

10 June 2019

To: The National Assembly
Speaker of National Assembly
Hon T R Modise, MP
c/o: The Secretary of Parliament
Per: E-mail (lclaasen@parliament.gov.za)

Dear Honourable Speaker

**REQUEST FOR AN INQUIRY INTO THE PUBLIC PROTECTOR SOUTH AFRICA
IN TERMS OF SECTION 194 OF THE CONSTITUTION OF THE REPUBLIC OF
SOUTH AFRICA, 1996**

OUR REF: L/PPSA01/001

YOUR REF: UNKNOWN

1. By way of introduction, the Organisation Undoing Tax Abuse (OUTA) is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. OUTA was established to challenge the abuse of authority, in particular the abuse of taxpayers' money.
2. OUTA is further geared towards the harmonious cooperation with government on various levels and seeks to assist government wherever necessary in carrying out its mandate in the interests of the citizens of South Africa.
3. In seeking to protect and sustain the prosperity of our nation we address you on this occasion regarding one of the most important institutions founded to protect and serve our democracy, the office of the Public Protector.
4. Advocate Busisiwe Mkhwebane's (hereinafter referred to as "the PP") tenure in the office of the Public Protector commenced on 19 October 2016 and less than 3 years into her seven-year term, South Africa has already seen a series of blunders relating to her own conduct or to her investigations and subsequent reports.

ORGANISATION UNDOING TAX ABUSE NPC

Reg No.: 2012/064213/08

Directors: W Duvenage (CEO), Adv. S Fick, G Gulston, Dr H Volmink

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5. The Constitution requires of the PP to “...*strengthen constitutional democracy in the Republic*”¹ and to be “... *independent... subject only to the Constitution and the law, ...must be impartial and must exercise [her] powers and perform [her] functions without fear, favour or prejudice*”².
6. The Constitution further requires the PP to be “*accountable to the National Assembly and... [to] report on [her] activities and... performance of [her] functions to the Assembly*”³.
7. Section 3(13) of the Public Protector Act⁴ supports the above and requires: “...*a member of the office of the Public Protector to... serve impartially and independently and perform his or her functions in good faith and without fear, favour, bias or prejudice...*”
8. The National Assembly has the power to remove the PP from office by establishing a committee to make a finding on the misconduct, incapacity or incompetence of the PP; adopting any or all of the committee findings; followed by a resolution calling for the removal of the PP supported by two thirds of the members of the Assembly.⁵
9. It is our submission that the PP has failed in her Constitutional duties and powers and that earnest action is required before serious damage is caused to the reputation of the institution, democracy and the Republic.
10. As the abovementioned provisions have not been applied and tested before we submit that the ordinary meaning of the words “*incompetence*” and “*misconduct*” should be applied when interpreting and complying with them.
11. Below we out line several instances of incompetence and misconduct on the part of the PP. Some instances were reported on and others were experienced by OUTA in our dealings with the office of the PP.

¹ Section 181(1) of the Constitution of the Republic of South Africa, 1996

² Section 181(2) of the Constitution of the Republic of South Africa, 1996

³ Section 181(5) of the Constitution of the Republic of South Africa, 1996

⁴ The Public Protector Act, 1994 – hereinafter referred to as the Public Protector Act.

⁵ Section 194 of the Constitution of the Republic of South Africa, 1996

PPSA Investigation Reports

- Principles set out in the Mail & Guardian case⁶ and subsequent PPSA Draft Rules
12. In the Mail & Guardian case the office of the PP was criticised by the court for basically accepting responses by implicated persons to allegations without conducting an independent investigation.
 13. The court held that “*The Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting*”. Also, that: “*The function of the Public Protector is as much about confidence that the truth has been discovered as it is about discovering the truth.*”⁷
 14. Since the abovementioned judgement was handed down the office of the PP took a more inquisitorial approach to investigations in order to comply with the principles set out in the judgement.
 15. The Mail & Guardian case also formed the basis of the draft Public Protector Rules and was relied heavily on by the Justice Committee in their consideration of the Rules tabled by the PP.
 16. Subsequently, the importance of this judgement and the compliance and application thereof by the PP is crucial. We submit that any reasonable Public Protector should at the very least familiarise herself with it before embarking on an investigation and issuing a subsequent report. We submit that the Public Protector did not take cognisance of this judgement when she dealt with the investigations and subsequent reports highlighted below.

