"ANNEXURE B" 649

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT No.

Court *a quo* Case No. 52883/2017

In the matter between:

PUBLIC PROTECTOR Applicant

and

SOUTH AFRICAN RESERVE BANK Respondent

REGISTRAR OF THE CONSTITUTIONAL COURT
PRIVATE BAG X1
CONSTITUTION HILL
30 APR 2018
BRAAMFONTEIN 2017

AFFIDAVIT IN SUPPORT OF THE APPLICATION FOR DIRECT ACCESS IN TERMS OF RULE 18 (1) ALTERNATIVELY RULE 19(2)

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I, the undersigned,

BUSISIWE MKHWEBANE

do hereby make oath and state that:

A. INTRODUCTION

1. I am the Public Protector, appointed as such in terms of section 1A of the Public Protector Act, 23 of 1994 (***"the Public Protector Act"***).

2. The facts to which I depose herein are within my own personal knowledge and are, except where the context indicates otherwise or I expressly say so, to the best of my knowledge and belief both true and correct.

3. Where I make legal submissions, I do so on the advice of my legal representatives and I believe them to be correct.

4. This is an application for direct access in terms of Rule 18(1) or, alternatively, leave to appeal in terms of Rule 19(2). 10

5. I seek direct access to this Court as contemplated in section 167(6)(a) of the Constitution for an order:

[V8 - P619] [V8 - P618 to 619]

5.1. declaring that paragraph 4.3 of the order which appears at paragraph 131 of the judgment handed down by Madam Justice C Pretorius, Madam Justice N P Mngqibisa-Thusi and Mr Justice D S Fourie in the High Court of South Africa, Gauteng Division, Pretoria (under case numbers 48123/2017, 52883/2017 and 46225/2017) on 16 February 2018 (***"the***

Judgment") impacts adversely and directly on the exercise by the Public Protector, a Chapter nine institution, of her constitutional power, obligations and functions without fear, favour or prejudice;

5.2. setting aside

5.2.1. paragraph 4.3 of the order which appears at [V8 - P619] paragraph 131 of the Judgment [V8 - P618 to 619]; and

5.2.2. the portion of the Judgment on which paragraph 4.3 of the order [V8 - P619] is premised, and in particular:

5.2.2.1. that there is a reasonable apprehension that I was biased; and

5.2.2.2. that I do not fully understand my constitutional duty to be impartial and to perform my functions without fear, favour or prejudice.

6. Alternatively, I seek leave to appeal to this Court as contemplated in section 167(6)(b) of the Constitution to appeal against:

6.1. paragraph 4.3 of the order which appears at [V8 - P619] paragraph 131 of the Judgment; and [V8 - P618 to 619]

6.2. the portion of the Judgment on which paragraph 4.3 of the order is premised, and in particular: [V8 - P619]

6.2.1. that there is a reasonable apprehension that I was biased; and

6.2.2. that I do not fully understand my constitutional duty to be impartial and to perform my functions without fear, favour or prejudice.

7. A copy of the judgment and order of the court *a quo* is annexed hereto as **"PP1"** [V8 - P549] and **"PP2"** respectively. [V8 - P622]

8. My application to the court *a quo* for leave to appeal to the Supreme Court of Appeal (***"the SCA"***) was dismissed with costs on 28 March 2018. A copy of the judgment and order of the court *a quo* refusing leave to appeal is annexed hereto as **"PP3"** and **"PP4"** respectively. [V8 - P639 and 643] 10

9. Simultaneously with this application, I have applied for special leave to the SCA. The application to the SCA is however conditional upon the application for direct access alternatively leave to appeal directly to this Court being refused.

B. FACTUAL BACKGROUND

10. I set out briefly those facts that I consider necessary to enable this Court to decide this application.

11. I was appointed Public Protector on 15 October 2016 and assumed my duties on 17 October 2016. When I assumed my duties as the Public Protector,

11.1. an investigation regarding the alleged maladministration, corruption, misappropriation of public funds and failure by the South African Government to implement the CIEX Report and to recover funds from Absa Bank was well under way in the Public Protector's Office; and

11.2. there was a provisional report that had already been drafted by the investigator who had left the Office of the Public Protector in December 2016.

