COMPLAINT AFFIDAVIT

I, the undersigned,

STEFANIE FICK

do hereby make an oath and state the following:

1. I am an adult female employed as Chief Legal Officer by the Organisation Undoing Tax Abuse ("OUTA"), who is the complainant in this matter, with business address, situated at 10th Floor, O'Keeffe & Swartz Building, 318 Oak Street, Ferndale, Randburg, Gauteng.

2. I am duly authorised to depose to this affidavit on behalf of the complainant.

3. The contents of this affidavit fall within my personal knowledge, unless stated otherwise, and are in all aspects true and correct.

A. MANDATE & INTRODUCTION

4. The Complainant, 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 with regards to taxpayers' money in South Africa.

5. By virtue of the position that I hold at OUTA, I depose to this Affidavit in support of a criminal complaint against the Public Protector, Adv Busisiwe Mkwebane, on a charge of perjury.

B. THE PARTIES

6. The Complainant is the ORGANISATION UNDOING TAX ABUSE (OUTA), a non-profit Company with limited liability, with company registration number 2012/0642/1308 and NPC number 124-38, duly registered in accordance with company laws of the Republic of South Africa, and with its principal place of business situated at 10th Floor, O'Keefe & Swartz Building, 318 Oak Avenue, Randburg, Gauteng.

7. The Accused is Adv Busisiwe Mkwebane, an adult female, acting in her capacity as the current Public Protector.

C. BACKGROUND TO THE COMPLAINT

8. On 19 June 2017, The Public Protector released a report No: 8 of 2017/18 that dealt with *"allegations of maladministration, corruption, misappropriation of public funds and failure by the South African Government to implement the CIEX Report and to recover public funds from ABSA Bank"* (hereinafter referred to as *"the final Report")*. This resulted in protracted litigation which ultimately culminated in a hearing before the Constitutional Court of South Africa on 27 November 2018.

9. The Public Protector's investigation had its genesis in a complaint submitted to it by Adv Paul Hoffman SC. It was initially investigated by the then Public Protector, Adv Thuli Madonsela from September 2013 to September 2016. Thereafter, the incumbent Public Protector, Adv Mkhwebane, took over and published the final report.

10. This final report recommended remedial action that differed from the provisional report. It directed the Chairperson of the Parliamentary Portfolio Committee to take steps to amend section 224 of the Constitution, in order to strip the Reserve Bank of its primary objective of protecting the value of the South African currency and to change the Reserve Bank's consulting obligations with the Minister of Finance. It also required the Special Investigating Unit to approach the President to re-open and amend the 1998 SIU Proclamation, in order to recover misappropriated public funds unlawfully given to ABSA in the amount of R1.25 billion.

11. The release of this final report caused severe harm to the South African economy. The Rand depreciated substantially, and non-resident investors sold off R1.3 billion worth of South African government bonds. Consequently, the Reserve Bank launched an urgent review application to set aside the remedial action concerning the amendment of section 224 of the Constitution. This application was not opposed by the Public Protector and succeeded.

12. Thereafter, the Reserve Bank launched another review application in the High Court concerning the second aspect of the remedial action, namely the re-opening and amendment of the 1998 SIU Proclamation.

13. The second review application was opposed by the Public Protector. In its replying affidavit, the Reserve Bank sought to hold the Public Protector personally liable for the costs on the basis that she had abused her office in conducting the investigation. The second review also succeeded, and the court held the Public Protector personally liable for 15% of the costs incurred.

14. On 9 March 2018, the Public Protector filed an application with the High Court, for leave to appeal to the Supreme Court of Appeal against the judgment handed down by the Full Court of the High Court of South Africa, Gauteng Division, Pretoria.

15. The High Court however, dismissed the Public Protectors application for leave to appeal to the Supreme Court of Appeal, with costs.

16. The Public Protector then filed an application to the Constitutional Court, to seek direct access to the court (as contemplated in section 167(6)(a) of the Constitution) for an order setting aside the Judgment of the court *a quo.*

17. The access was granted, and the matter was decided by the Constitutional Court on 22 July 2019. The judgment of which for the sake of brevity, has not been attached to this affidavit but some specific content thereof will be referenced herein.

18. The dissenting judgment was delivered by the Honourable Chief Justice Mogoeng and concurred in by the Honourable Acting Justice Goliath. The majority decision was delivered by the Honourable Justices Khampepe and Theron and concurred in by the Honourable Justices Basson (Acting), Cameron, Dlodlo, Froneman, Mhlantla and Petse (Acting).

D. <u>ALLEGED ACT OF PURJERY</u>

19. The majority decision of the <u>Constitutional Court</u> held, (with regards to the punitive cost order granted against Adv Mkhwebane, in her personal capacity) *inter alia* the following:

19.1. Our Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right, and

they must do it properly. They are required to be candid and place a full and fair account of the facts before a court.

