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Dear Madam Speaker,

CORRUPTION WATCH: CALL FOR URGENT PARLIAMENTARY INTERVENTION AND AN INVESTIGATION INTO THE CONDUCT AND COMPETENCE OF THE INCUMBENT PUBLIC PROTECTOR

1. Corruption Watch is a registered civil society organisation that opened its doors to the public in January 2012. We are registered as a non-profit company in terms of the Companies Act, 71 of 2008. Corruption Watch seeks to expose corruption and the abuse of public funds. We encourage and enable the public to report incidents of corruption to us and we use these reports as an important source of information to fight corruption in South Africa and to hold leaders accountable for their actions. We achieve this through policy advocacy, public mobilisation, strategic litigation and select investigations.

2. Corruption Watch has a vision of a corruption free South Africa, one in which informed citizens are able to recognise and report corruption without fear, in which incidents of corruption and maladministration are addressed without favour or prejudice and where public and private individuals are held accountable for the abuse of public power and resources.

3. As an accredited Transparency International chapter in South Africa, core to our mandate is the promotion of transparency and accountability within private sector and state institutions aimed at ensuring that corruption is addressed and reduced through the promotion and protection of democracy, rule of law and good governance.

Background

4. The performance of the Office of the Public Protector is of great concern to us as the institution serves a vital function in the achievement of accountability in South Africa. In this regard we echo the words of the North Gauteng High Court in *DA v Public Protector; CASAC v Public Protector*[1] that "the failure by the [Public Protector] to perform her functions properly and effectively is, therefore, a matter of grave constitutional importance".[2]
5. As a civil society organisation that is focused on combating corruption in the country and the effective functioning of our state institutions, we have a vested interest in the proper and effective functioning of the Office of the Public Protector.

6. We note, with deep concern, that despite Parliament being called upon to act on the conduct and performance of the incumbent public protector, which falls within Parliament's constitutionally mandated oversight responsibilities,[3] no concrete steps have been taken to date to give effect to this obligation. We wish to highlight here that section 237 of the

[1] *Democratic Alliance v Public Protector; CASAC v Public Protector* [2019] ZAGPPHC 132 (20 May 2019).
[2] *Democratic Alliance v Public Protector; CASAC v Public Protector* [2019] ZAGPPHC 132 (20 May 2019), para 31.
[3] Section 55(2) of the Constitution of the Republic of South Africa.

Constitution requires that all constitutional obligations be performed diligently and without delay.

7. We therefore address this letter to Parliament, and in particular the Speaker of the National Assembly and the parliamentary Portfolio Committee on Justice and Correctional Services (the "**Committee**"), to request your urgent action and intervention in the form of initiating an investigation into the conduct, performance and competence of the incumbent public protector.

8. In this letter we highlight the reasons why Parliament must act urgently and intervene in the ongoing controversy with the incumbent public protector, and we call on Parliament to utilise its constitutional powers to exercise oversight through an investigation to determine whether the incumbent public protector is fit to hold office.

The Role and Responsibility of the Office of the Public Protector

9. The Constitution created the Office of the Public Protector as one of the Chapter 9 "State Institutions supporting constitutional democracy". Section 182(1) confers the power on the Public Protector to "investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice".

10. The Constitutional Court has affirmed the important role the Public Protector plays in our constitutional democracy:

> "*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 an 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. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance."[4]

11. The Supreme Court of Appeal made a similar observation when, in *Public Protector v Mail and Guardian*,[5] Nugent JA discussed the nature of the office:

"*The Office of the Public Protector is an important institution. It provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that is capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee*."[6]

The Role of the National Assembly in Oversight of the Public Protector

12. Although the Public Protector plays a vital role in holding public bodies accountable, that does not exclude the office from facing accountability itself. As the then-Chief Justice Ngcobo noted in *Glenister v President of the Republic of South Africa and others*,[7] there is a need for strong oversight over constitutional accountability institutions.

"*These bodies should not be a law unto themselves. They should, as the passage cited earlier makes plain, submit regular performance reports to executive and legislative bodies, and enable public access to information on their work. All of this presupposes that the legislature, the executive and the judiciary have a role to play in the exercise by these bodies of their powers, consistently with the country's constitution*."[8]

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[4] *Economic Freedom Fighters v. Speaker of the National Assembly; Democratic Alliance v. Speaker of the National Assembly* 2016 (3) SA 580 (CC), para. 52.
[5] *Public Protector v Mail and Guardian* 2011 (4) SA 420 (SCA).
[6] *Public Protector v Mail and Guardian* 2011 (4) SA 420 (SCA), para. 6.
[7] *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347 (CC).
[8] *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347 (CC), para. 123.