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12. On 19 June 2017, I released Report No 8 of 2017/18 titled *"Alleged failure to recover misappropriated funds - Report on an investigation into allegations of maladministration, corruption, misappropriation of public funds and failure by the South African Government to implement the CIEX Report and to recover funds from Absa Bank"* (***"the Report"***). In summary, the remedial action set out in the Report:

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12.1. directs that the Special Investigating Unit (***"the SIU"***) approach the President to re-open and amend a 1998 Proclamation to enable the recovery of misappropriated public funds unlawfully given to ABSA Bank in the amount of R1.125 Billion, and to enable the investigation of alleged misappropriated public funds given to various institutions as mentioned in the CIEX report;

12.2. directs the Respondent (***"the SARB"***) to co-operate fully with, and assist, the SIU in its recovery of funds from ABSA Bank and in its investigation of alleged misappropriated public funds given to various institutions;

12.3. directs the Portfolio Committee on Justice and Correctional Services (***"the Portfolio Committee"***) to "initiate a process that will result in the amendment of section 224 of the Constitution"; 10

12.4. provides the proposed wording of the new section 224 of the Constitution; and

12.5. directs the SARB, the SIU and the Portfolio Committee to submit an action plan within 60 days of the release of the report detailing initiatives that each of them has taken in compliance with the remedial action.

13. Subsequent thereto, ABSA Bank, the SARB and National Treasury each launched three separate review proceedings in the High Court for the setting aside of the remedial action.

14. ABSA Bank and the SARB sought costs against any of the respondents in the event of unsuccessful opposition to their respective applications. Only the SARB sought costs *de bonis propriis* against me. The other applicants did not.

15. I was unsuccessful in my opposition to the review applications against the remedial action.

16. The court *a quo* ordered that I, in my personal capacity, pay 15% of the costs of the SARB on an attorney and client scale, including the costs of three counsel. 10

17. The reasons provided by the court *a quo* for this order are the following:

[V8 - P616]

17.1. *"[T]he Public Protector does not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice."*

[V8 - P616]

17.2. *"She failed to disclose in her report that she had a meeting with the Presidency on 25 April 2017 and again on 7 June 2017."*

[V8 - P616]

17.3. *"[I]t was only in her answering affidavit that she admitted the meeting on 25 April 2017, but she was totally silent on the second meeting which took place on 7 June 2017."*

[V8 - P616 to 617]

17.4. *"She failed to realise the importance of explaining her actions in this regard, more particularly the last meeting she had with the Presidency."*

[V8 - P617]

17.5. *"The last meeting is also veiled in obscurity if one takes into account that no transcripts or any minutes thereof have been made available."*

[V8 - P617]

17.6. *"This all took place under circumstances where she failed to afford the reviewing parties a similar opportunity to meet with her."*

[V8 - P617]

17.7. *"[S]he pretended, in her answering affidavit, that she was acting on advice received with regard to averments relating to economics prior to finalising her report [when in fact such advice] was obtained after the final report had been issued and the applications for review had been served."*

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[V8 - P617]

17.8. *"The Public Protector has demonstrated that she has exceeded the bounds of indemnification [under section 5(3) of the Public Protector Act]."*

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17.9. [V8 - P617] *"It is necessary to show our displeasure with the unacceptable way in which she conducted her investigation as well as her persistence to oppose all three applications to the end."*

18. In the final analysis, the Court *a quo* appears to punish me for what it terms the [V8 - P617] *"unacceptable way in which [I] conducted [my] investigation"* and for my *"persistence to oppose all three applications to the end"*.

19. On 9 March 2018, I filed an application with the court *a quo* for leave to appeal to the SCA against [V8 - P619] para 4.3 of the order (that I, in my personal capacity, pay 15% of the costs of the SARB on an attorney and client scale, including the costs of three counsel).

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20. The court *a quo* dismissed my application for leave to appeal with costs. The reason cited by the court *a quo* was that there is no reasonable prospect that another court will come to a different conclusion due to the reasons set out in the judgment, the very judgment sought to be set aside on appeal.