19.2. Public officials who flout their constitutional obligations must be held to account. When their defiance of their constitutional obligations is egregious, they should pay the costs of the litigation brought against them, not the taxpayer.

19.3. The traditional common law tests of bad faith and gross negligence must be infused by the Constitution.

19.4. The Public Protector falls into the category of a public litigant. A higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights.

19.5. The immunity which the Public Protector enjoys against personal liability under section 5(3) is only triggered when she acts in good faith. The High Court held that the Public Protector exceeded the bounds of this indemnification in the present matter to the extent that the Public Protector conducted herself in bad faith, the potential immunity she may otherwise enjoy under section 5(3) is of no assistance to her.

19.6. The High Court found that the Public Protector acted in bad faith. This Court has no reason to interfere with this finding. Accordingly, this ground of appeal must be rejected. In any event, the ambit of the immunity afforded under section 5(3) is expressly limited to "*anything reflected in any report, finding, point of view or recommendation made*".

19.7. It is doubtful whether this includes the Public Protector's exercise of her investigating powers, her conduct during the investigation, or the litigation associated with the final report.

19.8. The Public Protector had been alerted to the importance of explaining her impugned conduct. As a public litigant, the Public Protector cannot be permitted to benefit from any decision which she made to forgo this opportunity to fully explain her conduct. She had been expressly notified by the Reserve Bank in its replying affidavit that it would seek a personal costs order against her.

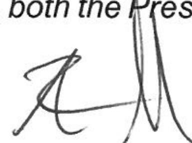
20. For ease of reference, during the reading of this affidavit, the relevant parts of the Public Protectors Answering Affidavit (submitted during the High Court litigation) and the two Affidavits (submitted during the Constitution Court litigation), will be reproduced hereunder, to enable the complainant to show just cause as to why a Charge of Perjury is warranted.

21. Regarding Adv Mkhwebane's admissions under oath, we highlight the following:

21.1. The following paragraphs contained in the Respondents ANSWERING AFFIDAVIT, as part of the Constitution Court litigation record, paginated pages 142 – 237 (hereto attached as **"ANNEXURE A"**):

"166. The Applicants have raised various criticism or attacks against the fact that I met with the President, SIU and members of Black First Land First during the course of finalising the final report. As demonstrated below, these meetings were not improper and correctly conducted during the course of our investigation."

"168. As already mentioned, in my report I make certain findings concerning the Government and the SARB's failure to recover the misappropriated funds and direct them to take remedial action to rectify this. Therefore, both the President,



as the primary representative of government, and the SIU are implicated as contemplated section 7(9)."

"171. On 29 March 2017, I received an email from the Presidency in which the President called for a meeting. I agreed to have the meeting, which took place on 25 April 2017. A copy of the email requesting a meeting is attached marked "PP9""

"172. I attended the meeting at the Presidency, together with Mr Ntsumbedzeni Nemasisi, the Public Protector's Senior Manager Legal Services and Mr Tebogo, our Senior Investigator."

"182. There was accordingly nothing untoward with the meeting with the President, SIU and BLF. Although the outcome of the meeting between the Public Protector and any person or submission of any evidence to the Public Protector may influence the direction of my investigation or remedial action to be taken, I always remain independent, impartial and I always exercise my powers and perform my functions without fear, favour or prejudice."

21.2. The following paragraphs contained in the Applicant's FOUNDING AFFIDAVIT, as part of the Constitution Court litigation record, paginated pages 649 to 677 (hereto attached as **"ANNEXURE B"**):

"40. In this regard, I wish to explain that two meetings took place at this 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" 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 in paragraphs 171 to 173 of my answering affidavit in a different context which to appear to have created the impression that it was more than an introductory meeting. This mistake was occasioned by the hurried manner in which the answering affidavit had to the prepared within very tight timeframes set during the case management process thus putting pressure on me and legal representatives to study voluminous papers in three consolidated application within few days."

"40.2. The second meeting took place on 07 June 2017. What was explained in my answering affidavit at paragraph 172 in fact relate 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 is attached hereto as annexure "PP8"."

"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 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 application to which the Judgment relates. A confirmatory affidavit of Mr Ntsumbedzeni Nemasisi, Senior Manager-Legal Services, who also attended both meetings, is hereto attached as annexure "PP9"."

"43. I did not disclose the meeting in the report because it is covered by the 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. The meeting occurred on 7 June 2017…"

"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. 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 Presidency'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."

21.3. The following paragraphs contained in the Applicant's REPLYING AFFIDAVIT, as part of the Constitution Court litigation record, paginated pages 766 to 803 (hereto attached as **"ANNEXURE C"**) and paginated page 130a (hereto attached as **"ANNEXURE D"**):

"10.6. As stated in my founding affidavit, the meeting of April 2017 had nothing to do with the CIEX investigation, as it was a meet and greet meeting and the meeting for June 2017 had nothing to do with the substance of the content of my report. I therefore did not intentionally fail to disclose the meeting in my report hence the disclosure (in the rule 53 record) of the notes taken in the aforesaid meeting."

