

CLOSING REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994



**PUBLIC PROTECTOR
SOUTH AFRICA**

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CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT IN CONNECTION WITH THE IMPARTING OR COMMUNICATING OF INFORMATION REGARDING PENDING JUDICIAL PROCEEDINGS BY A MEMBER OF EITHER THE ADMINISTRATION OR THE JUDICIARY IN THE CONSTITUTIONAL COURT, PRIOR TO THE OFFICIAL AND PUBLIC RELEASE OF SUCH INFORMATION.

TABLE OF CONTENTS

1.	INTRODUCTION	3
2.	OWN INITIATIVE COMPLAINT	3
3.	POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	4
4.	INVESTIGATION	6
5.	THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS	10
6.	REASONS FOR CLOSURE	31

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1. INTRODUCTION

- 1.1 This is the Public Protector's closing report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).
- 1.2 The report relates to the investigation in connection with suspicions of maladministration or improper conduct by one or more unidentified employees of the Constitutional Court for unlawfully communicating and/or leaking of information concerning pending judicial proceedings thereby bringing the administration of justice by the courts into disrepute and maladministration.
- 1.3 The report is submitted to the following recipients in terms of section 8(3) of the Public Protector Act, 1994:
 - 1.3.1 The Chief Justice of the Republic of South Africa, Justice Raymond Zondo.
 - 1.3.2 The Minister of Justice and Constitutional Development, Honourable Ronald Lamola and
 - 1.3.3 The National Head of the Directorate of Priority Crimes investigations, General Godfrey Lebeya.

2. OWN INITIATIVE COMPLAINT

2.1 On 4 May 2022, the Public Protector of the Republic of South Africa: Adv Busisiwe Mkhwebane (the Public Protector) initiated an own investigation in connection with suspicions of maladministration or improper conduct by one or more unidentified employees of the Constitutional Court for unlawfully communicating and/or leaking of information concerning pending judicial proceedings thereby bringing the administration of justice by the courts into disrepute and maladministration.

In the main the complaint arose from the following circumstances:

2.2 On Sunday 24 April 2022, the lead Senior Counsel for the Speaker of National Assembly, Adv Andrew Breitenbach SC (Adv Breitenbach), received a short-message-service (“sms”) from a cellphone number later known to him as belonging to Mr Ismail Abramjee (Mr Abramjee) of Pretoria.

The SMS read as follows:

“Hello Adv Breytenbach (sic) Re: The Public Protector case tomorrow. I have it on very good authority that the Concourt has declined to hear the Public Protector’s rescission application. The decision will be made known sometime this coming week but not later than Friday. I thought I’d just share this with you on a strictly confidential basis. Thanks”

2.3 It is suspected that by specifically sending the information to Adv Breitenbach, Mr Abramjee intended to assist and favour a particular side to the litigation and to hurt or prejudice the opposing side namely, the Public Protector. Furthermore, the Public Protector has already reported this matter to the South African Police Service as per Brooklyn CAS 94/05/2022 with a view to conduct criminal investigations against Mr Abramjee and/or his accomplice(s).

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The mandate of the Public Protector

3.1.1 The Public Protector is an independent constitutional institution, established in terms of section 181(1)(a) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.1.2 Section 182(1) of the Constitution provides that:

“The Public Protector has the power as regulated by national legislation, -

(a) 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;

(b) to report on that conduct; and

(c) to take appropriate remedial action”.

3.1.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.

3.1.4 The Public Protector’s powers are regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers powers on the Public Protector to resolve disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purposes of an investigation.

3.1.5 The Department of Justice and Constitutional Development is an organ of state and its conduct amounts to conduct in state affairs. The judicial authority of the Republic of South Africa is vested in the courts. The courts are

independent and subject only to the Constitution. However, the “administrative part” of the courts lies with the Department of Justice and Constitutional Development. This preliminary investigation seeks to establish whether or not one or more the employees of either the Administration or the Judiciary in the Constitutional Court in the course of administration leaked the information concerning pending judicial proceedings before being made public. This preliminary investigation did not only relate to employees, nor did it relate to judicial proceedings *per se* but to improper conduct of leaking information which happens to deal with the timing of the announcement of a court ruling. The court decision itself is not under investigation by the office of the Public Protector.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The process commenced with a preliminary investigation which included correspondences with the Registrar of Constitutional Court, the Secretary General in the Office of the Chief Justice, certain Justices of the Constitutional court, Mr Abramjee, Adv Breitenbach and various Cellphone Network Providers.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

(a) What happened?

(b) What should have happened?

(c) Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration or other improper conduct?

(d) In the event of maladministration or improper conduct, what would it take to remedy the wrong or to place the Complainant as close as possible to where he/she would have been but for the maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.

4.2.3 The Supreme Court of Appeal (SCA)¹ made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

4.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the Department to prevent maladministration and prejudice.

4.2.5 The enquiry regarding the remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where he or she would have been had the Department complied with the regulatory framework setting the applicable standards for good administration.

4.3 On analysis of the complaint, the following issue was considered and investigated:

4.3.1 Whether one or more employees of either the Administration or the Judiciary in the Constitutional Court, prior to the official and public release of information concerning pending judicial proceedings communicated and/or leaked the

1 Public Protector vs Mail and Guardian 2011(4) SA 420 (SCA) at Paragraph 11.

information, and if yes whether such conduct amounts to improper conduct and constitutes maladministration as envisaged in section 182(1) of the Constitution and in terms of section 6(4)(a)(i) of the Public Protector Act.

