



## **REPORT**

PRELIMINARY ASSESSMENT OF THE INDEPENDENT PANEL ESTABLISHED IN TERMS OF THE RULES OF THE NATIONAL ASSEMBLY ON THE REMOVAL FROM OFFICE, IN TERMS OF SECTION 194 OF THE CONSTITUTION, OF A HOLDER OF PUBLIC OFFICE IN A STATE INSTITUTION SUPPORTING CONSTITUTIONAL DEMOCRACY

In re:

A MOTION FROM HONOURABLE MS FA MASIKO MP, INITIATING REMOVAL PROCEEDINGS AGAINST COMMISSIONER MBUYISELO BOTHA OF THE COMMISSION ON GENDER EQUALITY ("CGE") IN TERMS OF THE RULES OF THE NATIONAL ASSEMBLY AND SECTION 194 OF THE CONSTITUTION ON GROUNDS OF MISCONDUCT

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Date: 05 April 2024

**A: ABBREVIATIONS:**

1. CGE: COMMISSION FOR GENDER EQUALITY
2. MP: MEMBER OF PARLIAMENT
3. NA: NATIONAL ASSEMBLY
4. N A RULES: NATIONAL ASSEMBLY RULES ADOPTED IN TERMS OF SECTION 57 OF THE CONSTITUTION

**B: LEGISLATION**

1. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT, 1996
2. PEPUDA: PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCREMINATION ACT, 2000 (ACT NO 4 OF 2000)
3. COMMISSION FOR GENDER EQUALITY ACT, 1996 (ACT NO. 39 OF 1996)
4. REGULATION OF INTERCEPTION OF COMMUNICATIONS AND PROVISION OF COMMUNICATION RELATED INFORMATION ACT, 2002 (ACT NO. 70 OF 2002)
5. ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT, 2002 (ACT NO. 25 OF 2002)

**C: NAMES OF PERSONS MENTIONED IN THE REPORT AND THEIR TITLES:**

1. HON. F.A MASIKO: MEMBER OF THE NATIONAL ASSEMBLY MOVING THE MOTION
2. MR BOTHA: COMMISSIONER AT THE CGE TO RESPOND AGAINST THE MOTION
3. MS TAMARA MATHEBULA: CHAIRPERSON (AT THE TIME) AND COMMISSIONER AT CGE
4. MS NOMASONTO MAZIBUKO: COMMISSIONER AT CGE
5. DR MOLEKO: COMMISSIONER AT CGE
6. MS PROMINANCE RAKOLOTE: COMMISSIONER AT CGE
7. MENZI VILAKAZI ATTORNEYS: ATTORNEYS FOR MR BOTHA

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## Introduction

1. On 01 November 2023, Honourable FA Masiko MP (hereinafter referred to as the member), submitted a motion in terms of the rules of the National Assembly ("NA Rules") for the initiation of an enquiry under section 194(1) of the Constitution<sup>1</sup> of the Republic of South Africa, 1996 ("the Constitution"), for the removal of Mr Mbuyiselo Botha ("Mr Botha") from office as a Commissioner of the Commission for Gender Equality ("the CGE"), on grounds of misconduct.
  
2. The Speaker of the National Assembly ("the Speaker") considered the motion and declared it compliant as required by NA Rule 129T<sup>2</sup> and referred the motion with supporting documentation provided by the member to this panel, appointed by the Speaker for a preliminary assessment of the matter. This panel, established in terms of NA Rule 129U<sup>3</sup> is required to conduct a preliminary enquiry on the motion initiated by the member, and determine whether there is *prima facie* evidence to show that Mr Botha (who is the holder of public office) has committed misconduct as alleged by the member, and if so, make recommendations accordingly.

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<sup>1</sup> S. 194(1) of the Constitution states that: "(1) The Public Protector, the Auditor-General or a member of a Commission established in 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.

<sup>2</sup> NA Rule 129T states: "Referral of motion –

When the motion is in order, the Speaker must –

- (a) immediately refer the motion, and any supporting documentation provided by the member, to an independent panel appointed by the Speaker for a preliminary assessment of the matter; and
- (b) inform the Assembly and the President of such referral without delay.

<sup>3</sup> NA Rule 129U states: Establishment: The Speaker must, when required, establish an independent panel to conduct any preliminary inquiry on a motion initiated in a section 194 enquiry.

3. The panel has conducted and finalised its preliminary assessment relating to the motion and has made findings and recommendations in this report.

#### **The establishment of the panel**

4. The panel was appointed by the Speaker to commence its work with effect from 08 March 2024, and to submit its report within 30 days, calculated from 08 March 2024. The motion with supporting documentation was referred to the panel for consideration and preliminary assessment.
5. The motion, together with supporting documentation consisted of 124 pages. The documentation provided is as follows:: applicable rules of the National Assembly (“NA”); the motion submitted by member, MP, dated 01 November 2023; the transcript of the audio clip recorded during break of a CGE plenary meeting of 20 July 2021; the audio recording of the CGE plenary meeting of 20 July 2021; the CGE report on investigation into breach of code of conduct by Commissioner Botha adopted by the CGE plenary on 06 August 2021, and the CGE Commissioner’s Handbook.

**The panel's compliance with Rule 129X(1)(c)(ii) and (iii)**

6. The panel complied with its functions in terms of the NA rules, *inter alia* NA, Rule 129X(1)(c)<sup>4</sup>, which enjoins the panel, without delay, to provide the holder of a public office with copies of all information available to the panel relating to the assessment; and provide the holder of a public office with a reasonable opportunity to respond, in writing, to all relevant allegations against him or her.
  
7. Mr Botha was provided with relevant information available to the panel under cover of a letter on 18 March 2024. Mr Botha was requested to respond in writing to all relevant allegations against him by no later than Friday, 22 March 2024. He did not.

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<sup>4</sup> NA Rule 129X states as follows in full: Functions and powers of the panel –

- (1) The panel –
  - (a) must be independent and subject only to the Constitution, the law and these rules, which it must apply impartially and without fear, favour or prejudice;
  - (b) must, within, 30 days of its appointment, conduct and finalize a preliminary assessment relating to the motion proposing a section 194 enquiry to determine whether there is prima facie evidence to show that the holder of a public office –
    - (i) committed misconduct;
    - (ii) is incapacitated; or
    - (iii) is incompetent; and
  - (c) in considering the matter –
    - (i) may, in its sole discretion, afford any member an opportunity to place relevant written or recorded information before it within a specific timeframe;
    - (ii) must without delay provide the holder of a public office with copies of all information available to the panel relating to the assessment;
    - (iii) must provide the holder of a public office with a reasonable opportunity to respond, in writing, to all relevant allegations against him or her;
    - (iv) must not hold oral hearings and must limit its assessment to the relevant written and recorded information placed before it by members, or by the holder of a public office, in terms of this rule; and
    - (v) must include in its report any recommendations, including the reasons for such recommendations, as well as any minority view of any panelist.
- (2) The panel may determine its own working arrangements strictly within the parameters of the procedures provided for in this rule.

Instead, his attorneys addressed a letter to the panel on 20 March 2024 with certain questions and requests directed at the panel. Mr Botha's attorneys requested that the panel provide Mr Botha with a copy of the audio recording as well as the sworn translation of the transcript contained in the panel's bundle.

8. A copy of the audio recording was provided to Mr Botha's attorneys on 22 March 2024, and the panel extended Mr Botha's deadline for submission of written representations to 27 March 2024.
9. The correspondence between the panel and Mr Botha's attorneys is reproduced in full below.

