was initiated into the conduct of the accounting officer of the Department, Mr. Thabethe. This was in order to comply with the National Treasury Report, described above.

28.2 Advocate Mkhwebane removed this remedial action from the Provisional Report, replacing it with a requirement that the Premier initiate and institute disciplinary action against "*implicated officials*". She thereby left it to the Premier to determine which officials were implicated. The remedial action makes no specific mention of the accounting officer.

28.3 Advocate Madonsela also proposed remedial action requiring the Head of the Special Investigating Unit ("**SIU**") to conduct a forensic investigation into maladministration, improper conduct by Department officials, and the

unlawful appropriation or expenditure of public money. Clearly, Advocate Madonsela would not have referred the matter to another state anti-corruption unit, unless she suspected serious wrongdoing, which extended far beyond mere non-compliance with procurement regulations.

28.4 Again, Advocate Mkhwebane removed this remedial action from the Provisional Report, without a trace, and without reason.

28.5 Advocate Madonsela also proposed remedial action requiring the Auditor-General to commission a forensic and due diligence audit, with a view to verifying all the transfers and expenditure of public money in respect of the Project, in order to determine whether or not value for money was received by the state. This was because of the insufficiency of the financial information provided by the Department.

28.6 Again, Advocate Mkhwebane removed this remedial action in the Final Report, and, as noted above, merely noted that the question of overpayment was "*difficult to determine*".

29 The alteration of the Report by Advocate Mkhwebane raises disturbing questions about her motives and calls into question her good faith.

29.1 She cannot contend that the reason for removing the remedial action regarding the SIU and the Auditor-General was because of the responses she received from government officials to her section 7(9) notices.

29.2 The section 7(9) notices (attached marked "**PN17**") make clear that those remedies had already been removed when the section 7(9) notices were sent, and certainly before she received responses to the notices from Messrs Magashule, then-MEC Mr Khoabane, and Thabethe (attached marked "**PN18**").

30 Regrettably, all of this also calls into question the Public Protector's decision to abide by this Court's judgment. It appears that she may have done so not merely because she concedes that her investigation was flawed, and the Report irrational, but also in an effort to avoid having to answer, on oath, important questions that go to her integrity and competence.

31 In the absence of any explanation from the Public Protector, CASAC submits that the only possible inference, which the Court should not hesitate to draw, is 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.

DEVELOPMENTS SINCE CASAC LAUNCHED THE APPLICATION

32 CASAC filed its application on 23 February 2018.

33 On 8 March 2018, the Public Protector delivered a notice to abide the decision of the Court, reserving her right to file an explanatory affidavit.

34 As explained above, CASAC initially interpreted that notice as a mere admission that the Report was fatally flawed. It now understands that it is in fact likely an attempt to avoid having to explain those failings.

35 Most recently, on 17 April 2018, the Public Protector appeared before the Portfolio Committee on Justice and Constitutional Development. According to the Parliamentary Monitoring Group's report of the portfolio committee's meeting (attached marked "**PN19**"), this is the explanation given by the Public Protector for not having investigated the involvement of officials:

> "*On why the Vrede matter did not investigate political involvement in the scandal, it was indicated both in the Report itself and at the March Committee meeting that the report was ready when she took office. The internal think tank had already taken a decision by that point that the report was ready. There was nothing in the Vrede Dairy file which was declared in court under Rule 53 of the Uniform of Rules Court (URC). The Executive Committee, through the Accounting Officer, had also signed off the report at that time. In sum, the report was already in a draft format by the time she took office. The only remaining issue which Advocate Mkhwebane was involved in was the issuing of section 7(9) notices and the incorporation of those responses into the final report*."

36 Having now had an opportunity to examine the Rule 53 Record, it appears that the Public Protector has been less than candid with the Portfolio Committee.

37 Of course, as explained in detail above, it is true that when she was appointed, a Preliminary Report had already been prepared by her predecessor, Advocate Thuli Madonsela.