13. As the Portfolio Committee for Justice and Correctional Services, the Committee assumes oversight responsibility for the Public Protector.

14. The Rules of the National Assembly discuss the functions of the committees in the National Assembly and rule 227 confers oversight responsibilities on committees for the constitutional institutions falling within the committee's portfolio:

1) A portfolio committee —

a) must deal with Bills and other matters falling within its portfolio as are referred to it in terms of the Constitution, legislation, these rules, the Joint Rules or by resolution of the Assembly;

b) 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;

c) may 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;

d) may consult and liaise with any executive organ of state or constitutional institution; and

e) must perform any other functions, tasks or duties assigned to it in terms of the Constitution, legislation, these rules, the Joint Rules or resolutions of the Assembly, including functions, tasks and duties concerning parliamentary oversight or supervision of such executive organs of state, constitutional institutions or other bodies or institutions.

15. The wording used in this rule is that the Committee “must maintain oversight” which obliges the Committee to proactively and continually examine the performance of the Office of the Public Protector.

16. Section 194 of the Constitution governs the removal of the public protector but it also provides guidance into the standards of conduct against which the performance of the public protector should be measured.

    1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only 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.

    2) A resolution of the National Assembly concerning the removal from office of—

        a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or

        b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

    3) The President—

        a) may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

        b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person’s removal.

17. Given that the oversight responsibility of the public protector falls to the Committee it is the responsibility of the Committee to determine whether the public protector is guilty of misconduct, lacks capacity or is incompetent.

18. We recognise that the Constitution has protected the independence and impartiality of the public protector by creating strict procedural requirements for her or his appointment and

removal. As the Constitutional Court itself recognised in the *Certification of the Constitution of the Republic of South Africa*[9] judgment, the "*independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government*".[10] In fact, the Constitutional Court rejected the first iteration of the constitutional provisionp addressing the removal of the public protector – which required only a simple majority of members of the National Assembly to vote for his or her removal – on the grounds that this removal procedure did not offer sufficient protection for the independence and impartiality of the public protector. The Constitutional Court approved the amended procedure, stating that the changes to the appointment and removal procedures – which included that the National Assembly would have to support the resolution calling for the public protector's removal with a supporting vote of at least two-thirds of the members of the National Assembly – "*substantially enhances the independence of both the Public Protector and the Auditor-General*".[11] We acknowledge and respect the imperative of protecting the independence of the public protector through strict removal requirements.

19. However, despite the strict procedural requirements for the removal of the public protector the Constitution still envisages that the public protector *can* be removed: the independence of the institution does not require unaccountable performance. In this respect, it is important to note that the standards for removal of the public protector as set out in section 194 are "*misconduct, incapacity or incompetence*" and, unlike the constitutional standards for the removal of other public officials, these are not strengthened by the qualifiers that the misconduct or incompetence be "gross" or "serious".[12] Thus, while the process to remove the public protector is necessarily onerous to protect the independence of the office, the standards to which the incumbent is held enable effective and engaged oversight of his or her performance.

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[9] *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).
[10] *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), para. 163.
[11] *Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 (2) SA 97 (CC), para. 134.
[12] See sections 89 and 130 of the Constitution which set the standard for removal of the President and provincial premiers respectively as "a serious violation of the Constitution" or "serious misconduct" and section 177 which permits the removal of judges only if a judge is found to be "grossly incompetent" or guilty of "gross misconduct".

Assessment of the Public Protector's Conduct

20. At present, the only way for members of the public to have insight into the performance of the public protector is through the judgments of the judicial reviews of her reports. The findings of these courts are deeply concerning and raise significant concerns about the performance of the incumbent public protector.

21. Given these judgments, it is necessary for the Committee to exercise its oversight responsibilities and utilize its powers to fully investigate the circumstances behind the pattern of concerning decisions taken by the public protector and to ascertain whether she is adhering to the constitutional standards required of her office. As the Supreme Court of Appeal noted in *Public Protector v Mail and Guardian*,[13] *"[t]he function of the Public Protector is as much about public confidence that the truth has been discovered as it is about discovering the truth*."[14] The Committee needs to assess the performance and conduct of the public protector to ensure continued public confidence in the office.