4.4 The key sources of information

Documents

4.4.1 Copy of the own initiative complaint dated 04 May 2022;

4.4.2 Affidavit of the Public Protector regarding the leaked SMS;

4.5 Correspondence sent and received

4.5.1 Subpoena from the office of the office of the Public Protector to a Cellphone Network Provider dated 10 May 2022;

4.5.1 Subpoena from the office of the office of the Public Protector to another Cellphone Network Provider dated 10 May 2022;

4.5.1 Response to a subpoena from a Cellphone Network Provider received by the office of the Public Protector on 11 May 2022;

4.5.1 Response to a subpoena from another Cellphone Network Provider received by the office of the Public Protector on 12 May 2022;

4.5.2 Subpoena from the office of the office of the Public Protector to the Registrar of the Constitutional Court dated 17 May 2022;

4.5.1 Subpoena from the office of the office of the Public Protector to the Secretary General in the office of the Chief Justice dated 17 May 2022;

- 4.5.1 Subpoena from the of the Public Protector to Justice Kollapen of the Constitutional Court dated 17 May 2022;
- 4.5.2 Subpoena from the office of the Public Protector to Justice Mlambo of the Constitutional Court dated 17 May 2022;
- 4.5.1 Subpoena from the office of the Public Protector to Adv Breitenbach, Counsel for the National Assembly dated 17 May 2022;
- 4.5.3 Subpoena from the office of the Public Protector to Mr Abramjee dated 17 May 2022;
- 4.5.2 Response to a subpoena from Adv Breitenbach, affidavit and annexures attaching SMSes dated 20 May 2022;
- 4.5.3 Confirmatory affidavit to the submission of Adv Breitenbach by Mr Leon Manuel dated 20 May 2022;
- 4.5.1 Response letter to a subpoena from Rambevha Morobane Attorneys on behalf of Justices Kollapen and Mlambo dated 26 May 2022;
- 4.5.2 Response letter to a subpoena from ENSafrica Attorneys on behalf of Justices Kollapen and Mlambo dated 26 May 2022 as instructed by General Council of the Bar of South Africa;
- 4.5.1 Response letter to a subpoena from Burger Huyser Attorneys on behalf of Mr Abramjee dated 27 May 2022;
- 4.5.2 Response letter from the office of the Public Protector to ENSafrica Attorneys dated 27 May 2022;
- 4.5.1 Response letter from the office of the Public Protector to Rambevha Morobane Attorneys dated 27 May 2022;

4.5.2 Response to the subpoena by the office of the Secretary General in the office of the Chief Justice, dated 30 May 2022 and

4.5.3 Response to the subpoena by the Registrar of the Constitutional Court dated 30 May 2022.

4.6 Legislation and other prescripts

4.6.1 The Constitution of the Republic of South Africa, 108 of 1996;

4.6.2 The Public Protector Act, 23 of 1994;

4.6.3 Judicial Service Commission Act, 9 of 1994;

4.7 Case Law

4.7.1 President of the Republic of South Africa vs The Public Protector and Others;

4.7.2 The Public Protector v Mail & Guardian Ltd and

4.7.3 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others.

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Whether one or more employees of either the Administration or the Judiciary in the Constitutional Court, prior to the official and public release of information concerning pending judicial proceedings communicated and/or leaked the information, and if yes whether such conduct amounts to improper conduct and constitutes

maladministration as envisaged in section 182(1) of the Constitution and in terms of section 6(4)(a)(i) of the Public Protector Act.

Common Cause Issues

- 5.1.2 It is common cause that, before the commencement of this investigation, the Public Protector was an applicant in separate civil proceedings currently before the Western Cape High Court under case number 8500/2022 in the form of an urgent application, *inter alia*, to interdict the National Assembly and/or one of its Committees from proceeding with a process aimed at removing her from office, pending the delivery of the outcome of a rescission application by the Constitutional Court of South Africa. On 06 May 2022, the Constitutional Court issued a judgment dismissing the application for rescission brought by the Public Protector.

Issues in Dispute

- 5.1.3 The Western Cape High Court was scheduled to hear the Public Protector's case number 8500/2022 on 26 and 27 May 2022. However, prior to the release of the Constitutional Court's judgment that dismissed her application for rescission brought by the Public Protector, on 24 April 2022, Adv Breitenbach received an SMS from a cellphone number² belonging to Mr Abramjee of Pretoria. The sms read as follows:

"Hello Adv Breytenbach (sic) Re: The Public Protector case tomorrow. I have it on very good authority that the Concourt has declined to hear the Public Protector's rescission application. The decision will be made known sometime this coming week but not later than Friday. I thought I'd just share this with you on a strictly confidential basis. Thanks"

² The cellphone number in question was disclosed by Adv Breitenbach to the Public Protector's investigation team however it will not be disclosed for the sake of compliance with Protection of Personal Information Act, 2013 (POPIA).

5.1.4 The upshot of the above SMS implied that Mr Abramjee had improperly received information from either a member of the Administration or the Judiciary in the Constitutional Court, prior to the official and public release of such information. If proven, such conduct would amount to improper conduct and constitutes maladministration as envisaged in section 182(1) of the Constitution and in terms of section 6(4)(a)(i) of the Public Protector Act. It is further suspected that by specifically sending the above SMS to Adv Breitenbach, Mr Abramjee intended to assist and favour a particular side to the litigation and to hurt or prejudice the opposing side namely, the Public Protector's side, to advance nefarious motives.