#### **Correspondence between the panel and Mr Botha's attorneys**

10. Mr Botha had requested that communication relating to this preliminary assessment be addressed to his attorneys, Menzi Vilakazi Attorneys. We have decided not to selectively quote excerpts from the letters exchanged between the panel and Mr Botha's attorneys, but instead reproduce the entire contents of the letters. Although prolix, we thought it best that the full picture of the communication, especially the contents, be appreciated and understood, within the prism of the preliminary assessment that was conducted by the panel.

11. The relevant information, together with the letter accompanying it, were dispatched to Menzi Vilakazi Attorneys who responded on 20 March 2024 by way of a letter.
12. The first letter from the panel to Mr Botha's attorneys is undated but dispatched to Mr Botha's attorneys with the bundle of relevant information contemplated in NA Rule 129X(1)(c)(ii)<sup>5</sup> on 18 March 2024. We do not reproduce the contents of this letter due to its length. But the substance of the letter was to direct Mr Botha, in his written representations, to address pertinent questions set out in the letter in respect of each of the charges levelled against him in the motion.
13. It was in response to this letter that Mr Botha's attorneys retorted by asking questions to the panel, instead of Mr Botha making written representations as requested by the panel.
14. On 20 March 2024, Menzi Vilakazi Attorneys addressed a letter to the panel which reads as follows:

- "1. We refer to your letter and bundle of documents delivered to our offices late on Monday 18 March 2024.*
- 2. We confirm that we represent Commissioner Botha and place on record that our client intends to cooperate fully with the panel's enquiry.*
- 3. To this end, we confirm that we are instructed to assist our client with the drafting of a comprehensive response to the draft charges against him, which will include substantive responses to the questions in your letter under reply.*

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<sup>5</sup> See footnote 4



4. *We intend to furnish you with our client's response in this regard as soon as possible. However, our client instructs us that:*
  - 4.1 *he is not aware of the source of the audio recording of 20 July 2021;*
  - 4.2 *he is not aware of the circumstances in which the audio recording was made;*
  - 4.3 *he is not aware who is in possession of the recording and how or in what manner such person(s) has kept the audio recording in their possession.*
  
5. *In the circumstances, in order for us to properly advise our client and to assist him with his response to the charges against him, we request that the panel provide our client with the following:*
  - 5.1 *the identity of the source of the audio recording;*
  - 5.2 *an indication of the circumstances in which the recording was made;*
  - 5.3 *an indication of who is in possession of the recording as well as how or in what manner such person(s) has kept the audio recording in their position.*
  
6. *In addition, our client request that the panel provide him with a copy of the audio recording as well as a sworn translation of the transcript contained in the panel's bundle (page 10 – 17).*
  
7. *Upon receipt of the information and record sought herein, our client will attend, as is his entitlement in the circumstances, to obtaining his own independent transcription of the audio recording. Thereafter our client will provide the panel with his comprehensive response to the charges against him.*
  
8. *In the light of the above, the deadline imposed by the panel of 22 March 2024 is obviously unrealistic and unfair and cannot in the circumstances be met. In this regard we draw the panel's attention to the fact that our client is entitled in terms of National Assembly Rule 129X(1)(c)(iii) to a reasonable opportunity to respond, in writing, to all relevant allegations against him. Our client undertakes to act with due expedition in relation to the steps required to be taken by him and to furnish the panel with his substantive response to the charges against him as soon as possible in the circumstances.*

9. *Finally, we draw to the panel's attention to the fact that our client is entitled throughout the Parliamentary process, including at the present stage, to proper legal representation and advise that we have in this regard, addressed a letter to the Commission for Gender Equality (CGE), asking for confirmation that our client's legal fees will be covered in respect of the present Rule 129U Parliamentary process and any subsequent Parliamentary proceedings that may ensue pursuant thereto. We attach a copy of our letter to the CGE hereto for your information.*
  10. *We look forward to hearing from you."*
15. The contents of the letter, dated 20 March 2024, addressed to the CGE by Mr Botha's attorneys, which was attached to the letter to the panel reproduced above read as follows:
- "1. We confirm that we have been instructed by Commissioner Botha to represent him in the section 194 proceedings which have been initiated in the National Assembly against him.*
  - 2. In this regard, we further confirm that an independent panel, as envisaged by National Assembly Rule 129U, to assess the Parliamentary motion for Commissioner Botha's removal from office has been established.*
  - 3. We advise that the panel addressed correspondence to Commissioner Botha made on Monday 18 March 2024 in which it required Commissioner Botha to make written representations in response to the allegations against him by close of business on Friday 22 March 2024. This time frame is obviously unrealistic and unfair in the circumstances, and this has been taken up with the panel.*
  - 4. we wish to place on record that Commissioner Botha intends to cooperate fully with the Parliamentary process. However, in order to do so, Commissioner Botha is entitled throughout the Parliamentary process, including at the present stage, viz in the proceedings pursuant to the establishment of the Rule 129U panel, to proper legal representation. This is particularly so in circumstances in which the Rule 129U panel is*

*empowered to make recommendations pertaining to the establishment of a formal section 194 enquiry in terms of National Assembly Rule 129 AA.*

5. *To ensure that Commissioner Botha is subjected to a fair process and is afforded a proper opportunity to present his case, including the Rule 129U panel stage, he has instructed us to brief two counsel on the matter. To this end, we confirm that we have briefed one senior and one junior counsel.*
  6. *In the circumstances, kindly confirmed that, as it is required is a matter of law, the CGE will cover Commissioner Botha's legal fees in respect of Rule 129U Parliamentary process and any subsequent Parliamentary proceedings that may ensue pursuant thereto.*
  7. *Kindly let us have the confirmation sought herein by no later than close of business on Friday, 22 March 2024."*
16. The panel responded to Mr Botha through his attorneys in the letter dated 22 March 2024 as follows:

- “1. *The panel has received your letter dated 20 March 2024, accompanied by a letter you addressed to the Commission for Gender Equality of the same date. The panel has considered the contents of both letters and respond accordingly herein below.*
2. *Mr Botha is reminded of the provisions of Rule 129X(1)(b), read with Rule 129X(1)(c)(ii) and (iii). The function and powers of the panel is to conduct a preliminary assessment relating to the motion proposing a section 194 enquiry and determine if there is prima facie evidence of misconduct, incapacity or incompetence.*
3. *The panel is obliged to provide Mr Botha with copies of all information available to the panel relating to the assessment and afford Mr Botha a reasonable opportunity to respond to the allegations against him in writing.*
4. *The panel has complied with its duty in terms of Rule 129X(1)(c)(ii) and (iii) on 18 March 2024 when it provided Mr Botha with all information available to it.*