38 But what the Public Protector appears not to have revealed to the Portfolio Committee – to whom she is directly accountable and owes a duty of full disclosure – and as I have explained above at length, is that she ***altered*** the Provisional Report by removing the very remedial action that specifically targeted the politicians she now says she will investigate.

39 She merely told parliament that she "incorporated" the responses to the section 7(9) notices into the Report. She does not appear to have told parliament that:

39.1 she altered the remedial action regarding referral to the SIU and National Treasury before sending the section 7(9) notices; and

39.2 insofar as the altered the remedial action after receipt of the responses to the section 7(9) notices, she did not merely "*incorporate*" such responses, but watered down the remedial action so that it did not specifically target the Head of Department, Mr. Thabethe.

40 If the Public Protector has in fact been candid with Parliament regarding her amendment of Advocate Madonsela's Provisional Report, either on this occasion or previously, I invite her to explain this on affidavit.

41 To the extent that she has not mentioned this to the Portfolio Committee, then she must explain why this Court should not conclude that she has deliberately misled the Portfolio Committee to whom she is directly accountable.

42 In the absence of such an explanation, CASAC submits that the only possible inference, and one which this Court should indeed draw, is that the Public Protector has sought to mislead Parliament.

THE GROUNDS OF REVIEW

First ground: The failure properly to investigate the complaints made on 12 September 2013 and 28 March 2014

43 As I explained in CASAC's founding affidavit, the Public Protector failed properly to investigate the complaints that were made to her on 12 September 2013 and 28 March 2014, in that:

43.1 the complaints, as well as the conclusive evidence of maladministration and irregular procurement, provided *prima facie* evidence of corruption, theft and fraud, which the Public Protector failed to investigate to their logical conclusion;

43.2 she ought to have ascertained *why* and *to what end* there was such maladministration and flagrant disregard for procurement processes, by following the money – the most elementary canon of any investigation into financial mismanagement and corruption; and

43.3 her failure to look any further than the bland allegation of irregular spending ignored the prescript of this Court that one feature of an investigation by the Public Protector "*that must always exist*" is that the investigation must be conducted "*with an open and enquiring mind*".

44 The Rule 53 Record confirms that the Public Protector's investigation of conduct beyond mere irregular spending was virtually *non-existent*, and that this ground of review is in fact substantially stronger than first thought.

45 Most significantly, in her various correspondence with affected persons, including the section 7(9) notices that she sent to implicated officials, she failed to ask a single question regarding:

45.1 allegations of fraud and corruption;

45.2 the involvement of the Gupta family; and

45.3 the manner in which beneficiaries were paid, and whether and how they benefited.

46 She also failed to subpoena a single witness, including:

46.1 any of the implicated officials, requiring them to go on oath and answer direct allegations against them; and

46.2 any of the purported beneficiaries of the Project, asking them to explain how they were chosen, what they had been promised, and what, if anything, they had received.

47 For all these reasons, her Report is accordingly reviewable under:

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

47.2 section 6(2)(e)(ii) in that the Report was published for an improper purpose or motive;

47.3 section 6(2)(e)(v) in that the Public Protector acted in bad faith in seeking to protect implicated government officials;

47.4 section 6(2)(e)(iii) of PAJA, for failing to consider relevant considerations;

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

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

47.7 section 6(2)(i), in that the Report is otherwise unconstitutional or unlawful; alternatively

47.8 the principle of legality, on the grounds of irrationality, unlawfulness and *mala fides*.

Second ground: Ignoring the complaint of 10 May 2016, which included allegations against the Office of Premier Ace Magashule

48 As I explained in CASAC's founding affidavit, the Public Protector impermissibly ignored, without sufficient basis, the third complaint of 10 May 2016, in that:

48.1 Section 6(4)(a) of the Public Protector Act implies a duty to investigate a complaint where there is *prima facie* evidence of wrongdoing of the kind set out in section 6(4)(a)(i) to (v).

48.2 The Public Protector's glib response that the investigation was already at an advanced stage cannot absolve her of this obligation and is in any event belied by the fact that it was another 18 months before the Report was published.