Consideration of other relevant information available on the public domain

5.1.5 On 29 March 2022, the Pretoria Rekord newspaper³ ran a story with an article headline "Community honours judge in spectacular fashion". The article further indicated that the Pretoria Legacy Foundation (PLF) hosted a magnificent celebratory evening to honour its vice chairperson in Laudium, Centurion, earlier this month. According to the article "the Constitutional Court judge, Justice Jody Kollapen, was feted and honoured in style by the foundation and local community, after his recent appointment to the apex court, said spokesperson of the foundation, Ismail Abramjee".

5.1.6 The article quoted Mr Abramjee as saying crowds of people from various communities attended the function and many more from the neighbouring precinct lined the streets to pay tribute to one of its finest sons. The popular justice and former human rights lawyer was introduced on stage by two of his daughters: one a medical doctor, and the other, an advocate, said Mr Abramjee. Mr Abramjee is alleged to have said Justice Kollapen delivered one of his finest speeches to date. Mr Abramjee allegedly said the prestigious event was even more significant in that the Judge President Dunston Mlambo and the Deputy Judge President, Aubrey Ledwaba, of the Gauteng

³ <https://rekord.co.za/412460/community-honours-judge-in-spectacular-fashion> accessed on 09 May 2022.

Division of the High Court were both in attendance. Judge Harshila Kooverjie, who was recently appointed to the bench of the High Court in Pretoria, was also honoured at the function, said Mr Abramjee.

5.1.7 Furthermore, on 27 May 2022, Laudium Sun newspaper⁴ (the Laudium Sun) ran an article featuring amongst other things a photograph of two gentlemen described in the article as being “*Ismail Abramjee with Justice Jody Kollepan at a function held early in March*”. The Laudium Sun article further highlighted headline snippets that appeared in various national newspapers, concerning Abramjee's text message.

5.1.8 From the above articles a reasonable inference may be drawn that Mr Abramjee may know or may have contacts or communication with certain persons based at Constitutional Court from whom he may have possibly received information concerning pending judicial proceedings regarding the case involving the Public Protector. It is against this background information which is available on the public domain that Mr Abramjee is reasonably suspected to have received information concerning pending judicial proceedings before being made official from certain persons based at Constitutional Court as mentioned and appearing in the said newspaper articles.

Preliminary Investigation undertaken by the Office of the Public Protector to assess the veracity of this own initiative complaint:

5.1.9 On 10 May 2022, the office of the Public Protector issued a subpoena to the relevant Cellphone Network Providers and requested an itemised list of telecommunication based information and/or records from the cellphone number that was used by Mr Abramjee to send the above stated SMS to Adv Breitenbach. This information was requested by the office of the Public Protector in order to establish if there is any communication between Mr

⁴

<https://nismedia.co.za/ismail-abramjee>, accessed on 28 May 2022.

Abramjee and any other persons either from the administration or judicial staff based at Constitutional Court.

5.1.10 On 12 May 2022, the relevant Cellphone Network Provider replied to the office of the Public Protector by furnishing the requested telecommunication data. As a precursor, the following explanation of call data terms is indispensable for an effective understanding of a telecommunication data to a non-expert reader:

CALL DATE	The date calls were received or made.
CALL TIME	The time calls were received or made or the length of time that the call lasted in seconds.
CALL DURATION	The duration in seconds of received or made calls.
OTHER PARTY	Number of other party when making or receiving calls.
MSISDN	Mobile Subscriber Integrated Services Digital Network. (This is a SIM card number for example 082)
IMSI	International Mobile Subscriber Identity is an electronically allocated serial number of a SIM card. The IMSI number is a unique 15-digit code that is attached to every Cellular number and allows the mobile networks to identify the home country and network of a subscriber.

IMEI	International Mobile Equipment Identification / Serial Number of the handset (This is the unique serial number of the handset of which the network provider only uses the first 14 digits to identify the handset)
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5.1.11 Below is an infographic table which sketches out some of the identified or observed salient exchange of telecommunication, dates, time and duration of calls suspected to have been taken place between Mr Abramjee and certain person(s) based at Constitutional Court. The record result range from the period between 01 January 2022 to 30- April 2022:

Serial No.	MSISDN	CALL DATE	CALL TIME	CALL DURATION	OTHER PARTY
1.	082455.....	04-Jan-2022	18:41:57	4	083265.....
2.	082455.....	03-Feb-2022	15:47:33	437	083265.....
3.	082455.....	02-Mar-2022	12:35:08	40	083265.....
4.	082455.....	03-Mar-2022	20:21:07	292	083265.....
5.	082455.....	03-Mar-2022	20:33:17	59	083265.....
6.	082455.....	04 March 2022	19:02:15	22	083265.....
7.	082455.....	04 March 2022	19:29:44	5	083265.....
8.	071488....	04-Mar-2022	19:05:14	74	082455.....

9.	082455.....	06 March 2022	10:48:01	0	083265.....
10.	082455.....	10 March 2022	16:17:13	37	083265.....
11.	082455.....	10 March 2022	16:19:22	142	083265.....
12.	082455.....	10 March 2022	18:05:44	101	083265.....
13.	082455.....	18 March 2022	17:47:30	61	083265.....
14.	082455.....	20 March 2022	14:00:44	3	083265.....
15.	082455.....	30 March 2022	17:14:15	6	083265.....
16.	082455.....	08 April 2022	15:01:41	255	083265.....
17.	082455.....	08 April 2022	15:08:47	7	083265.....
18.	082455.....	10 April 2022	15:54:16	6	083265.....
19.	082455.....	22 April 2022	21:21:37	59	083265.....