22. As already mentioned, the standards to which the public protector must be held are conduct and competence. Labour law jurisprudence provides guidance on the distinction between these two standards of performance. In *Minister of Home Affairs and another v General Public Service Sector Bargaining Council and others*[15] the Court stated that "*the distinction between poor performance and misconduct (negligence) can be established by the asking of two simple questions … 'Did the employee try but could not?' [and] 'Could the employee do it, but did not?'*."[16] If the answer to the first question is yes, then the employee would be guilty of poor performance, and if the answer to the second question is yes then the employee would be guilty of misconduct as this would be a situation where "*the employee is fully able to do*

[13] *Public Protector v Mail and Guardian* 2011 (4) SA 420 (SCA).
[14] *Public Protector v Mail and Guardian* 2011 (4) SA 420 (SCA), para. 19.
[15] *Minister of Home Affairs and another v General Public Service Sector Bargaining Council and others* (JR 2326/2006) [2013] ZALCJHB 252 (1 March 2013).
[16] *Minister of Home Affairs and another v General Public Service Sector Bargaining Council and others* (JR 2326/2006) [2013] ZALCJHB 252 (1 March 2013), para. 57.

what is required not to fail, and such failure could therefore only be because of an indifference or willfulness, or a failure to take care."[17]

23. It is clear, then, that misconduct requires some knowledge of what standards are required and an ability to achieve them, but also a willingness to disregard those standards. Incompetence represents a simple inability to achieve the required standards with no concomitant intention to disregard. In determining whether the public protector is guilty of misconduct or has been incompetent, the Committee is therefore required to determine the circumstances surrounding her conduct and the motivations behind her decision-making.

24. The public confidence in the public protector has been damaged by the recent judicial reviews. Here we set out a brief summary of the judicial reviews of her reports, and in particular highlight the reasons given by the courts in setting aside the reports. It is these reasons and the comments by the courts about the incumbent public protector's conduct that is cause for genuine concern.

24.1 *South African Reserve Bank v Public Protector*[18]

24.1.1 The South African Reserve Bank (SARB) brought an urgent application to the North Gauteng High Court to set aside the public protector's remedial action in her Report 8 of 2017/2018 which directed the chairperson of this portfolio committee to take steps to amend section 224 of the Constitution to change the primary object of the SARB.

24.1.2 It must be noted that the Speaker of the National Assembly had initially been cited as a respondent in the review application but then filed an application on behalf of herself and of the chairperson of this portfolio committee supporting the position of the SARB and requesting that the two institutions be regarded as co-applicants.[19]

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[17] *Minister of Home Affairs and another v General Public Service Sector Bargaining Council and others* (JR 2326/2006) [2013] ZALCJHB 252 (1 March 2013), para. 57.
[18] *South African Reserve Bank v Public Protector and others* 2017 (Reserve Bank v Public Protector) (6) SA 198 (GP).
[19] See *South African Reserve Bank v Public Protector and others* 2017 (Reserve Bank v Public Protector) (6) SA 198 (GP), para. 8.

24.1.3 The public protector filed an answering affidavit conceding the merits of the application and acknowledging that her remedial action was unlawful as Parliament is the only body empowered to amend the Constitution. Notwithstanding the public protector's concession, the Court conducted the review of her report on the grounds that a full ventilation of the issues was necessary in the interests of the public and of justice.[20]

24.1.4 The Court held that the remedial action amounted to a violation of the doctrine of separation of powers, and set it aside under section 6(2)(i) of PAJA.[21]

> *"The remedial action therefore violates the doctrine of the separation of powers guaranteed by section 1(c) of the Constitution … An order directing Parliament to amend the Constitution and going so far as to prescribe the wording of that amendment offends the principle of the separation of powers mostly by seeking to fetter in advance the legislative discretion vested in Parliament … Worse still, it forces the legislature to adopt an amendment to the Constitution which may circumvent the constitutional procedures enacted for that purpose"*[22]

24.1.5 The Court also held that the remedial action was irrational as there was no rational connection between the findings in the report and the remedial action. Accordingly, the Court concluded that "*[t]he Public Protector's superficial reasoning and erroneous findings of the issues, as appear in the final report and the answering affidavit, do not provide a rational basis for the remedial action*"[23] and set aside the remedial action on the grounds that it was irrational (under section 6(2)(f)(ii) of PAJA) and unreasonable (under section 6(2)(h) of PAJA).