21. The court *a quo* did not consider whether or not there is a compelling reason for the appeal to be heard, which is an important consideration in terms of section 17(1)(a)(ii) of the Superior Courts Act, 10 of 2013.

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C. GROUNDS FOR DIRECT ACCESS IN TERMS OF RULE 18(1)

22. I am advised that direct access may be granted only where the interests of justice permit.

23. For the reasons that will be demonstrated in detail below,

23.1. I have good prospects of success.

23.2. There is a need for an urgent decision from this Court.

23.3. Prejudice to the public good and good governance may occur if this application is not granted.

23.4. The issue to be decided has a grave bearing on the soundness of our constitutional democracy.

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24. I respectfully submit that the court *a quo*'s *de bonis propriis* costs order against me has *"a grave bearing on the soundness of our constitutional democracy"* in that it will in effect and rather ironically tend *"to stymie the fulfilment of a constitutional obligation by the Office of the Public Protector."* [V8 - P627]

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25. I am advised that this is precisely the conduct that the Full Bench in **President of the Republic of South Africa v Office of the Public Protector and Others [2018] 1 All SA 576 (GP)** deprecated and showed its displeasure by a punitive costs order against the President *de bonis propriis*.

26. With a cost order *de bonis propriis* hanging over my head as a result of a court order at the instance of an institution which I may well in future have occasion to investigate and make remedial action affecting it, inevitably comes the potential for my independence and impartiality in any future investigation by my office involving the SARB being adversely affected or seriously placed in doubt in the eyes of the public if I should reasonably, after thorough investigation, conclude in any future probe that the SARB has done nothing wrong, the complainant or public or reasonable observer may get the impression that my decision was influenced by a fear of incurring an adverse *de bonis propriis* costs order in the event of the SARB again taking my decision on review and seeking a similar costs order. This is undesirable and would reflect negatively on the work of the Office. It could in fact result in something akin to constructive dismissal if my tenure were terminated prematurely owing to what would effectively amount to unbearable working conditions where the effectiveness of the Office is held back by an ineffectual or gun-shy Public Protector who is held captive by fear of adverse personal costs orders being made against her for performing her constitutional function.

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27. Such an order begets fear and favour towards the SARB, and prejudice against anyone (and, by necessary extension, the public) who may dare lodge a complaint (valid or not) against the SARB.

28. If the precedent now set by the court *a quo* in this case goes unchallenged, what is to stop a political party or non-governmental organisation, or indeed a listed corporation intent on one or other political or economic agenda, from seeking costs *de bonis propriis* against the Auditor-General (whatever his or her identity) along with the review and setting aside of his or her decision to withdraw the mandate of one or other auditing firm auditing a State Owned Enterprise, on the ground that the Auditor-General's decision was preceded by an *"unacceptable way in which [he and his or Office] conducted his or her investigation"* and his *"persistence to oppose the application [for the review of that decision] to the end"*?

29. The implications of the costs order against the person of the Public Protector has far-reaching effects and the court *a quo* appears not to have considered these serious implications on the administration of justice and the Rule of Law. A Public Protector, operating always in fear of personal adverse cost orders, can hardly be effective in the performance of his/her constitutional obligations.

30. The Constitution prohibits any person from interfering with the functioning of the Public Protector.

31. A personal costs order against the person of the Public Protector in the circumstances of this case, and for the reasons provided by the court *a quo* (as reproduced elsewhere in this affidavit), may reasonably be construed as interference with the proper and effective functioning of the Office. Such interference has a restraining effect.

32. I respectfully submit that the court *a quo* failed properly to consider the deterrent or restraining effect that its personal costs order against me will have on me and the Office in the performance of my constitutional functions and obligations under section 182 of the Constitution. The order impacts adversely and directly on the exercise of a constitutional power of a chapter nine institution. 10

33. The adverse impact is continuing as it is an ever-present threat to the institution's independence, impartiality and ability to act without fear, favour or prejudice. As a matter of fact,

    33.1. Recently (during February 2018) the Democratic Alliance (a political party that has consistently opposed my appointment as Public Protector and is campaigning for my removal) has sought costs against me in my personal capacity in respect of another report that I have issued in the performance of my constitutional duties. The danger therefore is that these costs against the person of the Public Protector in the review of decisions that the Public