5.1.12 The redacted cellphone number beginning with **MSISDN** 082455.....as shown in the table above is the same number that Mr Abramjee used to send an SMS to Adv Breitenbach on 24 April 2022. The redacted cellphone number beginning with **MSISDN** 083265.....is registered under the name Narandran Kollapen as confirmed to the office of the Public Protector by the relevant Network Provider during the course of this preliminary investigation. The redacted cellphone number beginning with **MSISDN** 071488.....is registered under the government department namely, Department of Justice and Constitutional Development as confirmed by the relevant Network

Provider. This number is reasonably suspected to be issued to or used by Justice Mlambo.

5.1.13 An analysis of the cell phone data shows that 18 telephone calls were exchanged between the number from which the controversial SMS to Adv. Breitenbach was made and the one registered under the name Narandran Kollapen. These calls were exchanged between 04 January 2022 and 22 April 2022, two days before Adv. Breitenbach received the controversial SMS. The shortest call lasted three seconds while the longest took 436 seconds or just over seven minutes. There was just one cell phone call on 04 March 2022 between the number from which the controversial SMS to Adv. Breitenbach was made and the number registered under the Department of Justice and Constitutional Development, the number reasonably suspected to be issued to or used by Justice Mlambo.

5.1.14 Another notable observation from the cellphone records supplied by Cellphone Network Providers is that both the cellphone numbers with **MSISDN** 082455...used by Mr Abramjee and **MSISDN** 083265... for Narandran Kollapen are registered on the physical address within the same suburban area in Pretoria.⁵ That being so, it could simply mean that since the users stay within each other's vicinity, there is a possibility of other forms or means of contact and communication more than just telecommunication detailed above.

Responses to subpoenas

5.1.15 On 17 May 2022, the office of the Public Protector issued subpoenas to various people believed to be in possession of information that may have a bearing on the investigation of this matter. Those issued with subpoenas included Mr Abramjee, Adv Breitenbach, the Secretary General in the Office of the Chief Justice of South Africa, the Registrar of the Constitutional Court, Justice Jody Kollapen and Justice Dunstan Mlambo. All subpoenas sought

⁵ Exact location is withheld in compliance with POPIA.

to request one clarity in the main, and that was whether there exists communication or contact between the stated parties and Mr Abramjee, if yes an explanation of the extent, nature, scope, means and the frequency of such contact or communication.

5.1.16 Adv Breitenbach replied to the office of the Public Protector as per affidavit dated 20 May 2022. Firstly he confirmed having received SMS from unidentified person on Sunday 24 April 2022 at 17:13. Adv Breitenbach further furnished the office of the Public Protector with a cellphone number from which the SMS was received. Adv Breitenbach submitted further that he disclosed the contents of the SMS to the lead counsel for the parties in proceedings in the Western Cape Division of High Court under case number 8500/2022. The same SMS was also disclosed by Adv Breitenbach to the members of the Full Bench assigned to hear the matter. The upshot was on Tuesday, 26 April 2022, the hearing of the matter was postponed to Wednesday and Thursday, 18 and 19 May 2022.

5.1.17 According to Adv Breitenbach, he does not know Mr Abramjee and when he received an SMS he did not know it was from Mr Abramjee and that he did not make an attempt to call the sender. Adv Breitenbach submitted that he only became aware during the late afternoon of Monday, 25 April 2022 that the sender was Mr Abramjee, when one of the junior counsel briefed with Adv Breitenbach in the High Court matter showed him that the Truecaller Premium linked the sender's mobile telephone number to one Ismail Abramjee. Further that the lead counsel for the Public Protector, Adv Dali Mpofo SC mentioned that his researchers had revealed the sender to be Mr Abramjee.

5.1.18 Furthermore, Adv Breitenbach submitted in order to answer the questions asked in the subpoena by the office of the Public Protector he performed searches on his own mobile phone for the number that Mr Abramjee used to send him an SMS but the phone number did not yield any results. However, the search for "Abramjee" revealed a string containing two SMS exchanges with Ismail Abramjee, each initiated by Abramjee and which Adv Breitenbach had forgotten about. **The first on 22 August 2021 and the second on 5**

November 2021. Adv Breitenbach further furnished the office of the Public Protector with screenshots of the said two SMSes received from the same number used by Mr Abramjee.

5.1.19 The SMS exchange on Sunday 22 August 2021 at 21:48 was as follows:

“Hello Adv Breitenbach. My name is Ismail Abramjee from Pretoria.

Re: Parliamentary appeal on PP rules:

I was speaking to a judge colleague⁶ about your matter pending appeal and the following discussion ensued. I am not certain if you are aware of the Act.

The Law Reform Commission Act requires that the chairperson of the commission be a High Court judge.

However, when the judge sits and chairs the commission’s meetings, he does not do so as a judge but merely as a chairperson of the commission.

I thought that this snippet of information may just assist you in your case against the public protector.

Regards.

21:48”

“Thank you

22: 49”

5.1.20 In the light of the above SMS, it becomes germane to indicate that South African Law Reform Commission (SALRC) is an independent advisory statutory body established in terms of the South African Law Reform Commission Act of 1973. It investigates the state of South African law and makes reform proposals to the national and provincial legislatures. Judge Narandran Kollapen is the Chairperson of the SALRC.⁷

⁶ Our underlining.