⁶ The Public Protector v Mail & Guardian Ltd and Others (2011 (4) SA 420 (SCA)) [2011] ZASCA 108; 422/10 (1 June 2011)

⁷ *Supra* paragraph 19

- The ABSA Report⁸

17. During June 2017 the PP released the ABSA report. The Report was successfully taken on review by ABSA Bank Limited and Others⁹. In the judgement handed down by the Court, on 16 February 2018, the court crisply explained the shortcomings of the Public Protector in her conduct throughout her investigation of this matter by stating that:

17.1. *“The Public Protector engaged with the Presidency and the SSA without affording a similar opportunity to the reviewing parties. **This cannot be an administrative oversight as she was clearly aware of the provisions of section 7(9) of the Public Protector Act when she decided to have an interview with the Presidency on 25 April 2017. Furthermore, if it was an oversight, one would have expected the Public Protector to have said so in her answering affidavit.***

*The Public Protector did not disclose in her report that she had meetings with the Presidency on 25 April 2017 and again on 7 June 2017. It was only in her answering affidavit that she admitted to the meeting of 25 April 2017, but she was totally silent on the second meeting which took place on 7 June 2017. She gave no explanation in this regard when she had the opportunity to do so. **Having regard to all these considerations, we are of the view that 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.***

We therefore conclude that it has been proven that the Public Protector is reasonably suspected of bias as contemplated in section 6(2)(a)(iii) of PAJA.”¹⁰ (Own emphasis added)

17.2. *“It was submitted that although the Public Protector has recommended that the State President should, through the SIU, reopen the investigation into the alleged stolen funds, she has not furnished any reasons as to why the Heath report's findings are irrelevant to the extent that there is a need for another investigation by the SIU. It is the applicants' contention*

⁸ Public Protector South Africa Report 8 of 2017/2018, Alleged Failure to Recover Misappropriated Funds, ISBN: 978-1-928366-29-4, hereinafter referred to as the ABSA Bank Report

⁹ Absa Bank Limited and Others v Public Protector and Others (48123/2017; 52883/2017; 46255/2017) [2018] ZAGPPHC 2; [2018] 2 All SA 1 (GP) (16 February 2018)

¹⁰ *Supra* at pages 55- 56 paragraphs 100 and 101

*that they have a right as affected persons to know the reasons for the discounting of the Heath report and, in terms of the audi alteram partem rule, to respond thereto. It was argued that the Public Protector's conduct in failing to provide the applicants with the above-mentioned documents, she denied them an opportunity to respond to those documents before the final report was prepared. The court finds that in terms of section 6(2)(c) of PAJA this conduct by the Public Protector was **procedurally unfair**. Therefor the remedial action in paragraphs 7.1 and 8.1 of the Report has to be set aside. They were the product of a procedurally unfair process and are unlawful. **The process was not impartial and therefor there is a reasonable apprehension that the Public Protector was biased against ASSA and the Reserve Bank.**"¹¹ (Own emphasis added)*

- 17.3. *"The Public Protector did not conduct herself in a manner which should be expected from a person occupying the office of the Public Protector... **She did not have regard thereto that her office requires her to be objective, honest and to deal with matters according to the law and that a higher standard is expected from her. She failed to explain her actions adequately...**"¹²(Own emphasis added)*
- 17.4. *"The court has found the remedial action to be unlawful and that there is a reasonable apprehension of bias. The court further finds no reason to remit the report. **It is clear that the Public Protector unlawfully, ultra vires and breached several provisions of PAJA. In these circumstances it would be untenable to remit the Report to the Public Protector.**"¹³ (Own emphasis added)*
- 17.5. *"**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. 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. As we have already pointed out above, it 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. She failed to realise the importance of explaining her actions in this regard, more particularly the last meeting***

¹¹ *Supra* at pages 56 to 57, paragraph 103

¹² *Supra* at page 64, paragraph 120

¹³ *Supra* at page 66, paragraph 123 lines 6 - 12

she had with the Presidency. This last meeting is also veiled in obscurity if one takes into account that no transcripts or any minutes thereof have been made available. This all took place under circumstances where she failed to afford the reviewing parties a similar opportunity to meet with her.”¹⁴ (Own emphasis added)