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Protector has made in the fulfilment of her constitutional obligations opens the floodgates for numerous similar applications for such extraordinary orders. I annex a copy of the Democratic Alliance's notice of motion as **"PP5"**. [V9 - P679]

33.2. Another organisation called CASAC that has been openly critical of the person of the Public Protector has also sought costs against me in my personal capacity in its review of the same report that is being challenged by the Democratic Alliance. I attach its notice of motion as **"PP6"**. [V9 - P684]

34. I respectfully submit that this threat to the fulfilment of my constitutional obligations without fear, favour and prejudice requires an urgent intervention by this Court. It is a distinct possibility (if not probability) that these two applicants have been buoyed or fortified by the court *a quo*'s *de bonis proriis* order against the person of the Public Protector. As indicated above, this may open the floodgates for numerous similar applications for such extraordinary orders. Until the threat is removed, the operating environment of the chapter nine institution is untenable, whoever the incumbent head of that institution may be. There exists also the real risk that other chapter nine institutions – such as the Auditor-General – may be stymied in the performance of their constitutional obligations and functions by adverse *de bonis propriis* cost orders being obtained against the incumbent head.

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35. Such an operating environment is wholly intolerable and runs counter to the constitutional principle in section 181(2) of the Constitution. A gun-shy Public Protector, operating always in fear of personal adverse cost orders, can hardly be effective in the performance of his/her constitutional obligations and functions.

36. As regards bias, I am advised that this Court has held that the question whether there was actual or reasonable apprehension of bias is a constitutional issue.[1] That should have impelled the court *a quo* to grant leave to appeal (and I ask this Court to put that right by granting direct access alternatively leave to appeal directly to this Court) because the court *a quo* is not the final arbiter on constitutional issues. It erred in not granting leave to appeal because the bias finding was a material consideration in the court *a quo*'s decision to award a punitive costs order against me in my personal capacity.[2]

37. Legal argument will be advanced at the appropriate stage on the merits of the court *a quo*'s bias finding against me. For now, I only submit that as the bias question is a constitutional issue, there is a compelling reason for the appeal to be heard where that question forms part of the bases for the costs order that I seek to have reversed on appeal.

38. But, briefly on the merits I say this. The standard in bias cases is trite. Ultimately the applicant must establish reasonable apprehension of bias and need not

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1 ***Bernert v Absa Bank* 2011 (3) SA 92 (CC) at para [18]**
2 See para 101 of the main judgment

establish actual bias. Both the apprehension of bias, on the one hand, and the person holding that apprehension, on the other, must be reasonable.[3] It is not enough to establish only the one and not the other.

39. The basis for the court *a quo*'s conclusion that *"it has been proven that the Public Protector is reasonably suspected of bias . . ."* is that I did not disclose in my report that I had meetings with the Presidency on 25 April 2017 and again on 7 June 2017, that I only disclosed the first meeting in my answering affidavit, that I did not afford the reviewing parties a similar opportunity as I did the Presidency, and that I gave no explanation for this omission when I had the opportunity to do so.[4] [V8 - P603 to 604]

40. In this regard, I wish to explain that two meetings took place at the instance of the Presidency.

40.1. The first meeting took place on 25 April 2017. It was a meet and greet meeting and was unrelated to this matter. I attach hereto as annexure **"PP7"** [V9 - P687] a copy of an email dated 24 April 2017 which confirms that *"The purpose for the meeting is a greet and meet between the Public Protector and the President's Legal Advisor"*. I however mistakenly referred to this meeting [V9 - P687] in paragraphs 171 to 173 of my answering affidavit in a different context [V3 - P199] which appears to have created the impression that it was more than an

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3 ***Bernert v Absa Bank* 2011 (3) SA 92 (CC) at para [34]**

4 Paras 100 to 101 of the main judgment [V8 - P603 to 604]

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introductory meeting. This mistake was occasioned by the hurried manner in which the answering affidavit had to be prepared within the very tight timeframes set during the case management process thus putting pressure on me and my legal representatives to study voluminous papers in three consolidated applications within a few days.

