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Chairperson

Portfolio Committee on Justice and Correctional Services

Per email: vramaano@parliament.gov.za

Submission by Civil Society Organisations to the Justice and Correctional Services Portfolio Committee of the National Assembly

Removal from office of the Public Protector

1. Introduction

This submission has been prepared by a group of diverse South African civil society organisations, representing a broad range of citizens and interests. The names of the organisations are set out on the last page of this submission - it will be noted that political parties or organisations are not included in this group.

We are making this submission as a result of several recent court judgments on the activities of the Public Protector, Ms Busisiwe Mkhwebane, which have demonstrated, beyond any doubt, that she is unfit for office and unable to fulfil the office's defined functions in a lawful manner. If she is not removed from office, we are gravely concerned at the potential further damage that will be inflicted on South Africa.

As a result, we are convinced that she has to be removed from office and that Parliament must take the necessary measures that are laid down in the Constitution for such a step. This submission sets out the grounds for our conviction in this regard, as well as a proposal for the process to be followed by the Portfolio Committee on Justice & Correctional Services.

2. Role of the Public Protector

The Public Protector is an office of critical importance within South Africa's constitutional framework. Immense powers are vested in that office to serve the public interest by being able to investigate suspected improper conduct in any sphere of government.[1] As the Constitutional Court has stated:

> "The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for the average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly."[2]

3. Constitutional requirements for the removal of the Public Protector

In terms of the Constitution,[3] the Public Protector may be removed from office on –

(a) the ground of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly; and
(c) the adoption by the Assembly of a resolution calling for that person's removal from office, which must be adopted with a two-thirds majority in the National Assembly.

4. Judicial findings which warrant removal

From a series of court judgements, it cannot be denied that the conduct of the Public Protector has demonstrated clear evidence of misconduct, incapacity or incompetence. Some of the most glaring examples of her conduct are set out below.

4.1 Public Protector v South African Reserve Bank[4]

This judgment was handed down by the Constitutional Court on 22 July 2019. It alone suffices to justify the removal of the Public Protector.

It relates to the Public Protector's Report[5] which dealt with the failure of the State (and the Reserve Bank in particular) to recover funds which were allegedly improperly made available as part of the so-called "lifeboat transactions" entered into during the mid-1980s between the Reserve Bank and several financial institutions.

Section 5(3) of the Public Protector Act[6] provides that the Public Protector shall not be liable for anything contained in a report, provided it is made in good faith. The High Court found that she had misconducted herself to such an extent that she could not rely on this provision and that she must pay 15% of the costs on a punitive scale in her personal capacity. The

[1] Public Protector Act 23 of 1994.
[2] Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016(3) SA 580 (CC) par. 22. ("**the Nkandla Judgment**")
[3] Section 194
[4] (2019) ZACC 29 ("**the Reserve Bank Judgment**")
[5] Report no. 8 of 2017/2018
[6] Act 23 of 1994

Public Protector then unsuccessfully appealed against this personal costs order to the Constitutional Court.

In a scathing judgment, the majority of the Constitutional Court found that it had no reason to interfere with the High Court's ruling that she had acted in bad faith and in a grossly unreasonable manner. The High Court had found that the Public Protector had been dishonest, had misrepresented to Court what material she had relied on, had failed to disclose meetings with the Presidency and other parties, had failed to disclose what was discussed at these meetings (and even contradicted herself in attempted explanations) and was reasonably suspected of bias.

The Constitutional Court found that

> "the Public Protector had acted in bad faith; did not fully understand her constitutional duty to be impartial and perform her functions without fear, favour or prejudice … "[7]

The public attention that has been focused on the personal costs order in the public discussion on this case, has obscured another very important aspect: the Public Protector's findings that the Reserve Bank's mandate had to be changed, had caused significant damage. The Court stated that it had

> "caused severe harm to the South African economy. This included a significant depreciation in the Rand and a sell off by non-resident investors of R1.3 billion worth of South African government bonds."[8]

In the High Court proceedings, the Public Protector even admitted that she had no power to dictate to Parliament about amending the Constitution in respect of the Reserve Bank's mandate. This had been one of the important findings of her report and underlines the fact that she does not understand her constitutional role. Persons in important public positions who inflict such damage on South Africa's financial and economic situation through unlawful conduct, cannot be allowed to remain in their posts.

4.2 Democratic Alliance v Public Protector/Council for the Advancement of the South African Constitution v Public Protector[9]

This matter related to the Public Protector's report on the agreement between the Free State Department of Agriculture and Estina (Pty) Ltd in the Vrede dairy farm matter.[10] The High Court set this report aside, declaring it unlawful, unconstitutional and invalid.