24.1.6 The Court also held that the remedial action was procedurally unfair as the public protector had changed the scope of the investigation and the remedial action itself between the preliminary and the final reports without giving the parties a reasonable opportunity to make representations. Importantly, the Court noted that the public protector had given no reason for why she had changed the scope of the investigation

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[20] *South African Reserve Bank v Public Protector and others* 2017 (6) SA 198 (GP), para. 9.
[21] *South African Reserve Bank v Public Protector and others* 2017 (6) SA 198 (GP), para. 46.
[22] *South African Reserve Bank v Public Protector and others* 2017 (6) SA 198 (GP), para. 44.
[23] *South African Reserve Bank v Public Protector and others* 2017 (6) SA 198 (GP), para. 57.

and that she did not explain whether "*it was done at her own instance or at the instance of other interest groups*".[24]

24.1.7 The Court also made various general comments on the public protector's report and conduct, noting that "[t]*he preliminary report is incoherent, confused and confusing*",[25] and that "*the Public Protector's explanation and begrudging concession of unconstitutionality offer no defence to the charges of illegality, irrationality and procedural unfairness.*"[26]

24.2 *ABSA Bank Limited and others v Public Protector and others*[27]

24.2.1 ABSA Bank, the SARB, the Minister of Finance and the National Treasury brought a review application in the North Gauteng High Court against the public protector's Report 8 of 2017/2018 – the same report that was the subject of the above case (the *South African Reserve Bank v Public Protector*) but this review was brought on wider grounds.

24.2.2 The Court held that the remedial action in ordering the Special Investigating Unit (SIU) to approach the president to recover the funds and to investigate misappropriated funds was unlawful because it was beyond the scope of the public protector's powers. In addition, the Court held that as the SIU had investigated this very matter in 1999, it would be *functus officio* for it to approach the president and re-open the investigation as that would violate the principle of legal certainty.[28]

24.2.3 The Court also held that there was a reasonable apprehension of bias as the public protector had not disclosed that she had met with officials from the Presidency and the Black First Land First organisation, and that as a result, there would "*reasonably have an apprehension that the Public Protector would not have brought an impartial mind to bear on the issues before her*."[29] The Court concluded that the public protector's

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[24] *South African Reserve Bank v Public Protector and others* 2017 (6) SA 198 (GP), para. 31.
[25] *South African Reserve Bank v Public Protector and others* 2017 (6) SA 198 (GP), para. 25.
[26] *South African Reserve Bank v Public Protector and others* 2017 (6) SA 198 (GP), para. 59.
[27] *ABSA Bank Limited and others v Public Protector and others* (ABSA v Public Protector) [2018] 2 ALL SA 1 (GP).
[28] *ABSA v Public Protector*, para. 82.
[29] *ABSA v Public Protector*, para. 101.

process was "*not impartial and therefore there is a reasonable apprehension that the Public Protector was biased against ABSA and the Reserve Bank.*"[30]

24.2.4 The Court also found that there was procedural unfairness in the way in which this report had been drafted: the public protector had not provided the parties with all the relevant reports she had considered and had not given any reasons why a previous report on the same issue had been deemed to be irrelevant; and, like in *South African Reserve Bank v Public Protector* she had not given the parties an opportunity to respond to the radically different remedy in the final report.[31]

24.2.5 The Court made a number of statements that demonstrated its concern with the conduct and performance of the public protector. It noted that "*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*"[32] and that "[i]*t 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*".[33] As a result, the Court ordered that the public protector pay 15% of the costs order in her personal capacity.

24.2.6 The Constitutional Court granted the public protector direct access to challenge the personal and punitive costs order. In its judgment, the Constitutional Court emphasised that the public protector is bound by the basic values and principles governing public administration as set out in section 195(1) of the Constitution, and that the Constitution requires public officials to be accountable. The Court acknowledged the rarity of personal costs orders, and stated that it is only when a public official's "*defiance of their constitutional obligations is egregious*"[34] that they must pay costs of litigation brought against them in their official capacity. The Court described the public protector's explanations of the content of a meeting with the State Security Agency as

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[30] *ABSA v Public Protector*, para. 103.
[31] *ABSA v Public Protector*, para. 103.
[32] *ABSA v Public Protector*, para. 127.
[33] *ABSA v Public Protector*, para. 128.
[34] *Public Protector v. South African Reserve Bank* (CCT107/08) [2019] ZACC (22 July 2019), para. 153.

