NOTE FOR ORAL ARGUMENT

ON BEHALF OF THE TENTH RESPONDENT

THE PROPER APPROACH

1 We have set out in our heads of argument, the principles that govern this application.

2 These have been unanswered by the Public Protector.

3 The principles are:

3.1 A Court is required to seek to interpret the Rules in a manner that renders them consistent with the Constitution – not inconsistent with the Constitution.

See: DA heads, paras 10-11

3.2 A Court is required to approach the matter in a manner that promotes, rather than undermines, the principle of accountability which applies to the Public Protector. RETRO

See: DA heads, paras 12-19

3.3 A Court is required to approach the matter with due deference to the principle of separation of powers entrenched in the Constitution, meaning that Parliament must be given due deference. The fact that this Court might or might not have done things precisely as Parliament chose to is not a basis for a

declaration of invalidity – absent a patent illegality, the Court will not intervene. Baartman on judge; Dolamo on panel

See: DA heads, paras 20-27

3.4 In doing so it must assume that the powers conferred by the Rules will be properly exercised – not abused.

See: DA heads, paras 28-31

4 Most surprising was the suggestion by the Public Protector that the moment the rules were invalid in any respect, they had to be declared invalid as a whole.

4.1 This is plainly wrong as a matter of constitutional text and precedent.

4.1 Section 172(1)(a) of the Constitution provides that when deciding a constitutional matter, a court "*must declare that any law or conduct that is inconsistent with the Constitution* ***is invalid to the extent of its inconsistency***".

4.2 The suggestion therefore that the Rules as a whole should be declared is invalid is patently without merit. Even if any aspect were shown to be invalid, the remedial approach of severance (and explained in cases like ***Van Rooyen***) would need to be applied.

5 The proper approach is neatly captured by the Constitutional Court in ***Van Rooyen***:

"The correct approach to constitutional adjudication

[87] In dealing with the legislation that was the subject matter of the constitutional challenge, the High Court seems not to have had regard to two important considerations. First, that decisions of the Magistrates Commission and the Minister in giving effect to powers vested in them by the legislation are subject to constitutional control. If they take decisions or conduct themselves in a manner inconsistent with judicial independence, or with the right that everyone (including magistrates) have to just administrative action, such decisions or conduct will be invalid, and liable to be set aside by the higher judiciary. The well-informed, thoughtful and objective observer would pay due regard to this.

[88] Secondly, the legislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with judicial independence. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or sub-section be made."

***S and Others v Van Rooyen and Others* 2002 (5) SA 246 (CC) at paras 87-88**

THE ROLE OF THE PANEL

6 The Public Protector pleads only one ground of attack regarding the Panel. It is that the inclusion of the judge on a panel is impermissible.

See: Founding Affidavit, p 70 – 71, paras 149-150

7 This has been dealt with in detail by counsel for the Speaker. There is no merit in the challenge.

8 Justice Dolamo then raised a different question of whether it was permissible for the National Assembly to have an independent panel <u>at all</u> to advise it on the question of whether there was a basis for removal.

9 We submit that this need not concern the bench for two reasons.

10 First, there is no pleaded challenge on this basis. On that basis alone, the point cannot avail the Public Protector.

Eg: *Shaik v Minister of Justice & Constitutional Development* 2004 (3) SA 599 (CC) at paras 38-40

11 Second, our law has always been clear that an official or institution vested with a power is entitled to take advice on this score. Parliament is no different.