Some of the most damning findings of the Court's judgment of 20 May 2019 with regard to the Public Protector were:

- "her decision to limit the scope of her investigation so dramatically was irrational as it sidestepped all the crucial aspects regarding the complaints and led to a failure on her part to execute her constitutional duty";[11]

[7] Para 172 of the Reserve Bank Judgment
[8] Para 142 of the Reserve Bank Judgment
[9] (2019) 3 All SA 127 (GP) ("**the Estina Farm Judgment**")
[10] Report No. 31 of 2017/2018
[11] Para 47 of the Estina Farm Judgment

- she had deleted findings of irregular expenditure, which had appeared in the provisional report, "which could lead to one justifiably asking whether this was done for some ulterior purpose";[12]

- the fact that she had "missed the point completely" in relation to the agreement, led to irrational conclusions and she "did not enquire any further into the nature of the irregularities committed, or whether the agreement and execution thereof resulted in misappropriation of public funds. This is inexplicable seen in the broader context of her duties and powers";[13]

- she misrepresented to Court that she could not obtain evidence relating to market prices, when this material had been supplied by a complainant;[14] and

- "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."[15]

The High Court's judgment on costs was reserved, pending the Constitutional Court's judgment in the Reserve Bank matter (dealt with above) and was subsequently handed down on 15 August 2019.[16] This judgment contains the following statements:

> "The failures and dereliction of duty by the Public Protector in the Estina matter are manifold. They speak to her failure to execute her duties in terms of the Constitution and the Public Protector Act. In my view her conduct in this matter is far worse, and more lamentable, than that set out in the Reserve Bank matter. At least there her failures impacted on institutions that have the resources to fend for themselves. In this instance her dereliction of her duty impacted on the rights of the poor and vulnerable in society, the very people for whom her office was essentially created. They were deprived of their one chance to create a better life for themselves. The intended beneficiaries of the Estina project were disenfranchised by the very people who were supposed to uplift them. Yet the Public Protector turned a blind eye, did not consult with them and did not investigate the numerous irregularities that allegedly occurred properly and objectively."[17]
>
> "Her inability to comprehend and accept the inappropriateness of her proposed remedial action constitutes ineptitude. …. The Public Protector failed the people of this country in the way she dealt with the investigation of the Estina dairy project."[18]

As a result of these findings, the Court ordered the Public Protector to pay 7.5% of the costs of each of the two applicants on a personal and punitive scale.

5. Conclusions regarding judicial findings

In summary, Ms Mkhwebane has been found by the Courts to be dishonest; to have acted in a biased manner; to have misrepresented facts to Court; to have committed numerous fundamental errors of law; to have failed to understand her own powers, to have acted in a manner where an inference of ulterior purpose may reasonably be drawn, to have failed to pursue the truth and to have run roughshod over procedural rights of those adversely affected

[12] Para 75 of the Estina Farm Judgment
[13] Paras 64, 66 and 67 of the Estina Farm Judgment
[14] Para 79 of the Estina Farm Judgment
[15] Para 109 of the Estina Farm Judgment
[16] Not yet reported in the All SA Reports ("**the Estina Costs Judgment**")
[17] Para 25 of the Estina Costs Judgment
[18] Para 27 of the Estina Costs Judgment

by the exercise of the powers of her office. She has not been candid with the Courts, has fallen far short of the standard required of her office; and has operated in a clandestine fashion contrary to fundamental constitutional requirements and values of transparency and the rule of law. She has been the subject of the severest of judicial rebukes.

It must be emphasised that the Courts are in principle very reticent about making public officials personally liable for legal costs arising of action taken in an official capacity. Apart from the costs orders in the Reserve Bank and Estina cases referred to above, we are only aware of two other cases in which such an order was made: firstly, President Zuma was ordered to pay the costs, in his personal capacity, of his failed bid to have the previous Public Protector's State of Capture reviewed; and secondly, that of the then Minister of Social Development, Ms Bathabile Dlamini, where the Constitutional Court ordered her to pay part of the costs of litigation in a personal capacity as a result of her role in the social grants crisis in 2017 and 2018. The rarity of cases where such public office holders are held liable for legal costs in their personal capacity, is a further indication of how serious the conduct of the current Public Protector is seen by the Courts. Measures of this kind constitute extraordinary judicial action and they are in effect used by the Courts as a last resort to confront particularly objectionable behaviour by persons in public office.

6. Constitutional duty of organs of state to support the Courts

Section 165 of the Constitution states that "Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts." In addition to the provisions relating to the removal of a Public Protector, the National Assembly is therefore under a constitutional obligation to act in order to support the effectiveness of the courts.

7. Potential political motives of the Public Protector

Much has been said in the current public debate about Ms Mkhwebane's political bias or motives in her pursuit of specific cases. In this context, it must be noted that her removal from office is justified by the facts set out above on their own and speculation about potential motives is unnecessary for present purposes. Such speculation may just have the negative effect of diverting attention away from what needs to be done.