40.2. The second meeting took place on 7 June 2017. What was explained in my answering affidavit at paragraph 172 [V3 - P199] in fact related to the meeting of 7 June 2017 and not the meeting of 25 April 2017. A copy of the email from the Presidency requesting a meeting [V9 - P690] is attached hereto as annexure **"PP8"**.

41. I only became aware of the error in preparation for this application when I was asked by my new legal representatives what the purpose of each of the two meetings was and why I did not disclose them in my answering affidavit. 10

42. I respectfully submit that I did not intentionally fail to disclose in the Report that I had meetings with the Presidency on 25 April 2017 and again on 7 June 2017. As I have already pointed out, the meeting of 25 April 2017 had nothing to do with the subject matter of the applications to which the Judgment relates. A confirmatory affidavit of Mr Ntsumbedzeni Nemasisi, Senior Manager-Legal Services, who also attended both meetings, [V9 - P692] is attached hereto as annexure **"PP9"**.

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43. I did not disclose the meeting in the report because it is covered by the [V6 - P476] Presidency's response to the provisional report (the response annexed as "PP8" to my answering affidavit), which requested a meeting in order to clarify their response. That meeting occurred on 7 June 2017. That is where I indicated that there is a pending judicial review about state of capture, and I asked about the report of the SIU, which they did not have but clarified that if the proclamation is issued and there is no report, it remains valid. This was raised when I asked about the issuance of proclamations which is the sole preserve of the President. Hence I requested clarity on the process and not how to craft the remedial action.

44. In any event, I am advised that, 10

44.1. This relates more to the fairness of my approach as regards the *audi* principle rather than to bias. The court *a quo* appears to conflate the two principles in its judgment and finds bias on a fairness question.[5]

44.2. The court *a quo* failed to engage with the two-stage inquiry in the bias assessment. It contents itself simply with stating the standard but fails to apply it.

45. I did explain the purpose for my meetings with the Presidency in my answering affidavit. They had nothing to do with the substance of the content of my Report.

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5 Paras 97 to 101 of the main judgment [V8 - P601 to 604]

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I just confused the June 2017 meeting for the April 2017 meeting. That confusion came about because I had only a few days in which to prepare and file my answering affidavit in response to three separate consolidated judicial review applications, which I had to file within a very shortened period as directed during the case management process. I did not discuss any aspect of this case with the Presidency during the April 2017 meeting (as confused with the June meeting). It was a meet and greet meeting with the President's legal advisor and we talked about general matters relating to general co-operation between the Presidency and the Public Protector's Office in the performance of its tasks.

46. The fact that the SARB does not believe me cannot give rise to reasonable apprehension of bias by a reasonable person. In any event, all implicated parties were given section 7(9) notices in terms of the Public Protector Act. In terms of this section the Public Protector shall afford any implicated person an opportunity to respond in connection with the matter under investigation, in any manner that may be expedient under the circumstances. In fact, the SARB appreciated not only the opportunity to respond but also the extension of the time period by which to do so.

47. I am advised that the standard is that of **"a reasonable, objective and informed person"**[6], not that of a litigant intent on teaching the Public Protector a lesson by

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6 ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others*** **1999 (4) SA 147 (CC) at 177B, para [48]**

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a costs order that can only impede rather than promote the effectiveness of the Office in the performance of its constitutional function.

48. The SCA has found that, **"[b]ias arises when a deliberative process is subverted by receiving information and hearing one party to the deliberate exclusion of the other".**[7] That is not what happened here. The meeting with the Presidency in April 2017 was not deliberative and there was no deliberate exclusion of the reviewing parties from a deliberative process. The June 2017 meeting was also not deliberative as it dealt with the Presidency's clarification, at their request, and in accordance with section 7(9)(a) of the Public Protector Act, of their response to the provisional report [V6 - P476] (see "PP8" to my answering affidavit) and in respect of the status of the proclamation that had been issued to the SIU, to which no report of the SIU has been issued. 10

49. I submit that it is therefore in the interests of justice that an order for direct access be granted.

D. GROUNDS FOR LEAVE TO APPEAL

50. The application for leave to appeal in terms of Rule 19(2) is conditional upon this Court refusing direct access in terms of Rule 18(1).