> *"A functionary in whom a discretionary power is vested must himself exercise that power in the absence of the right to delegate. …*
>
> > *'It is well established that a discretionary power vested in one official must be exercised by that official (or his lawful delegate) and that, although where appropriate he may consult others and obtain their advice, he must exercise his own discretion and not abdicate it in favour of someone else; he must not, in the words of Baxter Administrative Law (at 443), ''pass the buck'' or act under the dictation of another and, if he does, the decision which flows therefrom is unlawful and a nullity.'*
>
> *As to the reliance on the advice of another, the functionary would at the least have to be aware of the grounds on which that advice was given. …. But it does not follow that a functionary such as the DDG in the present case would have to read every word of every application and may not rely on the assistance of others. Indeed, given the circumstances, Parliament could hardly have intended otherwise. What the functionary may not do, of course, is adopt the role of a rubber stamp and so rely on the advice of others that it cannot be said that it was he who exercised the power. If in making a decision he were simply to rely on the advice of another without knowing the grounds on which that advice was given the decision would clearly not be his. But, by the same token, merely because he was not acquainted with every fact on which the advice was based would not mean that he would have failed properly to exercise his discretion …*
>
> *Whether, therefore, there has been an abdication of the discretionary power vested in the functionary is ultimately a question that must be decided on the facts of each case…."*
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> ***Minister of Environmental Affairs & Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) at para 20**

RETROSPECTIVITY

12 The Public Protector's argument yesterday was not that it would be constitutionally impermissible for the Rules to apply retrospectively.

13 The argument was instead only that, if the rules were to apply retrospectively, they had to say so expressly.

14 This is not our law. There is no principle of our law that says that a statute has to say expressly that it applies retrospectively.

15 On the contrary, the proper approach is to look at the law and see whether was intended to apply retrospectively – this can be because it says so expressly or by implication. This is made clear by the ***Lek*** decision referred to by the Speaker in para 193 of her heads, which held that "*(s)uch an inference can be drawn when the consequences of holding an Act to be non-retrospective would lead to an absurdity or practical injustice*".

16 The Constitutional Court has adopted the same approach:

> *"The presumption against retrospectivity is rebuttable; it is not a magic wand that must trump a discernible purpose of a legislative instrument."*
>
> ***Electoral Commission v Mhlope* 2016 (5) SA 1 (CC*) at para 29***

17 The only authority that the Public Protector offered on this score was a dictum from the 1910 decision of ***Curtis v Johannesburg Municipality* 1906 TS 308 at 311**, endorsed in ***Pienaar Brothers (Pty) Ltd v Commissioner SARS* 2017 (6) SA 435 (GP) at para 28**.

17.1 That dictum stated that in the absence of express reference to retrospectivity, statutes should "*should if possible be so interpreted*

as not to take away rights actually vested at the time of their promulgation".

17.2 But that is plainly inapposite. What vested rights have been taken away here? There are none.

18 The bottom line is that this Court is faced with two interpretations of the Rules:

18.1 The first (urged by the Public Protector) would mean she is immune from any proceedings in the National Assembly for any conduct – no matter how egregious – just because it took place prior to the Rules being enacted.

18.2 The second (urged by the Speaker and DA) would allow a fair and lawful process before the National Assembly where the Public Protector can account for her conduct and also defend herself.

19 We submit that in a constitutional scheme devoted to founding values or "*accountability, responsiveness and openness*", it is self-evidently the second interpretation that must be adopted. Anything else would prevent the "*ultimate accountability mechanism*" being used, even in the face of the extraordinarily serious findings made by the Courts regarding the Public Protector.

***UDM v Speaker, National Assembly* 2017 (5) SA 300 (CC) at para 10**

LEGAL REPRESENTATION

20 We have set out in our main heads of argument at paras 47 – 54 why the legal representation complaint is not well-founded. We do so on the basis of authorities which make clear that "*our courts have consistently denied any entitlement to legal representation as of right in fora other than courts of law*".

> ***Legal Aid South Africa v Magidiwana and Others* 2015 (6) SA 494 (CC) at para 75**

21 But even if we were wrong on this score, this could never lead to the invalidation of the Rules as a whole.

22 First, as we have explained in paragraph 52 of our heads, the problem can be resolved via <u>interpretation</u>.

22.1 Rule 129AD(2) provides that the committee appointed to conduct the enquiry "*must ensure that the enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe*".

22.2 Rule 129D(3) provides that the committee:

> *"must afford the holder of the 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."*

22.3 The Speaker has stated in answer that her understanding of the effect of Rule 129AD is that the legal representative will not be entitled to "*speak for*" Ms Mkhwebane, as this would undermine the principle of accountability to the National Assembly.