⁷ <https://www.justice.gov.za/salrc/members.htm> accessed on 28 May 2022.

5.1.21 The SMS exchange on Friday 05 November 2021 was as follows:

“Good Day Advocate Breitenbach

Further to my email message to you, I have also established that Act 92 of 1997 requires a sitting judge to chair the Independent Commission established in terms of the Remuneration of Public Office Bearers Act.

I hope this assist you with your case on Monday.

Kind regards

15:16”

“Also former DCJ Dikgang Moseneke previously chaired the body mentioned above.

15:19”

“Thank you. I’ll relay this to my colleague Steven Budlender who will be arguing this aspect for the applicants for leave to appeal.

15:21”

It’s a pleasure. Please pass on my regards to Steven. He knows me as well.

15:23”

“Will do.

15:23”

5.1.22 This evidence showed that the controversial SMS was not the first time Mr Abramjee sent text messages to Adv. Breitenbach. Adv Breitenbach further clarified that on Sunday 24 April 2022 and at all material times until he found the SMS string on Friday 20 May 2022 by searching for “Abramjee” on his phone, he was under the impression that the SMS he received on 24 April 2022 was a stand-alone SMS. According to Adv Breitenbach he then asked his instructing attorney Mr Leon Manuel to perform and confirm the results of

the searches described above on Adv Breitenbach's phone which Mr Leon Manuel did and filed a confirmatory affidavit. The office of the Public Protector was furnished with the confirmatory affidavit of Mr Leon Manuel dated 20 May 2022, which corroborates Adv Breitenbach's affidavit.

5.1.23 With regard to the question of whether Adv Breitenbach had solicited any information from Mr Abramjee, he answered that question with resounding "NO". All the above described copies or screenshots of the SMSes sent by Mr Abramjee to Adv Breitenbach were given to the office of the Public Protector as annexures to the affidavit of Adv Breitenbach.

5.1.24 On 26 May 2022, Rambevha Morobane Attorneys replied to the subpoena as instructed by Justices Kollapen and Mlambo and submitted the following:

*"We refer to the subpoenas dated 17 May 2022 purportedly issued by you in terms of section 7(4)(a) of the Public Protector Act, 23 of 1994, as amended ("**the Act**") to Justices J. Kollapen and D. Mlambo. We confirm that we act on behalf of both Justices and address this letter to you on their instructions.*

Our clients have carefully considered the contents of the subpoenas you have issued and your request that they should submit affidavits in terms of section 7(4)(a) of the Act in which they deal with the inquiries set out in the table under paragraph 9 of your letter.

We record that it is clear from the contents of the subpoenas that our clients are not the subjects-matter of the investigation referred to in paragraph 7 of your letter. It is also clear from your letter that you have reported the subject-matter of your complaint to the South African Police Service station at Brooklyn under CAS 94/05/2022 for criminal investigation.

We place on record that the information you require from our clients have no rational connection to the complaint that you are investigating, and the broadness of your inquiries has no reasonable relationship with the matters that you are investigating. It is also clear from your letter that the suspicion

you refer to and the inferences you seek to draw arising from our clients' attendance at the function referred to in paragraph 7.6 of the subpoenas are not justifiable and cannot rationally require our clients to respond to the list of questions you have posed in the table set out in paragraph 9 of your letter.

In the light of the fact that our clients occupy judicial office in the Constitutional Court and the fact that the complaint you are investigating arises from judicial proceedings that led to the decision referred to in paragraph 7.7 of your letter, our clients consider that it is inappropriate and improper that they should be called upon to submit affidavits, presumably as witnesses, in respect of a complaint relating to employees or officials of the Constitutional Court who are suspected of the alleged maladministration and improper conduct relating to judicial proceedings in which our clients presided and were part of the judgment flowing from those proceedings.

We specifically record that your office and yourselves have a clear constitutional duty, amongst others, in terms of section 165 of the Constitution not to interfere with the functioning of the Constitutional Court, to protect the dignity of the Constitutional Court, its impartiality, independence and effectiveness. Self-evidently the request that our clients should furnish with information you require in terms of the subpoenas violates these constitutional obligations.

In the light of the fact that the office that our clients occupy and your office must be treated with respect and integrity, we call upon you to withdraw the subpoenas to avoid unnecessary controversy that could undermine the independence of the respective public offices.

We have been instructed to request you to withdraw the subpoenas and notify us within 4 days of receipt of this letter that you have done so.

Our clients' rights to take such further actions as they may be advised to do in the event you do not withdraw the subpoenas are specifically reserved.

We look forward to receiving your response by close of business on Tuesday, 31 May 2022”.

- 5.1.25 On 26 May 2022, ENSafrica Attorneys (ENSafrica) also replied to the subpoena on behalf of Justices Kollapen and Mlambo as instructed by General Council of the Bar of South Africa. ENSafrica and submitted the following:

*“We act on behalf of the General Council of the Bar of South Africa (“**our client**”).*

*We refer to the subpoenas addressed to Justices Mlambo and Kollapen dated 17 May 2022 (“**the subpoenas**”).*

Our client has noted that you contend that the subpoenas had been issued in terms of the Public Protector Act, 1994. Our client denies that the office of the Public Protector was lawfully entitled to issue the subpoenas.

The Public Protector has no power to investigate the judiciary. Any complaints against the judiciary are to be dealt with in accordance with the Judicial Service Commission Act, 1994.