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7 ***Chairman, Board of Tariffs and Trade and Others v Brenco Inc and Others*** **2001 (4) SA 511 (SCA) at 538H-I, para [65]**

51. I am advised that it is axiomatic that the applicable standard in applications for leave to appeal has traditionally been whether there is a reasonable possibility that another Court may come to a different conclusion than that reached by the Court of first instance. Now the position is governed by the Superior Courts Act 10 of 2013 which says leave to appeal may be granted where:

51.1. the appeal would have a reasonable prospect of success; or

51.2. there is some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; or

51.3. the decision sought will have a practical effect or result; and

51.4. the appeal would lead to a just and prompt resolution of the real issues between the parties even where the decision sought to be appealed does not dispose of all the issues in the case.

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52. The court *a quo* confined itself only to the first of these factors (prospects of success)[8] and did not consider any of the others in its consideration on my application for leave to appeal before it. This was, I am advised, a material misdirection which I ask this Court to put right. Clearly, the fact that this is <u>the first time ever</u> that a costs order of the kind ordered by the court *a quo* against a

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8 See para 6 of the Leave to Appeal Judgment, *jurat* 28 March 2018 [V8 - P641]

Chapter nine constitutional functionary in the performance of her constitutional powers and functions is a compelling reason why the appeal on that issue should be heard.

53. I respectfully submit that the court *a quo* erred:

53.1. In finding that [V8 - P616] *"In the matter before us it transpired that the Public Protector does not fully understand her constitutional duty to be impartial and to perform her functions without fear, favour or prejudice"*.

53.2. In taking into account my non-disclosure in my Report that I had a meeting with the Presidency on 25 April 2017 and on 7 June 2017 for purposes of concluding that I am biased and I don't understand the importance of conducting myself without fear, favour or prejudice.

53.3. In finding that I was totally silent on the second meeting which took place on 7 June 2017 in my answering affidavit, and using that as a basis for finding that I am biased and conduct myself with partiality.

53.4. In finding that I veiled myself in obscurity by not making available any transcripts or minutes in relation to the meeting of 7 June 2017.

53.5. In finding that this all took place under circumstances where I failed to afford the reviewing parties a *"similar opportunity to meet"* with me. Neither meeting was deliberative, so I saw no need to afford the reviewing parties "similar opportunity to meet". In any event, a *"similar opportunity"* had been sent to the reviewing parties in terms of section 7(9) of the Public Protector Act. Only the Presidency requested a meeting and I had no reasons to decline that meeting. None of the reviewing parties had requested a meeting after delivery of section 7(9) notice or provisional report.

53.6. In finding that [V8 - P603] *"Having regard to all these considerations...a reasonable, objective and informed person, taking into account all these facts, would reasonably have an apprehension that the Public Protector would not have brought an impartial mind to bear on the issues before her"* and in concluding that [V8 - P603 to 604] *"...it has been proven that the Public Protector is reasonably suspected of bias..."*. 10

53.7. In finding that I failed to make a full disclosure in that I [V8 - P617] *"pretended, in [my] answering affidavit, that [I] was acting on advice received with regard to averments relating to economics prior to finalising [my] report"* when such advice was obtained after the final report had been issued.

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53.8. In finding that I demonstrated that I exceeded the bounds of indemnification under section 5(3) of the Public Protector Act.

53.9. In finding that I conducted myself in an unacceptable manner in my investigation and in my persistent opposition to all three applications.

53.10. In finding that [V8 - P617] *"It was necessary to show"* the court's displeasure.

53.11. In finding that [V8 - P617] *"...this is a case where a simple punitive costs order"* against me in my official capacity [V8 - P617] *"will not be appropriate"*.

53.12. In finding that [V8 - P617] *"This is a case"* where the court [V8 - P617 to 618] *"should go further an order the Public Protector to pay at least a certain percentage of the costs incurred on a punitive scale"*.

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53.13. In finding that 15% of the costs of the application should be paid by me in my personal capacity.

54. The court *a quo* should have found that there is no basis for any of these findings and conclusions.

55. I am advised and respectfully submit that none of the reasons provided by the court *a quo* – taken individually or cumulatively – justifies the order for costs *de bonis propriis*.