49 The Rule 53 Record reveals that the Public Protector apparently thought herself quite capable of further investigating the matter during the course of 2016 and 2017 (i.e. subsequent to the third complaint), provided that the outcome of such further investigation was to exonerate implicated officials.

50 In this regard, I note that:

50.1 section 7(9) notices were sent to Messrs Magashule, Khoabane, and Thabethe on 7 June 2017;

50.2 the Public Protector ***removed*** the remedial action referring the matter to the SIU and National Treasury from the Provisional Report, at some point before she sent out the section 7(9) notices; and

50.3 thereafter, the Public Protector amended her remedial action further in an effort to protect Mr. Thabethe and the Department.

51 The suggestion, therefore, that she simply took the Provisional Report as she found it when she arrived is utterly misleading.

52 In addition, the complaint of 10 May 2016 (which included direct allegations against the Office of Ace Magashule), could have been investigated, at least in some manner, without the expenditure of significant resources.

53 As I explain in the concluding section of this affidavit, the Public Protector's justification regarding resource constraints is entirely without merit. But 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*." (Founding Affidavit, para 64.3).

54 Her report is accordingly reviewable under:

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

54.2 section 6(2)(e)(ii) in that the Report was published for an improper purpose or motive;

54.3 section 6(2)(e)(iii) of PAJA, for failing to consider relevant considerations;

54.4 section 6(2)(e)(v) in that the Public Protector acted in bad faith in seeking to protect implicated government officials;

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

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

54.7 section 6(2)(i), in that the Report is otherwise unconstitutional or unlawful; alternatively

54.8 the principle of legality, on the grounds of unlawfulness, irrationality and *mala fides*.

Third ground: Ignoring the contents of reports regarding the involvement of the Gupta family, and thus of clear corruption

55 I explained in my founding affidavit that the Public Protector was not entitled merely to "*note*" but then ultimately ignore the contents of reports regarding the involvement of the Gupta family, and thus of clear corruption.

56 The substantial and compelling evidence of the Gupta family's unlawful involvement, and the complicity of state officials such as then-MEC Mosebenzi Zwane, had, in fact, and contrary to her claim that they surfaced in 2017, been in the public domain since at least 2013.

57 Once more, the Public Protector has failed to explain why questions in respect of these allegations were never put to anyone to answer under oath. Resource constraints cannot explain that omission.

58 Nor can she claim ignorance. In my founding affidavit, I explained that as early as 2013 reports had implicated the Gupta family in the Project. The Provisional Report *cites* the very 2013 article to which I referred in my application. The Public Protector removed that reference in the final Report, but was self-evidently aware of the earlier allegations. The claim that they only came to light later is entirely disingenuous.

59 The difficulty is compounded by the fact that, *before* the final Report was published, the media reported that the Hawks had conducted a raid of Premier Ace Magashule's office. In this regard, I attach marked "**PN20**" a report dated 26 January 2018, titled "*Hawks raid Magashule's office over Vrede Dairy case*". As the article explains, just a week earlier, the Asset Forfeiture Unit had obtained a Free State High Court order placing the farm under its curatorship, on the basis that the Department had paid R220m to the Guptas in what the AFU described as a "*scheme designed to defraud and steal monies from the department*".

60 In other words, the Public Protector – a purportedly independent anti-corruption institution – learnt that the government official at the head of the Project she was investigating had been targeted by the Asset Forfeiture Unit for his possible involvement in the links that very project had to the Gupta family. Rather than investigating that aspect any further, she decided to look the other way.

61 That is, of course, plainly unlawful and irrational. But in the absence of some compelling justification, which we call on the Public Protector to provide, it is also indicative of having acted for an improper purpose and in bad faith in order to protect Mr. Magashule.

62 Her Report is accordingly reviewable under:

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

62.2 section 6(2)(e)(ii) in that the Report was published for an improper purpose or motive;

62.3 section 6(2)(e)(iii) of PAJA, for failing to consider relevant considerations;

62.4 section 6(2)(e)(v) in that the Public Protector acted in bad faith in seeking to protect implicated government officials;

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

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

62.7 section 6(2)(i), in that the Report is otherwise unconstitutional or unlawful; alternatively

62.8 the principle of legality, on the grounds of unlawfulness, irrationality and *mala fides*.