17.6. *“The Public Protector failed to make a full disclosure when she pretended, in her answering affidavit, that she was acting on advice received with regard to averments relating to economics prior to finalising her report. We have already pointed out that Dr Mokoka's report was obtained after the final report had been issued and the applications for review had been served. Section 5(3) of the Public Protector Act provides for an indemnification with regard to conduct performed "in good faith". The Public Protector has demonstrated that she exceeded the bounds of this indemnification. It will therefore be of no assistance to her. 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.”¹⁵*

- Estina Report¹⁶

18. The PPSA received a complaint and investigated an agreement between the Free State Agriculture Department and a private entity called Estina which allegedly contained an unusual confidentiality clause. The Public Protector subsequently issued a report, also known as the *Vrede Dairy Farm*– or *Estina* Report.

19. Serious allegations have been made that the PP suppressed evidence when issuing her final report. This has been brought under serious scrutiny not only in the media¹⁷ but also by the Justice Committee¹⁸.

¹⁴ *Supra* at pages 68 to 69, paragraph 127

¹⁵ *Supra* at page 69, paragraph 128

¹⁶ Public Protector Report no 31 of 2017/2018, Allegations of maladministration against the Free State Department of Agriculture – Vrede Integrated Dairy Project, ISBN: 978-1-928366-53-9

¹⁷ “DA in a bid to force Busisiwe Mkhwebane’s hand in Vrede Dairy Farm report inquiry” available at <https://www.thesouthafrican.com/da-busisiwe-mkhwebanes-vrede-dairy-farm-report-inquiry/> accessed on 23 November 2018

¹⁸ Public Protector on serious matters of public interest affecting her Office, Justice and Correctional Services, 06 March 2018, <https://pmg.org.za/committee-meeting/25912/> accessed on 23 November 2018

20. The report was taken on review and in the latest High Court judgement¹⁹, the Court held that the PP contravened the Public Protector Act and Constitution.
21. Esteemed Tolmay, J held that the PP's report did not comply with the requirement of legality as it was unlawful and unconstitutional.
22. The court also made the following findings:
 - 22.1. *"The steps taken by her [the Public Protector seem wholly inadequate, considering the magnitude and importance of the complaints raised]."*²⁰
 - 22.2. *"Significantly, whereas the provisional report had sought to give effect to Treasury's investigations and recommendations, the PP did not accept these findings. She instead found, that compliance with the requirements for concluding a PPP was not required for the Estina agreement. On what basis she could justifiably come to such a conclusion is unclear. It points either to **ineptitude or gross negligence** in the execution of her duties."*²¹ (Own emphasis added)
 - 22.3. *"The conclusion by the PP was **clearly irrational**."*²² (Own emphasis added)
 - 22.4. *"The failure of the PP to execute her constitutional duties in investigating and compiling a credible and comprehensive report **points either to a blatant disregard to comply with her constitutional duties and obligations or a concerning lack of understanding of those duties and obligations**."*²³ (Own emphasis added)
 - 22.5. *"Whatever her [the Public Protector] office's resource constraints were, they could perhaps conceivably explain the narrowing of the scope of the investigation, but never explain and justify the **irrational and arbitrary findings and material errors of law** in the Report, or the inappropriate and ineffective investigation executed by her office."*²⁴ (Own emphasis added)

¹⁹ Democratic Alliance vs The Public Protector; Council for the Advancement of the South African Constitution vs The Public Protector, case number: 11311/2018 reportable case, judgement handed down on 20 May 2019 in the High Court of South Africa, Gauteng Division, Pretoria.