"10.7 I did not disclose the final report/new remedial action with the Presidency or anyone before the publication of the report. As already stated in my founding

affidavit, the meeting with the Presidency was to discuss the Presidency's response to the provisional report/section 7(9) notice and not the final remedial action. The final remedial action were only taken after having taken into account the responses from ABSA, the SARB, the Presidency and the Minister of Finance. I accordingly deny that the final remedial action was discussed with the Presidency during the June 2017 meeting."

"10.11 Recordings of the meetings can be in different forms. In this instance, the only recordings of the meetings with the SSA and the Presidency were handwritten notes. These notes were disclosed in the rule 53 record. I have already indicated above that the meeting in April 2017 was not part of the matter investigated and, therefore, disclosure was not necessary."

"11.3 What was discussed at the meeting of 7 June 2017 is clear from the handwritten notes taken during the meeting by Mr Tebogo Kekana, Senior Investigator who assisted me during the investigation. The handwritten note was disclosed as part of the rule 53 record and is annexed hereto as "RA1" which formed part of the record. Confirmatory affidavits by Mr Kekana and Mr Nemasisi are filed herewith."

"13.4 ...Accordingly, the meetings with the Presidency and SSA were normal meetings which the Public Protector would normally have in any investigation, as the institutions are key stakeholders in the matter under investigation."

"13.6 I also made a mistake in citing "PP8" as the letter from the Presidency requesting a meeting. The reference should have been to "PP9" to my answering affidavit."

22. With reference to the aforementioned admissions, it is abundantly clear that there are concerning discrepancies between the three affidavits deposed to by Adv Mkhwebane.

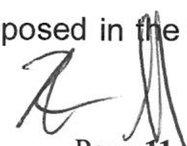
23. The following observations (regarding the discrepancies in Adv Mkhwebane affidavits) were made, which in the complainant's view, makes out a good case to charge Adv Mkhwebane with Perjury:

23.1. In her answering affidavit in the High Court litigation, Adv Mkhwebane gave no explanation at all of her meeting with the Presidency on 7 June 2017. That was the meeting at which the handwritten notes (which was retyped and admitted as part of the record in the Constitution Court litigation, paginated page 130a) record that she discussed amending the Constitution to remove the primary object of the Reserve Bank, as well as the proposed remedial action involving the SIU and the Presidency;

23.2. In her founding affidavit in the Constitution Court litigation, Adv Mkhwebane appears to have corrected her previous statement and confirms in her affidavit that the Presidency requested the meeting, held on 7 June 2017, in response to her provisional report;

23.3. Therefore, on Adv Mkhwebane's own version the meeting on 7 June 2017 could not conceivably have been about the Presidency wanting to clarify the response to the provisional report because, Adv Mkhwebane says that what was discussed at the meeting was her new remedial action involving the SIU (paragraph 43 of her founding affidavit). That was not part of the remedial action in her provisional report.

23.4. The Constitutional Court also noted that the Public Protector states in her founding affidavit before the Constitutional Court that her meeting with the Presidency on 7 June 2017 concerned the new remedial action which she had proposed in the final



report. This contradicts her claim that the meeting concerned a request by the Presidency to clarify its response to the provisional report.

23.5. The Public Protector's dogged insistence that the substance of her remedial action in the final report was not discussed with the Presidency, is contradicted by her own confirmation that the hand-written notes of the meeting held on 7 June 2017 reflect what was discussed.

24. The Constitutional Court found further that Adv Mkhwebane statements were contradictory. The majority decision of the Constitutional Court held, *inter alia* the following:

24.1. It is disturbing that there is no explanation from the Public Protector as to why none of her meetings with the Presidency were disclosed in the final report. Evidence that the Public Protector had met with the Presidency surfaced for the first time in the record which she produced before the High Court under rule 53 of the Uniform Rules of Court.

24.2. The Public Protector's explanation of the meeting with the State Security Agency is not only woefully late but also unintelligible.

24.3. The High Court correctly found that the Public Protector was totally silent in her answering affidavit about her meeting with the Presidency on 7 June 2017. This conduct clearly falls foul of her obligation as a public litigant to be candid with the court and violates the standards expected of a Public Protector in light of her institutional competence.

24.4. The Public Protector also endeavoured to overcome the deficiencies in her explanation in the High Court. She says that she confused the two meetings that she had had with the Presidency.

24.5. Her explanation for the mistake which she made in her answering affidavit also does not account for her failure to be frank and candid with the High Court about her meetings with the Presidency.