5. *Mr Botha was afforded an opportunity by the panel to respond to the allegations in writing by no later than 22 March 2024.*
  6. *It seems evident from your letter that Mr Botha will not be submitting his written response or representations on 22 March 2024, and will not do so any time thereafter, unless the panel provides him with information requested in paragraphs 5 and 6 of your letter, and the Commission for Gender Equality confirms that it will cover Mr Botha's legal fees inclusive of fees of the employment of senior counsel and junior counsel which he has already appointed.*
  7. *The panel has nothing to add to the information it has provided to Mr Botha, and it does not have the information Mr Botha is requesting from the panel in paragraphs 4 and 5 of your letter. The audio recording as requested in paragraph 6 of your letter is available on the Parliamentary website at <https://www.parliament.gov.za/project – event - details/3109>.*
  8. *The panel does not have the sworn translation of the recordings or transcription thereof. The panel has also taken note of Mr Botha's responses in paragraph 4 of your letter, which will be taken into account by the panel when evaluating the information in its possession for preliminary assessment of a draft motion.*
  9. *The panel has decided to mero motu extent the date of submission of written response or representations to the allegations to Wednesday, 27 March 2024.*
  10. *The panel will conduct an assessment of the information available to it and make a preliminary assessment with or without Mr Botha's written response or representations and finalise the report for submission to the Speaker of the National Assembly by 5 April 2024."*
17. Menzi Vilakazi Attorneys responded to this letter on 27 March 2024 as follows:
- "1. *We refer to your letter dated 22 March 2024 and confirm our instructions as set out below.*

2. *Commissioner Botha remains committed to cooperating with the independent panel assessment. While he is grateful to the independent panel for providing the link to the audio recording, our client believes that he is not in a position to provide full and proper responses to the panel's questions, and to make further submissions in regards to the allegations raised against him, in the absence of a transcription of the entire meeting in the course of which it is alleged he was to have made the statements he is accused of, more than 2 ½ years ago. To that end, we are attending to having the audio recording transcribed and translated.*
3. *We record furthermore, that it is, with the greatest respect, inconceivable that the panel does not have the information requested at paragraphs 4 and 5 of our letter dated 20 March 2024. Given that our client potentially stands to be subjected to removal proceedings as a result of your findings, we trust that it will be appreciated that our client is entitled to the information requested in order to enable him to prepare a comprehensive response to the charges levelled against him and to submit substantive and meaningful responses to the questions posed in your letter dated 18 March 2024.*
4. *We note from the charges against Commissioner Botha and your letter dated 18 March 2024 that it is alleged that Commissioner Botha made the allegedly offending statements during a private telephone conversation, more than 2 ½ years ago. It is in the circumstances undoubtedly fair and reasonable for Commissioner Botha to request and be provided with clarity on what was recorded, the circumstances in which a private telephone conversation came to be recorded, by whom, and the like. Commissioner Botha is entitled to such information, without which his right to participate meaningfully in this process continues to be prejudiced, as is the fairness of the process itself.*
5. *Furthermore, we respectfully fail to appreciate how, in the absence of the information requested by Commissioner Botha, an independent panel can itself arrive at even a prima facie view on whether there is evidence of our client having committed misconduct that would warrant impeachment proceedings.*
6. *Lastly, we note from paragraph 2 of your letter under reply, the assertion that the independent panel's function and powers are to conduct an assessment to determine whether there is prima facie evidence of misconduct, incapacity, or incompetence against Commissioner Botha. In*

*this regard, we respectfully draw your attention to paragraph 1(3) of the resolution tabled by Ms FA Masiko MP in the National Assembly (paginated page 7 of the bundle), which was adopted by the National Assembly. The resolution provides that an enquiry envisaged by section 194 of the Constitution is confined to grounds of misconduct only. Accordingly, the independent panel's functions and powers are similarly limited to considering whether, prima facie, removal proceedings are warranted on the grounds of misconduct only, and not on grounds of incapacity or incompetence as suggested.*

7. *We look forward to receiving the requested information at your earliest convenience."*
18. The panel did not respond to this letter because Mr Botha was insistent that the panel should provide him with information which the panel had already informed him that it did not have, and that information was not part of the draft resolution submitted by the member. Mr Botha remained in default of submitting written representations to the panel for consideration and the deadline given to Mr Botha expired on 27 March 2024.
19. The panel has made it clear to Mr Botha, through his attorneys, that if no written representations were received from him by 27 March 2024, the panel would proceed to assess the information at its disposal with or without Mr Botha's representations. The panel would also take into account the version put up by Mr Botha through his attorneys in paragraph 4 of his attorneys' letter, dated 20 March 2024.

## Applicable legal framework

### The Constitution

20. Section 2 of the Constitution<sup>6</sup> proclaims the Constitution as the supreme law of the Republic; and that law or conduct inconsistent with it is invalid. The obligations imposed by the Constitution must be fulfilled. The Bill of Rights, entrenched in the Constitution, binds the CGE as an organ of State, as defined in section 239 of the Constitution.<sup>7</sup>
21. Other relevant provisions of the Constitution are set out below.
22. Section 1 of the Constitution states that:

*"1. Republic of South Africa*

*The Republic of South Africa is one, sovereign, democratic state founded on the following values:*

- (a) human dignity, the achievement of equality and the advancement of human rights and freedoms;*
- (b) non racialism and none sexism;*

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<sup>6</sup> S.2 of the Constitution states that: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

<sup>7</sup> S.239 of the Constitution defines organ of state to mean –

- "(a) any department of state administration in the national, provincial or local sphere of government; and
- (b) any other functionary or institution –
  - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;"

- (c) *supremacy of the Constitution and the rule of law.*
- (d) *Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."*

23. Chapter 2 is the Bill of Rights. Section 7, being the first provision under the Bill of Rights, guarantees human rights of all persons. It provides as follows:

*"7. Rights*

- (1) *this Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.*
- (2) *the state must respect, protect, promote and fulfil the rights in the Bill of Rights.*
- (3) *the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."*

24. Section 8 deals with the application of the Bill of Rights and provides that it applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. A provision of the Bill of Rights binds a natural or a juristic person, when it is applicable to that person when taking into account the nature of the right and the nature of any duty imposed by the right.

25. Section 9 is the equality provision. It states that:

- "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*



- (2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) *The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”*

26. Section 10 protects human dignity. It provides as follows:

*“10. Human dignity*

*everyone has inherent dignity and the right to have their dignity respected and protected”.*

27. Chapter 9 is dedicated to state institutions supporting constitutional democracy. It starts from section 181 to section 194. Section 181 provides for the establishment of these institutions, whereas section 194 provides for the removal mechanisms of persons appointed to these institutions.

28. Section 181 provides that:

*“(1) The following state institutions strengthen constitutional democracy in the Republic:*

- (a) *The Public Protector.*
  - (b) *The South African Human Rights Commission.*
  - (c) *The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.*
  - (d) *The Commission for Gender Equality.*
  - (e) *The Auditor-General.*
  - (f) *The Electoral Commission.*
- (2) *These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.*
  - (3) *Other organs of State, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.*
  - (4) *No person or organ of State may interfere with the functioning of these institutions.*
  - (5) *These institutions are accountable to the National Assembly and must report on their activities and the performance of their functions to the assembly at least once a year."*

29. Section 187 is dedicated specifically to the CGE. It provides as follows:

- "(1) *The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.*
- (2) *The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.*
- (3) *The Commission for Gender Equality has the additional powers and functions prescribed by national legislation."*

30. Section 193 deals with the appointment of commissioners of these institutions. It provides as follows:

*"(1) the Public Protector and the members of any commission established by this chapter must be women or men who –*

*(a) ...*

*(b) are fit and proper persons to hold the particular office; and*

*(c) comply with any other requirements prescribed by national legislation;*

*...*

*(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor General and the members of –*

*...*

*(b) the commission for gender equality; ..."*

31. Of great importance for present purposes is section 194. It reads as follows:

*"194 Removal from office*

*194(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 the commission must be adopted by 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."*

32. Lastly, section 195 bears relevance. It is located in chapter 10, which is dedicated to public administration. Section 195 deals with the basic values and principles governing public administration. It provides, in relevant parts, as follows:

*"(1) public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

*(a) A high standard of professional ethics must be promoted and maintained..."*

Commission for Gender Equality Act, 1996 (Act No. 39 of 1996)

33. We refer to the relevant provisions of the Commission for Gender Equality, 1996 (Act No. 39 of 1996) ("the CGE Act").