8. Process to be followed by the Portfolio Committee

The Public Protector has written to the Speaker to advise that in light of the judgment of ***Economic Freedom Fighters and others (Democratic Alliance as Intervening Party) v Speaker of the National Assembly and another 2018 (3) BCLR 259 (CC)*** **("EFF2")** the National Assembly may not initiate removal proceedings against her as there are currently no National Assembly Rules which are able to give effect to her removal in terms of section 194(1) of the Constitution.

However, for the reasons which follow, we are of the view that:

- the EFF2 judgment was intended to provide clarity on the procedure relating to the President's removal in accordance with the provisions of Section 89 of the Constitution, which, for instance, makes no mention of a committee of the National Assembly being involved. That judgment does not prohibit the Portfolio Committee on Justice and Correctional Services from proceeding to inquire into the Public Protector's fitness to hold office, as the provisions relating to the removal of the Public Protector explicitly require that a finding be made by a committee of the National Assembly;

- the Portfolio Committee's existing oversight obligations include consideration of the findings by courts in the above-mentioned matters;
- the Portfolio Committee should conduct the enquiry expeditiously, mindful that section 237 of the Constitution requires that constitutional obligations must be performed diligently and without delay.

9. Legal Framework

Section 181(5) of the Constitution provides that the Public Protector is "*accountable to the National Assembly*". In terms of section 194(1) the Public Protector, may be removed from office on the grounds of -

"(a) misconduct, incapacity, incompetence,
(b) a finding to that effect by a committee of the National Assembly; and
(c) the adoption by the Assembly of a resolution calling for that person's removal from office".

While the EFF2 judgment did find "*without rules defining the entire process, it is impossible to implement [impeachment proceedings against the President*]", for the reasons which follow, the EFF judgment does not prohibit the Portfolio Committee from proceeding with its enquiry.

The chief complaint in the EFF2 matter was that the National Assembly failed to hold the President to account in terms of section 89(1) of the Constitution and secondly, that the Assembly failed to put in place effective mechanisms to hold the President accountable.

Firstly, it is trite that the position of the President as the head of state is significantly different to that of the Public Protector.

Secondly, the removal provisions for the President are also very different, in that the removal provisions for the Public Protector require that he/she be removed on the grounds of misconduct, incapacity or incompetence, whereas the President may only be removed on the grounds of a serious violation of the Constitution or the law, serious misconduct, or the inability to perform the functions of office.

In the EFF matter the Constitutional Court held –

> "One of those grounds is a serious violation of the Constitution or the ordinary law. What qualifies this ground is the word serious. The second ground is serious misconduct and the third is inability to perform the functions of the office. None of these grounds is defined in the Constitution…. the drafters left the details relating to these grounds to the Assembly to spell out. But the drafters could not have contemplated that members of the Assembly would individually have to determine what constitutes a serious violation of the law or the Constitution and conduct on the part of the President which, in the first place, amounts to misconduct and whether, in the second place, such conduct may be characterised as serious misconduct. If this were to be the position, then we would end up with divergent views on what is a serious violation of the Constitution or the law and what amounts to serious misconduct envisaged in the section… And since the determination of these matters falls within the exclusive jurisdiction of the Assembly, it and it alone is entitled to determine them. This means that there must be an institutional predetermination of what a serious violation of the Constitution or the law is."[19]

This is not applicable to the Public Protector.

Thirdly, the Constitutional Court held that in the case of the President

[19] EFF judgment at para 176-177.

> "For the impeachment process to commence, the Assembly must have determined that one of the listed grounds exists. This is so because those grounds constitute conditions for the President's removal. A removal of the President where none of those grounds is established would not be a removal contemplated in section 89(1). Equally, a process for removal of the President where none of those grounds exists would amount to a process not authorised by the section… Therefore, any process for removing the President from office must be preceded by a preliminary enquiry, during which the Assembly determines that a listed ground exists. The form which this preliminary enquiry may take depends entirely upon the Assembly. It may be an investigation or some other form of an inquiry. It is also up to the Assembly to decide whether the President must be afforded a hearing at the preliminary stage."[20]

With regard to the Public Protector, the Portfolio Committee (in terms of Section 194(1)(b) of the Constitution) has been tasked with conducting this very inquiry process into the existence of the grounds for removal.

Fourth, in EFF2 the Constitutional Court was concerned at the failure of the National Assembly to hold the President to account because of the absence of an objective enquiry mechanism and because in the current committee system, members of the majority party thwarted attempts to hold the President to account. In this regard the Constitutional Court held:

> "Where the interests of the political parties are inconsistent with the Assembly's objectives, members must exercise the Assembly's power for the achievement of the Assembly's objectives. For example, members may not frustrate the realisation of ensuring a government by the people if its attainment would harm their political party. If they were to do so, they would be using the institutional power of the Assembly for a purpose other than the one for which the power was conferred. This would be inconsistent with the Constitution."[21]

Thus, whereas in the EFF2 matter the failure to have rules in place effectively rendered the President unaccountable, in the case of the Public Protector, she seeks to escape accountability by erroneously claiming that there are no rules in place. The two cases are, however, clearly distinguishable, as we have shown above.