24.6. By the time the Public Protector met with the Presidency in April 2017, she had already ensured that her remedial action did not direct the President to appoint a commissioner of enquiry but rather to *consider* doing so. The meeting of 25 April 2017 remains shrouded in mystery. The Public Protector's explanation of what was discussed is obscure.

24.7. In her replying affidavit, the Public Protector says that there was an error in her founding affidavit in the Constitutional Court. She concedes that the President's response to the provisional report did not request a meeting.

24.8. Thus, despite three successive explanations for the 7 June 2017 meeting with the Presidency, the Public Protector still has not come clean and frankly explained why the meeting was held.

24.9. In the Constitutional Court, the Public Protector's explanations are contradictory.

24.10. The Public Protector has not been candid about the meetings she had with the Presidency and the State Security Agency before she finalized the report. The Public

Protector's conduct in the High Court warranted a *de bonis propriis* (personal) costs order against her because she acted in bad faith and in a gross unreasonable manner.

24.11. The High Court had concluded that *"the question remains unanswered as to why* [the Public Protector] *acted in such a secretive manner and she does not give an explanation for doing so."*

24.12. She omitted pertinent documents from the record, some of which were only put up for the first time as annexes to her answering affidavit in the High Court, and others, which were disclosed for the first time in the Constitutional Court.

24.13. The Public Protector contended further that the adverse findings made against her by the High Court were based on innocent errors on her part. The Public Protector's persistent contradictions, however, cannot simply be explained away on the basis of innocent mistakes. This is not a credible explanation.

E. <u>CONCLUSION</u>

25. In the circumstances, the Constitutional Court held that regard must be had to the highest standard of conduct expected from public officials and the number of falsehoods that had been put forward by the Public Protector in the course of the litigation.

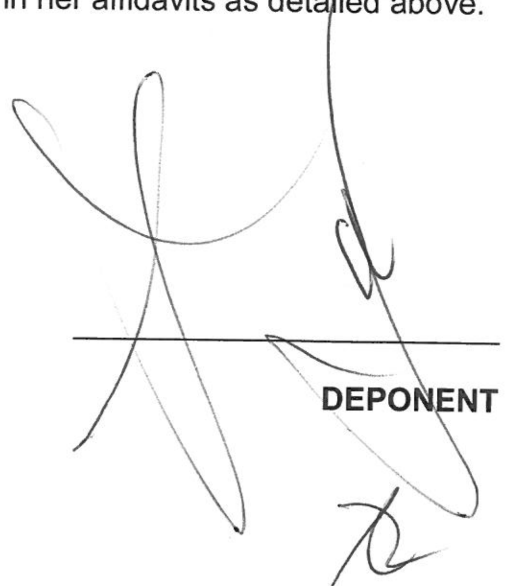
26. The Public Protector either failed entirely to deal with the allegations that she was irresponsible and lacking in openness and transparency, or, when she did address them, offered contradictory or unclear explanations.

27. This conduct included the numerous *"misstatements"*, like misrepresenting under oath, her reliance on evidence of economic experts in drawing up the report, failing to provide a complete record, order and indexed, so that the contents thereof could be determined, failing to disclose material meetings and then obfuscating the reasons for them and the reasons why they had not been previously been disclosed, and generally failing to provide the Court with a frank and candid account of her conduct in preparing the report.

28. The crime of perjury is defined as consisting in the unlawful and intentional making of a false statement in the course of a judicial proceeding by a person who has taken the oath or made an affirmation before, or who has been admonished by, somebody competent to administer or accept the oath, affirmation or admonition. The statement may be verbal or in the form of an affidavit, but it must be false.

29. Having regard to the judgment by the Constitutional Court and the affidavits submitted by the Public Protector during the judicial proceeding, there can be no doubt that the Public Protector, Adv Busisiwe Mkwebane, unlawfully and intentionally told mistruths under oath.

30. I thus respectfully request that Adv Busisiwe Mkwebane be prosecuted on a Charge of Perjury for the false statements that she made in her affidavits as detailed above.



DEPONENT

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at **RANDBURG** on this the **22ND** day of **AUGUST 2019**, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

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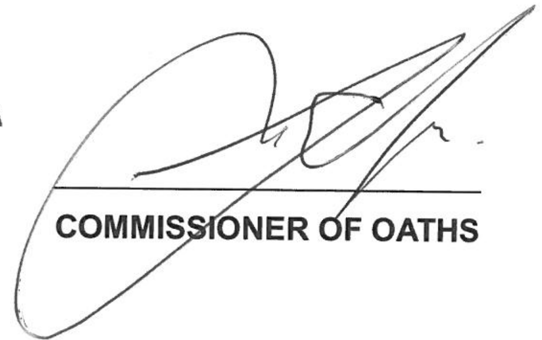

COMMISSIONER OF OATHS