²⁰ *Supra* at page 25 paragraph 49

²¹ *Supra* at page 29 paragraph 60

²² *Supra* at page 30 paragraph 66

²³ *Supra* at page 37 paragraph 64

²⁴ *Supra* at page 41 paragraph 95

- 22.6. *“The Report by the PP did not address the major issues raised in the complaints, nor the numerous indications of irregularities. **In this instance the PP did nothing to assure the public that she kept an open and enquiring mind and that she discovered, or at least attempted to discover the truth.**”²⁵ (Own emphasis added)*
- 22.7. *“To put people who are implicated in wrongdoing in a position to investigate that very same wrongdoing, is **absurd and goes against every known principal of law and logic.**”²⁶ (Own emphasis added)*
23. The PP did not comply with her Constitutional duty by not exercising her power to:
- 23.1. **Investigate** and **report** and in doing so discover and expose corruption and prejudice in order to maintain effective public service and good governance.
- 23.2. Properly **formulate** and **implement** remedial action in order to remedy the corruption and prejudice, hold the responsible people accountable, grant appropriate relief to those adversely effected and prevent the re-occurrence of the same conduct.
24. The Court found that in the circumstances the report had to be set aside, but referring it back to the PP for reconsideration, which would be the norm, would be inappropriate.
- Grounds for a review:
25. In order to fully appreciate the significance of the abovementioned criticisms, it is important to understand the purpose of a review application.
26. *“**In considering the grounds of review we remind ourselves of the principle that a review is not concerned with the correctness of a decision made by a functionary, but with whether (and how) it performed the function with which it was entrusted**”²⁷. Judicial review is therefore essentially concerned*

²⁵ *Supra* at page 47 paragraph 109

²⁶ *Supra* at page 50 paragraph 116 line 17 - 19

²⁷ MEC for Environmental Affairs and Development Planning v Clairison’s CC 2013(6)SA

with the judicial detection and **correction of maladministration**²⁸. In *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another*²⁹, Navsa ADP dealt with rationality review and held: *Rationality review is concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand, and the purpose or end itself on the other. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Rationality review also covers the process by which the decision is made. So, both the process by which the decision is made and the decision itself must be rational. If a failure to take into account relevant material is inconsistent with the purpose for which the power was conferred there can be no rational relationship between the means employed and the purpose.*³⁰ (Own emphasis added)

27. In terms of Section 6(2) of PAJA³¹:

“A court or tribunal has the power to judicially review an administrative action if-

- (a) *the administrator who took it-*
 - (i) *was not authorised to do so by the empowering provision;*
 - (ii) *acted under a delegation of power which was not authorised by the empowering provision; or*
 - (iii) ***was biased or reasonably suspected of bias;***
- (b) *a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
- (c) *the action was procedurally unfair;*
- (d) *the action was materially influenced by an error of law;*
- (e) *the action was taken-*
 - (i) *for a reason not authorised by the empowering provision;*
 - (ii) ***for an ulterior purpose or motive;***
 - (iii) ***because irrelevant considerations were taken into account or relevant considerations were not considered;***

²⁸ Hoexter, *Administrative Law in South Africa*, 2nd edition at p 9

²⁹ [2017] 4 All SA 726 (SCA) at paragraph 82

³⁰ *Absa Bank Limited and Others v Public Protector and Others* (48123/2017; 52883/2017; 46255/2017) [2018] ZAGPPHC 2; [2018] 2 All SA 1 (GP) (16 February 2018) page 35

³¹ Promotion of Administrative Justice Act 3 of 2000

- (iv) *because of the unauthorised or unwarranted dictates of another person or body;*
- (v) *in bad faith; or*
- (vi) *arbitrarily or capriciously;*
- (f) *the action itself-*
 - (i) *contravenes a law or is not authorised by the empowering provision; or*
 - (ii) *is **not rationally connected to-***
 - (aa) ***the purpose for which it was taken;***
 - (bb) *the purpose of the empowering provision;*
 - (cc) *the information before the administrator; or*
 - (dd) *the reasons given for it by the administrator;*
- (g) *the action concerned consists of a failure to take a decision;*
- (h) *the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*
- (i) *the action is otherwise unconstitutional or unlawful.” (Own emphasis added)*

28. The findings against the Public Protector was aimed at her behaviour during her investigations that did not instil “...*confidence that the truth has been discovered...*”

The PP’s reporting to the Committee on Justice and Correctional Services

29. From the outset it is understood that the Committee on Justice and Correctional Services (hereinafter referred to as the Justice Committee) does not have the power to intervene in the business or investigations conducted by the PPSA, but rather has an oversight duty to ensure that the PP and the PPSA complies with their respective Constitutional obligations.
30. Thus, it is safe to say that trust and respect of the highest regard is expected from the PP when dealing with the Justice Committee and *vice versa*.
31. Unfortunately, it would seem as if the PP has, through her actions and absenteeism, shown disrespect and disregard for the Justice Committee and what the Committee represents.