34. Section 3 deals with composition of the CGE. It provides as follows:

*"(1) The commission shall consist of a chairperson and no fewer than seven no more than 11 members, who shall –*

- (a) *have a record of commitment to the promotion of gender equality; and*
  - (b) *be persons with applicable knowledge or experience with regard to matters connected with the objects of the commission.*
- (2) *The President shall, whenever it becomes necessary, appoint as a member of the commission the person –*
- (a) *nominated by a committee of the National Assembly proportionally composed of members of all parties represented in the assembly;*
  - (b) *approved by the National Assembly by a resolution adopted with supporting vote of the majority of the members of the assembly; and*
  - (c) *on the recommendation of the assembly...*

35. Section 6 deals with committees of the CGE. It states that:

- “(1) The commission may establish one or more committees consisting of one or more members of the commission designated by the commission and one or more other persons, if any, whom the commission may appoint for that purpose and for any period determined by it...*
- (3) *Subject to the directions of the commission, the committee –*
- (a) *may exercise such powers of the commission as the commission confer on it; and*
  - (b) *shall perform such functions of the commission as the commission may assign to it.*
- (4) *On completion of the functions assigned to it in terms of subsection (3), a committee shall submit a written report thereon, including recommendations, if any, for consideration by the commission.*
- (5) *The commission may at any time dissolve any committee.*
- (6) *The provisions of section 5 shall, with the necessary changes, apply to a meeting of a committee.*

- (7) *The commission shall not be absolved from responsibility for the performance of any functions entrusted to any committee in terms of this section."*

36. Section 10 deals with the CGE's independence and commissioners' responsibilities.

It provides as follows:

- "(1)
- (a) *the commission shall be independent;*
  - (b) *a member of the commission as well as a member of the staff of the commission shall perform his or her functions in good faith and without fear, favour or bias or prejudice.*
- (2) *No organ of State and no member or employee of an organ of State nor any other persons shall interfere with, hinder or obstruct the commission, any member thereof or a person appointed under section 6(1) or 7(1) or (5) in the performance of its, his or her functions.*
- (3) *All organs of State, including any statutory body or functionary, shall afford the commission such assistance as may reasonably be required for –*
- (a) *the protection of its independence and dignity;*
  - (b) *the effective exercise of its powers and performance of its functions.*
- (4) *No person shall conduct an investigation or render assistance with regard thereto in respect of a matter in which he or she has any pecuniary or any other interest which might prejudice him or her from exercising or performing his or her powers and functions in a fair, unbiased and proper manner.*
- (5) *If any person failed to disclose an interest contemplated in subsection (4) and conducts or render assistance with regard to an investigation while having an interest so contemplated in the matter being investigated, the commission may take such steps as it deems necessary to ensure a fair, unbiased and proper investigation."*

37. Section 11 deals with the powers and functions of the CGE. It provides that:

*“(1) In order to achieve its object referred to in section 187 of the Constitution, the commission –*

*(a) shall monitor and evaluate policies and practices of –*

- (i) organs of state at any level;*
- (ii) statutory bodies or functionaries;*
- (iii) public bodies and authorities; and*
- (iv) private businesses, enterprises and institutions, in order to promote gender equality and make any recommendations that the commission deems necessary;*

*(b) shall develop, conduct or manage:*

- (i) information programs;*
- (ii) education programs,*

*to foster public understanding of matters pertaining to the promotion of gender equality and the role or activities of the commission;*

*(c) ...*

*(d) ...*

*(e) shall investigate any gender related issues of its own accord or on receipt of a complaint, shall endeavour to –*

- (i) resolve any disputes; or*
- (ii) rectify any act or omission, by mediation, conciliation or negotiation:*

*Provided that the commission may at any stage refer any matter to –*

*(aa) the Human Rights Commission to deal with it in accordance with the provisions of the Constitution and the law;*

*(bb) the Public Protector to deal with it in accordance with the provisions of the Constitution and the law; or*

(cc) *any other authority, whichever is appropriate;*

(g) ...

(h) *shall monitor the compliance with international conventions, international covenants and international charters, acceded to or ratified by the Republic, relating to the object of the commission; ..."*

Promotion of Equality and Prevention of Unfair discrimination Act, 2000 (Act No. 4 of 2000) ("PEPUDA")

38. Another relevant piece of legislation is PEPUDA. PEPUDA was enacted to give effect to section 9, read with item 23(1) of schedule 6 to the Constitution, so as to:

38.1 prevent and prohibit unfair discrimination and harassment;

38.2 promote equality and eliminate unfair discrimination; and

38.3 prevent and prohibit hate speech; and

38.4 provide for matters connected therewith.

39. We refer to the relevant sections below.

*"Section 1*

*Prohibited grounds are –*



- (a) *race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, believe, culture, language and birth; or*
- (b) *any other ground where discrimination based on that other ground –*
  - (i) *courses or perpetuates systemic disadvantage;*
  - (ii) *undermines human dignity; or*
  - (iii) *adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);*

## *Section 2*

### *Objects of Act*

*The objects on this Act are –*

- (a) *to enact legislation required by section 9 of the Constitution;*
- (b) *to give effect to the letter and spirit of the Constitution. In particular –*
  - (i) *the equal enjoyment of rights all rights and freedoms by every person;*
  - (ii) *the promotion of equality;*
  - (iii) *the values of non- racialism and non- sexism contained in section 1 of the Constitution;*
  - (iv) *the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;”*

### *The Commissioners' Handbook*

40. The purpose of the handbook is to provide guidance to and regulate Commissioners in the execution of their responsibilities and also *inter alia* guide the Commissioners in the implementation of their public office as Commissioners.

41. Clause 3.2 of the Handbook states that Plenary is the final decision-making body of the CGE.
42. Clause 5.3.2 deals with Commissioners roles and responsibilities. It reads as follows:

*"Commissioners roles and responsibilities*

*Responsibilities of commissioners:*

- (a) corporative governance and determining the strategic direction of the commission.*
- (b) lead the commission ethically for sustainability in terms of the economy, environment and society, taking into account impact on internal and external stakeholders.*
- (c) ensure the commission operates as and is seen to be a responsible, compliant corporate citizen.*
- (d) ...*
- (e) commissioners should be a vocal point of good governance, meet at least four times a year, monitor management and stake holders relations and ensure that the commission survives and thrives.*
- (f) ensure the commission complies with the applicable laws, and considers adherence to non-binding rules, codes and standards.*
- (g) act in the best interest of the organisation, including managing conflicts.*
- (h) ...*
- (i) ...*
- (j) ...*
- (k) the commission should delegate certain functions to well-structured committees, without abdicating its own responsibilities."*

43. The code of conduct for Commissioners is prescribed in clause 10 of the Handbook, and attached to the Handbook as Annexure B.

Code of conduct for Commissioners

44. The relevant clause of the code for present purposes is clause 3. It reads as follows:

*“Section 3*

*General conduct of commissioners*

- (a) *perform the functions of office in good faith, honesty and transparent manner; and*  
 (b) *at all times act in the best interest of the CGE and in such a manner that the credibility, dignity and integrity of the CGE will not be compromised.*

The NA Rules

45. The NA Rules were adopted to give effect, *inter alia*, to the provisions of section 194 of the Constitution.<sup>8</sup> NA Rules 129R–129AF, entitled ‘*Part 4: removal from office of the holder of a public office in a state institution supporting constitutional democracy*’ are applicable. NA Rules 129R to 129Y are of particular relevance in the present matter.