"*unintelligible*",[35] and with the Presidency as "*obscure*",[36] and that her conduct in failing to provide full details of her meetings "*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*".[37] The Constitutional Court agreed with the High Court's personal costs order against the public protector as it held that the public protector had "*acted in bad faith and in a grossly unreasonable manner*".[38]

24.2.7 Of great concern,, the Constitutional Court stated that regard had to be taken to "*the number of falsehoods that have been put forward by the Public Protector in the course of the litigation*" which included "*numerous 'misstatements, like misrepresenting herself under oath, her reliance on evidence of economic experts in drawing up the report, failing to provide a complete record, ordered and indexed, so that the contents thereof could be determined, failing to disclose material meetings and then obsfuscating the reasons for them and the reasons why they had not been previously disclosed, and generally failing to provide the court with a frank and candid account of her conduct in preparing the report.*"[39]

24.2.8 The Constitutional Court also referred to the apprehension of bias in the public protector's conduct, highlighting that her failure to provide a full and frank explanation of her meetings with the Presidency and the State Security Agency "*give[s] rise to a reasonable apprehension on the part of the Reserve Bank that the Public Protector was biased against it*".[40]

24.3 *Democratic Alliance v Public Protector; CASAC v Public Protector*[41]

24.3.1 The Democratic Alliance and the Council for the Advancement of the South African Constitution separately brought applications before the North Gauteng High Court

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[35] *Public Protector v. South African Reserve Bank* (CCT107/08) [2019] ZACC (22 July 2019), para. 181.
[36] *Public Protector v. South African Reserve Bank* (CCT107/08) [2019] ZACC (22 July 2019), para. 189.
[37] *Public Protector v. South African Reserve Bank* (CCT107/08) [2019] ZACC (22 July 2019), para. 195.
[38] *Public Protector v. South African Reserve Bank* (CCT107/08) [2019] ZACC (22 July 2019), para. 205.
[39] *Public Protector v South African Reserve Bank* (CCT107/08) [2019] ZACC (22 July 2019), para. 237.
[40] *Public Protector v South African Reserve Bank* (CCT 107/08) [2019] ZACC (22 July 2019), para. 177.
[41] *Democratic Alliance v Public Protector; CASAC v Public Protector* [2019] ZAGPPHC 132 (20 May 2019).

seeking the review and setting aside of the public protector's Report 31 of 2017/2018 which examined allegations of maladministration in respect of the Free State provincial government's handling of the Vrede Integrated Dairy Project. The complaint regarding this project had been investigated by the previous public protector (who had written the preliminary report).

24.3.2 The Court held that the public protector had not fully investigated the complaints brought to her, and that she had therefore acted irrationally and unreasonably. The Court held that any complaint received by the public protector must be investigated and it is only after the conclusion of the preliminary investigation that the public protector may decide not to investigate further: a failure to do so constitutes a failure to have regard to relevant facts which can make the decision irrational.[42] The Court criticised the public protector's description of her wide discretion to "*opt out*" of investigating complaints that fell within her jurisdiction, and noted that this is "*not a proper reading of the constitutional and statutory provisions contained in the legislation*".[43]

24.3.3 The Court added that the narrowing of the scope of the final report from what had been investigated and reported on in the preliminary report was irrational which led to a failure on her part to execute her constitutional duty."[44]

24.3.4 The Court, in criticising the public protector's failure to obtain easily-accessible documents, noted that it represented a worrying indication of the extent to which the public protector understood her powers:

> "*The PP's failures to undertake these simple and cost effective measures are to put it lightly, of serious concern, as it may point to a concerning incomprehension of the nature and extent of her obligation towards the people of this country and her obligations in terms of the Constitution and the PP Act*."[45]

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[42] *Democratic Alliance v Public Protector; CASAC v Public Protector* [2019] ZAGPPHC 132 (20 May 2019), para. 38.
[43] *Democratic Alliance v Public Protector; CASAC v Public Protector* [2019] ZAGPPHC 132 (20 May 2019), para. 98.
[44] *Democratic Alliance v Public Protector; CASAC v Public Protector* [2019] ZAGPPHC 132 (20 May 2019), para. 47.
[45] *Democratic Alliance v Public Protector; CASAC v Public Protector* [2019] ZAGPPHC 132 (20 May 2019), para 94.