32. In support of the latter it was reported on the PMG website³² that concern was raised on the PP's report on her first 100 days in office. Some of the concerns raised as the financial reporting done by the Chief Financial Officer of the 2017/2018 budget was inaccurate and it was unclear how the PPSA calculated the amount of R 1 billion which it requested as an increase in its funding.
33. Several months later, during October 2017³³, concern was expressed over the substantial increase in expenses incurred by the PP. The following was pointed out as point of concern:
 - 33.1. Catering costs had increased from R424 000 to R1.3 million;
 - 33.2. Consultancy and Professional fees increased from R1.5 million to R5.2 million;
 - 33.3. Domestic travel increased from R2.9 million to R7.3 million; and
 - 33.4. Foreign travel increased from R900 000 to R2 million.
34. It is difficult to understand why the travelling (international and local) increased so substantially taking into consideration that the PPSA's staff compliment decreased without approved positions being filled.
35. Further, a more than triple increase in consultancy and professional fees is concerning taking into account that the PPSA employs qualified professionals who should be capable of conducting investigations. Even if it is accepted that the latter was paid for skills not possessed by the employees of the PPSA, the question which begs to be asked is whether the amount and, more importantly, the quality of reports issued by the PP justifies the bill.
36. No definitive justification was given by the PP to the abovementioned concerns and it is still unclear why the increase in the expenditure has occurred.
37. Further PPSA has requested yet another increase in their annual budget from R310 million to R870 million citing "*...insufficient funding for 2018/19, low staff morale, capacity shortages and increased litigation against PPSA resulting from various judicial review applications of the remedial action ordered by the Public*

³² Public Protector First 100 Days & Annual Performance Plan, Justice and Correctional Services, 30 March 2017, <https://pmg.org.za/committee-meeting/24223/> accessed on 1 August 2018

³³ Public Protector speaking on 2016/17 Annual Report, Justice and Correctional Services, 05 October 2017, <https://pmg.org.za/committee-meeting/25156/> accessed on 1 August 2018

*Protector... poor turnaround times from state agencies and various challenges related to security such as the Department of Public Works (DPW) on rental of state owned buildings and the State Security Agency (SSA)*³⁴ as challenges. It is however unclear how the PPSA is currently addressing these challenges.

38. The removal of the PP has been discussed on no less than 6 occasions by the Justice Committee with the first request being made on 10 October 2017³⁵. There were conflicting views on whether the matter should be referred to the National Assembly for the appointment of an ad hoc committee to investigate the matter or if the Justice Committee possess the power to investigate the matter. It was finally decided, by way of vote, that the matter would not be taken further at that stage.³⁶
39. However, 8 months later during June 2018³⁷, the PP was schedule to appear before the Justice Committee to answer concerns regarding the appointment of a special advisor but failed to appear without proper notice. In addition, a letter was submitted to the Justice Committee requesting the institution of proceedings for the removal of the PP. Neither of the issues could be taken further as the Justice Committee required a response form the PP as due process had to be followed.
40. At the subsequent meeting³⁸ the PP reported on, amongst others, her policy on the appointment of Special Advisors and the appointment of a special advisor. The Justice Committee again discussed the PP's competence to hold office and possible institution of the process to have her removed.
41. Of concern in regarding to the policy on The Appointment of Special Advisors related to the procedural correctness of the policy. It would seem as if the process followed was flawed and did not comply with legislative requirements and good governance.