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<sup>8</sup> The relevant section of the Constitution is s.57(1)(b) which reads: “(1)(b) The National Assembly may –

- (a) Determine and control its internal arrangements, proceedings and procedures; and ...  
 (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

The duty of the NA is to make rules impeachment was confirmed by the Constitutional Court in *EFF v Speaker of the NA* 2018 (2) SA 571 (CC) at para 196.

46. However, the source of the power to remove is section 194 of the Constitution. It permits removal of a commissioner from office on grounds of misconduct, incapacity or incompetence. Section 194 does not define misconduct. It must therefore be inferred that the misconduct contemplated in section 194 of the Constitution must be 'gross misconduct' or 'gross negligence', some conduct akin to recklessness in order to trigger removal provision in the section. This interpretation finds support in the definition of 'misconduct' as defined in NA Rules, which is as follows:

*"... Misconduct means the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office."*

47. The enquiry for purposes of removal from office of the holder of a public office is process based, clothed with rules of natural justice. The NA Rules provide such mechanisms which afford the necessary safeguards and protection to the holder of a public office so that the process is fair and transparent.

48. The process unfolds as follows, in accordance with the relevant provisions of the NA Rules:

48.1 the member submits a notice of motion as contemplated in Rule 129R.<sup>9</sup>

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<sup>9</sup> Rule 129R states that: "(1) Any member of the Assembly may, by way of a notice of a substantive motion in terms of Rule 124(6), initiate proceedings for a section 194(1) enquiry, provided that:

- (a) the motion must be limited to a clearly formulated and substantiated charge on the grounds specified in section 194, which must *prima facie* show that the holder of a public office:
  - (i) committed misconduct;

- 48.2 the Speaker may, as required by Rule 129S<sup>10</sup> consult the member to ensure that the motion is compliant with the criteria set out in the rule.
- 48.3 The Speaker must immediately refer the motion, and any supporting documentation provided by the member, to an independent panel appointed by the Speaker for a preliminary assessment of the matter;
- 48.4 And inform the Assembly and the President of such referral without delay.
49. The independent panel conducts and finalise a preliminary assessment within 30 days and submits a report to the Speaker.
50. In terms of Rule 129X(1)(c)(i), the panel has a discretion whether any member should be afforded an opportunity to place relevant written or recorded information before it within a specified period. We did not deem it necessary to request the member, or any other member, to supplement the information because the relevant evidentiary

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- (ii) is incapacitated; or
  - (iii) is incompetent;
  - (b) the charge must relate to an action performed or conduct ascribed to the holder of a public office in person;
  - (c) All evidence relied upon in support of the motion must be attached to the motion; and
  - (d) the motion is consistent with the Constitution, the law and these rules.
- (2) For purposes of proceedings in terms of section 194(1), the term “charge” must be understood as the grounds for averring the removal from the office of the holder of a public office.”

<sup>10</sup> Rule 129S states that: “Compliance with criteria – Once a member has given notice of a motion to initiate proceedings in a section 194 enquiry, the Speaker may consult the member to ensure the motion is compliant with the criteria set out in this rule.

material is contained in the audio recording of the plenary meeting of 20 July 2021 during the tea-break.

### **The meaning of the term misconduct**

51. The term misconduct is defined as follows in the NA Rules –

*“Misconduct means the intentional or gross negligent failure to meet the standard of behaviour or conduct expected of a holder of a public office...”*

52. A conduct that gives rise to misconduct may either be by ‘commission’ or ‘omission’. It may be intentional or by negligence. The intention is measured against what is expected from the transgressor to meet the required or desired standards, and what constituted the deviation from those standards.

53. In other instances, a conduct is also regarded as intentional if the holder of a public office, or the office bearer, foresees the possibility of not meeting the required standards of behaviour, but nevertheless proceeds with the conduct and reconciles herself with the consequences of not meeting the standards.

54. In the case of misconduct arising from negligent conduct, mere negligence would not rise to the level of misconduct contemplated in section 194 of the Constitution or the definition of ‘misconduct’ in the NA Rules. In order to constitute ‘misconduct’ within the contemplation of section 194 of the Constitution, the negligence must be gross.

The conduct or behaviour must be reckless. Recklessness has to do with a failure to give consideration to the consequences of one's actions. Recklessness is established if pursued in complete disregard of the applicable standards or rules, in utter disregard of the consequences thereof.

55. The test for recklessness is objective. This means that, in the present instance, Mr Botha is to be measured against the standard or conduct of the notional reasonable person. The notional being he ought to be measured against, is one who comparatively belongs to the same group or class of people. As a Commissioner of a Chapter 9 institution, he is to be judged in accordance with fellow Commissioners doing the same job and subscribing to the same constitutional norms and standards.
  
56. This does not mean that a higher standard of behaviour or conduct is to be ascribed to him. He is for that matter a holder of a public office and not a perfectionist. He is expected, however, to conduct himself in a manner befitting a Commissioner of a Chapter 9 institution, let alone that of the CGE. He is expected to uphold the standards and norms embodied in the Constitution, the CGE Act and the Commissioners' Handbook. A high degree of perfection is, however, not a requirement.

### Prima facie evidence

57. In determining what *prima facie* means, guidance is sought from how courts have interpreted it over the years. We have adopted the same approach in our preliminary assessment of the information.

58. In *Webster v Mitchell*.<sup>11</sup> The court formulated the test in the context of an interim interdict as follows:

*"If the phrase used were prima facie case what the court would have to consider will be whether the applicant had furnished proof which, if uncontradicted and believed at the trial, would establish his right. In the grant of a temporary interdict, apart from prejudice involved, the first question for the court in my view is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. Prima facie that has to be shown. The use of the phrase prima facie established though open to some doubts indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to some doubt. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."*

59. This exposition was confirmed in *Gool vs Minister of Justice and another*.<sup>12</sup>

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<sup>11</sup> 1948(1) SA 1186 (W) at 1189

<sup>12</sup> 1955(2) SA 682(c) at 688



60. On the above exposition, it is so that where the facts alleged are peculiarly within the knowledge of the opposite party, less evidence will suffice to establish a *prima facie* case than would under other circumstances be required. If evidence is produced calling for an answer from the opposite party, a *prima facie* proof has been provided, and in the absence of an answer from the opposite party, then the *prima facie* evidence becomes conclusive proof. An unsatisfactory answer is equivalent to no answer and the *prima facie* proof, being unshaken, becomes full proof.<sup>13</sup>
61. The allegations levelled against Mr Botha are peculiarly within his knowledge. He made the utterances he is accused of in the audio recording, and he knows what he said. He listened to the audio recording and does not dispute that it is his voice on the audio recording. It was therefore incumbent upon him to provide an explanation to the panel as to why he made those utterances, instead of putting an onus on the panel to answer questions and provide answers to him on matters which squarely fall within his knowledge.
62. Mr Botha's failure to provide an explanation to the panel on the allegations levelled against him can best be described as a downside and misguided. In *S v Mthethwa*<sup>14</sup>, albeit in the context of criminal proceedings, the Appellate Division (as it then was) stated that 'where however there is a direct *prima facie* evidence implicating, the accused in the commission of the offence his failure to give evidence whatever his

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<sup>13</sup> See *Gericke v Sack* 1978(1) SA H21(A) at 827H; See also: *ex parte: The Minister of Justice: in re R v Jacobson and Levy* 1931 AD 466 at 478 – 479

<sup>14</sup> *S v Mthethwa* 1972 SA(3) 766 (A), at 769D

reason may be for such failure in general *ipso facto* turns to strengthen the state's case because there is nothing to gainsay it and therefore less reason for doubting its credibility or reliability". This legal principle was endorsed in *Chabalala*<sup>15</sup>:

63. A little earlier in 2001, the Constitutional Court had an occasion to reaffirm this legal principle in *Boesak*<sup>16</sup>. What the Constitutional Court reiterated is that 'if there is evidence calling for an answer and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused'.