In addition, the Public Protector has a material interest in the outcome of the investigation, and may not abuse her powers to advance causes that are personal to her. Accordingly, the office of the Public Protector is not suited to carry out the investigation or initiate it.

It also appears clear to our client that the documentation you require, as per the subpoenas, is unduly wide and is not limited to the Constitutional Court’s order dated 6 May 2022.

The delivery of the subpoenas is furthermore a direct attack on the judiciary and impacts upon the dignity and independence of the judiciary. It thus

constitutes an abuse of office on the part of the Public Protector, and is inconsistent with her duties under section 165 of the Constitution.

Finally, the issuing and serving of the subpoenas appears clearly to be in respect of the civil proceedings that the Public Protector has launched in the Constitutional Court. At paragraphs 7.7 of the subpoenas, they record that the events in the preceding paragraphs of the subpoenas were followed by the Constitutional Court on 6 May 2022 issuing “a judgment dismissing the application for rescission brought by the Public Protector”. The Public Protector has launched urgent proceedings before the Court on 10 May 2022 inter alia seeking to rescind and/or reconsider “the judgment or order dated 6 May 2022” of the Constitutional Court. Her complaints grounding the application to the Constitutional Court include, in material respects, the same factual background that the Public Protector suggests grounds her subpoenas, including the text message of Mr Abramjee and the attendance by Justices Kollapen and Mlambo at the same event as Mr Abramjee. The subpoenas by design or effect thus appear to be in respect of the Constitutional Court proceedings, and appear to have been served without compliance with section 47 of the Superior Courts Act, 2013.

*In these circumstances, we are instructed to urgently demand that you confirm in writing that the subpoenas are withdrawn. If we do not receive the confirmation by **12h00 on 27 May 2022**, our client reserves the right to approach a court for appropriate relief and to seek costs against the Public Protector, including on a punitive and personal basis.*

Our client is entitled to seek such relief in order to protect the dignity and independence of the judiciary and in order to prevent an abuse of office on the part of the Public Protector.

The contents of this letter should not be regarded as an exhaustive list of the reasons our client contends that the delivery of the subpoenas is irregular.

We look forward to urgently hearing from you”.

5.1.26 Both Rambevha Morobane Attorneys and ENSafrica further requested the office of the Public Protector to withdraw the subpoenas against the two judges citing the above reasons and threatening approach a court for appropriate relief and to seek costs against the Public Protector, including on a punitive and personal basis.

5.1.27 As custodians of the law and the Constitution itself, this reaction from judges may be incompatible with the following injunctions laid down by the Constitutional Court in the *Economic Freedom Fighters v Speaker of the National Assembly and Others*⁸ while confirming of the investigative powers of the Public Protector:

“Her investigative powers are not supposed to bow down to anybody, not even at the door of the highest chambers of raw State power. The predicament though is that mere allegations and investigation of improper or corrupt conduct against all, especially powerful public office-bearers, are generally bound to attract a very unfriendly response. An unfavourable finding of unethical or corrupt conduct coupled with remedial action, will probably be strongly resisted in an attempt to repair or soften the inescapable reputational damage. It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated.

5.1.28 On 27 May 2022, the office of the Public Protector replied to both Rambevha Morobane Attorneys and ENSafrica by simply explaining and reiterating the legal context⁹ under which the subpoenas were issued and further emphasising that the two judges were not the subject matter of the investigation by the office of the Public Protector save for the clarity that was

⁸ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 at Paragraph 55.

⁹ Section 7(4)(a) of the Public Protector Act, 1994 provides that, “for the purposes of conducting an investigation the Public Protector may direct any person to submit an affidavit”

requested from them by way of the subpoena.¹⁰ This clarity was sought in the light of the information available in the public domain as discussed above which clearly sought to link the judges to Mr Abramjee. It was therefore procedurally fair and reasonable for the office of the Public Protector to give judges an *Audi Alteram Partem* opportunity to reply.

- 5.1.29 Taking into consideration the fact that this was only a preliminary investigation for the purposes of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with, there was no need to pursue the subpoena against the two judges beyond this point. As a result, the office of the Public Protector deemed it appropriate to accede to a request to withdraw the subpoena against the two judges.
- 5.1.30 However, and without dealing with each and every averment advanced for the two justices, the office of the Public Protector denies that this preliminary investigation which is no different from the one being simultaneously carried out by the office of the Chief Justice violates the obligations set out in section 165(4) of the Constitution. Both investigations are aimed at protecting and the dignity, impartiality, independence and effectiveness of the courts and ultimately to strengthen democracy.
- 5.1.31 On 28 May 2022, Burger Huyser Attorneys replied on a letter dated 27 May 2022 on behalf of Mr Abramjee, indicating that Mr Abramjee will not submit an affidavit to the Public Protector since the subpoena is deemed invalid and that their client chose to exercise his right to remain silent in terms of section 35 of the Constitution. Without accepting or dealing with each objection or averment raised on behalf of Mr Abramjee, the office of the Public Protector does not intend to pursue Mr Abramjee beyond this point. Mr Abramjee being a private person was not necessarily the subject of this investigation, save to afford him a right of reply, as an interested party.

¹⁰ Judiciary itself carry a reciprocal constitutional duty in terms of section 181(3) of the Constitution, to “assist and protect the Public Protector to ensure the independence, impartiality, dignity and effectiveness of the office of the Public Protector.