³⁴ Public Protector on its 2018/19 Annual Performance Plan, Justice and Correctional Services, 17 April 2018, <https://pmg.org.za/committee-meeting/26123/> accessed on 1 August 2018

³⁵ Public Protector removal proceedings request; Office of Chief Justice 2016/17 Annual Report, Justice and Correctional Services, 10 October 2017, <https://pmg.org.za/committee-meeting/25189/> accessed on 1 August 2018

³⁶ Public Protector removal request; Deputy Public Protector alleged misconduct, Justice and Correctional Services, 25 October 2017, <https://pmg.org.za/committee-meeting/25319/> accessed on 1 August 2018

³⁷ Public Protector on special advisor appointment; Fitness of Public Protector to hold office, Justice and Correctional Services, 06 June 2018, <https://pmg.org.za/committee-meeting/26583/> accessed on 1 August 2018

³⁸ Public Protector: Tabling of Rules; Policy on Appointment of Special Advisor; Request by MP to remove Public Protector from office, Justice and Correctional Services, 13 June 2018, <https://pmg.org.za/committee-meeting/26650/> accessed on 1 August 2018

42. Further, the appointment of a special advisor for three months at a remuneration level 14 was justified by the PP by stating that budget was used from the previous CEO who had resigned and “... *savings were used from compensation of staff. It was not only the CEO post that had been vacant; there were other positions that were vacated by some of the senior investigators.*”
43. The PP stated that the special advisor was merely appointed as an advisor and “... *had nothing to do with reports or the quality assurance of reports. He only dealt with advising on decisions on issues indicated, and not on classified matters.*” This means that the PP had utilised financial resources allocated for operations and investigations at the cost of her staff compliment and the business of the PPSA.
44. The judgement handed down in the review of the ABSA report and the personal cost order granted against the PP was described as forming a crucial factor in determining the PP’s competency. The meeting resolved that due process should be followed and that the PP should be granted an opportunity to respond formally.
45. The PP was requested to appear before the committee to which she submitted a response to the request of removal, again without proper notice the evening prior to the meeting at 23:00, subsequently resulting in the Justice Committee not having enough time to consider the submission and which resulted in the matter being postponed.³⁹
46. On 5 December 2018, the Justice Committee finally debated and considered the PP’s response to the “*REQUEST TO EXPIDITE PROCEDURE TO REMOVE THE PUBLIC PROTECTOR*”.⁴⁰
47. The Justice Committee, by majority vote, resolved not to refer the Removal of the Public Protector to the National Assembly.
48. What is important to note from the PP’s response is that:

³⁹ Public Protector response to MP request for her removal from office (postponed); Legal Practice Act Regulations: adoption, Justice and Correctional Services, 22 August 2018, <https://pmg.org.za/committee-meeting/26880/> accessed on 23 November 2018

⁴⁰ Public Protector removal from office request, 5 December 2018, <https://pmg.org.za/committee-meeting/27735/> accessed on 10 January 2019

- 48.1. The requirement of being a “*fit and proper person*” relates to the appointment of the Public Protector⁴¹ and not the removal as envisaged in section 194 of the Constitution. Section 194 makes provision for its own requirements which may or may not include an inquiry into whether a person is *still* “*fit and proper*” after their appointment.
- 48.2. As indicated above, “*incompetence*” is not defined in the Constitution and a quick examination of South African Labour laws also does not provide a clear definition. Thus, in terms of the rules of interpretation the normal dictionary meaning of the word should be considered. A search for the definition of “*incompetence*” and requirements set out and applied by the PP in her response⁴² shows that it was obtained from an article written by a Canadian attorney, Mr Hendrik Nieuwland, from Shields O'Donnell MacKillop LLP⁴³. In the article he explains new Canadian labour legislation in relation to employees who are deemed incompetent and the steps and remedies available to the employer.
- 48.3. What is concerning is that the PP adopted the article and Canadian Law without proper citation or recognition to the author. Although the Constitution makes provision for the consideration of foreign law by courts, a pure adoption and application of requirements set out in Canadian Labour Legislation would be improper.
- 48.4. We submit that the mechanics of section 194 of the Constitution does not require the application of Labour Legislation *per se*, but rather makes provision for the removal of the PP as a presidential appointment with its own appointment and removal process and cannot be equated to that of a normal employee.
- 48.5. In later submissions, the PP likens her office to that of a judge, which would also infer that she should be held to a higher standard than to that of an employee.
- 48.6. We submit that the Constitutional principle that the PP has to perform her duties “*without fear, favour or prejudice*” does not negate her