10. Eskom example in relation to National Assembly committee rules

On 21 June 2017, the Portfolio Committee on Public Enterprises instituted an enquiry into the matter of Mr Brian Molefe's retirement package and reappointment as Eskom CGEO (Group Chief Executive Officer).[22] The committee was asked by varying bodies to investigate allegations of state capture reported in the media and the #Guptagate emails. The Committee instituted the oversight inquiry in line with the mandate of Parliament in terms of section 55 of the Constitution read together with Rules 167 and 227(1)(b)(iv) and (c) of the National Assembly.[23]

Specifically, section 55 (2) (b) of the Constitution provides that the National Assembly must provide for mechanisms to maintain oversight of (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state. [24]

Additionally, Rule 167 of the National Assembly provides that a committee may, (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; (b) receive petitions, representations or submissions from interested persons or

[20] EFF judgment at para 179-180
[21] EFF2 judgment at para 144.
[22] Report of the Portfolio Committee on Public Enterprises on the inquiry into governance, procurement and the financial sustainability of Eskom, 28 November 2018 at pg. 4.
[23] Ibid.
[24] Section 55 of the Constitution of the Republic of South Africa 1996.

institutions; (c) permit oral evidence on petitions, representations, submissions and any other matter before the committee; (d) conduct public hearings; (e) consult any Assembly or Council committee or subcommittee, or any joint committee or subcommittee; (f) determine its own working arrangements; (g) meet at a venue determined by it, which may be a venue beyond the seat of Parliament; (h) meet on any day and at any time, including — (i) on a day which is not a working day, (ii) on a day on which the Assembly is not sitting, (iii) at a time when the Assembly is sitting, or (iv) during a recess; and (i) exercise any other powers assigned to it by the Constitution, legislation, the other provisions of these rules or resolutions of the Assembly. [25]

Lastly, Rule 227(1)(b)(iv) and (c) of the National Assembly provides that a portfolio committee must maintain oversight of (i) the exercise within its portfolio of national executive authority, including the implementation of legislation, (ii) any executive organ of state falling within its portfolio, (iii) any constitutional institution falling within its portfolio, and (iv) any other body or institution in respect of which oversight was assigned to it; and may (c) monitor, investigate, enquire into and make recommendations concerning any such executive organ of state, constitutional institution or other body or institution, including the legislative programme, budget, rationalisation, restructuring, functioning, organisation, structure, staff and policies of such organ of state, institution or other body or institution.[26]

On the basis of the above legal principles emanating from the Constitution and the Rules of the National Assembly, the Committee's report was able to make findings which not only exposed corrupt activities on part of the board members and other prominent players in Eskom but provided a series of recommendations.

11. Conclusion

On the procedural aspects, it is clear that the process for the removal of the Public Protector may be instituted on the basis that the Portfolio Committee on Justice and Correctional Services has an oversight function over the Public Protector in terms of the Constitution and that this function is to be exercised in terms of the existing rules of the National Assembly.

Regarding the substantive allegations, one cannot escape the conclusion that Ms Mkhwebane is unfit for office. It is clear from the judicial pronouncements on her conduct (of which we have only included a limited number of examples) that her behaviour more than fulfils the Constitutional requirements for her removal - those of misconduct, incapacity or incompetence. From the way in which these three criteria appear in Section 194 of the Constitution, it is clear that any one of them is sufficient to justify her removal. In her case, all have been proven beyond any doubt.

In these circumstances, the civil society organisations that have endorsed this submission, request that the Justice and Correctional Services Portfolio Committee of the National Assembly gives effect to the judicial pronouncements that have a bearing on the current Public Protector's fitness for office by taking the necessary action to commence the process to remove her from office. The grounds for this action are indisputable. Through her behaviour, she has ensured that the office of the Public Protector has lost the credibility and respect which should, by rights, be accorded to that important public office. We concur with the sentiments expressed by the Speaker of the National Assembly that Parliament should

[25] Rules of the National Assembly 9th edition at pg. 117.
[26] Ibid at pg. 114 and 115.

not be intimidated and cowed into not initiating a process for the removal of the Public Protector.

This submission has been endorsed by the following organisations (in alphabetical order):

Active Citizen's Movement KZN

Ahmed Kathrada Foundation

Council for the Advancement of the South African Constitution

Corruption Watch

Freedom Under Law

Helen Suzman Foundation

Johannesburg Against Injustice

Right2Know

Women and Democracy Initiative, Dullah Omar Institute UWC