22.4 Rule 129AD is capable of being interpreted in a way that affords Ms Mkhwebane the right to be entitled to be assisted by a legal representative during the committee proceedings, including by examining or cross-examining witnesses on behalf of Ms Mkhwebane.

22.5 On that interpretation, the only effect of the Rule is that the legal representative may not "speak for" Ms Mkhwebane in responding to the committee's questions put to her.

Cf: Speaker's AA v 3 p 269, para 179. See also Speaker's Supp AA v 12 pp 1143, para 66.

22.6 This interpretation would accord with the language and purpose of the rule, and give effect to all the relevant constitutional imperatives.

22.7 But it would do so in a manner that gives effect to sections 181(5) and 194 of the Constitution that require Ms Mkhwebane to be accountable to the National Assembly. As the Speaker asserts, the accountability of public office-bearers necessarily implies that they are <u>personally</u> accountable to the National Assembly, and must therefore <u>personally</u> answer charges against them before the section 194 committee.

23 Second, in the alternative, if the Court concluded that this interpretation was not tenable, then this would not lead to all of the Rules (or even the whole of Rule 129AD(3) being declared invalid. The problem can then be resolved via an appropriate <u>remedy</u>.

23.1 In that event the appropriate order would be one of severance – to declare invalid the phrase in Rule 129AD(3) that "*, provided that the legal practitioner or other expert may not participate in the committee*".

23.2 That would mean Rule 129AD(3) would read simply:

> *"The committee must afford the holder of the 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."*

23.3 This would plainly be the appropriate order in light of the ***Van Rooyen*** judgment referred to earlier.

> ***See: S and Others v Van Rooyen and Others* 2002 (5) SA 246 (CC) at paras 88, 180, 202, 211, 214**

23.4 As the Court explained in ***Van Rooyen***:

> *"If regulation 26(17) is declared to be invalid, and the presiding officer at any enquiry is a magistrate, the remainder of the regulation will serve the legitimate and important purpose of providing a framework for conducting enquiries into serious allegations that might warrant the removal of a magistrate from office. …. The appropriate order, therefore, is not to declare the whole regulation to be inconsistent with the Constitution, but to sever the offending portions from the regulation.*
>
> *The order of the High Court declaring the whole of regulation 26 invalid is set aside and is replaced by an order deleting the words "or person" where they appear for the first time in regulation 26(6) immediately before the words "hereinafter called the presiding officer" and deleting the whole of regulation 26(17)."*
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> ***S and Others v Van Rooyen and Others* 2002 (5) SA 246 (CC) at paras 214-5**

FAIRNESS

24 It is clear that the Rules allow the Public Protector two opportunities to be heard in full.

24.1 The first is by the Panel – in terms of Rule 129X(1)(c)(i).

24.2 The second is by the National Assemblky Committee – in terms of Rule 129AD(2)

25 The question then is whether the Public Protector is also entitled to a third and prior opportunity to be heard – when the Speaker makes a decision on whether the motion is in order.

26 The contention in this regard is unsustainable for three reasons.

27 First, it is not clear where this requirement would come from.

27.1 It cannot come from PAJA – because PAJA does not apply.

27.2 It cannot come from "procedural rationality" under legality. This is because there is nothing "procedurally irrational" about only allowing two chances to be heard rather than three. As the SCA has explained in rejecting such an argument:

> *"There is no general duty on decision-makers to consult interested parties for a decision to be rational under the rule of law. See Minister of Home Affairs & others v Scalabrini Centre & others 2013 (6) SA 421 (SCA) para 67 and 72. But there are circumstances in which rational decision-making requires consultation with interested parties.*
>
> …
>
> *… Unlike the decisions in Albutt and Scalabrini, the National Treasury made no final or binding decision. The municipality*

was under no obligation to accept any of the recommendations.