### The charges

64. The member formulated five charges of misconduct against Mr Botha as fully set out in the motion tabled by the member. These charges are formulated as follows:

*"Charge 1: statements made against former Commissioner Tamara Mathebula*

- 1.1 *The statement to party A as per transcribed audio record that former Commissioner Tamara Mathebula lacks a backbone.*
- 1.2 *The statement is disrespectful, demeaning and humiliating. By its nature, the statement undermined the standing of former Commissioner Mathebula and the CGE in the eyes of party A, the staff of the CGE and the public.*
- 1.3 *This conduct is in violation of section 10 read with 187 of the Constitution, and clause 5.3.2 of the CGE Commissioners Handbook.*

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<sup>15</sup> *S v Chabalala* 2003 (1) SACR 134 at para 20

<sup>16</sup> *Sv Boesak* 2000 ZACC25, 2001 (1) SA 912 CC: 2001 (1) BCLR 36 CC

*Evidence of this misconduct is contained in the audio recording and related transcription of the plenary of 20 July 2021, as attached.*

*Charge 2: statements made against Commissioner Nomasonto Mazibuko*

- 2.1 The reference to Commissioner Nomasonto Mazibuko's albinism made on 20 July 2021 in a telephone conversation with party A. The references is hurtful, discriminatory, objectifies Commissioner Mazibuko, and impugns her dignity.*
- 2.2 The statement made on 20 July 2021 that Commissioner Mazibuko does not know anything about diplomacy is dismissive and belittling of her contribution and ability. The statements are embarrassing and humiliating to Commissioner Mazibuko and Commissioner Botha was or ought to reasonably have been aware of this.*
- 2.3 The statement undermined her and the CGE's standing in the eyes of Commissioner Botha's interlocutor and in the eyes of the public that ultimately came to hear his views of Commissioner Mazibuko.*
- 2.4 The conduct is in violation of sections 9 and 10 read with 187 of the Constitution; section 10 of Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 2000 ("PEPUDA"), and clause 5.3.2 of the Commissioners Code of Conduct.*

*Evidence of this misconduct is contained in the audio recording and related transcription of the plenary of 20 July 2021 as attached.*

*Charge 3: Commissioner Botha's posture and attitude that he intended to disrupt and fight at plenary meeting is not in the best interest of the CGE*

- 3.1 He has failed to act without prejudice, to bring an open mind to the affairs of the CGE and to manage any conflicts with his fellow commissioners. He failed to provide leadership and instead revealed to party A details of plenary discussions and disagreements and that he did not intend to act in the best interest of the CGE.*
- 3.2 The conduct of Commissioner Botha brought the CGE into disrepute. He succeeded to portray the CGE as dysfunctional because of his agenda to*

*disrupt its functioning at plenary and to portray his fellow Commissioners Mathebula and Mazibuko as weak and without intellectual gravitas respectively.*

- 3.3 *He has failed to act in good faith, with honesty and in a transparent manner, and always in the best interest of the CGE, and in such a manner that the credibility, dignity and integrity of the CGE is not compromised.*
- 3.4 *This conduct is in violation of the fiduciary duty to act in good faith and in the best interest of the organisation as a member of the Commission and the provisions of clause 5.3.2 of the CGE commissioners Handbook.*

*Evidence of this misconduct is contained in the transcribed audio recording of the plenary of 20 July 2021, as well as the CGE report on the investigation into breach of conduct by Commissioner Botha, adopted by plenary on 06 August 2021, as attached.*

*Charge 4: statement made against Commissioner Moleko*

- 4.1 *The statement to party A as per transcribed audio record that former Commissioner Moleko was "moleko oa nnete" insinuating that she was 'troublesome' and or 'problematic'.*
- 4.2 *The statement is disrespectful, demeaning and humiliating. By its nature, the statement undermined the standing of former Commissioner Moleko and the CGE in the eyes of party A, the staff of the CGE and the public and deliberately misuses and misinterprets her surname to give it a negative connotation.*
- 4.3 *This conduct is in violation of section 10 read with 187 of the Constitution, and cause 5.3.2 of the CGE Commissioners Handbook.*

*Evidence of this misconduct is contained in the audio recording and related transcription of the plenary of 20 July 2021, as attached.*

*Charge 5: statement made against Commissioner Rakolote*

- 5.1 *The statement to party A as per transcribed audio record Commissioner Botha mentioned the litigation between himself and Commissioner Rakolote and stated that Commissioner Rakolote would mess his pants once he is*

*finished with him. At the time of this incident both Commissioners were involved in a legal dispute where Commissioner Botha had defamed Commissioner Rakolote. He has since apologised.*

5.2 *The statement is disrespectful, demeaning and humiliating. By its nature, the statement undermined the standing of former Commissioner Rakolote and the CGE in the eyes of party A, the staff of the CGE and the public.*

5.3 *This conduct is in violation of section 10 read with 187 of the Constitution, and clause 5.3.2 of the CGE Commissioners Handbook.*

*Evidence of this misconduct is contained in the audio recording and related transcription of the plenary of 20 July 2021, as attached.”*

### **Analysis of the charges and the evidence**

#### **The audio recording of 20 July 2021 and Mr Botha’s failure to make written representations**

65. During the tea-break of the plenary meeting of CGE Commissioners on 20 July 2021, Mr Botha, whilst talking to party A, made certain statements about Ms Tamara Mathebula and other Commissioners mentioned in the charges levelled against Mr Botha. The statements were captured in the audio virtual recording of the plenary meeting. It is clear that, when making these statements, Mr Botha was not aware that the recording was running even during the break. We listened to the audio recordings and read the transcript.

66. In the correspondence between the panel and Mr Botha’s attorneys, he did not deny that it was him talking on the audio recording. What his attorneys said in the letter,

dated 27 March 2024, was that 'Mr Botha was not in a position to provide full and proper responses to the panel's questions, and to make further submissions in regard to the allegations raised against him, in the absence of the transcription of the entire meeting in the course of which it is alleged he was to have made the statements he is accused of more than two and a half years ago'. What this confirms is that Mr Botha attended the virtual plenary meeting of 20 July 2021, and that the voice in the audio recording during the break of the plenary meeting is his voice. This renders the contentions advanced in paragraphs 4.1; 4.2 and 4.3 of Mr Botha's letter, dated 20 March 2024, wrong.