- 5.1.32 On 30 May 2022, the Secretary General of the Office of the Chief Justice, Ms Memme Sejosengwe replied to the subpoena issued against her by the office of the Public Protector on 17 May 2022, by means of an affidavit.
- 5.1.33 Ms Sejosengwe whilst admitting that the investigation undertaken by the office of the Public Protector concerns or involves the performance of the judicial functions of the court, in particular the Constitutional Court, she expressed a view that the Public Protector is precluded from doing so by the provisions of sections 182(1)(a), 182(3) and 239 of the Constitution as well as sections 6(4) and 6(6) of the Public Protector Act.
- 5.1.34 Ms Sejosengwe further proceeds to submit that the preclusion is based on the fact that the courts are not part of “government” or the state as contemplated in the provisions cited above.
- 5.1.35 She also intimated that given that the “complaint” that led to the investigation in question concerns judicial proceedings to which the Public Protector herself is a party, makes it inappropriate for her office to be involved in those investigations, or even to initiate them.
- 5.1.36 Ms Sejosengwe concluded by stating that in so as judgments of the Constitutional Court are concerned, these are handled and dealt with by the Justices of the Court and would not be in the purview of the Office of the Chief Justice, which according to her, is a national department established in terms of the Public Service Act. As such the Office of the Chief Justice does not have *“policies, regulations or such other similar regulatory measures that govern communication, publication, safe-keeping, management and administration of the Constitutional Court’s information concerning pending judicial matters”*.
- 5.1.37 According to her, there are no OCJ documents that address or deal with such issues and is thus unable to provide the office of the Public Protector with any documents contemplated in paragraph 9 of the subpoena.

- 5.1.38 Similarly a response to the subpoena was received from Mr Dumisani Mathiba, the Registrar Clerk at the Constitutional Court by means of an affidavit signed on 30 May 2022.
- 5.1.39 Mr Mathiba stated that he has seen Ms Sejosengwe' s affidavit referred to above and shares the concerns raised by her about the unlawfulness and the inappropriateness of the investigation by the Office of the Public Protector.
- 5.1.40 Mr Mathiba, having expressed his reservations about the information sought from him as per paragraph 9 of the subpoena, went on to state that the main objective of the Registrar's Office entails ensuring case flow management support to the Justices of the Constitutional Court and administrative processing of case filings by parties and their representatives. Second, judgments of the Court are forwarded to the Office of the Registrar, after they have been formally delivered by the Court, for distribution to the relevant parties and publication on the Court's website.
- 5.1.41 He concluded by stating that with regards to communications referred to in paragraph 9 of the subpoena, based on the checks he conducted and enquiries he made, there does not appear to be or to have been any contact or communication between the Constitutional Court's Administrative staff and Mr Abramjee.
- 5.1.42 The above submissions by Ms Sejosengwe Mr Mathiba stands be rebutted. As already argued, the source(s) of Mr Abramjee may well be members of the administrative staff or the judiciary in the Constitutional Court as circumstantial evidence suggests. The focus of this preliminary does not relate to judicial proceedings or court decisions *per se* but to the criminal and the improper act of leaking information. Such corrupt and/or otherwise improper conduct falls directly in the heartland of the Public Protector's mandate, as set out in section 6 of the Public Protector Act. The judiciary forms part of the state and the Public Protector has jurisdiction to investigate improper conduct in state affairs. What is expressly precluded by section

182(3) of the constitution is court decisions. This is not about the court decision or a judicial function.

Application of the relevant law

- 5.1.43 Section 7(1)(a) of the Public Protector Act provides that the Public Protector shall have power on or her own initiative or on receipt of a complaint or on allegation or on the ground of information that has come to his or her knowledge which points to conduct such as referred to in section 6(4) or (5) of this Act, to conduct a preliminary investigation for the purposes of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.
- 5.1.44 Informed by the foregoing provisions, the Public Protector initiated this investigation on the ground of information that came to her knowledge regarding the SMS sent by Mr Abramjee to Adv Breitenbach. On 17 May 2022, the Public Protector, by virtue of powers vested in her in terms of section 3(3) of the Public Protector Act authorised Mr Vusumuzi Xolani Dlamini (Mr Dlamini), in his capacity as the Chief Investigator within the Investigations Branch in the office of the Public Protector South Africa, to exercise all powers conferred on the Public Protector, to conduct the investigation in relation to this matter.
- 5.1.45 Section 7(1)(b)(i) of the Public Protector Act indicates the format and the procedure to followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case. In line with this provision, the issuing of subpoenas on 17 May 2022 was a chosen and a preferred investigation option, method or format used by the office of the Public Protector to gather from all identified sources information that could have a bearing on the preliminary investigation of this matter.
- 5.1.46 Section 7(4)(a) of the Public Protector Act, 1994 provides that, “*for the purposes of conducting an investigation the Public Protector may direct any*

person to submit an affidavit¹¹ or affirmed declaration or to appear before him or her to give evidence or to provide any document in his or her possession or under his or her control which has a bearing on a matter being investigated, and may examine such person."

5.1.47 Section 7 (4)(b) of the Public Protector Act provides that "*the Public Protector or any person duly authorised thereto by him or her may request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being or to be investigated.*"

5.1.48 Guided by the investigative powers as they flow directly from the preceding legal provisions, and as authorised by way of delegation by the Public Protector, Mr Dlamini issued the subpoenas to all the persons deemed to have an information with a bearing on this preliminary investigation. However, it is apposite to emphasise *en passant* that a subpoena issued by the office of the Public Protector does not always denote that the persons thus served are the subject matter of the investigation. At times, it could simply be that they are merely required by way of a subpoena to share information which may have a bearing on the investigation at hand, either as interested parties or as people in possession or control of such information.