⁴¹ Section 1A of the Public Protector Act 1994

⁴² Ad paragraph 9 on page 3 of the Response dated 5 July 2018 and titled: “RE:REQUEST TO EXPIDITE PROCEDURES TO REMOVE THE PUBLIC PROTECTOR”

⁴³ Terminating an Incompetent Employee for Cause (Yes, it can be done), 18 February 2014, [http://www.somlaw.ca/blog/blog-post/blog/2014/02/18/terminating-an-incompetent-employee-for-cause-\(yes-it-can-be-done\)](http://www.somlaw.ca/blog/blog-post/blog/2014/02/18/terminating-an-incompetent-employee-for-cause-(yes-it-can-be-done)) by H Nieuwland accessed on 9 January 2019

responsibility of accountability and competency. In other words, the PP cannot use the former to nonchalantly interpret and apply the law, with dire consequences, as in the case of the ABSA Bank Report. The latter speaks directly to the PP's competency as a legal practitioner and Public Protector.

- 48.7. Even Judges who negligently or incompetently interpret and apply the law face the possibility of a complaint being lodged with the Judicial Service Commission and subsequent enquiry and scrutiny. This process of check and balance promotes accountability and democracy, something the PP as a democratic watchdog should welcome.
- 48.8. We submit that the enquiry called for by section 194 of the Constitution is not an inquiry into the dispute before any court but rather an enquiry into the conduct and competency of the PP. The dispute before the court would continue whether the PP is removed or not and any finding by a Committee would not interfere with a finding or order made by a court on the legality or lawfulness of the PP'S report or any legal dispute before the court. The PP is not on trial but rather the PPSA report.
- 48.9. In terms of section 149 of the Constitution the National Assembly will have to appoint an independent committee to conduct an objective factual enquiry into the alleged incompetence and misconduct of the PP and make a recommendation to the National Assembly which must be adopted by way of a majority vote before she is removed. Thus, the PP is not being found "*guilty*" nor will there be any "*interference*" in her "*decisional independence*" until due process has been followed.

Service Delivery by the PPSA

49. During March 2017 OUTA lodged a complaint with the Human Rights Commission. Said complaint was referred to PPSA⁴⁴ on 14 August 2017 and ever since we have been met with delays, refusals or negligence to take action or make decisions, despite OUTA doing everything in our power to assist the PPSA. To date we have not received any substantial response to our queries save for a meeting held with the PPSA and which have borne little to no fruit.

⁴⁴ PPSA complaint reference number: 7/2-009316/17

50. We have had no choice but to send a final letter requesting reasons for the delay in terms of PAJA and is currently seeking legal counsel as to the remedies available to us. A letter which remain unanswered.
51. During the period 2017 to date OUTA has lodged no less than three PAIA applications with the PPSA, several of which have been unanswered. We have experienced very little to no communication from the PPSA and which has been exacerbated by the fact that the PPSA PAIA manual is out of date. It is noteworthy to mention that the latter is a criminal offence in terms of PAIA⁴⁵.
52. Unfortunately, we have had no choice but to abandon some of the PAIA requests as it became irrelevant and taking the PPSA on review would have amounted to a serious financial burden on our organisation, one which would negate the assistance and work we provide to our supporters.
53. Thus, the PPSA's neglect or refusal to consider our PAIA applications did not only infringe on our Constitutional Rights but also amounts to a blatant disregard of the Constitutional Rights of the people of South Africa by one of its own watchdogs.

Daily administration of the Institution

54. It has been reported that the PP has made several questionable high-level staff appointments in her office without following due process and which possibly caused the PPSA financial loss.
55. Among some of these appointments was the secondment and subsequent appointment of the former PPSA Customer Service Manager, Ms Linda Molelekoa, to the position of Chief of Staff.
56. The appointment was however withdrawn as Ms Molelekoa did not produce alternatively possess an undergraduate qualification to qualify for a level 14 (senior management) position. The withdrawal only happened after 17 months of her being seconded to the post and being remunerated on a salary level of approximately R1.2 million per annum which could potentially have led to a salary bill of R1.7 million for the duration of the secondment.⁴⁶

⁴⁵ Section 14 read with section 90 of the Promotion of Access to Information Act, 2000

⁴⁶ "Mkhwebene drops aide over qualifications doubt" available at <https://www.pressreader.com/south-africa/sunday-times/20180603/283583811075044> and "Thuli Madonsela: Staff Who Worked On The State Capture Report Are Being Targeted By Busisiwe Mkhwebane" available at

57. It is unclear if any steps were taken against the people responsible for the secondment and subsequent appointment of Ms Molelekoa or if any of the money paid in terms of salary has been recouped.
58. The above clearly indicates a blatant disregard of the rules and regulations set out in national legislation⁴⁷ and good governance practices.