Although some loose language may have been used in this regard, it is clear in the context of the report, that what was said in respect of Mr Kubukeli (and other officials) was in the nature of prima facie findings. These findings are clearly not binding on Mr Kubukeli and could be challenged in any subsequent proceedings. Paragraph 7.16.4 of the report must be seen in this light, namely that in the absence of an explanation by Mr Kubukeli the Treasury team found no record of account for the amount of R8 000 advanced to Mr Kubukeli. Most importantly, objectively it was beyond doubt that if the recommendations in respect of disciplinary proceedings or recovery of losses were to be implemented, the implementation would take place in terms of processes that would afford Mr Kubukeli a full opportunity to present his case.

I therefore conclude that the investigation, report and recommendations of the National Treasury without the participation of Mr Kubukeli, were founded on reason and were not arbitrary or irrational. It follows that the appeal must succeed."

***The National Treasury v Kubukeli* 2016 (2) SA 507 (SCA) at paras 16 and 25-27**

28 Second, upholding such a right would be quite inconsistent with the series of authorities quoted at length in paras 40.1 to 40.7 of the DA's heads, which make clear that there is no right to a "hearing before a hearing".

"While a judge is obviously entitled to be heard in the course of the investigation of a complaint (as appears from the various cases and protocols referred to by the high court and referred to in the heads of argument) that is not what we are concerned with in this appeal. We are concerned instead with the act that initiates such an enquiry (the 'trigger'), which is the decision to lay a complaint. In that respect there is no authority to which we were referred or of which we are aware – whether in decided cases or in judicial protocols anywhere in the world – that obliges a complainant to invite a judge to be heard before laying the complaint."

Langa and others v Hlophe 2009 (4) SA 382 (SCA) at para 40.

See also: ***Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another 2011 (1) SA 327 (CC) paras 37 to 39.***

Competition Commission v Yara (SA) (Pty) Ltd and Others 2013 (6) SA 404 (SCA).

Meyer v Law Society, Transvaal 1978 (2) SA 209 (T) at 214F-H

Meyer v Prokureursorde van Transvaal 1979 (1) SA 842 (T) at 855G-856E

Wiseman and another v Borneman and others [1971] AC 297 (HL)

Moran v Lloyd's (A Statutory Body) [1981] 1 Lloyd's Reports 423 (CA) at 427.

29 Third, neither of the authorities relied on by the Public Protector establish a right to a "hearing before a hearing".

29.1 The Public Protector relies on the *NERSA* case but it was not a procedural rationality case at all nor did it consider a right to a "hearing before a hearing". It was about failure to have regard to relevant considerations:

> *"Rationality is concerned with one question: do the means justify the ends? Democratic Alliance developed the test for rationality by explaining that an absence of a sufficient link can arise for procedural reasons. This is not a new or different type of irrationality, but rather a way of evincing a broken or missing link between the means and the ends. The means chosen by an administrator include everything done (or not done) in the process of making that decision.*
>
> *In this case, NERSA failed to consider Sasol's marginal costs in the method it used to determine the maximum gas price for Sasol. The decision to apply the basket of alternatives approach specifically to Sasol was not rational. Sasol is a monopolist and any rational attempt at regulating its prices needed to consider its costs in order to fairly and equitably divide the economic surplus between Sasol's profit and the economic value for Sasol's consumers."*
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> **NERSA v PG 2020 (1) SA 450 (CC) at paras 64-65**

29.2 The Public Protector then relies on the *Earthlife* case. But that case too did not have to consider whether there was a right to a "hearing before a hearing" because it was common cause that the parties

were entitled to be heard by the Director-General. The only debates were whether the information provided was sufficient for a proper hearing and whether the review was launched prematurely.

> **Earthlife Africa (Cape Town) v Director General Department of Environmental Affairs 2005 (3) SA 156 (C) at para 53-54 and 73. (49-50) and** **35 and 49-50**
>
> **[74] However, it does not follow from the foregoing authorities that an interested party is invariably entitled to be heard by the decision-maker personally. The weight of authority appears to indicate that some other person or body may, in suitable circumstances, C be appointed to 'hear' the interested party - whether orally or by receiving written representations. This procedure may be permissible where the enabling statute authorises it and it may be a convenient course to follow, eg where the credibility of witnesses is not involved. 28**

30 The Public Protector has therefore simply provided no basis for a finding that she had a right to a hearing when the Speaker accepted the motion as being in order.

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