56. The court *a quo* should have taken the following considerations into account and found that it could not make an adverse costs order against me in my personal capacity on any scale:

56.1. I was brought to court as the applicants sought to set aside my remedial action which I made not in pursuit of my own personal interest but in the fulfilment of my constitutional function.

56.2. In terms of section 5(3) of the Public Protector Act, neither a member of the office of the Public Protector nor the office of the Public Protector shall be liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith. I prepared the Report and made a recommendation in good faith.

56.3. The manner of investigation that the court *a quo* found objectionable, and the persistence in opposing applications aimed at setting aside decisions arising from that investigation, are hardly grounds for mulcting any decision-maker in costs *de bonis propriis*, much less the head of a chapter nine institution in the exercise of her constitutional and statutory functions.

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56.4. I prepared the Report in accordance with what I believe to be my constitutional and statutory duties.

56.5. As appears from the Report, I interviewed, amongst others, Mr Stephen Mitford Goodson, a well-known author and a former independent non-executive director of the South African Reserve bank. I therefore did not [V8 - P617] *"pretend"* that I was acting on the advice received with regard to averments relating to economics prior to finalising my report [V8 - P617] *"[when in fact such advice] was obtained after the report had been issued and the applications for review had been served"*. I did not aver that I relied on the report of Dr Mokoka during the investigation.

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57. I repeat the averments made under the heading *"Grounds for direct access"* herein.

58. I respectfully submit that:

58.1. There will be no prejudice to this Court, nor to any of the parties if leave to appeal directly to this Court is granted rather than the potentially longer and more expensive route of first allowing the appeal to be heard by the SCA.

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58.2. The evidence in the original application is sufficient to enable this Court to deal with and dispose of the matter without having to refer the matter back to the court *a quo*.

58.3. There are good prospects of success on appeal;

58.4. There are compelling reasons for the hearing of the appeal by the Constitutional Court.

E. CONDONATION

59. To the extent necessary, I humbly request that the Honourable Court grant condonation for the late filing of the application for leave to appeal directly to this Court.

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60. Judgment was handed down in the court *a quo* on 16 February 2018.

61. Upon having considered the judgment, I applied to the court *a quo* for leave to appeal to the SCA on 09 March 2018 and within the period prescribed for such applications.

62. The application for leave to appeal was heard on 26 March 2018. I am advised that this application for leave to appeal should have been filed within fifteen (15) days from the date on which the application for leave to appeal in the court *a quo*

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was dismissed. Accordingly, the fifteen (15) days referred above expired on 18th April 2018 and this application is only seven (7) days late.

63. On 28 March 2018, the court *a quo* dismissed the application for leave to appeal.

64. I thereafter sought legal advice on petitioning the SCA. In term of the Rules of the SCA the application for leave to appeal must be filed within one month of the order refusing leave.

65. Upon having received and considered the legal advice on 20th April 2018, I deemed it prudent to launch the application directly to this Honourable Court at the same time as launching special leave to the SCA.

66. I respectfully submit that my prospects in this application are good for the reasons already advanced above and that the SARB will not suffer any prejudice should this Honourable Court condone the late filing of this application. 10

67. Should this Court not grant condonation, I will be prejudiced in that the judgment under appeal has a severe deterrent to the performance of my constitutional obligation.

F. CONCLUSION

68. For all these reasons, it is respectfully submitted that:

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68.1. It is in the interests of justice that an order for direct access be granted.

68.2. Alternatively, there are good prospects of success on appeal.

68.3. There are compelling reasons for this matter to be heard by the Constitutional Court.

[V9 - P644]

WHEREFORE I pray for an order in terms of the notice of motion to which this affidavit is attached.

BUSISIWE MKHWEBANE

I certify that the above signature is the true signature of the deponent who has acknowledged to me that she knows and understands the contents of this affidavit, which affidavit was signed and sworn to at PRETORIA on this the 26th day of April 2018 in accordance with the provisions of Regulation R128 dated 21 July 1972, as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR774 of 23 April 1982.

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COMMISSIONER OF OATHS

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