Fourth ground: The failure to devise an appropriate, proper, suitable or effective remedy

63 I explained in my founding affidavit that the Public Protector's remedial action, which places Mr. Magashule in charge of disciplinary proceedings, and Mr. Thabethe in charge of training and other measures, was not appropriate, proper, fitting, suitable or effective.

64 The extent to which Messrs Magashule and Thabethe are directly conflicted in this regard has been even more palpably demonstrated in the Rule 53 Record and in this affidavit. In short:

64.1 Mr. Magashule was identified in the National Treasury Report as having delegated authority in respect of the Project to Mr. Thabethe, and as having been involved in the signature of the leases, and the authorisation of provincial funds.

64.2 Mr. Thabethe was identified in the National Treasury Report as having been primarily responsible for the unlawfulness of the Project, and disciplinary action against him was recommended.

65 The Public Protector removed the remedial action that targeted Mr. Thabethe directly. She also removed the remedial action which would have referred the investigation to the SIU (in which any transgressions by Mr. Magashule were more likely to be uncovered).

66 In doing so, the Public Protector flatly ignored the fact that disciplinary action against Mr. Thabethe had been recommended by National Treasury, and had never been undertaken.

67 Again, in each of these respects it is beyond question that the Public Protector acted irrationally and unlawfully. However, CASAC submits that unless she is able to provide full, candid and compelling reasons to the contrary, this Court should draw the only possible inference, which is that she acted in bad faith and for an improper purpose in protecting implicated officials against further investigation.

68 The Report is accordingly reviewable under:

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

68.2 section 6(2)(e)(ii) in that the Report was published for an improper purpose or motive;

68.3 section 6(2)(e)(iii) of PAJA, for failing to consider relevant considerations;

68.4 section 6(2)(e)(v) in that the Public Protector acted in bad faith in seeking to protect implicated government officials;

68.5 section 6(2)(f)(ii) of PAJA, in that the remedial action was not rationally related to the information before the Public Protector or the purpose of her power to take remedial action;

68.6 section 6(2)(h) in that the failure to take appropriate remedial action was so unreasonable that no reasonable person could have so exercised it; and/or

68.7 section 6(2)(i), in that the Report is otherwise unconstitutional or unlawful; alternatively

68.8 the principle of legality, on the grounds of unlawfulness, irrationality and *mala fides*.

Fifth: The deliberate attempts to protect various officials against investigation for fraud and corruption

69 This ground of review constitutes a catch-all for the various respects in which the Public Protector appears to have deliberately protected high-ranking government officials implicated in the Project.

70 It is, of course, unconscionable that a constitutionally created anti-corruption watchdog would behave in this way. Accordingly, notwithstanding her decision to abide, the Rule 53 Record calls for a full and candid explanation from the Public Protector.

71 In the absence of such an explanation, the only possible inference, which we would indeed ask this Court to draw, is that she acted for an improper purpose, in bad faith and in a deliberate effort to protect the relevant officials.

72 On this basis, the Report is reviewable under:

72.1 section 6(2)(e)(ii) in that the Report was published for an improper purpose or motive;

72.2 section 6(2)(e)(v) in that the Public Protector acted in bad faith in seeking to protect implicated government officials; alternatively

72.3 the principle legality, on the grounds of unlawfulness, irrationality and *mala fides*.

THE "RESOURCE CONSTRAINTS" JUSTIFICATION IS UNSUSTAINABLE

73 Together with the Rule 53 Record, the Public Protector filed an affidavit in terms of Rule 53(1) (b), setting out the "*Reasons*" for her decision. Far from reasons for reaching the conclusions she did (or for failing to reach those that she did not), the

affidavit does no more than seek to justify the shortcomings in the Report on the basis of financial and resource constraints.