5.1.49 In a matter between the *President of the Republic of South Africa vs The Public Protector and Others*¹² the court agreeably held the following in the words of JP Mlambo:

"The investigative powers conferred on the Public Protector are of the widest ambit. In s 7 the Act gives the Public Protector extensive investigatory powers. On receipt of a complaint the Public Protector has the power to conduct a preliminary investigation for the purposes of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.²⁷ The Public Protector has the power to

¹¹ Our underlining.

¹² President of RSA v Public Protector et al 2018 (2) SA 100 Gauteng Division Pretoria at Paragraph 76 and 78.

*determine the format and procedure to be followed in conducting any investigation.*²⁸ *The Public Protector is entitled to subpoena persons and require them to give evidence*¹³

5.1.50 Similarly in the seminal and prescient case of the *The Public Protector v Mail & Guardian Ltd*¹⁴ the following was accentuated by the Spreme Court of Appeal:

“...Although the conduct that may be investigated is circumscribed I think it is important to bear in mind that there is no circumscription of the persons from whom and the bodies from which information may be sought in the course of an investigation. The Act confers upon the Public Protector sweeping powers to discover information from any person at all. He or she may call for explanations, on oath or otherwise, from any person...”

5.1.51 Section 180(b) of the Constitution provides that national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including procedures for dealing with complaints about judicial officers;

5.1.52 Section 14(1) of the Judicial Service Commission Act¹⁵ stipulates that any person may lodge a complaint about a judge with the Chairperson of the Committee. Subsection (3) further states that: A complaint must be-

- (a) based on one or more of the grounds referred to in subsection (4); and
- (b) lodged by means of an affidavit or affirmed statement, specifying-
 - (i) the nature of the complaint; and
 - (ii) the facts on which the complaint is based.

5.1.53 At all material times and throughout the course of this preliminary investigation, the office of the Public Protector fully appreciated the salient

¹³ Our underlining.

¹⁴ (422/10) [2011] ZASCA 108 (1 JUNE 2011) at paragraph 11.

¹⁵ Act 9 of 1994.

provisions of the Judicial Service Commission Act. At no stage did the office of the Public Protector intend to investigate and pronounce on judicial functions. This investigation has never been about judicial proceedings *per se* but the improper conduct of leaking information relating a pending judicial matter before the order is made public. It is not the decision itself which is under investigation and this distinction has to be marked.

- 5.1.54 Section 6(4)(c)(i)(ii) of the Public Protector Act provides that the Public Protector shall be competent at any time prior to, during or after an investigation if he or she is of the opinion that facts disclose commission of an offence by any person to bring the matter to the notice of the relevant authority charged with prosecutions or if he or she deems it advisable to refer any matter which has a bearing on an investigation to the appropriate public body or authority affected by it or to make appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.

Conclusion

- 5.1.55 The weight of available circumstantial evidence established in this preliminary investigation appear to tilt the scales towards an ineluctable conclusion that the sources of Mr Abramjee may well be members of the administrative staff or judicial official based at Constitutional Court and the weight leans more towards members of the judiciary.
- 5.1.56 The cumulative weight of this evidence as highlighted above namely, the SMSes sent to Adv Breitenbach by Mr Abramjee, the frequency of telecommunication or close association between Mr Abramjee and the judicial officer(s), are all sufficient to lay a foundation of a belief upon which to invoke section 14(1) of the Judicial Service Commission Act by the office of the Public Protector.

5.1.57 Equally, the motive behind the unsolicited SMSes sent by Mr Abramjee to Adv Breitenbach is emblematic of a nefarious intention and effort to commit a criminal conduct in terms of Prevention and Combatting of Corrupt Activities Act 12 of 2004 (PRECCA) or in terms of other statutory or common law crime offences. Accordingly, this aspect triggers a referral to the Directorate for Priority Crimes Investigation (DPCI) for criminal investigation against Mr Abramjee and his accomplice(s).

5.1.58 It can therefore be concluded that the suspicions referred to are, in the circumstances and until the investigation shows otherwise, justifiable and reasonable.

6. REASONS FOR CLOSURE

6.1 In view of the foregoing, the Public Protector closes this investigation on the following basis:

6.1.1 In line with the provisions of section 6(4)(c)(ii) of the Public Protector Act, this matter is accordingly referred to the Judicial Service Commission as envisaged in section 14(1) of the Judicial Service Commission Act.

6.1.2 Similarly, in line with section 6(4)(c)(i) of the Public Protector Act, this matter is referred to the DPCI for investigations of possible violations of PRECCA and other crimes which may have been committed in connection with the unsolicited SMSes sent to Adv Breitenbach by Mr Abramjee and his accomplice(s) to unlawfully influence the outcome of a judicial process in pursuit of a manifestly nefarious motive.

6.1.3 The preliminary investigation has proven that the nature of this complaint invariably stretches to the judicial arena. Furthermore, the complaint carries all the hallmarks of criminality and nefarious motives by Mr Abramjee and his accomplice(s). Consequently the complaint may not be executed fully within the mandate of the Public Protector, without bringing it to the attention or notice of the Judicial Service Commission, the South African Police Service and the DPCI.



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 31 / 05 / 2022

Assisted by Mr Vusumuzi Dlamini
Chief Investigator
Head Office