67. Mr Botha is not accused of what he said during the plenary meeting. He is accused of what he said during the break of the plenary meeting, when he was unaware that the virtual recording was running at the time. We have concluded that Mr Botha did not need the transcription of the entire meeting of the plenary in order for him to respond to the allegations against him. All he needed was the audio recording to listen to what he was recorded saying during the break. The transcript simply reduced to writing the verbatim recording of the conversation between Mr Botha and party A. Both the audio recording and the transcript were provided to Mr Botha. He had no justifiable reason for avoiding responding to the panel's questions and from submitting written representations to the panel for consideration.
68. To the extent that Mr Botha places in issue the legality of the audio recordings, a suggestion that is somewhat implied in his attorneys' correspondence with the panel, such proposition does not accord with the law. The legal position is as follows:

68.1 Audio recordings are regulated in terms of the Regulation of Interception of Communications and Provision of Communication related- Information Act, 2022 (Act No. 70 of 2022) ("RICA"). Audio recordings can be made without a party's consent in terms of RICA, where the person concerned is party to the communication, and whether recording is made for the purposes of carrying on business. Section 36 of the Constitution records that rights contained in the Constitution are not absolute and therefore the right to privacy under section 14 of the Constitution, can be limited by the exceptions provided under RICA, that allow audio recordings without consent. Mr Botha was party to the audio recordings and the recordings were made during the course of business, as a result of which they are admissible, and do not require his consent.

68.2 Furthermore, the very nature of an audio recording in terms of Electronic Communications and Transaction Act, 2002 (Act No 25. of2002), "(ECTA)" constitutes data and a data message, as set out in section 1 of ECTA. Section 15(1) of the ECTA records that the rules of evidence must not be applied to deny the admissibility of a data message, and in section 15 (2) that it must be given due evidential weight. The most important section, however, is section 15(4) which records:

*"A data message by a person in the ordinary course of business, or a copy or print out of an or extract from such data message certified to be correct*

*by an officer in the service of such a person, is on its mere production in any civil, criminal, administrative, or disciplinary proceedings under any law, the rules of self-regulatory organization or any other law or common law admissible in evidence against any person and rebuttable proof of the facts contained in such recording, copy, print out or extract"*

68.3 As this audio recording is admissible under RICA and constituted data message in terms of section 15(4) of ECTA, and was taken in the ordinary course of business, having been certified as required in terms of section 15(4) of ECTA, the audio constitutes *prima facie* proof of the audio recording of Mr Botha at the plenary meeting of the 20<sup>th</sup> of July 2021. The independent panel can accept it as such. Mr Botha's attorney's request, or requests in terms of information, is not required under the current legislation to determine the *prima facie* status of the audio recording, and the independent panel is entitled to accept it as such.

#### Charge 1

69. Mr Botha is recorded talking to party A about Ms Mathebula. The conversation between Mr Botha and party A is mostly in Sesotho language, with a mixture of English here and there. Mr Botha said Ms Mathebula lacks a backbone. He said this in Sesotho: "*ke sono ka ntho, Tamara ha ana back bone Tamara man*". Loosely translated, this could mean that Ms Mathebula is weak. Ms Mathebula was the chairperson of the CGE at the time and a fellow Commissioner.



70. Mr Botha is required in terms of the legislation and other legal prescripts applicable, to treat other fellow commissioners with respect.
71. In this charge, it is alleged that the statement by Mr Botha to a fellow Commissioner and chairperson of CGE is disrespectful, demeaning and humiliating. It is alleged that the statement undermined the standing of former Commissioner Mathebula and the CGE in the eyes of party A, the staff of the CGE and the public.
72. It is alleged that this conduct is in violation of section 10 read with section 187 of the Constitution, and clause 5.3.2 of the CGE Commissioners Handbook.
73. We are satisfied that *prima facie* evidence exists that the statements made by Mr Botha about Ms Mathebula are disrespectful, demeaning and humiliating. We also conclude that there is *prima facie* evidence of a breach of section 10 read with section 187 of the Constitution by Mr Botha.

#### Charge 2

74. With regard to charge 2, Mr Botha is heard making utterances about fellow Commissioner Nomasonto Mazibuko. In his discussions with party A, he is overheard talking about Commissioner Mazibuko's albinism, and also dismissive of Commissioner Mazibuko's contribution in the plenary and belittling her contribution and her abilities.

75. It is alleged in this charge that the statements he made about Commissioner Mazibuko's albinism, and her aptitude and abilities, is discriminatory, embarrassing and humiliating to Commissioner Mazibuko.
76. It is also alleged that the statement undermined Commissioner Mazibuko and the CGE's standing in the eyes of Commissioner Botha's interlocutor and in the eyes of the public that ultimately came to hear his views of Commissioner Mazibuko. It is also alleged that Mr Botha's conduct is in violation of sections 9 and 10, read with section 187 of the Constitution; section 10 of PEPUDA, and clause 5.3.2 of the Commissioners code of conduct.
77. We agree that there is *prima facie* evidence of misconduct by Mr Botha based on utterances he made about Commissioner Mazibuko, which *prima facie*, are in violation of sections 9 and 10, read with section 187 of the Constitution, and section 10 of PEPUDA and clause 5.3.2 of the Commissioners' Handbook.

### Charge 3

78. Mr Botha is recorded informing party A about his appetite to fight and disrupt in plenary meetings. He said in Sesotho: "*ke etsa ka mmabomo, wena hao ntsebe ke rata ntwana, owa bonahaele two days ke rapelafela ebe hosing ke batla fela ho mo kgama*". Loosely translated this could mean that he was deliberately waging war

against his fellow Commissioners and prayed that during these two days of the plenary he wished to strangle her. It is alleged that Mr Botha failed to provide leadership and instead revealed to party A details of plenary discussions and disagreements and that he did not intend to act in the best interest of the CGE.

79. It is alleged further that the conduct of Mr Botha brought the CGE into disrepute. It is alleged that he succeeded to portray the CGE as dysfunctional because of his agenda to disrupt its functioning at plenary and to portray his fellow commissioners Mathebula and Mazibuko as weak and without intellectual gravitas respectively. It is alleged that he has failed to act in good faith, with honesty and in a transparent manner, and always in the best interest of the CGE, and in such a manner that the credibility, dignity, and integrity of the CGE is not compromised. It is alleged that this conduct is in violation of the fiduciary duty to act in good faith and in the best interest of the organisation as a member of the commission and the provisions of clause 5.3.2 of the CGE Commissioners' Handbook.
80. We are satisfied that there is *prima facie* evidence in support of the allegation that Mr Botha's utterances have brought the image of the CGE into disrepute, and in breach of his fiduciary duty to act in good faith and in the best interest of the CGE. His conduct compromised the credibility, dignity and integrity of the CGE. Mr Botha's conduct is in breach of clause 5.3.2 of the Commissioners' Handbook.

#### Charge 4

81. Mr Botha also made utterances about Commissioner Moleko. This is what he said in Sesotho: "*moleko yenwa ke Moleko oa nnete*". Loosely translated, what he meant was that Commissioner Moleko is 'trouble' or 'troublesome', or 'problematic'.
82. It is alleged in this charge that the statement is disrespectful, demeaning and humiliating. By its nature, the statement undermined the standing of former Commissioner Moleko and the CGE in the eyes of party A, the staff of the CGE and the public and deliberately misuses and misinterprets her surname to give it a negative connotation.
83. It is alleged that this conduct is in violation of section 10, read with section 187 of the Constitution, and clause 5.3.2 of the CGE Commissioners' Handbook.
84. We are satisfied that there is *prima facie* evidence in support of this charge.