Perceived lack of Impartialness of the PP

59. During December 2016 it was reported that the PP laid charges against her predecessor, Advocate Thuli Madonsela (hereinafter referred to as “Madonsela”), after Madonsela allegedly leaked an audio recording took during an investigation interview and which confirmed an interview with former president Jacob Zuma.
60. Madonsela ostensibly did this to rebut former president Zuma’s allegation that she did not interview him during the course of her investigations. Former president Zuma lodged a complaint with the PP’s office and the PP laid charges against Madonsela in this regard. The PP alleged that she did so to protect the credibility of the office of the Public Protector.⁴⁸
61. During January 2017, the PP failed to oppose former President Zuma’s attempt to interdict the release of the State of Capture Report.
62. What is concerning is that in December 2016 the PP “protected” the credibility of the Office by lodging a complaint against Madonsela yet in the following month, January 2017, she failed to oppose an application whereby former president Zuma sought to interdict her office from releasing the report and thereby directly challenging the authority of her Office.

https://www.huffingtonpost.co.za/2017/02/05/thuli-madonsela-staff-who-worked-on-the-state-capture-are-being_a_21707478/ accessed on 11 December 2018

⁴⁷ Public Service Act, 1994

⁴⁸<https://www.news24.com/Drum/Archive/the-public-protector-public-spat-mkhwebane-vs-madonsela-20170728> accessed on 20 June 2018

<https://www.news24.com/SouthAfrica/News/new-protector-mkhwebane-lays-charges-against-madonsela-after-zuma-complaint-20161127> accessed on 20 June 2018

Upholding the reputation of the Institution

63. It was also reported in December 2016 that the PP threatened to withdraw South Africa's hosting of the African Ombuds' Conference if Madonsela were invited to attend. This was never rebutted by the PP and the PP refused to accept an accolade on her predecessor's behalf but rather delegated it to the Deputy Public Protector, Kevin Mahlangu.⁴⁹
64. The PP acted in a manner that is unacceptable and improper by failing to provide public administration⁵⁰ which is in line with the democratic values and principles of–
- 64.1. High standard of professional ethics by not adhering to the rule of law and bringing the office of the Public Protector into disrepute,
 - 64.2. The efficient, economic and effective use of resources,
 - 64.3. The provision of service that is impartial, fair, equitable and without bias,
 - 64.4. Accountable administration,
 - 64.5. Transparency through provision of timely, accessible and accurate information,
 - 64.6. Good human resource management maximising human potential.
65. We submit that the PP has demonstrated through the lack of institutional administration, the seriousness of the grounds upon which certain of her reports have successfully been taken on review and her conduct that she does not act in a manner that is impartial, independent and in good faith. This in turn negates her competence to head the Office of the Public Protector South Africa and warrants, at the very least, an enquiry by National Assembly as made provision for by the Constitution.
66. We further submit that based on the above, Advocate Mkhwebane has failed and/ or still fails in her Constitutional duty by acting in a manner that amounts to misconduct and incompetence resulting in her failure to protect democracy and the citizens of the Republic of South Africa.
67. Therefore, we request that you consider exercising your power to appoint a committee⁵¹ to investigate the above allegations and other transgressions and take the appropriate action as required by the Constitution.

⁴⁹ <https://www.news24.com/SouthAfrica/News/busi-hates-on-thuli-20161217-2> accessed on 20 June 2018

⁵⁰ Section 195 of the Constitution of the Republic of South Africa, 1996

⁵¹ Section 194(1) of the Constitution of the Republic of South Africa, 1994

68. Should you have any queries or require any further information please contact writer hereof or our Legal Manager, Ms Soretha Venter, at soretha.venter@outa.co.za alternatively telephonically at 087 170 0639.

Yours Sincerely,



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