24.3.5 The Court held that the remedial action in the report was irrational because it did not provide a remedy that was "*appropriate, proper, fitting, suitable or effective*."[46] More significantly, however, the Court noted that the public protector was wrong in arguing that she did not have the legal power to instruct the SIU or the Attorney-General to investigate – the Court said that, in fact, she had demonstrated elsewhere that she knew she had that power and that the jurisprudence had expressly commented that the public protector regularly instructs organs of state "to perform functions that are ordinarily left to their discretion."[47]

24.4 *Minister of Water and Sanitation v Public Protector*[48]

21.4.1. The then-mnister of water and sanitation filed an urgent application before the North Gauteng High Court seeking to interdict the publication of the public protector's report which implicated him in wrongdoing during his period as minister of rural development and land reform. The minister argued that the public protector's refusal to grant him an extension on the time given to respond to the allegations was unlawful. The public protector had sent the minister a letter on 1 April 2019, giving him until 20 April 2019 to respond before the report would be released on 6 May 2019.

21.4.2. The Court granted the interdict, holding that the public protector had not contacted the minister at any stage during the investigation, and held that waiting until 1 April (just over a month before the release of the report) "*goes against the principles of natural justice and fairness*".[49]

25. In summary, these judgments all raise serious questions of whether the public protector understands the responsibility and mandate of her office, and whether she is conducting investigations in a manner required of such an integral element of our constitutional democracy. Of greatest concern, she appears to flout procedural fairness and to

[46] *Democratic Alliance v Public Protector; CASAC v Public Protector* [2019] ZAGPPHC 132 (20 May 2019), para. 155.
[47] *Democratic Alliance v Public Protector; CASAC v Public Protector* [2019] ZAGPPHC 132 (20 May 2019), para. 144.
[48] *Minister of Water and Sanitation v Public Protector* ZAGPPHC 193 (31 May 2019).
[49] *Minister of Water and Sanitation v Public Protector* ZAGPPHC 193 (31 May 2019), para. 35.

misunderstand the constitutional limitations and powers of her office. In order to restore public confidence in the Office of the Public Protector the Committee needs to undertake a thorough investigation of the incumbent public protector's fitness to hold office.

26. While we accept and even defend the notion that the setting aside of a public protector's report is not, on its own, grounds for removal, we submit that the judicial review judgments of the incumbent public protector's reports demonstrate a deeply concerning pattern of poor performance, misconduct and incompetence, which cannot go ignored by the parliamentary body tasked with exercising oversight of the Public Protector's office. We further submit that the failure of Parliament to, even of its own volition, seek to investigate the conduct of the incumbent public protector would be tantamount to a dereliction of its vital constitutionally-mandated oversight responsibilities

Conclusion

27. The Office of the Public Protector is a vital safeguard for South Africa's constitutional democracy. Recent judgments in the judicial reviews of the incumbent public protector's reports have set aside her reports in a manner which raises grave questions of her understanding of the constitutional mandate and power of her office, and of the manner in which she is conducting investigations.

28. Given Parliament's oversight responsibility of the Office of the Public Protector it is necessary that the Committee undertake a thorough investigation of the public protector's conduct in office to determine whether she meets the constitutional standards for her performance. Such an assessment is imperative to ensure both the public confidence in the Office of the Public Protector and the continued effective role of the office as an institution to protect our constitutional democracy.

29. The comprehensive list of failures and dishonesty identified by the Constitutional Court in *Public Protector v South African Reserve Bank* raises serious concerns about the

competence of the public protector to hold office and of whether she has been guilty of misconduct during her tenure as public protector. Given that these findings have been made by the apex Court and there is no opportunity for the public protector to appeal the findings, it is imperative that Parliament act to interrogate the context in which the public protector has conducted her investigations and prepared her reports.

30. In the light of the seriousness of the above mentioned matter and the importance of the oversight responsibilities of Parliament, we hereby request your urgent response informing us of what actions Parliament intends to take in the above mentioned request by or before close of business on Wednesday 7 August, 2019.

31. Please note that in the interests of transparency, we may publish this correspondence and any response hereto.

Yours faithfully,

Deborah Mutemwa-Tumbo

Head: Legal and Investigations, Corruption Watch