#### Charge 5

85. Mr Botha spoke about Commissioner Rakolote with party A. He was talking about the litigation between himself and Commissioner Rakolote. Apparently, a litigation had ensued between Rakolote as plaintiff and Mr Botha as defendant, in which Rakolote sued Mr Botha for defamation. It appears the matter was settled, and Mr

Botha apologised. In this conversation with party A, Mr Botha said that Commissioner Rakolote '*would mess his pants once he is finished with him*'.

86. It is alleged that, by its nature, the statement undermined the standing of former Commissioner Rakolote and the CGE in the eyes of party A, the staff of the CGE and the public. It is also alleged that this conduct is in violation of section 10, read with section 187, of the Constitution, and clause 5.3.2 of the CGE Commissioners' Handbook. It could be viewed that his behaviour was unbecoming, especially in the manner in which he insulted Commissioner Rakolote, which was completely unprovoked.
87. We are satisfied that there is *prima facie* evidence in support of this charge.

#### **The cumulative effect of these charges**

88. We conclude that charge 2, which relates to utterances about Commissioner Mazibuko's albinism; charge 3, which relates to Mr Botha's incompatibility with fellow Commissioners and his belligerent posture and charge 5; with regard to derogatory utterances he made about Commissioner Rakolote, individually, *prima facie* establish ground of misconduct, as contemplated in section 194 of the Constitution.
89. Charges 1 and 4, whilst they do not rise to the level of gross misconduct, *prima facie*, when cumulatively considered with the other charges, demonstrate a pattern of

behaviour of Mr Botha which is incompatible with the office of Commissioner of the CGE, thus rendering him unfit to be holder of such public office.

90. This view is buttressed by the plethora of constitutional and legislative provisions Mr Botha is alleged to have breached through the conduct he is accused of. We have summarised those provisions below.

91. The Constitution embodies the Bill of Rights which preserves the rights of the citizens of the Republic by entrenching democratic values of human dignity, equality and freedom and those rights must be respected, protected and fulfilled. Section 187(1) of the Constitution reads:

*“Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.”*

92. The CGE was established precisely to ensure and facilitate the development and attainment of gender equality. Section 187(2) states:

*“The power as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby and advice and report on issues concerning gender equality.”*

93. The enactment of the CGE Act was to give effect to section 187(3) of the Constitution.

94. Furthermore, the Constitution places obligations on Mr Botha as Commissioner of the CGE not to:

*“Unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).”*

95. The grounds in subsection (3) include:

*“Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, coincidence, belief, culture, language and birth.”*

96. The Constitution protects everyone’s dignity in section 10, Commissioners of CGE must be *“women or men who ... are fit and proper persons...”* who also *“comply with any other requirements prescribed by national legislation”*. The Constitution also provides in section 195 that *“public administration must be governed by the democratic values and principles enshrined in the Constitution...”*, including that *“... a high standard of professional ethics must be promoted and maintained”*.

97. The CGE Act requires that Commissioners must *“be persons with applicable knowledge or experience with regard to matters connected with the objects of the commission”*. A Commissioner must *“perform his or her functions in good faith and without... prejudice”*. And to not *“... interfere with, hinder or obstruct the commission, any members thereof... in the performance of its, his or her functions”*.

98. Mr Botha's conduct, as gleaned from his conversation with party A during the tea-break of the plenary meeting of 20 July 2021, *prima facie*, did not live up to the expectations embodied in the above-mentioned provisions. Instead, he acted in complete disregard of these provisions. He contravened the relevant provisions of the Constitution, the CGE Act, PEPUDA, the Commissioners' Handbook and the Code of Conduct for Commissioners.
99. Mr Botha's conduct has *prima facie* breached the following constitutional provisions:
- 99.1 He undermined the values enshrined in section 1 of the Constitution.
  - 99.2 He undermined the provisions in section 7 which proclaim that the Bill of Rights is the cornerstone of democracy in South Africa.
  - 99.3 Infringed on section 9 equality rights in respect of his utterances about Commissioner Mazibuko's albinism, which prohibits unfair discrimination.
  - 99.4 is in conflict with section 10 of the Constitution which guarantees the right to human dignity.
  - 99.5 he contravened section 181 of the Constitution by interfering with the functioning of the CGE;
  - 99.6 is in conflict with section 193 of the Constitution which expects commissioners to be fit and proper persons to hold office; and
  - 99.7 he contravened section 195 which deals with the basic values and principles governing public administration and requires public administration to be governed by the highest standards of professional ethics.



100. Mr Botha's conduct also *prima facie* breached relevant provisions of the CGE Act as follows:

100.1 his record of commitment to the promotion of gender equality is put in doubt, as expected by section 3.

100.2 his good faith in the performance of his functions is obliterated by scurrilous attack of fellow Commissioners, and his utterances and his perception about fellow Commissioners hinders the CGE in the performance of its functions.

101. In his capacity as Commissioner, he is required to uphold the relevant provisions of PEPUDA by:

101.1 preventing and prohibiting unfair discrimination and harassment;

101.2 promoting equality and eliminate unfair discrimination; and

101.3 preventing and prohibiting hate speech.

102. Mr Botha's conduct is *prima facie* also in conflict with the duties imposed on Commissioners in the Commissioners' handbook and the code attached to the Commissioners' Handbook because his conduct is:

102.1 in conflict with some of his roles and responsibilities encapsulated in clause 5 of the Commissioners Handbook; and is in conflict with conduct expected of Commissioners in terms of section 3 of the Code.

103. Lastly, the Constitutional Court has authoritatively stated in paragraph 27 of *Hoffman v SAA*<sup>17</sup> (citing with approval other authorities) that ‘at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of its impact on the person discriminated against. Consideration in this regard include the position of the victim of the discrimination in the society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interest of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim’.

### **Findings**

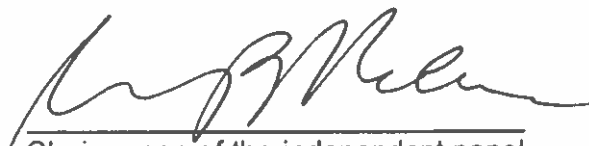
104. The panel finds that there is *prima facie* evidence of misconduct by Mr Botha.

### **Recommendations**

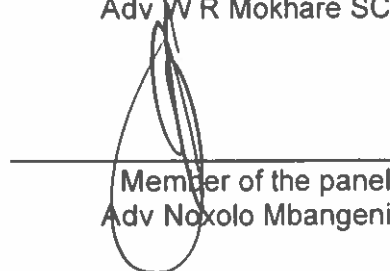
105. Based on our assessment of the information provided, we recommend that the charges of misconduct be referred to a committee of the National Assembly, as provided for in the NA Rules.

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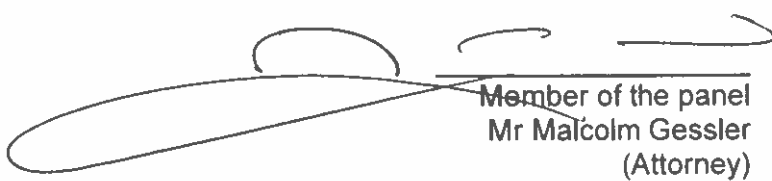
<sup>17</sup> (CCT17/00) 2000 ZACC 17 2001(1)SA; 2000 (11) BCLR 1211; 12 BLLR 1365 (CC) 26 SEPTEMBER 2000



Chairperson of the independent panel  
Adv W R Mokhare SC



Member of the panel  
Adv Noxolo Mbangeni



Member of the panel  
Mr Malcolm Gessler  
(Attorney)

05 April 2024