74 As a question of fact, the justification is entirely unsustainable. I am advised that is also fatally flawed in law.

75 Factually, there does not seem to be any basis for the suggestion that the Public Protector lacked adequate resources to investigate the matter properly.

75.1 Her affidavit does nothing more than say how many people her Office employs, how many complaints it received, and what its budget is.

75.2 But these figures say nothing about why her Office was so resource-constrained that it could not investigate *this matter* properly.

75.3 This is particularly so when one has regard to the extent of her failings – many of which are entirely resource-*independent*. As I explained in CASAC's founding affidavit:

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

75.3.2 As regards the failure to investigate the complaint of 10 May 2016, I explained that "*To the extent that she contends that resource constraints precluded the consideration of the 10 May 2016 allegations, I invite the Public Protector to provide a full and frank*

account of those constraints, and why she could not, at minimum, have put the allegations to the relevant public officials to answer under oath." (Founding Affidavit, para 64.3).

75.3.3 As regards the failure to investigate allegations of fraud and the involvement of the Gupta family, I said that she was similarly required to "*provide a full and frank account of those constraints, and why she could not, at minimum, put such allegations to public officials, and the Gupta family itself, to answer under oath*." (Founding Affidavit, para 65.3).

75.4 She has failed to do any of this. In particular, as appears from the Rule 53 Record:

75.4.1 she did not subpoena any witnesses, or ask a single question, aimed at determining whether fraud and corruption by high-ranking officials were involved in the Project, or regarding the involvement of the Gupta family;

75.4.2 she did not interview a single beneficiary to ascertain what they had received; and

75.4.3 to have done so would have not have been a burden on the Public Protector's financial or other resources.

75.5 In any event, this was a matter of significant national importance involving compelling evidence of corruption to the tune of hundreds of millions of

rands. If some prioritisation of resources was necessary, it was surely warranted in this case. She has not demonstrated that it was not possible.

76 As a matter of law, she was still required to conduct a rational, reasonable and lawful investigation into the Project notwithstanding any financial constraints.

76.1 If she was unable herself to investigate the complaint fully (which is denied), section 12 of the Public Protector Act enabled her to refer the matter to other organs of state. Indeed, that is precisely what Advocate Madonsela did, by referring aspects of the investigation to the SIU and National Treasury. Advocate Mkhwebane *reversed* that remedial action. Against that backdrop, for her subsequently to blame resource constraints, is frankly cynical.

76.2 In any event, even if the superficiality of the investigation could be justified by resource constraints (which, again, is denied), they can provide no justification for reaching findings, and for devising remedies, which are irrational, unlawful and unreasonable.

CONCLUSION AND RELIEF

77 For the reasons set out in this affidavit, CASAC persists in seeking an order:

77.1 declaring that the Public Protector failed in her duties under sections 6 and 7 of the Public Protector Act and section 182 of the Constitution; and

77.2 reviewing and setting aside, and declaring unconstitutional, unlawful and invalid, the Public Protector's Report No 31 of 2017/18, dated 8 February 2018.

78 However, having regard to the contents of the Rule 53 Record, the Public Protector's apparent attempt to protect implicated officials within the Department, and her subsequent failure to be candid with Parliament – even when undertaking to investigate the involvement of such officials – I submit that no purpose would be served by remitting the matter to the Public Protector to re-investigate this matter.

79 She has shown herself to be incapable of doing so effectively. CASAC accordingly abandons this aspect of its relief.

80 Lastly, given the substantial and compelling evidence of bad faith, in the absence of a full and candid account which removes any reasonable suspicion such conduct, CASAC seeks a *punitive* costs order against the Public Protector, in her *personal* capacity.

81 In the circumstances, I pray for the relief in the Amended Notice of Motion.

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PARMANANDA NAIDOO

THUS SWORN TO AND SIGNED before me at DURBAN on this the 24th day of APRIL 2018 by the deponent who acknowledges that he knows and understands the contents of this affidavit and he has no objection to taking the prescribed oath and that he considers the oath as binding on his conscience.

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Commissioner of Oaths